

M E M O R A N D U M

September 21, 2020

TO: Health and Human Services Committee

FROM: Christine Wellons, Legislative Attorney

SUBJECT: Bill 28-20, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights

PURPOSE: Worksession – Committee to make recommendations to Council

Expected Attendees

James Stowe, Director, Office of Human Rights (OCR)

Bill 28-20, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights, sponsored by Lead Sponsor Councilmember Glass and Co-Sponsors Council President Katz, Councilmember Jawando, Council Vice-President Hucker, and Councilmembers Riemer, Alborno, Friedson, Navarro and Rice, was introduced on July 7, 2020.¹ A public hearing was held on July 28 at which five speakers testified on the bill.

Bill 28-20 would define and prohibit certain discriminatory practices based upon sexual orientation, gender expression, gender identity, and HIV status in places of public accommodation, including nursing homes and other healthcare and personal care facilities. The bill also would require the posting of certain anti-discrimination notices.

BACKGROUND

Under current County law, it is illegal for an owner or operator of a place of public accommodation to discriminate against individuals based upon sexual orientation or gender identity. Bill 28-20 would expand upon the current law to outlaw explicitly discrimination in public accommodations based upon an individual's gender expression or HIV status. In addition, the bill would delineate certain practices in nursing homes or other care facilities that automatically would constitute prohibited discrimination on the basis of sexual orientation, gender identity, gender expression, or HIV status.

SPECIFICS OF THE BILL

Under Bill 28-20, an "owner, lessee, operator, manager, agent, or employee of any place of public accommodation in the County" would be prohibited from discriminating against individuals based – not only upon "race, color, sex, marital status, religious creed, ancestry,

¹#LGBTQrights

national origin, disability, sexual orientation, or gender identity” – but also upon “gender expression” or HIV status. “Gender expression” would include “gender as expressed by an individual’s name, pronouns, clothing, hairstyle, behavior, voice, or similar characteristics”.

The bill would identify certain practices in nursing homes or other healthcare or personal care facilities that constitute prohibited discrimination, including when an owner, lessee, operator, manager, agent, or employee of the facility:

- (1) denies admission to a facility, transfers or refuses to transfer the individual within a facility or to another facility, or discharges or evicts an individual from a facility;
- (2) denies a request by individuals to share a room in a facility;
- (3) if rooms are assigned by gender, assigns, reassigns, or refuses to assign a room to a transgender individual other than in accordance with the individual’s gender identity, unless at the individual’s request;
- (4) prohibits an individual from using, or harasses an individual who seeks to use or does use, a restroom available to other individuals of the same gender identity, regardless of whether the individual is making a gender transition or appears to be gender-nonconforming;
- (5) willfully and repeatedly fails to use an individual’s name or pronouns after being clearly informed of the name or pronouns;
- (6) denies an individual the right to wear or be dressed in clothing, accessories, or cosmetics that are allowed for any other individual;
- (7) restricts an individual’s right to associate with other individuals, including the right to consensual sexual relations, unless the restriction uniformly applies to all individuals in a nondiscriminatory manner;
- (8) denies or restricts medical or nonmedical care; or
- (9) provides medical or nonmedical care in a manner that, to a similarly situated reasonable individual, unduly demeans the individual’s dignity or causes avoidable discomfort.

The bill also would require the posting of “a statement that the facility does not discriminate or allow discrimination, including bullying, abuse, or harassment, on the basis of:

- (A) actual or perceived sexual orientation, gender identity, gender expression, or HIV status; or

- (B) an association with another individual on account of that individual's actual or perceived sexual orientation, gender identity, gender expression, or HIV status...."

The requirements of the bill would be enforced by the Office and the Commission on Human Rights under Chapter 27 of the County Code.

SUMMARY OF PUBLIC HEARING

On behalf of the County Executive, Director Stowe of OHR spoke favorably about the bill. Director Stowe stated: "We believe...this law will help provide a marketplace and workplace free of discrimination allowing an environment that is productive for all employees and accessible to all seeking public services."

Director Stowe also identified two potential amendments (described further below), which have been recommended by the Office of the County Attorney (OCA).

Additional organizations and individuals testifying about the bill have noted:

- The bill is needed in order to ensure that LGBTQ individuals have full access to healthcare.
- The bill would advance the safety and well-being of LGBTQ individuals.
- "Access to safe long-term care is of dire concern for the LGBTQ community. Too many LGBTQ seniors are vulnerable and isolated because they are less likely to have adult children to look out for them. They are also more likely to have lost a significant part of their social network during the HIV/AIDS epidemic. Discrimination at the hands of providers, threatens the very health, financial security, and personal fulfillment of too many 50-plus LGBTQ adults." (AARP Maryland)
- "[A]ccording to the 2015 U.S. Trans Survey, 14% of trans people in nursing homes or other extended care facilities were denied equal treatment or service, verbally harassed, or physically attacked simply because of who they are. Anti-LGBTQ discrimination is a real problem, and must be addressed through legislation such as Bill 28-20." (LGBTQ Democrats for Montgomery County)

ISSUES FOR THE COMMITTEE'S CONSIDERATION

1. Posting of Anti-Discrimination Notices

Under the bill, a place of public accommodation would be required to post a notice that includes:

- (1) a statement that the facility does not discriminate or allow discrimination, including bullying, abuse, or harassment, on the basis of:

- (A) actual or perceived sexual orientation, gender identity, gender expression, or HIV status; or
- (B) an association with another individual on account of that individual's actual or perceived sexual orientation, gender identity, gender expression, or HIV status; and
- (2) information about filing a complaint with the Commission on Human Rights.

The OCA has recommended amending the notice requirements to provide that the notice must include:

- (1) a statement that the [[facility does not discriminate or allow]] law prohibits discrimination, including bullying, abuse, or harassment, on the basis of:

* * *

Council staff supports this OCA amendment as a reasonable and appropriate clarification regarding the required notices.

Decision Point: Whether to adopt OCA's amendment as described above.

2. Use of Correct Pronouns

Under the bill, the following practice, among others, would constitute prohibited discrimination:

willfully and repeatedly fail[ing] to use an individual's name or pronouns after being clearly informed of the name or pronouns[.]

The OCA has expressed concern that the provision described above could be construed as "compelled speech" that might be vulnerable under the First Amendment. The OCA has recommended amending the bill to provide that a violation would occur if a person:

willfully and repeatedly, with the intent to humiliate, fails to use an individual's name or pronoun after being clearly informed of the name or pronouns[.]

Council staff is uncertain how OCR would investigate an "intent to humiliate". An alternative to the OCA's amendment, which Council staff recommends, would be to provide that a violation would occur if a person:

willfully and repeatedly [[fails to use]] uses an individual's incorrect name or pronoun after being clearly informed of the correct name or pronouns[.]

This amendment should mitigate any “compelled speech” concern; an individual would run afoul of the law for willfully and repeatedly *using* a wrong name or pronoun, not for *failing to use* a correct name or pronoun. In addition, this amendment would not involve the complicated issue of proving “intent to humiliate”.

Decision point: Whether to (1) leave the language about pronouns as is; (2) amend the language as recommended by OCA; or (3) amend the language as recommended by Council staff.

NEXT STEPS: A recommendation by the Committee to the full Council is expected.

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Bill No. 28-20
Concerning: Human Rights and Civil
Liberties – Discrimination in Public
Accommodations – LGBTQ Bill of
Rights
Revised: 06/29/2020 Draft No. 5
Introduced: July 7, 2020
Expires: January 7, 2022
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Glass
Co-Sponsors: Council President Katz, Councilmember Jawando, Council Vice-President Hucker,
Councilmembers Riemer, Albornoz, Friedson, Navarro and Rice

AN ACT to:

- (1) prohibit discriminatory practices against certain individuals in places of public accommodation, including nursing homes and other facilities;
- (2) require certain notices to individuals; and
- (3) generally amend the laws regarding prohibited discrimination in places of public accommodation.

By amending

Chapter 27, Human Rights and Civil Liberties
Sections 27-6, 27-10, and 27-11

By adding

Chapter 27, Human Rights and Civil Liberties
Section 27-11A

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 27-6, 27-10, and 27-11 are amended, and Section 27-11A is added, as follows:

27-6. Definitions.

The following words and phrases have the following meanings, unless the context indicates otherwise:

* * *

Family responsibilities means the state of being financially or legally responsible for the support or care of a person or persons, regardless of the number of dependent persons or the age of any dependent person.

Gender expression includes gender as expressed by an individual's name, pronouns, clothing, hairstyle, behavior, voice, or similar characteristics.

Gender identity means an individual's actual or perceived gender, including a person's gender-related appearance, expression, image, identity, or behavior, whether or not those gender-related characteristics differ from the characteristics customarily associated with the person's assigned sex at birth.

Gender-nonconforming means gender expression that does not conform to stereotypical expectations of how a male or female should appear or act.

* * *

Source of income means any lawful source of money, paid directly or indirectly to a renter or buyer of housing, including income from:

- (1) any lawful profession or occupation;
- (2) any government or private assistance, grant, or loan program;
- (3) any gift, inheritance, pension, annuity, alimony, child support, or other lawful compensation or benefit; or
- (4) any sale or pledge of any property or interest in property.

Transgender individual means an individual whose gender identity differs from the individual's assigned or presumed sex at birth.

Undue hardship means an action requiring significant difficulty or expense. In determining whether an accommodation would impose an undue hardship, the decision maker must consider:

- (1) the nature and cost of the accommodation needed to comply with this article;
- (2) the overall financial resources of the person who would provide the accommodation; and
- (3) the impact of the accommodation on other persons.

* * *

27-10. Scope.

- (a) This division applies to every public accommodation of any kind in the County whose facilities, accommodations, services, commodities, or use are offered to or enjoyed by the general public either with or without charge, such as:
 - (1) restaurants, soda fountains, and other eating or drinking places, and all places where food is sold for consumption either on or off the premises;
 - (2) inns, hotels, and motels, whether serving temporary or permanent patrons;
 - (3) retail stores and service establishments;
 - (4) hospitals, health care institutions, domiciliary care homes, nursing homes, personal care homes, and clinics;
 - (5) motion picture, stage, and other theaters and music, concert, or meeting halls;
 - (6) circuses, exhibitions, skating rinks, sports arenas and fields, amusement or recreation parks, picnic grounds, fairs, bowling

alleys, golf courses, gymnasiums, shooting galleries, billiard and pool rooms, and swimming pools;

(7) public conveyances, such as automobiles, buses, taxicabs, trolleys, trains, limousines, boats, airplanes, and bicycles;

(8) utilities, such as water and sewer service, electricity, telephone, and cable television;

(9) streets, roads, sidewalks, other public rights-of-way, parking lots or garages, marinas, airports, and hangars; and

(10) places of public assembly and entertainment of every kind.

27-11. Discriminatory practices – in general.

(a) An owner, lessee, operator, manager, agent, or employee of any place of public accommodation in the County must not, with respect to the accommodation:

(1) make any distinction with respect to any person based on race, color, sex, marital status, religious creed, ancestry, national origin, disability, sexual orientation, gender expression, HIV status, or gender identity in connection with:

(A) admission;

(B) service or sales; or

(C) price, quality, or use of any facility or service;

(2) display, circulate or publicize or cause to be displayed, circulated or publicized, directly or indirectly, any notice, communication, or advertisement that states or implies:

(A) any distinction in the availability of any facility, service, commodity, or activity related to the accommodation that would violate paragraph (1), or

(B) that the patronage or presence of any person is unwelcome, objectionable, unacceptable, or not desired or solicited on account of any person's race, color, sex, marital status, religious creed, ancestry, national origin, disability, sexual orientation, gender expression, HIV status, or gender identity;

* * *

27-11A. Discriminatory practices – specific protections for LGBTQ individuals in care facilities.

(a) *Legislative findings and statement of policy.*

(1) The County has a goal to ensure that every resident can live without fear of discrimination based on sex—including on the basis of gender identity or sexual orientation. To achieve this goal the county will:

(A) protect LGBTQ community members from discrimination in all public facilities, including health and personal care facilities;

(B) ensure medical providers respect the gender identity and pronouns of all patients;

(C) strengthen access to care facilities for sexual minorities and all gender identities; and

(D) ensure that all public accommodations in Montgomery County adhere to non-discrimination laws;

(2) The County Council finds that ending and preventing harassment among LGBTQ individuals requires substantial coordination and cooperation among federal, state, and local governments, as well as private sector service providers and community organizations.

(b) Definitions. In this Section, the following terms have the meanings indicated.

Care facility or facility means a place of public accommodation that provides direct personal care or health care to individuals, such as a hospital, clinic, nursing home, domiciliary care home, or personal care home.

Harass includes requiring an individual to show identity documents to gain entrance to a restroom available to other individuals of the same gender identity.

(c) Discriminatory practices prohibited under Section 27-11 include when an owner, lessee, operator, manager, agent, or employee of any care facility in the County, based on an individual's sexual orientation, gender identity, gender expression, or HIV status:

(1) denies admission to a facility, transfers or refuses to transfer the individual within a facility or to another facility, or discharges or evicts an individual from a facility;

(2) denies a request by individuals to share a room in a facility;

(3) if rooms are assigned by gender, assigns, reassigns, or refuses to assign a room to a transgender individual other than in accordance with the individual's gender identity, unless at the individual's request;

(4) prohibits an individual from using, or harasses an individual who seeks to use or does use, a restroom available to other individuals of the same gender identity, regardless of whether the individual is making a gender transition or appears to be gender-nonconforming;

(5) willfully and repeatedly fails to use an individual's s name or pronouns after being clearly informed of the name or pronouns;

(6) denies an individual the right to wear or be dressed in clothing, accessories, or cosmetics that are allowed for any other individual;

(7) restricts an individual's right to associate with other individuals, including the right to consensual sexual relations, unless the restriction uniformly applies to all individuals in a nondiscriminatory manner;

(8) denies or restricts medical or nonmedical care; or

(9) provides medical or nonmedical care in a manner that, to a similarly situated reasonable individual, unduly demeans the individual's dignity or causes avoidable discomfort.

(d) Notice requirements. A facility must post prominently, and must include with any materials that describe the facility's nondiscrimination policies, a notice that:

(1) meets the requirements of subsection (e); and

(2) is in a form prescribed by the Director.

(e) The notice required under subsection (d) must include:

(1) a statement that the facility does not discriminate or allow discrimination, including bullying, abuse, or harassment, on the basis of:

(A) actual or perceived sexual orientation, gender identity, gender expression, or HIV status; or

(B) an association with another individual on account of that individual's actual or perceived sexual orientation, gender identity, gender expression, or HIV status; and

159 (2) information about filing a complaint with the Commission on
160 Human Rights.

LEGISLATIVE REQUEST REPORT

Bill 28-20

*Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ
Bill of Rights*

DESCRIPTION: Bill 28-20 would prohibit discriminatory practices against certain individuals in places of public accommodation, including nursing homes and other facilities, and would require certain notices to individuals.

PROBLEM: Discriminatory practices on the basis of sexual orientation, gender identity, gender expression, and HIV status in nursing homes and other places of public accommodation.

GOALS AND OBJECTIVES: Prohibit certain discriminatory acts on the basis of sexual orientation, gender identity, gender expression, or HIV status.

COORDINATION: Office of Human Rights

FISCAL IMPACT: OMB

ECONOMIC IMPACT: OLO

EVALUATION: To be done.

EXPERIENCE ELSEWHERE: District of Columbia

SOURCE OF INFORMATION: Christine Wellons, Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: N/A

PENALTIES: Civil penalties under County Code, Section 27-8

Economic Impact Statement

Office of Legislative Oversight

Bill 28-20

Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights

SUMMARY

Overall, the Office of Legislative Oversight (OLO) expects Bill 28-20 to have a negligible impact on the Montgomery County economy.

BACKGROUND

Current law prohibits an owner or operator of a place of public accommodation from discriminating against individuals based on their sexual orientation or gender identity.¹ Bill 28-20 would expand the scope of anti-discrimination protections to include HIV status and “gender expression,” which the bill defines as “gender as expressed by an individual’s name, pronouns, clothing, hairstyle, behavior, voice, or similar characteristics.”² Moreover, the bill identifies practices that would be prohibited in “care facilities” (i.e. public accommodations that provide “direct personal care or health care to individuals, such as a hospital, clinic, nursing home, domiciliary care home, or personal care home”).³ These care facilities must also post notices and update materials that describe their nondiscrimination policies.⁴

INFORMATION, ASSUMPTIONS and METHODOLOGIES

No methodologies were used in this statement. The assumptions underlying the claims made in the subsequent sections are based on the judgment of OLO staff.

VARIABLES

The variables that could affect the economic impacts of Bill 28-20 in the County are the following:

- Costs associated with training staff and updating materials (e.g. signs, brochures) on the new anti-discrimination protections
- Revenue generated from local businesses that produce signs, brochures, etc.
- Loss of customers due to discriminatory behavior by employees and owners
- Legal costs and settlements associated with gender expression discrimination lawsuits

¹ Christine Wellons, Memorandum, Bill 28-20, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights, July 2, 2020, Montgomery County Council, Montgomery County, Maryland, 1.

² Montgomery County Council, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights, Introduced on July 7, 2020, Montgomery County, Maryland, 2.

³ Ibid, 6.

⁴ Ibid, 7.

Economic Impact Statement

Office of Legislative Oversight

IMPACTS

Businesses, Non-Profits, Other Private Organizations

Workforce, operating costs, property values, capital investment, taxation policy, economic development, competitiveness, etc.

OLO believes that Bill 28-20 would have a negligible impact on private organizations in the County. Training staff and updating materials on the new anti-discrimination protections could result in short-term increases in operating costs for care facilities and other businesses. Also, expanding the scope of behavior prohibited under anti-discrimination law could result in increased legal costs for businesses that face lawsuits for gender expression discrimination. However, these potential costs to private organizations could be offset by businesses that retain customers who would otherwise patronize other establishments due to discriminatory behavior by owners and employees. Moreover, businesses that produce signs, brochures, and other communication materials may see short-term revenue increases from organizations that need updated materials. OLO sees no direct connection between the bill and the Council's other priority indicators, namely property values, capital investment, taxation policy, economic development, and competitiveness.

Residents

Workforce, property values, income, taxation policy, economic development, etc.

OLO believes that Bill 28-20 would have a minimal economic impact on County residents overall. The bill could reduce income costs to workers who experience gender expression discrimination. OLO sees no significant connection between the bill and property values, taxes paid, and the Council's other priority indicators.

WORKS CITED

Wellons, Christine. Memorandum, Bill 28-20, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights. July 2, 2020. Montgomery County Council. Montgomery County, Maryland.

Montgomery County Council. Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights. Introduced on July 7, 2020. Montgomery County, Maryland.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent the OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

This economic impact statement was drafted by Stephen Roblin (OLO).

Fiscal Impact Statement

Bill 28 -20, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights

1. Legislative Summary

Bill 28-20 will (1) prohibit discriminatory practices against certain individuals in places of public accommodation, including nursing homes and other facilities; (2) require certain notices to individuals; and (3) generally amend the laws regarding prohibited discrimination in places of public accommodation. This legislation will expand upon the current law (Chapter 27 of the Montgomery County Code) to outlaw discrimination in public accommodations based upon an individual's gender expression or HIV status. In addition, the legislation would delineate certain practices in nursing homes or other care facilities that would constitute prohibited discrimination based on sexual orientation, gender identity, gender expression, or HIV status.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget.

Includes source of information, assumptions, and methodologies used.

Changes to County expenditures are difficult to project because the potential cost of enforcing this legislation is dependent on the number of discrimination complaints that are received, reviewed, and determined that such complaints should be investigated. The Office of Human Rights does not currently have available staff to investigate such complaints. Therefore, additional resources may be required to enforce the law. Changes in County revenues are not expected.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

It is difficult to project the expenditure estimates over the next 6 fiscal years due to the number of complaints that will be received, reviewed, and investigated. The proposed legislation is not expected to impact revenues.

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

The proposed legislation will not affect retiree pensions or group insurance costs.

5. An estimate of expenditures to County's information technology (IT), including Enterprise Resource Planning (ERP) systems.

The proposed legislation is not expected to impact expenditures related to County IT or ERS systems.

6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Bill 28-20 does not authorize future spending.

7. An estimate of the staff time needed to implement the bill.

The implementation of the proposed legislation will strain current staffing levels in the Office of Human Rights and increase staff time required for resolving potential cases, depending on any increase in complaints. Currently, the number of investigations conducted by the Office of Human Rights has increased, and that trend is anticipated to continue. Should this trend continue and due to the complexity of potential cases, additional staffing may be needed. The implementation of new human rights laws continues to present workload challenges at our current staffing levels.

8. An explanation of how the addition of new staff responsibilities would affect other duties.

Expenditures related to discrimination complaints that should be investigated is difficult to project due to the length of time and nature of the investigation. However, as new human rights laws are enacted, the number of complaints will increase, thereby increasing the potential for more complaints for the Office and the workload for each of the current investigation staff members. This would cause possible backlogs in complaint categories where such backlogs do not currently exist due to the increased time to investigate and close complaints.

If the number of complaints do not increase after the enactment of the legislation, then no additional appropriation would be needed to implement Bill 28-20.

The chart below illustrates the personnel costs for additional staff (e.g., Investigator I, Investigator II and an Investigator III).

FY21 - MINIMUM SALARY + 25%		INVESTIGATOR I		INVESTIGATOR II		INVESTIGATOR III	
		GRADE 20		GRADE 23		GRADE 25	
		MINIMUM		MINIMUM		MINIMUM	
		FULL YEAR	W/ 3 MTH LAPSE	FULL YEAR	W/ 3 MTH LAPSE	FULL YEAR	W/ 3 MTH LAPSE
FY20 GENERAL SALARY & MLS SALARY SCHEDULES		\$52,459.00	\$39,344.25	\$60,285.00	\$45,213.75	\$66,164.00	\$49,623.00
PLUS 25%		\$13,114.75	\$9,836.06	\$15,071.25	\$11,303.44	\$16,541.00	\$12,405.75
REVISED SALARY		\$65,573.75	\$49,180.31	\$75,356.25	\$56,517.19	\$82,705.00	\$62,028.75
FICA @ 7.65%		\$5,016.39	\$3,762.29	\$5,764.75	\$4,323.56	\$6,326.93	\$4,745.20
Retirement @ 8%		\$5,245.90	\$3,934.43	\$6,028.50	\$4,521.38	\$6,616.40	\$4,962.30
MEDICAL FLAT RATE		\$13,006.00	\$9,754.50	\$13,006.00	\$9,754.50	\$13,006.00	\$9,754.50
TOTAL PERSONNEL COSTS - 1 Position		\$88,842.04	\$66,631.53	\$100,155.50	\$75,116.63	\$108,654.33	\$81,490.75

9. A description of any variable that could affect revenue and cost estimates.

See item 2 above.

10. If a bill is likely to have no fiscal impact, why that is the case.

Not Applicable.

11. Other fiscal impacts or comments.

None.

12. An explanation of the staff time needed to implement this bill.

See item 8 above.

13. Ranges of revenue or expenditures that are uncertain or difficult to project.

See item 2 above.

14. The following contributed to and concurred with this analysis:

James Stowe, Office of Human Rights

Philip Weeda, Office of Management and Budget.



Richard S. Madaleno, Director
Office of Management and Budget

8/12/20

Date

**TESTIMONY ON BEHALF OF COUNTY EXECUTIVE ON BILL 28-20 -
HUMAN RIGHTS AND CIVIL LIBERTIES - DISCRIMINATION IN PUBLIC
ACCOMMODATIONS - LGBTQ BILL OF RIGHTS**

President Katz, Vice-President Hucker and distinguished members of Council, first we wish to thank you for allowing this opportunity to speak about this very important issue. We are here to speak on behalf of the County Executive in support of Council Bill 28-20 Human Rights and Civil Liberties- Discrimination in Public Accommodation-LGBTQ Bill of Rights. The proposed law would prohibit certain discriminatory practices against certain individuals in places of public accommodation, including nursing homes and other facilities and required the posting of certain anti-discriminatory notices to individuals. Further the proposed measure would define and prohibit certain discriminatory practices based on sexual orientation, gender expression, gender identity, and HIV status in places of public accommodation.

As you may be aware, under current law it already illegal for an owner or operator of a place of a of public accommodation to discrimination against an individual based upon sexual orientation or gender identity. The further expansion of the law to gender expression and or HIV status would provide protections for another very vulnerable and often targeted segment of our community, so therefore I am supportive of this proposed legislation.

There are however a couple of points I want to make sure County Council weighs in its decision on passage of this law.

The first is a point of potential First Amendment freedom of speech concerns. Section 27-11A(c)5 and Section 27-11 A (d) and (e) are the sections in question. Proposed section 27-11A(c) outlines discriminatory practices made by an owner, lessee, operator, manager, agent, or employee of any care facility in the County. These discriminatory practices include, under Section 27-11 A (c) 5, when one of these persons “willfully and repeatedly fails to use an individual’s name or pronoun after being clearly informed of the name or pronouns.” Proposed sections 27-11A (d) and (e) require the care facility to post notice that: (1) the facility does not discriminate or allow discrimination based on sexual orientation, gender identity, gender expression, or HIV status or due to association with one of these protected persons; and (2) information about filing a complaint of discrimination with the Human Rights Commission. This notice must also be included with any materials describing the care facility’s nondiscrimination policies.

In order to make these sections more defensible to any possible First Amendment challenges and to ensure that these sections would be upheld against such challenges, the County Attorney’s Office recommends two changes.

First, amend section 27-11 A 9(c) 5 to add...making it a violation if the speaker “willfully and repeatedly, with the intent to humiliate, fails to use an individual’s name or pronoun after being clearly informed of the name or pronouns.”

Second, amend section 27-11 A (e) to “the notice required under subsection (d) must include (1) a statement that the law prohibits discrimination, including bullying, abuse, or harassment, on the basis of...” Should there be specific questions I have asked the County Attorney to be available at the public hearing to offer additional reasoning for these suggested changes per your request.

The second point is a familiar one and while we believe this law will provide needed protection for members of our community; it will potentially create more complaints for the Office of Human Rights and the matter the concerns of businesses, service providers and employers that new human rights laws however justifiable may seem like a continuing interference in management of the workplace and may be viewed by employers as overreaching by government. We believe however in this instance this law will help provide a marketplace and workplace free of discrimination allowing an environment that is productive for all employees and accessible to all seeking public services.

If approved, the Office of Human Rights would address complaints as directed by the provisions of the law. The Office of Human Rights would also provide support for technical questions that might arise from employers, employees and service providers. However, this additional responsibility and potential increase in number of complaints will put additional strain on the agency’s current staffing levels. We must include considerations for additional staff resources to be determined by the Office of Human Rights.

We are in support of the passage of this law. Thank you for the opportunity to share these comments and observations

The Board of Directors of the MoCo Pride Center would like to offer our wholehearted endorsement for Bill 28-20, also known as the LGBTQ Bill of Rights. We stand with Councilmembers Glass, Katz, Jawando, Hucker, Riemer, Albornoz, Friedson, Navarro, and Rice in supporting this much-needed piece of legislation. This bill offers an excellent foundation for building the comprehensive legal and social protections so desperately needed by members of the LGTBQ community. We look to our county council members to honor their commitment to the safety and well-being of all their constituents by voting in favor of Bill 28-20. This is just the beginning of the work needed to achieve equity for all members of our community. Thank you for your time and continued support of our community.

Bill 28-20
Human Rights and Civil Liberties – Discrimination in Public Accommodations –
LGBTQ Bill of Rights
Montgomery County Council
July 28, 2020

Position: Support

Good afternoon Council President Katz and members of the Montgomery County Council. I am Nancy Carr, director of communications for AARP Maryland. As you know, AARP Maryland is one of the largest membership-based organizations in the state, with nearly 900,000 members. I am here today to voice our support for **Bill 28-20 Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights**.

AARP estimates that by the year 2030, more Americans will be over the age of 65 than under the age of 18. And three out of four adults age 45 and older who are lesbian, gay, bisexual or transgender say they are concerned about having enough support from family and friends as they age. Many are also worried about how they will be treated in long-term care facilities and want specific LGBTQ services for older adults. The LGBTQ Bill of Rights provides equal treatment under the law by prohibiting discrimination and mistreatment of patients based on their gender identity and HIV status.

According to AARP's 2018 landmark national LGBTQ research study, "Maintaining Dignity: A Survey of LGBT Adults Age 45 and Older":

- 34 percent of LGBT older adults are concerned that they will have to hide their identity in order to have access to suitable housing as they age; and
- 76 percent of respondents are concerned about having adequate family or social supports to rely on as they age.

Although the title of the study refers to "LGBT," transgender and gender expansive adults were among the respondents to the survey. The research also found that based on their life experiences, many LGBTQ elders are worried about their safety in care facilities:

- 67% fear neglect
- 60% anticipate verbal or physical harassment
- 61% expect to face limited access to services
- 52% say they will be forced to hide or deny their identity

Access to safe long-term care is of dire concern for the LGBTQ community. Too many LGBTQ seniors are vulnerable and isolated because they are less likely to have adult children to look out for them. They are also more likely to have lost a significant part of their social network during the HIV/AIDS epidemic. Discrimination at the hands of providers, threatens the very health, financial security, and personal fulfillment of too many 50-plus LGBTQ adults.

AARP Maryland thanks Councilman Evan Glass for his leadership on this issue and we respectfully ask the Council to vote YES on Bill 28-10.

We look forward to working with members of the Council on this and future efforts to ensure that all Marylanders are free to choose how they live as they age, in dignity, safety and comfort. For questions, please contact AARP Maryland Director of Advocacy Tammy Bresnahan at tbresnahan@aarp.org or by calling 410-302-8451.

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*The full report, "Maintaining Dignity: A Survey of LGBT Adults Age 45 and Older" (2018) is available online at <https://www.aarp.org/research/topics/life/info-2018/maintaining-dignity-lgbt.html>

Testimony Favorable for Bill 28-20, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights

Council President Katz and esteemed members of the Montgomery County Council: my name is Samantha Jones and I am the President of the LGBTQ Democrats of Montgomery County. My pronouns are she/her/hers. On behalf of our club, I am submitting this testimony **in full support of Councilmember Glass’s Bill 28-20, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights.**

The LGBTQ Democrats of Montgomery County are dedicated to improving the lives of the LGBTQ people who live, work, and study in Montgomery County. We strongly believe that transgender, nonbinary, and gender-expansive people, as well as those living with HIV, must be protected from discrimination in care facilities and other public accommodations.

Bill 28-20 seeks to prohibit discrimination specifically on the basis of gender identity, gender expression, sexual orientation, and HIV status. The most vulnerable members of the LGBTQ community, transgender and nonbinary people, routinely face these exact types of discrimination when seeking care. This discrimination is prominent all over the country, and Maryland and Montgomery County are no exceptions. In a 2018 study, Human Rights Watch reported that LGBTQ people face higher barriers to accessing health care, and that many of us have difficulty finding providers who will treat us without passing judgment. Many of us, and trans folks especially, have difficulty finding health care providers who will offer treatment at all.

Additionally, according to the 2015 U.S. Trans Survey, 14% of trans people in nursing homes or other extended care facilities were denied equal treatment or service, verbally harassed, or physically attacked simply because of who they are. Anti-LGBTQ discrimination is a real problem, and must be addressed through legislation such as Bill 28-20.

As LGBTQ people age and require care in nursing homes or other care facilities, the justifiable concern over discrimination increases. Our LGBTQ elders must be able to seek affirming care in these facilities without the fear of being misgendered, mistreated, harassed, neglected, or abused due to their identity. LGBTQ seniors are particularly vulnerable to discrimination in nursing homes because they are often unable to advocate for themselves. One of the most common forms of discrimination is the intentional misgendering of trans and nonbinary people, which is harmful on every level. Bill 28-20 explicitly prohibits this form of discrimination, and provides protections against other senseless forms of discrimination that LGBTQ folks face when they are at their most vulnerable.

Similarly, too many care facilities discriminate against LGBTQ people by disallowing same-gender partners to continue living as a married couple and instead disrespectfully referring to them as “friends.” Imagine being in a nursing home with your partner and being unable to support them, be openly affectionate with them, or authentically refer to your relationship without fear of harassment or violence from facility staff members. This

discrimination is not just limited to patients of care facilities either. Often, LGBTQ adult children caretakers and their partners or spouses face similar discrimination when trying to visit their parents or relatives in care facilities. Anti-LGBTQ discrimination in care facilities can harm multiple generations of families and must be stopped.

Out of consideration for the mental health, physical health, and equitable treatment of LGBTQ individuals, the LGBTQ Democrats of Montgomery County strongly urges a favorable vote on Bill 28-20, Human Rights and Civil Liberties – Discrimination in Public Accommodations – LGBTQ Bill of Rights.

Thank you,

Samantha Jones, Esq.
President
LGBTQ Democrats of Montgomery County
www.lgbtqdemsmoco.org

From: "Timothy Tutt" <tim@westmorelanducc.org>
Date: 7/28/2020 2:12:37 PM
To: "county.council@montgomerycountymd.gov"
<county.council@montgomerycountymd.gov>
Cc: "Lora, Bianca" <Bianca.Lora@montgomerycountymd.gov>
Subject: Testimony in support of Bill 28-20 - LGBTQ Bill of Rights

Thanks for giving me the opportunity to speak to the County earlier today. Here is a written version of my testimony in favor of Bill 28-20.

Rev. Dr. Timothy Tutt
Senior Minister
Westmoreland Congregational United Church of Christ
Bethesda, Maryland

Testimony to the County Council
in support of Bill 28-20

Thank you Council President Katz. Thank you Councilmember Glass for introducing Bill 28-20, this important LGBTQ Bill of Rights. Thanks to all of the Council members for your unanimous support of this legislation and for hosting this hearing.

My name is Tim Tutt. I'm the senior minister of Westmoreland Congregational United Church of Christ in Bethesda, and I support this bill.

Westmoreland, as a local congregation, and our denomination, the United Church of Christ (UCC), both have long supported persons who identify as lesbian, gay, bisexual, transgender, and/or queer.

The UCC first called for full protection under the law of LGBTQ persons in 1969. The UCC called for equal marriage rights for same sex couples in 1996. The denomination called for affirmation, protection, and inclusion of transgender persons in 1998. These and other statements and affirmations have been added to and re-affirmed over the years.

Westmoreland, as a community of faith in Montgomery County, voted in 1999 to be affirming of and welcoming to persons of all sexual orientations, later expanded that statement to include persons of all gender identities, and worked for marriage equality in our state as well-among the ways in which our congregation has tried to live out words of blessing and justice for all people.

As a person of faith, who is also a citizen in a pluralistic democracy, I am aware of Constitutional separation of religion and government. I am aware that not all religious tenets make for good public policy.

In this instance, however, my belief, and the affirmations of our congregation and of our denomination - that all people are created in the image of God and are gifts to creation - and the purpose of this legislation - to make sure that LGBTQ persons are fully included in healthcare, nursing, and personal care facilities - run parallel to each other. And, honestly, the theological language of affirmation and blessing that we in the church use and the governmental language of rights and legal protection that this legislation uses are really the

same human sentiments, calling us all to honor, accept, include, affirm, protect and respect one another, equally and with dignity.
I gladly support Bill 28-20.

Rev. Dr. Timothy B. Tutt

Senior Minister | Westmoreland Congregational United Church of Christ

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Westmoreland on the web<<http://www.westmorelanducc.org/>> | Westmoreland on

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Tim on Facebook<<https://www.facebook.com/timothy.tutt>> | Tim on

Twitter<<https://twitter.com/timothytutt>> | Tim on

Instagram<<https://www.instagram.com/timothytutt/>> | Zen, Texas (Tim's sporadic blog)<<http://zentexas.blogspot.com/>>

Executive Director | Briggs Center for Faith & Action

For Briggs-related matters, please email me at tim@BriggsCenter.org.

Click here<<https://www.briggscenter.org/>> to learn more about Briggs.

"Be kind to unkind people. They need it the most."

Close



OFFICE OF THE COUNTY ATTORNEY

Marc Elrich
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

TO: James Stowe
Director, Office of Human Rights

VIA: Edward B. Lattner, Chief *Edward B. Lattner*
Division of Government Operations

FROM: Kathryn Lloyd *Kathryn Lloyd /EBJ*
Associate County Attorney

DATE: July 22, 2020

RE: **OCA Review of Bill 28-20, Human Rights and Civil Liberties –
Discrimination in Public Accommodations – LGBTQ Bill of Rights**

SUMMARY

Section 27-11A(c)(5) and Sections 27-11A(d) and (e) of Bill 28-20, as currently presented in the bill, raise some First Amendment freedom of speech legal concerns, outlined in more detail below. Proposed section 27-11A(c) outlines discriminatory practices made by an owner, lessee, operator, manager, agent, or employee of any care facility in the County. These discriminatory practices include, under section 27-11A(c)(5), when one of these persons “willfully and repeatedly fails to use an individual’s s¹ name or pronouns after being clearly informed of the name or pronouns.” Proposed sections 27-11A(d) and (e) require the care facility to post notice that: (1) the facility does not discriminate or allow discrimination based on sexual orientation, gender identity, gender expression, or HIV status or due to association with one of these protected persons; and (2) information about filing a complaint of discrimination with the Human Rights Commission. This notice must also be included with any materials describing the care facility’s nondiscrimination policies.

In order to make these sections more defensible to First Amendment challenges and to ensure that these sections would be upheld against such challenges, the County Attorney’s Office recommends two changes. First, amend section 27-11A(c)(5) to add the bolded language, making it a violation if the speaker “willfully and repeatedly, **with the intent to humiliate**, fails to use an individual’s name or pronouns after being clearly informed of the name or pronouns.”

¹ There is a typo in the July 7, 2020 version of the bill that includes this extra “s”.

Second, amend section 27-11A(e) to “[t]he notice required under subsection (d) must include (1) a statement that the ~~facility does not discriminate~~ **law prohibits discrimination**, including bullying, abuse², or harassment, on the basis of...” The reasoning for these suggested changes is outlined in the First Amendment analysis below.

BACKGROUND

Bill 28-20 amends section 27-11 of the County Code to include gender expression and HIV status as protected classes against whom discriminatory practices are prohibited in places of public accommodation. In that regard, the bill amends section 27-6 of the County Code to include definitions for gender expression, gender-nonconforming, and transgender individual. However, the bill does not add a definition for “HIV status” under section 27-6.

The bill also amends section 27-10(a)(5) of the County Code to include health care institutions, domiciliary care homes, nursing homes, and personal care homes as examples of places of public accommodation in the County. Later in the bill, under new section 27-11A(b), the bill defines a care facility as “a place of public accommodation that provides direct personal care or health care to individuals, such as a hospital, clinic, nursing home, domiciliary care home, or personal care home.” This definition does not specifically list health care institutions, which, as previously mentioned, were added as an example of a place of public accommodation in section 27-10(a)(5).

Finally, Bill 28-20 adds a new section to the County Code, section 27-11A, Discriminatory practices – specific protection for LGBTQ individuals in care facilities. This section outlines legislative findings and a statement of policy setting forth the County’s “goal to ensure that every resident can live without fear or discrimination based on sex – including on the basis of gender identity or sexual orientation.” Section 27-11A(a)(1). Section 27-11A(b) defines the terms care facility/facility and harass. Section (c) outlines discriminatory practices prohibited by a care facility based on an individual’s sexual orientation, gender identity, gender expression, or HIV status.

ANALYSIS

I. The First Amendment

The First Amendment to the United States Constitution provides that “Congress shall make no law...abridging the freedom of speech.” The First Amendment, as applied to the states by the Fourteenth Amendment, protects not only “the right to speak freely,” but also “the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Therefore, laws that compel speech are ordinarily considered content-based regulations of speech subject to strict scrutiny because “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795

² The terms “bullying” and “abuse” are not defined in Chapter 27 or in this bill.

(1988).

However, if the speech could be considered commercial speech or professional speech, it could invoke a lower level of scrutiny. Commercial speech is usually considered to be speech that does nothing more than propose a commercial transaction. *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Generally, courts consider three factors to consider whether speech is commercial speech: whether the speech is an advertisement; whether the speech refers to a specific product or service; and whether the speaker has an economic motive for this speech. *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 879 F.3d 101, 108 (4th Cir. 2018). Professional speech, on the other hand, applies to professionals in traditional occupations which are subject to state licensing, accreditation, or discipline, such as doctors or accountants. *Id.* at 109. Professional speech may also occur when “the speaker is providing personalized advice in a private setting to a paying client.” *Moore-King v. City of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013). While the Fourth Circuit cases discuss professional speech, the Supreme Court’s precedents do not generally recognize this category of speech as being entitled to less protection. *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

II. Section 27-11A(c)(5).

Section 27-11A(c)(5) includes as a discriminatory practice “when an owner, lessee, operator, manager, agent, or employee of any care facility in the County, based on an individual’s sexual orientation, gender identity, gender expression, or HIV status...willfully and repeatedly fails to use an individual’s name or pronouns after being clearly informed of the name or pronouns.” Requiring a person involved with a care facility to use an individual’s name or pronouns that that person may not have otherwise used without providing reasoning why the speech is subject to discriminatory practices may violate the First Amendment.

In *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), the Fourth Circuit held that a statute requiring doctors to display an ultrasound and describe a fetus during the ultrasound to women seeking an abortion was a compelled speech provision that violated the First Amendment. The Court found the statute to be a content-based regulation of a medical professional’s speech subject to heightened intermediate scrutiny. *Id.* at 245. The Court found that, while the government can argue that it has a stronger interest in regulating professional conduct, and thus the regulation was not subject to strict scrutiny, the regulation was clearly content-based regulation of speech. *Id.* at 248. The Court explained that “[t]he First Amendment not only protects against prohibitions of speech, but also against regulations that compel speech. ‘Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.’” *Id.* (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995)) The Court explained that “[a] regulation compelling speech is by its very nature content-based, because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent.” *Id.* at 246.

Under the professional speech standard, the State has the burden to demonstrate “at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.” *Id.* (citing *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667-68). Even under this lessor standard, the Court found that the substantial State interest in protecting fetal life “must be drawn so as to directly advance the interest without impeding too greatly on individual liberty interests or competing state concerns.” *Id.* (citing *Sorell*, 131 S. Ct. at 2667-68). The Court found the provision was not a reasonable regulation of the medical profession but instead imposed an extraordinary burden on expressive rights. *Id.* at 254. Therefore, the Court found that “requiring the physician to speak to a patient who is not listening” and “rendering the physician the mouthpiece of the state’s message” acted to compromise a physician’s free speech rights. *Id.* at 255. Thus, “[t]he means here exceed what is proper to promote the undeniably profound and important purpose of protecting fetal life.” *Id.*

In Bill 28-20, section 27-11A(c)(5) makes it a discriminatory practice for an owner, lessee, operator, manager, agent, or employee of any care facility in the County to willfully and repeatedly fail to use an individual’s name or pronouns after being clearly informed of the name or pronouns. Amending this section to add the bolded language, making it is a violation when the speaker “willfully and repeatedly, **with the intent to humiliate**, fails to use an individual’s name or pronouns after being clearly informed of the name or pronouns” clarifies the intent of the statute and the purpose of governing the speech, that is, to avoid discriminatory practices, and helps alleviate First Amendment concerns.

III. Sections 27-11A(d) and (e).

In Bill 28-20, proposed sections 27-11A(d) and (e) would require a care facility to “post prominently, and must include with any materials that describe the facility’s nondiscrimination policies, a notice that...the facility does not discriminate or allow discrimination, including bullying abuse, or harassment” based on “actual or perceived sexual orientation, gender identity, gender expression, or HIV status; or association with an individual on account of that individual’s sexual orientation, gender identify, gender expression, or HIV status.” The notice further requires “information about filing a complaint with the Commission on Human Rights.” While this notice requirement’s intent is to inform about prohibited discriminatory practices, because the notice requires the facility to make a statement rather than just to state the law, it also raises First Amendment concerns.

Maryland courts have struck down some posting requirements under the strict scrutiny standard as violations of the First Amendment. In *Tepeyac v. Montgomery County*, 5 F. Supp. 3d 745 (D. Md. 2014), the United States District Court for the District of Maryland examined a Montgomery County Resolution requiring a Limited Service Pregnancy Resource Center (LSPRC) to post a sign on its premises stating that the LSPRC did not have a licensed medical professional on staff and that the Montgomery County Health Officer encouraged women who are or may be pregnant to consult with a licensed health care provider. *Id.* at 748. The sign was required to be easily readable and to be “conspicuously posted in the Center’s waiting room or other area where individuals await service.” *Id.* (citing Montgomery County Resolution 16-

1252). The *Tepeyac* Court analyzed whether the County's Resolution violated the First Amendment under the strict scrutiny standard, which required the County to prove that the Resolution was narrowly tailored to promote a compelling government interest. *Id.* at 755, 763.

In *Tepeyac*, the compelling government interest was to protect the health of pregnant women. *Id.* at 763. Under Bill 28-20, the compelling government interest, as outlined in section 27-11A(a), is "to ensure that every County resident can live without fear of discrimination based on sex – including on the basis of gender identity or sexual orientation." The notice requirement seeks to promote this interest to "ensure that all public accommodations in Montgomery County adhere to non-discrimination laws." The *Tepeyac* Court found that the County had a compelling interest in protecting the health of pregnant women. *Id.* at 763-64. Yet the Court explained that "[t]he mere identification of a valid compelling interest is not sufficient, however: the restriction on speech must also actually further that interest." *Id.* at 764. The *Tepeyac* Court found that while the County may have had a compelling interest in positive health outcomes for pregnant women, "the critical flaw for the County is the lack of any evidence that the practices of LSPRCs are causing pregnant women to be misinformed which is negatively affecting their health. It does not necessarily follow that misinformation will lead to negative health outcomes." *Id.* at 768. That is, the County must show that the harm is real, not conjectural, and that the law, here Bill 28-20, will alleviate these harms.

Likewise, in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 879 F.3d 101 (4th Cir. 2018), the Fourth Circuit considered whether a Baltimore ordinance that required pregnancy clinics that did not offer or refer for abortions to post signs in their waiting rooms disclosing that fact violated the First Amendment. Finding that the commercial and professional speech standards did not apply, the Court, as did the *Tepeyac* Court, applied the strict scrutiny standard. *Id.* at 110. The Court found that the ordinance forced the Center in the case to utter words in its waiting room at odds with the Center's pro-life beliefs. *Id.* While the Court found that the City's interests were important – to address deceptive advertising and prevent health risks that can result from delaying in seeking an abortion – there was insufficient evidence to show that there was deception and that health issues were caused by delays resulting from deceptive advertising. *Id.* at 111. The Court also found issue with the fact that the ordinance applied only to speakers discussing pregnancy-related services but not to speakers on other topics. *Id.* at 112.

Similarly, in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Supreme Court considered the constitutionality of a California law that required (1) licensed pregnancy clinics to notify women, on site in the waiting room, of free or low-cost services and give them a phone number to call, and that required (2) unlicensed pregnancy clinics to notify women, also on site, that they are not licensed. As to the licensed notice, the Supreme Court found that the law was meant to provide low-income women with information about state-sponsored services, and that the licensed notice was not sufficient to achieve that goal. *Id.* at 2375. The notice requirement only pertained to certain clinics and excluded other clinics as well as federal clinics. *Id.* at 2375-76. The Court also noted that there were other ways for the State to get its message across, such as through a public-information campaign. *Id.* at

2376.

As to the unlicensed notice, the Supreme Court found that this disclosure requirement (that the facility was not licensed) had no justification and that the State had already made it a crime to practice medicine without a medical license. *Id.* at 2377. Again, the Court noted that only some facilities were required to comply with the notice requirement, finding “[t]his Court’s precedents are deeply skeptical of laws that ‘distinguis[h] among different speakers, allowing speech by some but not others.’” *Id.* (citing *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 340 (2010)).

The Supreme Court in *Becerra* explained that the Court has afforded less protection for professional speech in two circumstances: where laws require a professional to disclose factual, noncontroversial information in their commercial speech and where laws regulate professional conduct that could incidentally involve speech. *Id.* at 2365. The Court, citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), explained that licensed notice limited to “purely factual and uncontroversial information about the terms under which...services will be available” was subject to the lessor standard of professional speech. *Id.* at 2366. The notice and posting requirements in section 27-11A (c) and (d) are meant to be notice of the law. Changing proposed section 27-11A(e)(1) to “[t]he notice required under subsection (d) must include (1) **a statement that the law prohibits discrimination**, including bullying, abuse, or harassment, on the basis of...” clarifies that the notice is merely providing information as to what the law requires, and is not a statement that the care facility is being compelled to make.

CONCLUSION

Bill 28-20 defines and prohibits certain discriminatory practices based upon sexual orientation, gender expression, gender identity, and HIV status in places of public accommodation. Three sections of the bill – section 27-11A(c)(5) and sections 27-11A(d) and (e), raise First Amendment concerns because they compel speech where the speaker may have not spoken or may have spoken something different. In order to survive a First Amendment challenge, changes, as outlined above, should be made in order to clarify: 1. the intent of the violation in section 27-11A(c)(5); and 2. that the notice in section 27-11A(e)(1) is what the law states, not a statement the care facility is being forced to make.

cc: Dale Tibbitts, Special Assistant to the County Executive
Marc P. Hansen, County Attorney
Christine Wellons, Legislative Attorney