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**HOUSE BILL NO. 2011**

Offered January 11, 2017

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*A BILL to amend and reenact §§ 2.2-3901 and 15.2-965 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 22.1-79.7, relating to discrimination; separation of the sexes.*

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 Patron—Marshall, R.G.
 

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 Referred to Committee on General Laws
 

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Whereas, there are numerous immutable physiological and psychological differences between the sexes; and

Whereas, Herbert Ratner, MD, former Director of Public Health, Oak Park, Illinois, has enumerated the natural links that exist between a mother and an infant that set the mother apart from the father to be the primary caretaker of an infant as follows:

"Although the human male and female share a common nature and its attendant equality, dignity, freedom and personality, man and woman are not identical in soma and psyche. They differ in bodily parts and psychologic dispositions, in the balance of hormones that give rise to natural inclinations, and in the interplay of the two components of the intellect: understanding and reason—the intuitive and the discursive. These differences set the female apart to be the primary caretaker of the newborn.

"Since nature fashioned the mammalian female to be the prime nurturer, the key to the woman's special qualities is the infant—the *raison d'être* of nature's formation of woman as woman. T.S. Eliot, echoing Aristotle, states the principle: 'The end is where we start from.' A woman's task requires of her a certain congruence, a complementariness and reciprocal fitness with the infant, for the natural togetherness of the nursing couplet is far more than a lactary relationship. Nature finely attunes the woman to the total physiological and psychological needs of the helpless, inarticulate, withal responsive human being—the baby. This makes possible a two-way affective connaturality which, with or without cognitive knowledge, generates an interpersonal, loving relationship.

"The soft, smooth skin of the infant bespeaks the soft, smooth skin of the woman. As we, out of solicitude, envelop the baby in soft, smooth coverings, so, also, with even greater solicitude, does nature. What baby, if given a choice, would prefer to be cuddled and cherished by a rough-skinned, hairy and stubbly male? Touch, the most fundamental of the senses, and a major means of communicating love, is facilitated in man by furless skin, and is enhanced in the woman and infant by their mutual tactile softness . . . .

"The infant's ability to hear only high tones bespeaks the woman's soprano voice. This explains why adults, universally, raise their voices to get a baby's attention, and why males are conspicuously unsuccessful in lullabying babies to sleep. Furthermore, since hearing matures earlier than vision, the mother's voice is familiar to the baby. During the last trimester of its gestation, the child in the womb hears its mother's voice daily. This probably explains why the most effective and earliest stimulus to elicit a smile from the baby is not the face, but the female voice.

"The scent of the baby bespeaks the discriminatory olfactory acuity of the mother. As the lover desires to smell good to the beloved, nature wants the baby to smell good to its mother. In the early postpartum period, some mothers' olfactory ability is so enhanced that they speak of a unique fragrance emanating from the baby. Often, they liken it to the fragrance of roses. This heightened olfactory ability enables the mother to identify her newborn by smell. With even more certainty, the newborn is capable of recognizing its mother by smell within a few days after birth.

"The infant's need to have the mother's face in focus bespeaks the woman's protruding breasts, unique amongst primates. The human face is the most expressive of all animal faces and is the major source of the infant's security during its long immobilized dependent state. Research shows that the newborn is responsive to the face from birth. The response is initially elicited by the eyes and forehead, and subsequently, by the full face. This coincides with the focal length of the newborn's vision which is about nine inches, a measure that approximates the distance from the baby at the breast to the mother's eyes and face. In contrast to the perceptual ability of primates whose young are mobile and clinging, the eyes of the immobilized infant, during the early months of nursing, are steadily fixed on the mother's face . . . .

"The infant's need to be held, carried and comforted bespeaks the woman's cradling arms, arms that contrast significantly with the throwing arms of the male. The difference is not only evident in sports, but is even seen in the way children carry their books: boys at their sides; girls in front of them with

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59 flexed arms. The girls' inclinations to encircle and encompass foretells the future cradling of the nursling  
60 close to the heart and breast of an initiation of a bosom friendship.

61 "The infant's inability to communicate verbally and conceptually bespeaks the woman's ability to  
62 communicate through a modality of 'feeling': of knowing and loving through the intuitive, the poetic, the  
63 experiential and the affective. These non-conceptual modes of communicating result in a preternatural  
64 form of knowledge, a primary knowing common to all but most necessary in the intercommunication of  
65 the nursing couplet. In Pascal's words, 'the heart has reasons of its own which reason does not know.'

66 "The natural togetherness of woman and infant constitutes a predominantly spiritual, sensorial gestalt.  
67 It is the infant's need to survive and thrive that preordains the special characteristics of the woman qua  
68 woman." Herbert Ratner, MD, *The Natural Institution of the Family*, Address to the 10th Convention of  
69 the Fellowship of Catholic Scholars (1987); and

70 Whereas, Leonard Sax, family physician and psychologist, has identified several psychological  
71 differences between male and female children, including the types of stories they prefer, and has stated  
72 as follows: "Boys as young as two years of age, given a choice between violent fairy tales and fuzzy  
73 fairy tales, usually choose the violent stories. Girls as young as two years of age consistently choose the  
74 warm and fuzzy stories. In another study, psychologists found that five- and seven-year-old girls who  
75 prefer violent stories are more likely to have significant behavioral problems than girls who prefer  
76 warm, nurturing stories. However, among boys, preference for violent stories is not an indicator of  
77 underlying psychiatric problems. A preference for violent stories seems to be normal for five- to  
78 seven-year old boys, while the same preference in five- to seven-year-old girls suggests a psychiatric  
79 disorder." Leonard Sax, MD, PhD, *Why Gender Matters* (New York: Harmony, 2006, pp. 58-59) (citing  
80 Tracy Collins-Stanley et al., *Choice of Romantic, Violent, and Scary Fairy Tale Books by Preschool*  
81 *Girls and Boys*, 26 *Child Study Journal* 279-302 (1996) and Kai Klitzing et al., *Gender Specific*  
82 *Characteristics of 5-year-Olds' Play Narratives and Associations with Behavioral Ratings*, 39 *Journal of*  
83 *the American Academy of Child and Adolescent Psychiatry* 1017-23 (2000)); and

84 WHEREAS, Leonard Sax has noted that boys and girls differ in how they assess risk: "Girls and  
85 Boys assess risk differently, and they differ in their likelihood of engaging in risky behaviors. As soon  
86 as kids are old enough to toddle across the floor, boys are significantly more likely to do something  
87 dangerous: put their fingers in a socket, try to stand on a basketball, jump off a chair onto the floor.  
88 And when parents try to stop their child from doing something risky, boys are less likely to comply.  
89 Studies in the United States and around the world universally find that boys are more likely than girls to  
90 be seriously injured or killed in accidents such as drowning, misuse of firearms, or head injury related to  
91 riding a bicycle. . . . Boys systematically overestimate their ability, while girls are more likely to  
92 underestimate their abilities. For example, psychologists at Boston University asked a simple question:  
93 why are almost all drowning victims male? They concluded that a major contributor was that men  
94 consistently overestimate their ability to swim." Leonard Sax, MD, PhD, *Why Gender Matters* (New  
95 York: Harmony, 2006, pp. 41-43) (citing Barbara Morrongiello and Tess Dawber, *Toddlers' and*  
96 *Mothers' Behaviors in an Injury-Risk Situation: Implications for Sex Differences in Childhood Injuries*,  
97 19 *Journal of Applied Developmental Psychology* 625-39 (1998); William Pickett and Associates,  
98 *Multiple Risk Behavior and Injury: An International Analysis of Young People*, 156 *Archives of*  
99 *Pediatric and Adolescent Medicine* 310-315 (1989); and Jonathan Howland and Associates, *Why Are*  
100 *Most Drowning Victims Men: Sex Differences in Aquatic Skills and Behaviors*, 86 *American Journal of*  
101 *Public Health* 93-96 (1996)); and

102 WHEREAS, there are demonstrated differences in the way men and women think: "In the 1950's Dr.  
103 D. Wechsler, the American Scientist who developed the widely used IQ test produced results that  
104 'favored' either males or females. He stated, 'Our findings do confirm what poets and novelists have  
105 often asserted, and the average person long believed, namely, that men not only behave, but "think"  
106 differently from women.'" Anne Moir and David Jessel, *Brain Sex* (New York: Dell, 1991, p. 14) (citing  
107 D. Wechsler, *Sex Differences in Intelligence: The Measurement and Appraisal of Adult Intelligence*  
108 (Baltimore: Williams and Wilkins, 1958. p. 14); and

109 WHEREAS, differences between the sexes begin at conception and "a morphological difference  
110 between male and female on the basis of the sex chromatin content of resting nuclei permits the  
111 prediction of sex in a fetus in utero, by using cells from the amniotic fluid." Nicholas Eastman, MD,  
112 and Lewis Hellman, MD, *William's Obstetrics*, 12th ed. (New York: Appleton-Century-Crofts, 1956 , p.  
113 216). Furthermore, "about four days post-conception under a special microscope the prospective sex can  
114 already be determined." Robert Rugh and Landrum B. Shettles, *From Conception to Birth: The Drama*  
115 *of Life's Beginnings* (New York: Harper and Row, 1971, p. 23); and

116 WHEREAS, differences between the sexes that exist at conception and influence preterm births and  
117 other outcomes have been described as follows: "It was previously believed that sex differentiation took  
118 place when the undifferentiated gonads formed either testes or ovaries. Studies in recent years indicate  
119 that sex differentiation begins at conception. The SRY gene on the Y-chromosome is already transcribed  
120 at the 2-cell stage and triggers growth acceleration in the XY embryos. This accelerated growth is

believed to be important for the male embryo as it allows complete testicular differentiation before the levels of oestrogenic hormones become too high as pregnancy progresses. It is well known that the death rate is higher for male than for female fetuses and that the increase is about 30% in chromosomally normal spontaneous abortions (i.e. significantly higher than at birth). National figures from Sweden show that boys are more likely to be delivered prematurely, accounting for 55-60% of all newborns between 23 and 32 gestational weeks.

"Neonatal deaths in these gestational weeks are also more common among boys. In 1993, the overall 1-year mortality rate (including all gestational weeks) in Sweden was 5.4% for boys and 4.1% for girls. The difference in infant mortality (within 1 year) is most pronounced at extremely early birth (23-24 gestational weeks) being 60% for boys compared with 38% for girls. The release of catecholamines during labour is an important defence mechanism by a hypoxic fetus. Preterm females have significantly higher catecholamine levels than males, which may explain the better outcome in females after a hypoxic event. Deaths occurring secondary to respiratory distress syndrome are greater for males and their cognitive recovery from perinatal intracranial haemorrhage is worse. Pulmonary hypoplasia after preterm rupture of the membranes is significantly more common among male newborns." Ingemar Ingemarsson, *Gender Aspects of Preterm Birth*, 110 *British Journal of Obstetrics and Gynecology* 34-38 (2003); and

WHEREAS, males differ from females as to aggression levels: "From mouse to man, with few exceptions, the male of the species is the more aggressive . . . . Human aggression is essentially a problem for men, not women. It is men who wage wars, engage in bitter competition, fight each other individually, and maintain vendettas lasting for years or even centuries." Anne Moir and David Jessel, *Brain Sex* (New York: Dell, 1991, p. 76) (citing K. E. Moyer, *The Biological Basis for Dominance and Aggression*, in Diane McGuinness, ed., *Dominance, Aggression and War* (New York: John Wiley and Sons, 1974); and

WHEREAS, according to the Federal Bureau of Investigation's Uniform Crime Reporting data for 2013, males committed almost 74 percent of all crimes reported, including 77.2 percent of aggravated assaults, 86.6 percent of robberies, 88.1 percent of murders and manslaughters, and 98.4 percent of rapes; and

WHEREAS, according to the Department of the State Police's Uniform Crime Reporting data for 2015, males committed almost 70 percent of all crimes reported, including 75.8 percent of aggravated assaults, 92.6 percent of robberies, 88.6 percent of murders and manslaughters, and 98.3 percent of rapes; and

WHEREAS, in recognition of these differences between the sexes, Article I, Section 11 of the Constitution of Virginia, which prohibits governmental discrimination based on sex, expressly acknowledges that "the mere separation of the sexes shall not be considered discrimination"; now, therefore,

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 2.2-3901 and 15.2-965 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 22.1-79.7 as follows:**

**§ 2.2-3901. Unlawful discriminatory practice and gender discrimination defined.**

Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability shall be an "unlawful discriminatory practice" for the purposes of this chapter.

The terms "because of sex or gender" or "on the basis of sex or gender" or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of pregnancy, childbirth or related medical conditions. Women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all purposes as persons not so affected but similar in their abilities or disabilities.

*Recognition by any entity of the inherent differences between males and females, including the biological characteristics or qualities that distinguish an individual as either male or female as determined at birth, and the mere separation of the sexes by such entity based on such differences shall not constitute discrimination, provided that such separation is consistent with Article I, Section 11 of the Constitution of Virginia.*

**§ 15.2-965. Human rights ordinances and commissions.**

A. Any locality may enact an ordinance, ~~not~~ *neither* inconsistent with nor more stringent than any applicable state law, prohibiting discrimination in housing, employment, public accommodations, credit, and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability.

B. *Any ordinance that recognizes the inherent differences between males and females, including the biological characteristics or qualities that distinguish an individual as either male or female as*

182 *determined at birth, and the mere separation of the sexes by such ordinance based on such differences*  
183 *shall not constitute discrimination, provided that such separation is consistent with Article I, Section 11*  
184 *of the Constitution of Virginia.*

185 C. The locality may enact an ordinance establishing a local commission on human rights ~~which~~ that  
186 shall have the powers and duties granted by the Virginia Human Rights Act (§ 2.2-3900 et seq.).

187 **§ 22.1-79.7. Human rights policies.**

188 *Any school board may enact a policy, neither inconsistent with nor more stringent than any*  
189 *applicable state law, prohibiting discrimination in education based on race, color, religion, sex,*  
190 *pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability.*  
191 *Any policy that recognizes the inherent differences between males and females, including the biological*  
192 *characteristics or qualities that distinguish an individual as either male or female as determined at*  
193 *birth, and the mere separation of the sexes by such policy based on such differences shall not constitute*  
194 *discrimination, provided that such separation is consistent with Article I, Section 11 of the Constitution*  
195 *of Virginia.*