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June 4, 2025

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

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CC: City Attorney's Office

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RE: Webster City Ordinance Sec. 12-197

Dear Councilpersons:

I am writing on behalf of the ACLU of Iowa regarding the City of Webster ("the City") Ordinance Sec. 12-197 ("the Ordinance").

This Ordinance regulates any "Adult amusement or entertainment" which includes "topless or bottomless dancers, exotic dancers, strippers, male or female impersonators or similar entertainment." WEBSTER CITY, IA. MUN. CODE § 12-197. Section 12-200 prohibits minors from the premises of any adult entertainment business. WEBSTER CITY, IA. MUN. CODE § 12-200. Individual business owners who violate this prohibition are subject to penalties applicable to municipal infractions. WEBSTER CITY, IA. MUN. CODE §12-201.

To be clear, drag is not a synonym for obscenity, and many drag performances are family-friendly. This Ordinance is outmoded and discriminatory, and we respectfully ask you to amend the Ordinance to remove any reference to "male or female impersonators" and "similar entertainment".

The Ordinance's prohibition on drag performance is unconstitutional under the U.S. and Iowa Constitutions for at least three reasons, as explained in detail below. First, it impermissibly infringes on speech protected by the First Amendment to the United States Constitution and the Iowa Constitution, because it is a content-based restriction that is not narrowly tailored to serve a

compelling government interest. Second, the Ordinance is overbroad because it encompasses all "male or female impersonators" and "similar entertainment" under prohibited adult entertainment, 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.

Several other Iowa municipalities have already repealed similarly unconstitutional ordinances. Following a notification letter from the ACLU of Iowa in 2022, Eagle Grove amended its ordinance to remove "female and male impersonators" from the definition of adult entertainment. Since then, Newton, Grinnell, Waukee, Knoxville, Pella, and Dyersville have also repealed similarly unconstitutional ordinances. Webster City should follow the example of these other Iowa cities and amend the Ordinance at once to remove the unconstitutional regulation of drag performances.

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

Content-based laws, which target speech based on its communicative content, are subject to strict scrutiny under the First Amendment: 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 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*, 576 U.S. at 164. 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").

A federal district court found that a similar law in Tennessee was a facially content-based restriction and unconstitutional under a strict scrutiny analysis and granted the plaintiff's request for a preliminary injunction. *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831 (W.D. Tenn. 2023), *rev'd and remanded sub nom. Friends of George's, Inc. v. Mulroy*, 108 F.4th 431 (6th Cir. 2024), *cert. denied*, 145 S. Ct. 1178, 221 L. Ed. 2d 255 (2025). 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 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*, 675 F. Supp. 3d at 871-73. Among other flaws, the court found that Tennessee's use of the term "male or female impersonators" discriminated "against the viewpoint of gender identity--particularly, those who wish to impersonate a gender that is different from the one with which they are born." *Id.* at 861-64. The Sixth Circuit reversed the district court, finding that plaintiffs lacked standing; it did not address the plaintiffs' First Amendment claims. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431 (6th Cir. 2024), *cert. denied,* 145 S. Ct. 1178, 221 L. Ed. 2d 255 (2025).

Furthermore, in *Woodlands Pride, Inc. v. Paxton*, the court found that a law targeting the content of speech, i.e., "sexual oriented performances," some of which did not rise to the definition of obscenity, was an impermissible content-based restriction. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 845 (S.D. Tex. 2023). The court specifically noted that "[d]rag shows express a litany of emotions and purposes, from humor and pure entertainment to social commentary on gender roles." *Id.* at 843. Considering the artistic value of drag shows, the court concluded that "[t]here is no doubt that at the bare minimum these performances are meant to be a form of art that is meant to entertain," which alone "warrant[ed] some level of First Amendment protection." *Id.* The court emphasized that "drag shows ... are performances that express conduct with no need for extra explanation. ... [They] express either pure entertainment, or, like most types of expressive art, an underlying deeper message. (Such as music, theater, and poetry)." *Id.*

Like the laws in those cases, this Ordinance here is a content-based restriction because it targets the speech of "male or female impersonators" (or "similar entertainment") 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 entertainment" 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.[1]

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. 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 includes all "male or female impersonators" as "adult amusement or entertainment" and 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 guarantee of the U.S. Constitution.

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). Therefore, the drag ban in the Ordinance violates the Iowa Constitution for the same reason it violates the First Amendment.

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 entertainment."

[1] 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 that 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 when 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.* Instead, strict scrutiny applies.

In several recent cases, courts have granted and upheld injunctions finding similar laws unconstitutionally overbroad. 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). The Eleventh Circuit Court of Appeals found that a similar law defining adult live performances as those depicting "lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts" was likely unconstitutionally overbroad and vague. *HM Fla.-ORL, LLC v. Governor of Fla.*, No. 23-12160, 2025 WL 1375363, at *21 (11th Cir. May 13, 2025). It reasoned that the "lewd conduct" provision directly threatened protected speech because it was broad enough to include family-friendly drag performances. *Id.* at *5.

As for the inclusion of drag in the definition of "adult" entertainment, the court noted that other state laws already made it a misdemeanor to admit minors into commercial premises exhibiting various sexual content. *Id.* at *27.

In another case, *Imperial Sovereign Court of Montana v. Knudsen*, a federal district court in Montana relied on *Friends of Georges* to temporarily block the enforcement of a statute prohibiting minors from attending drag events by trying to include them in the definition of regulated sexual performances, like the Ordinance. *Imperial Sovereign Ct. v. Knudsen*, 699 F. Supp. 3d 1018, 1028–29 (D. Mont. 2023). That court also found the drag ban to be vague and overbroad, chilling protected speech, and creating a risk of disproportionate enforcement against gender nonconforming people. *Id.* at 1049.

Finally, in *Woodlands Pride,* a federal district court found a similar law was overbroad because it lacked key definitions, allowing it to sweep too broadly and encompass constitutionally protected conduct:

> It is not unreasonable to read S.B. 12 and conclude that activities such as cheerleading, dancing, live theater, and other common public occurrences could possibly become a civil or criminal violation of S.B. 12. Further, the scope of S.B. 12 is broad, stating that it applies 'on public property at a time, in a place, and in a manner that could reasonably be expected to be viewed by a child' OR 'in the presence of an individual younger than eighteen years of age.' The plain reading of this could virtually ban any performance in public that is deemed to violate S.B. 12, including drag shows."

Woodlands Pride, Inc. v. Paxton, 694 F. Supp. 3d 820, 848 (S.D. Tex. 2023).

Like the laws in the cases discussed, the Ordinance regulates "male or female impersonators, or similar entertainment" as a prohibited "Adult amusement or entertainment", without regard for whether any such speech or expression actually has a sexually explicit component. But 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 both the U.S. and Iowa Constitutions' 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) it 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, 440-41 (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 the 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-humanservices?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 we believe would be applied under equal protection, the Iowa Supreme Court has also found that discrimination against transgender employees 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. There are already laws prohibiting obscenity, and the drag ban in this Ordinance does not generally prohibit obscenity but rather targets only LGBTQ drag performers. Thus, there is no reason offered for the facially discriminatory classification but bare animus, and the Ordinance cannot pass constitutional muster.

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

This City should follow the examples of Eagle Grove, Iowa, and the other cities in updating their ordinances.

We urge the City to, at a minimum, remove all references to "male or female impersonators or similar entertainment" from the Ordinance. A court would likely find that the restriction of these performances under the Ordinance violates equal protection and the First Amendment because it is a content-based restriction and overbroad. It is insufficient 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.

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 at shefali.aurora@aclu-ia.org.

Sincerely,

Shefali Aurora
Staff Attorney

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