On behalf of the Campaign for Southern Equality, we propose that the City of Asheville adopt an inclusive and expansive Human Rights Ordinance scheme and establish a Human Rights Commission to accept and adjudicate complaints of discrimination on enumerated protected-class categories within the City of Asheville. This memorandum proposes the adoption of specific policies and outlines the legal authority in furtherance of this objective.

I. EXECUTIVE SUMMARY

The passage of the law known as "HB2" has created both an imperative and an opportunity for the City of Asheville to reaffirm its core values: Continuous Improvement, Integrity, Diversity, Safety & Welfare, and Excellent Service ("The Asheville Way").[1] Asheville has an opportunity to reaffirm its unique and proud place as a welcoming community that embraces diversity and stands with and for all its citizens.

Asheville has a history of striving to create a welcoming and inclusive environment for the estimated 12% of its citizens who identify as lesbian, gay, bisexual, or transgender. Against the backdrop of hostile state laws, Asheville has previously adopted internal employment nondiscrimination policies, a domestic partnership registry prior to the recognition of marriage equality, and a resolution opposing HB2.[2] Asheville has long been understood as a "sanctuary" for the Southern LGBT community and its reputation in this regard extends far beyond state lines. We now ask Asheville to take the next step. As the passage of both SB2 and HB2 illustrate, the next chapter of the struggle for LGBT equality is underway and North Carolina has become ground zero for that. HB2 is regarded as the most extreme anti-LGBT law in effect in the nation. LGBT advocates and supporters have worked for political repeal since the moment the law went into effect, and are also seeking recourse in federal courts. To date, neither the state political system nor the federal courts have provided remedy and thus the urgency of seeking new action from local municipalities like Asheville, which have the ability to create policy protecting the most basic rights of LGBT citizens.

---

[1] City of Asheville Core Values, http://www.ashevillenc.gov/Departments/CityManagersOffice.aspx (last visited Sept. 20, 2016).

[2] City of Asheville, Resolution No. 16-83 ("SECTION 4. The Asheville City Council urges the North Carolina General Assembly to repeal House Bill 2 at the earliest opportunity. Meanwhile, Council will look to the court system for remedy, seeking opportunities to partner with other local jurisdictions and advocacy organizations in taking appropriate legal action against this unconstitutional legislation; to adopt appropriate local ordinances to advance the cause of equal protection; and to encourage other local governments to exercise their legislative authority to promote equal protection and nondiscrimination.").

Until now, Asheville has not had a human rights or robust non-discrimination ordinance. The Council Strategic Priorities Staff Report of September 6, 2016 contemplates the establishment of a Human Relations Commission. **We propose adopting a Human Rights Ordinance, whose authority derives from constitutional law that prohibits animus-driven policymaking and from federal laws which require equal protection, in these areas: 1. housing; 2. city contracts; 3. employment; 4. education; 5. business or industries in which regulation is expressly delegated to the City by statute; and 6. public accommodations. This Memorandum also proposes adopting the Human Relations Commission contemplated by City Council and empowering it, by and through the Human Rights Ordinance, to enforce the provisions proposed herein.**

This Memorandum is intended to be a starting point and not a limitation on the City's authority or creativity. Strategically, an inclusive Human Rights Ordinance could be drafted and enacted immediately in Asheville. The ordinance should contain language requiring the creation of a Human Relations Commission empowered to enforce its provisions, the particulars of which would be enacted by a separate ordinance at a later date after consideration of the recommendations contained in the Council's equity case studies.

II. ENUMERATED PROTECTED CLASSES

We propose that the following protected classes be adopted in all created and amended ordinances establishing non-discrimination policies that constitute the proposed Human Rights Ordinance: race, religion, color, ethnicity, class, sex, pregnancy status, gender, gender identity, gender expression, sexual orientation, marital status, familial status, religion, national origin, immigration status, military status, age, and disability. In light of purported amendments to N.C. Gen. Stat. § 115C-521.2 which seek to define "biological sex" without any medical or scientific basis[3], the following definitions[4] are proposed as part of the adoption of a comprehensive ordinance:

> *Sexual orientation*: A person's physical and/or emotional attraction to the same and/or different gender.
>
> *Gender identity*: An individual's internal, deeply-felt sense of being male, female, or something other or in-between, regardless of the sex the person was assigned at birth.

[3] From a scientific perspective, there is no distinction between an individual's gender identity and his or her "biological" sex or gender. Rather, an individual's gender identity is one of the numerous components that determine an individual's sex or gender. *See e.g., In Re Lovo-Lara*, 23 I. & N. Dec. 746, 752 (BIA 2005) (discussing eight components that determine an individual's sex); *Schroer v. Billington (Schroer I)*, 424 F. Supp. 2d 203, 212-13 (D.D.C. 2006) (discussing "real variations in how the different components of biological sexuality – chromosomal, gonadal, hormonal, and neurological – interact with each other").

[4] Christy Mallory, Adam Romero, and Brad Sears, Model Employment Policies for Federal Contractors Related to Sexual Orientation and Gender Identity, Williams Institute (Oct. 2015), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/EO-Model-Policy-October-2015.pdf.

Gender expression: An individual's characteristics and behaviors (such as appearance, dress, mannerisms, speech patterns, and social interactions) that may be perceived as masculine or feminine.

Transgender: A term for those people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth.

III. COVERED ACTIVITIES

Cities are authorized to exercise its police powers *vis a vis* N.C. Gen. Stat. § 160A-174 and § 160A-4; these powers give the City authority to protect the health, welfare, and safety of its citizens, of which protection from discrimination is part and parcel. Specifically, this statute authorizes cities to "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."[5] Should there be any ambiguity regarding the city's authority, the General Assembly requires that the scope of the city's power be resolved in favor of finding that such power exists: "the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. . ."[6] Notably, N.C. Gen. Stat. § 160A-177 also states that the enumeration of specific powers "shall not be deemed to be exclusive or a limiting factor upon the general authority to adopt ordinances conferred on cities by G.S. 160A-174." N.C. Gen. Stat. § 160A-177. Additionally, the following activities are covered under existing North Carolina State and Federal law and should be included in the proposed human rights ordinance:

A. Housing

N.C. Gen. Stat. Ann. § 160A-499.2 provides that "a municipality shall have the power to adopt ordinances prohibiting discrimination on the basis of race, color, sex, religion, handicap, familial status, or national origin in real estate transactions." Moreover, municipalities have the power to amend any existing ordinance to adhere to the mandates of the federal Fair Housing Act (41 U.S.C. §§ 3601, et seq.).[7] In January 2012, the U.S. Department of Housing and Urban Development has issued regulations construing the "sex" prong of the Fair Housing Act to include actual or perceived sexual orientation and gender identity, regardless of state laws.[8] The North Carolina General Assembly further provides municipalities with a broad grant to "create or designate a committee to assume the duty and responsibility of enforcing ordinances adopted pursuant to this section. The committee may be granted any authority deemed necessary by the city council for the proper enforcement of any fair housing ordinance."[9]

---

[5] N.C. Gen. Stat. Ann. § 160A-174.
[6] N.C. Gen. Stat. Ann. § 160A-4.
[7] N.C. Gen. Stat. Ann. § 160A-499.2.
[8] 24 C.F.R. 5.105(a)(2), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=5359-F-02EqAccessFinalRule.pdf.
[9] N.C. Gen. Stat. Ann. § 160A-499.2.

B. City Contracts

Pursuant to its corporate powers, the General Assembly has authorized the City to enter into contracts. N.C. Gen. Stat. § 160A-11, 160A-16 *et. seq.* As a market participant empowered as any other corporation to negotiate the terms and conditions of such contracts and in consideration of the requirements of the Equal Protection Clause, the City can and constitutionally must require compliance with the Equal Protection Clause in employment practices and rendering goods, services, or accommodations to the public. The provision created by HB2, N.C. Gen. Stat. § 160A-20.1, which purports to limit a city's ability to regulate the employment non-discrimination practices or regulate the provision of goods, services, or accommodations to the public as a condition of a contract, violates the Equal Protection Clause, *infra* Part V.

The Human Rights Ordinance should state that in all requests for proposals issued for city contracts, the bidder or proposer shall include a certification in which he, she, or they certify and agree that he, she, or they have not engaged in discrimination as defined in the Human Rights Ordinance; that discrimination means discrimination against any of the above-stated protected classes; that a false certification constitutes grounds to reject the bid or proposal and breach of contract; that the bidder or proposer agrees to provide information and documentation concerning its selection of subcontractors in the solicitation process, upon request; and that the bidder or proposer agrees to abide by the nondiscrimination clause as set forth below.

As part of this provision, the City could include the following provision in its contracts: "As a condition of entering into this agreement, the company represents and warrants that it will fully comply with the City's commercial nondiscrimination policy, as described in [] of the City Code. As part of such compliance, the company shall not discriminate on the basis of race, religion, color, ethnicity, class, sex, gender, gender identity, gender expression, sexual orientation, marital status, familial status, religion, national origin, immigration status, military status, age, or disability in the solicitation, selection, hiring, or treatment of subcontractors, vendors, suppliers, or commercial customers in connection with a city contract or contract solicitation process, nor shall the company retaliate against any person or entity for reporting instances of discrimination. The company shall provide equal opportunity for subcontractors, vendors and suppliers to participate in all of its subcontracting and supply opportunities on city contracts, provided that nothing contained in this clause shall prohibit or otherwise limit lawful efforts to remedy the effects of marketplace discrimination that has occurred or is occurring in the marketplace. The company understands and agrees that a violation of this clause shall be considered a material breach of this agreement and may result in termination of this agreement, disqualification of the company from participating in city contracts or other sanctions."

C. Employment

HB2 itself provides that local governments retain the authority in "regulating, compensating, or controlling its own employees."[10] Moreover, Federal law prohibits cities from discriminating on the grounds of age, disability, race, color, religion, sex, pregnancy, citizenship,

[10] N.C. Gen. Stat. §95-25.1(c)(1).

union activity, military service, and national origin.[11] The Equal Employment Opportunity Commission has issued regulations construing the "sex" prong of Title VII to include sexual orientation and gender identity, regardless of state laws.[12] An ever-increasing number of federal courts have adopted the EEOC's interpretation of Title VII. Even more specifically, Title VII, OSHA regulations, and the U.S. Office of Personnel Management require covered employers, of which the City is one, to provide transgender employees with access to a bathroom that corresponds to his, her, or their gender identity or expression.[13] Contrary state law is not a defense to a violation of Title VII.

Aside from the City's obvious authority to regulate its own employment practices, the General Assembly has granted cities broad power to regulate businesses within their jurisdiction: "A city may by ordinance, subject to the general law of the State, regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment and prohibit those that may be inimical to the public health, welfare, safety, order, or convenience."[14] Protecting its citizens from discrimination falls within the ambit of protecting the health, safety, and welfare of its citizens. Ostensibly for these reasons, the City adopted Resolution No. 11-43 in February 2011, which extended the City's employment non-discrimination clause to include sexual orientation, gender, and gender identity or expression. This same provision should be codified into an ordinance, possibly amending the City's policy of nondiscrimination contained in Section 2-186, and made enforceable by the proposed Human Rights Commission.

D. Education

All public educational institutions within the City of Asheville are required to adhere to Federal protections from discrimination in education under Title IX. Specifically regarding the gender identity provision of the ordinance, the Equal Employment Opportunity Commission, the Department of Education and the Department of Justice have determined that discrimination based on someone's gender identity or transgender status is *per se* discrimination based on sex.[15]

---

[11] *See* Americans with Disabilities Act, The Age Discrimination in Employment Act, USERRA, and the Civil Rights Act of 1964.

[12] *See Macy v. Holder*, No. 0120120821 (EEOC April 20, 2012).

[13] *See* EEOC, *Fact Sheet*, https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm; OSHA, *A Guide to Restroom Access for Transgender Workers*, https://www.osha.gov/Publications/OSHA3795.pdf; OPM, *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last visited Sept. 20, 2016).

[14] N.C. Gen. Stat. Ann. § 160A-194.

[15] *See Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012) ("[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex.'"); U.S. Dep't of Educ., Office for Civil Rights, *Questions & Answers on Title IX and Sexual Violence*, at 5 (Apr. 29, 2014), available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation."); U.S. Attorney General, *Attorney General Memorandum re Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, at 2 (Dec. 15, 2014), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf ("The most straightforward reading of Title VII is that discrimination 'because of ... sex' includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex."); Statement of Interest of the United States in *Tooley v. Van Buren Public Schools*, No.

Moreover, the General Assembly places the regulation of educational opportunities squarely in the hands of local education boards.[16] Recognizing that the city does not set policy for local school boards, we recommend that the City ally with and support Asheville City Schools with regard to complying with Title IX.

E. Expressly Delegated Authority

1. Regulation & Licensing vis a vis Public Health, Welfare, Safety, Etc.

The City is empowered to regulate and license "occupations, businesses, trades, professions, and forms of amusement or entertainment and prohibit those that may be inimical to the public health, welfare, safety, order, or convenience." N.C. Gen. Stat. § 160A-194. *See also* Asheville City Code, Chapter 9. We propose that the Human Rights Ordinance include non-discrimination policies that apply to the provision of goods and services by health care providers, mental health providers and counselors, social workers, law enforcement, and security personnel within the City of Asheville.

2. Public Enterprises

Pursuant to N.C. Gen. Stat. § 160A-312, the City is empowered to own and operate statutorily-defined public enterprises, including the operation of a public transportation system, water supply, and storm water management, to name a few. In Section 7-12-6(e), the City has adopted a nondiscrimination ordinance with respect to the storm water service charge credits or reductions specifically with regard to race, tax status, economic status, or religion. Similarly, in Section 4.5-98, the City has adopted an equal opportunity policy with respect to the provision of telecommunications services and specifically enumerates race, color, religion, age, national origin, sex, or handicap. These ordinances and any other ordinance adopting nondiscrimination provisions should be amended to include the above-cited protected classes, and all public enterprises operated by the City, including but not limited to public transportation, should include an inclusive nondiscrimination provision.

F. Public Accommodations

The regulation of public accommodations may be divided into two categories, discussed in turn below: 1. publicly-owned accommodations owned or operated by the City, such as parks, city-owned facilities, and city-owned buildings; 2. privately-owned public accommodations;

2:14-cv-13466 (E.D. Mich. Feb. 20, 2015), available at http://www.justice.gov/crt/about/edu/documents/tooleysoi.pdf (discrimination "'[o]n the basis of sex' includes discrimination based on the fact that an individual is transgender (i.e., has a gender identity different from the person's sex assigned at birth)").

[16] "It shall be the duty of local boards of education to provide students with the opportunity to receive a sound basic education and to make all policy decisions with that objective in mind, including employment decisions, budget development, and other administrative actions, within their respective local school administrative units, as directed by law." N.C. Gen. Stat. Ann. § 115C-47.

namely, privately-owned businesses that are open to the public, such as retail stores, restaurants, and hotels.

1. Publicly-owned public accommodations.

A city is empowered to operate a parks and recreation system. N.C. Gen. Stat. Ann. § 160A-354. The City may also "[a]ccept any gift, grant, lease, loan, or devise of real or personal property for parks and recreation programs. Devises and gifts may be accepted and held subject to such terms and conditions as may be imposed by the grantor or trustor, except that no county or city may accept or administer any terms that require it to discriminate among its citizens on the basis of race, sex, or religion." N.C. Gen. Stat. Ann. § 160A-353(6). Pursuant to this authority, we recommend the City adopt nondiscrimination policies as stated herein that are applicable to all parks, venues, and recreation services owned or operated by the City of Asheville.

Additionally, pursuant to its police powers, N.C. Gen. Stat. § 160A-174, the authority vested in cities to enter into contracts, N.C. Gen. Stat. § 160A-16 *et. seq.*, and the authority vested in the City pursuant to its corporate powers, N.C. Gen. Stat. § 160A-11 (i.e. to own property), the City is empowered and obliged by the Equal Protection Clause to prohibit discrimination in all facilities and buildings it owns. We propose enacting an inclusive nondiscrimination policy with respect to all public accommodations and city-owned buildings and facilities owned or operated by the City.

2. Privately-owned public accommodations.

Title II of the Civil Rights Act of 1964, or the federal law which prohibits discrimination by private business which are places of public accommodation, prohibits businesses from refusing service based on race, color, religion, or national origin. The source of law which would authorize the City to prohibit discrimination on the inclusive grounds stated herein derives from the City's authority to regulate private actors with whom the City enters into contracts. Further, protecting citizens from discrimination falls within Asheville's broad police power and the business regulation power granted to North Carolina cities. Numerous federal and state courts have determined that non-discrimination ordinances applicable to businesses providing public goods and services are permissible under the police powers of cities. *See e.g., Chicago Real Estate Bd. V. City of Chicago*, 36 Ill.2d 530 (1967); *Hutchinson Human Rel. Comm'n v. Midland Mgmt. Inc*., 213 Kan 308, 312 (1973) ("the enactment of a civil rights ordinance is a proper exercise of a municipality's police power as tending to promote the health, safety, convenience and general welfare of its citizens."); *Hartman v. City of Allentown*, 880 A. 2d 737, 743 (2005) ("a municipality's authority to enact anti-discrimination law is derived from its police powers.").

We propose that the City codify into the Human Rights Ordinance the provisions of Resolution No. 16-83, Section 5, which "encourages all businesses providing public accommodations in Asheville and throughout North Carolina to demonstrate their support for the dignity of all people by openly welcoming LGBT people to their places of business, and by providing gender-nonspecific bathroom facilities for their customers and employees wherever practicable." To that end, we propose that the City create a "Welcoming & Inclusive" list of local

businesses, to be published on the City's website, which commit to embracing diversity and practicing inclusivity by not discriminating against any person on the basis of any trait or status, including those named herein.

IV. ENFORCEMENT: THE HUMAN RELATIONS COMMISSION

Pursuant to N.C. Gen. Stat. § 160A-492, the City is empowered to create a Human Relations Commission. HB2 does not repeal or abrogate this statute. State law provides that a "'human relations program' is one devoted to (i) the study of problems in the area of human relations, (ii) the promotion of equality of opportunity for all citizens, (iii) the promotion of understanding, respect and goodwill among all citizens, (iv) the provision of channels of communication among the races, (v) dispute resolution, (vi) encouraging the employment of qualified people without regard to race, or (vii) encouraging youth to become better trained and qualified for employment." N.C. Gen. Stat. Ann. § 160A-492.

We propose that any Human Rights Ordinance specifically delegate to the Human Rights Commission, potentially constituted by a diverse group of citizens representative of our community, the authority to accept and adjudicate complaints of discrimination in violation of this Ordinance. The specific composition and rules governing the Human Rights Commission should take into account the recommendations of the Office of Equity and Diversity after careful study and close scrutiny of best practices found in Durham, Raleigh, Greensboro, and other cities across the nation such as Dayton, Ohio, Dubuque, Iowa, and Madison, Wisconsin. Under North Carolina law, the City is empowered by statute to impose fines and penalties for violation of its ordinances. The City may also obtain injunctions, equitable remedies, or civil penalties to further compliance. N.C. Gen. Stat. § 160A-175. Pursuant to that authority, the Human Relations Commission should be empowered to invoke this authority to enforce the nondiscrimination provisions of the Human Rights Ordinance.

Moreover, in consideration of the pertinent issues of concern in our community and nation and the scope of authority granted to human relations commissions generally, we recommend that the duties of the Commission include investigating use of force incidents in police-citizen encounters and developing best practices and policy recommendations.

V. LEGAL AUTHORITY

The legal authority to enact the above-cited nondiscrimination and enforcement provisions which constitute the Human Rights Ordinance is derived from federal and state law; namely, the Fourteenth Amendment of the U.S. Constitution and statutes adopted thereto.

North Carolina General Statutes confer on cities the power to "define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." N.C. Gen. Stat. § 160A-174. HB2 does not repeal this provision. Additionally, cities have authority to "regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment and prohibit those that may be inimical to the public health, welfare, safety, or convenience." N.C. Gen. Stat. § 160A-194.

These powers are restricted to the extent that they conflict with federal and state law. *See King v. Town of Chapel Hill*, 367 N.C. 400, 407 (2014), or when the field has been preempted by federal or state law. *See* N.C. Gen. Stat. § 160A-174(b). HB2 purports, among other things, to compel public agencies to adopt single-sex multiple occupancy bathroom and changing facilities for persons based on an unscientific and medically incorrect definition of "biological sex;" to preempt local governments from adopting a minimum wage; to preempt local governments from regulating discriminatory practices or adopting ordinances pertaining to discriminatory practices. It is, of course, precisely the latter provision where HB2 may be perceived to conflict with the human rights ordinance proposed herein. However, because HB2 is unconstitutional under the following provisions of law and because HB2 does not invalidate N.C. Gen. Stat. § 160A-492 (appointment of human relations committees), the City of Asheville, a state actor and covered entity under several provisions of federal law, finds legal support for a human rights ordinance in both state (as established above) and federal law. Dillon's Rule, commonly cited for the general rule that municipalities lack power to act without express statutory authorization, does not undermine this analysis.

A. HB2's purported preemption of nondiscrimination ordinances is driven by animus against the LGBT community and communities which embrace the inclusivity and diversity that LGBT North Carolinians contribute. This provision of HB2 is thus unconstitutional under *Romer v. Evans.*

As a threshold matter, HB2 is unconstitutional under the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court held in *Romer v. Evans*, 517 U.S. 620 (1996), that a state law which purported to invalidate local ordinances designed to protect citizens based on sexual orientation was unconstitutional under the Fourteenth Amendment. There, the ordinances at issue adopted inclusive and broad policies affecting public accommodations, private businesses, housing, employment, sale of real estate, insurance, health and welfare services, and education. The Court noted that "these are protections taken for granted by most people either because they already have them or do not need them." *Id.* at 631. In so holding, the Court reasoned, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus towards the class it affects; it lacks a rational legitimate to state interests." *Id.* at 632. The Court concluded that laws which single out an entire group of people based on a single trait because of animus is prohibited under the Equal Protection Clause of the U.S. Constitution.[17]

The *Romer* analysis was affirmed in *US* v. *Windsor*, where the Court in determining the unconstitutionality of the federal Defense of Marriage Act (DOMA) stated: "DOMA seeks to injure the very class New York seeks to protect. . . . The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture v. Moreno,*

[17] Also note that in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), the Court held that state government cannot use facially neutral law to provide private entities a license to discriminate. There, a facially-neutral state amendment that denied municipalities' right to pass fair housing ordinances was held to deny citizens' Equal Protection. "[The California Amendment] is a form of sophisticated discrimination whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions allow their government to do." (Douglas, J. concurring, at 383).

413 U.S. 528, 534–535 (1973). In determining whether a law is motived by an improper animus or purpose, " '[d]iscriminations of an unusual character' " especially require careful consideration. (quoting *Romer*, at 633, 116 S.Ct. 1620).[18] Much like DOMA, HB2 is the obvious product of a "bare congressional desire to harm a politically unpopular group," following the wake of *Obergefell* and increasing access to equality for LGBT citizens.

In February 2016, the City of Charlotte enacted an ordinance that extended existing municipal anti-discrimination protections to LGBT people. Before Charlotte's ordinance could take effect, the General Assembly hastily convened a special session with the express purpose of passing a statewide law that would preempt Charlotte's decision to protect its residents from discrimination. In a process filled with unconventional procedural irregularities, the legislature introduced and passed H.B. 2 in a matter of hours, and the governor signed the bill into law that same day. That HB2 is borne of animus is self-evident, but also amply documented in the public record surrounding its passage. Statements made by lawmakers demonstrate their absolute lack of any attempt to cloak their actions in a veneer of neutrality, instead openly and virulently attacking transgender people, who were falsely portrayed as predatory and dangerous to others. Therefore, HB2 violates the Equal Protection Clause of the U.S. Constitution for precisely the same reasons as the fact pattern in *Romer*.

Although the state legislators artfully attempt to evade litigation for the pre-emption provisions of HB2 by refusing to name sexual minorities, such an attempt does not save the bill. Under *Village of Arlington Heights v. Metropolitan Housing Development Corp,* 429 U.S. 252 (1977), courts must glean whether a law with a disparate impact on minorities was motivated by a discriminatory intent. To do so, courts examine numerous factors all of which align closely with the passage of HB2. The law clearly (1) disproportionately affects one minority, (2) the historical background reveals a "series of actions taken for an invidious purpose," (3) the events leading up the law depart from normal decision-making procedures, and (4) the legislative history clearly reveals animus. It should be noted that should the North Carolina General Assembly retaliate against the City of Asheville for enacting a human rights ordinance as described herein, such facts would strengthen the City's claims under *Romer v. Evans* and the Fourteenth Amendment.

B. Dillon's Rule does not circumvent the requirements of the Equal Protection Clause.

As a threshold matter, it is not clearly established that North Carolina is a so-called Dillon's Rule state.[19] It is perhaps more accurately described as being between "home rule" and Dillon's Rule. Nevertheless, N.C. Gen. Stat. § 160A-174 provides cities a broad grant of power to regulate. We recognize that while these powers are robust, they are not unlimited. The North Carolina Supreme Court has established that a city may not contradict higher federal or state law. *King v. Town of Chapel Hill*, 367 N.C. 400, 407 (2014). *See also* N.C. Gen. Stat. § 160A-174(b). However, as discussed *infra*, neither of these limitations applies to the enactment of a human rights commission which is explicitly recognized as a right provided to cities from the General

[18] *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

[19] See Frayda Bluestein, Coates' Canons: NC Local Government Law (Oct. 24, 2012), *available at* http://canons.sog.unc.edu/is-north-carolina-a-dillons-rule-state/ (last visited Sept. 21, 2016).

Assembly. Therefore, the issue of whether the city has such broad police power or not under *Dillon* is of no concern when such a right is so explicitly granted.

However, whether or not North Carolina is a Dillon's Rule state, HB2's enactment seeks to legislate North Carolina municipalities as such. Dillon's Rule, however, does not circumvent the dictates of the Fourteenth Amendment to the U.S. Constitution.

The proposed Human Rights Ordinance is narrowly tailored to the specific areas over which cities are given express statutory authority; namely:

1. Housing (N.C. Gen. Stat. Ann. § 160A-499.2)
2. Contracts (N.C. Gen. Stat. § 160A-11, 160A-16 *et. seq.*, *Romer v. Evans*, *infra*)
3. Employment (N.C. Gen. Stat. §95-25.1(c)(1), Title VII)
4. Education (Title IX)
5. Expressly delegated authority, such as protecting the health, safety, and welfare of citizens (N.C. Gen. Stat. § 160A-194) and public enterprises (N.C. Gen. Stat. § 160A-312)
6. Publicly-owned parks, facilities, and buildings (N.C. Gen. Stat. Ann. § 160A-354, 353(6), and 11)

Moreover, the proposed Human Rights Ordinance would be enforced by a Human Relations Commission which is authorized by North Carolina law and whose authority is not abrogated by HB2. *See also Standley v. Town of Woodfin*, 362 N.C. 328, 333 (2008) (declaring that the North Carolina Supreme Court "has long recognized that the police power of the State may be exercised to enact laws within constitutional limits, 'to protect the health, morals, order, safety, and general welfare of society.'").

By closely tracking the express statutory authority given to municipalities in the above-referenced areas, relying on protected class statuses recognized in state and federal law, and by delegating enforcement authority to an entity recognized by North Carolina General Statutes, the City of Asheville can provide equal protection under the law to its citizens, reaffirm the values that attract economic development to our community, and stand firmly on established legal principles.

The Campaign for Southern Equality and the LGBT community stand ready to support the City Council in enacting an inclusive Human Rights Ordinance. We have assembled a legal team that is prepared to work with the City in litigating any issues that may arise as a result of passing inclusive, forward-thinking, and constitutionally-protected nondiscrimination ordinances. Please contact Attorney Meghann Burke (828.423.3790 / meghann@brazilburkelaw.com) or Executive Director Jasmine Beach-Ferrara (828.242.6672 / jasmine@southernequality.org) if we can be of further assistance.

###