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REPLY TO FLORIDA

June 30, 2023

Via Email Only
Martin M. Petersen, City Attorney
City of Waterloo
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RE: Waterloo City Ordinance No. 5701

Dear Mr. Petersen (and City Council members):

By way of introduction, Liberty Counsel is a national nonprofit litigation, education, and public policy organization focused on protecting First Amendment liberties. Liberty Counsel engages in nationwide advocacy on behalf of the First Amendment through a variety of means, including informational letters and strategic impact litigation, in association with local counsel. We have constituents, supporters, and affiliated attorneys in every state of the nation, including Iowa.

Residents of the City of Waterloo have contacted Liberty Counsel regarding Waterloo City Ordinance 5701 ("Ordinance"), which on May 15, 2023, added "Article C, Unfair Practices – Conversion Therapy"[1] to the City of Waterloo Code of Ordinances Chapter 3, Human Rights, Title 5, Police Regulations. The Ordinance bans protected speech.

I therefore write on behalf of Liberty Counsel and on behalf of a client whose First Amendment rights are even now being violated by this speech ban. **I hereby request that the Waterloo City Council repeal the Ordinance. The Ordinance is offensive to the First Amendment.**

The Ordinance bans verbal counseling (erroneously called "conversion therapy" or "sexual orientation change efforts") based on the viewpoint of that counseling. The Ordinance constitutes a ban on protected speech and further imposes a penalty upon those who wish to exercise their First Amendment rights in their professional practice. This speech ban is unconstitutional and should be repealed. *See 303 Creative LLC v. Elenis*, No. 21-476 (June 30, 2023).

[1] https://weblink.cityofwaterlooiowa.com/weblink/DocView.aspx?id=354930&searchid=418d33e7-1cb6-4075-a765-d8d53e0b1e88&dbid=0

As the High Court stated this morning:

> [T]he First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," *Hurley*, 515 U. S., at 574, and likely to cause "anguish" or "incalculable grief," *Snyder v. Phelps*, 562 U. S. 443, 456 (2011). Equally, the First Amendment protects acts of expressive association. *See, e.g., Dale*, 530 U. S., at 647–656; *Hurley*, 515 U. S., at 568–570, 579. Generally, too, the government may not compel a person to speak its own preferred messages. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506 (1969); *see also, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 256 (1974); *Wooley v. Maynard*, 430 U. S. 705, 714 (1977); *National Institute of Family and Life Advocates v. Becerra*, 585 U. S. ___, ___ (2018) (*NIFLA*) (Slip Op., at 8).
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> **Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive.**"(Slip Op. at 17 (emphasis added).)

In violation of the First Amendment, the Waterloo Ordinance states, "It is a violation [of the Ordinance] for any medical or mental health professional to provide or advertise sexual orientation or gender identity change efforts to a minor," which include "efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender." The Ordinance permits the City to send an "advisory letter" to an alleged violator that "provision of conversion therapy or sexual orientation or gender identity change efforts is prohibited." Yet, the act of sending an "advisory" letter "**does not preclude any other enforcement power of the Commission or other body**." *See, generally*, Waterloo Code of Ordinances, Chapter 5-3C-1 through 5-3C-3.

Other enforcement powers are listed in Waterloo Municipal Code Chapter 3, "General Penalty:" "The doing of any act prohibited or declared to be unlawful or a misdemeanor by this code . . . is . . .punishable by a fine not to exceed the maximum fine and term for imprisonment for a simple misdemeanor under § 903.1(1)(a)."[2] This is the local implementation of Iowa Code § 364.3, which states in pertinent part, "For a violation of an ordinance a city shall not provide a penalty in excess of the maximum fine and term of imprisonment for a simple misdemeanor under [§ 903.1(1)(a)]."[3] Thus, speakers are left to guess as to how far the City is willing to go to suppress their speech. **The possible penalties for "violating" the Waterloo Ordinance and Iowa Code range anywhere from a $100.00 fine up to an $855.00 fine *and a 30-day imprisonment* if a violation of the ordinance constitutes a misdemeanor, or up to $750.00 if a violation of the ordinance constitutes a municipal infraction with the potential to rise to $1000.00 for a repeat offense.** The First Amendment does not permit this invasion of cherished liberties.

In addition to *303 Creative LLC v. Elenis,* No. 21-476 (June 30, 2023),[4] Liberty Counsel brings to your attention two rulings: both from the Eleventh Circuit Court of Appeals. Liberty Counsel filed suit against the City of Boca Raton and Palm Beach County in *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020). *Otto* concerned a municipal speech ban that prohibited licensed counselors from providing counsel to reduce or eliminate their unwanted same-sex attractions, behaviors, or gender identity. Initially, the U.S. District Court for the Southern District of Florida denied a preliminary injunction. Reversing, a three-judge panel of the Eleventh Circuit concluded:

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[2] Waterloo Code of Ordinances, Chapter 3, General Penalty, 1-3-1.
[3] Iowa Code § 364.3 (2)
[4] https://www.supremecourt.gov/opinions/22pdf/21-476_c185.pdf

> This decision allows speech that many find concerning—even dangerous. But consider the alternative. If the speech restrictions in these ordinances can stand, then so can their inverse. Local communities could prevent therapists from validating a client's same-sex attractions if the city council deemed that message harmful. And the same goes for gender transition—counseling supporting a client's gender identification could be banned. It comes down to this: if the plaintiffs' perspective is not allowed here, then the defendants' perspective can be banned elsewhere. **People have intense moral, religious, and spiritual views about these matters—on all sides. And that is exactly why the First Amendment does not allow communities to determine how their neighbors may be counseled about matters of sexual orientation or gender.**
>
> "If there is a bedrock principle underlying the First Amendment, it is that **the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.**" *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). The challenged ordinances violate that principle, and the district court should have enjoined their enforcement. We therefore **REVERSE** the district court's order and **REMAND** for entry of a preliminary injunction consistent with this opinion.

Otto, 981 F.3d at 871–72 (emphasis added and original). It should also be noted that in the Eleventh Circuit's consideration of *National Institute of Family & Life Advocates v. Becerra*, 138 S Ct. 2361, (2018) ("*NIFLA*"), the Eleventh Circuit found that the United States Supreme Court:

> [N]ot only addressed similar doctrinal issues to those we face here [but] it **directly criticized other circuit decisions approving of SOCE bans.** In *Pickup v. Brown*, the Ninth Circuit reviewed California's anti-SOCE law under the rational basis standard. *See* 740 F.3d 1208, 1231 (9th Cir. 2014). And in *King v. Governor of New Jersey*, the Third Circuit reviewed New Jersey's similar law under intermediate scrutiny. *See* 767 F.3d 216, 234–37 (3d Cir. 2014). ***NIFLA* disapproved of both courts' willingness to "except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny."** 138 S. Ct. at 2371. **"Speech is not unprotected merely because it is uttered by 'professionals.'"** *Id.* at 2371–72.

Otto, 981 F.3d at 867. (Emphasis added). As the City Council may (or may not) be aware, *Pickup* and *King* were both litigated by Liberty Counsel.

In addition to *Otto*, Liberty Counsel also prevailed in *Vazzo v. City of Tampa*, 2023 U.S. App. LEXIS 2678 (11th Cir. 2023). In *Vazzo*, the 11th Circuit Court of Appeals affirmed the ruling of the Middle District of Florida[5] on the basis of the Eleventh Circuit's decision in *Otto*. At the district court level, federal Judge William F. Jung issued an order[6] granting summary judgment to Liberty Counsel in a suit to invalidate the City of Tampa ordinance. This ordinance was virtually identical to the one struck down in Boca Raton (and similar to the ordinance recently passed by the Waterloo City Council). *Vazzo v. City of Tampa*, 415 F. Supp. 3d 1087 (M.D. Fla. 2019), *aff'd per curiam*, 2023 U.S. App. LEXIS 2678 (11th Cir. 2023). **The court ruled that local governments in Florida do not have the authority to regulate counseling because it is the prerogative of the state.** The 41-page ruling states, in part:

> "There is no grant of authority by the Florida Legislature to municipalities to substantively regulate healthcare treatment and discipline."

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[5] *Vazzo v. City of Tampa*, 415 F. Supp. 3d 1087 (M.D. Fla. 2019).
[6] http://lc.org/PDFs/Attachments2PRsLAs/100419TampaOrderGrantingMSJ.pdf

"The City Ordinance is preempted by the comprehensive Florida regulatory scheme for healthcare regulation and discipline. Accordingly, the Court strikes the Ordinance under the implied preemption doctrine and grants the Plaintiffs' motion for summary judgment on Count VI."

"The State statutory scheme for healthcare regulation leaves nothing substantive at all for municipalities to do; there is no grant or delegation at all to localities."

"To say that the State of Florida's regime of healthcare regulations is vast is an understatement. There seems nothing more regulated and addressed by the Florida legislative and administrative body than healthcare, and a material part of this is mental health related. In addition to its breadth and depth, this Florida regulatory scheme is uniform across each of the 400 plus municipalities in the State. In contrast, the Tampa Ordinance covers only the 114 square miles of city limits, leaving the substantive mental health therapy rules to vary depending which of the 400 plus Florida municipalities one is in, or even where one is within Hillsborough County."

"Nothing is more intimate, more private, and more sensitive, than a growing young man or woman talking to a mental health therapist about sex, gender, preferences, and conflicting feelings. The Ordinance inserts the City's code enforcers into the middle of this sensitive, intense and private moment. But this moment is already governed by Florida's very broad rights of privacy, something the Ordinance ignores...The Florida Constitution's privacy amendment suggests that government should stay out of the therapy room. The Tampa Ordinance does not address this constitutional issue, and in doing so the City attempts to occupy a very private space, contrary to a strong statewide policy."

"The Ordinance eliminates this longstanding parental right without discussion or exception—Florida already occupied this ground. Parental rights, which the Florida Supreme Court has noted are fundamental and protected by the state constitution, are reduced or increased within Hillsborough County, Florida, depending on whether one steps across the Tampa city line or not."

"All of these topics such as constitutional privacy rights, parental choice, patient choice as to treatment, and the availability of non-conventional or alternative treatments show that the Legislature has occupied entirely the very wide healthcare swath, whether it is called 'informed consent' or 'patient's rights.' No room exists in this pervasive and uniform statewide program for the more than four-hundred Florida municipalities to regulate where legislative intent resides so broadly."

The Court in *Vazzo* addressed the expert testimony presented by experts from the City of Tampa and Liberty Counsel. The summary of the testimony undermines any reason to enact these counseling bans, even if there were authority to do so. The Court provided many bullet points, stating "[a]lthough the City expresses confident certitude, the City's experts, one or both, expressly agreed with the following points:

- Minors can be gender fluid and may change or revert gender identity. Dkt. 192-2 at 38–40.
- Gender dysphoria during childhood does not inevitably continue into adulthood. Dkt. 192-2 at 85–87.
- Formal epidemiologic studies on gender dysphoria in children, adolescents, and adults are lacking. Dkt. 192-2 at 92.

- One Tampa expert testified there is not a consensus regarding the best practices with prepubertal gender nonconforming children. Dkt. 192-2 at 120–21.
- A second Tampa expert testified consensus does not exist regarding best practices with prepubertal gender nonconforming children, but a trend toward a consensus exists. Dkt. 192-1 at 159.
- Emphasizing to parents the importance of allowing their child the freedom to return to a gender identity that aligns with sex assigned at birth or another gender identity at any point cannot be overstated. Dkt. 192-2 at 123.
- One cannot quantify or put a percentage on the increased risk from conversion therapy, as compared to other therapy. Dkts. 192-2 at 131; 192-1 at 198–99.
- Scientific estimates of the efficacy of conversion therapy are essentially nonexistent because of the difficulties of obtaining samples following individuals after they exit therapy, defining success, and obtaining objective reassessment. Dkt. 192-1 at 136–37.

Here, just as local governments in Florida do not have the authority to regulate counseling, so it is in Iowa. The Iowa Legislature reserves sole enforcement power over counselors to the Board of Behavioral Science ("Board").[7] *See* Iowa Code § 272C.3 ("each licensing board shall have the powers to: Administer and enforce the laws and administrative rules . . . investigate . . . alleged acts or omissions which the board reasonably believes constitute cause under applicable law or administrative rule" and "[i]mpose licensee discipline."[8] The Iowa Legislature has mandated that "licensee discipline shall not be . . . imposed except pursuant to a written decision . . . which is entered by **the board.**"[9] (emphasis added). **The Iowa Legislature has thus occupied the field of regulation of licensed counselors, and municipalities have no power to regulate counselors through civil or criminal means.**

The Board's sole discretionary authority has been upheld by the Iowa Supreme Court in *Remer v. Board of Medical Examiners*, 576 N.W.2d 598 (Iowa 1998), where the court stated, "licensing boards. . . are authorized . . . [to] review or investigate alleged acts or omissions of licensees . . . and initiate and prosecute disciplinary proceedings."[10] The Iowa Attorney General also clearly recognized the sole authority of the Board: "**We recognize that other statutes place the responsibility for determining the process for disciplinary investigation and prosecution . . . squarely upon the shoulders of the Board** and its staff."[11] (emphasis added). The state Board alone has the authority and power to enforce any regulations placed upon counselors.

Beyond the enforcement of state regulations, the Board holds the sole power to impose further standards upon counselors (which must also comport with the Constitution of the United States and the State of Iowa). *See* Iowa Code § 154D.3 ("[T]he board shall adopt rules relating to: Standards required for licensees engaging in the professions [under its purview]" and "[s]tandards for professional conduct of persons licensed [by the Board]").

Grounds for discipline of licensed counselors are specified by statute. *See* Iowa Code § 33.2 and Code § 147.55 (providing for discipline based on "other acts or offenses as specified by board rule").[12] Neither statute references "sexual orientation or gender change efforts" as found in the Ordinance. **Thus, beyond the infringement upon the First Amendment liberties of counselors, the City's Ordinance trespasses upon the powers the State of Iowa explicitly reserves to the State Board of Behavioral Sciences.**

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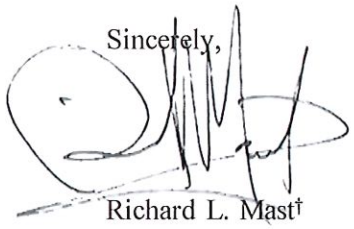
[7] Iowa Code § 147.13.
[8] Iowa Code § 272C.3.
[9] *Id.*
[10] *Remer v. Board of Medical Examiners*, 576 N.W.2d 598, 601 (Iowa 1998).
[11] 1996 Iowa AG LEXIS 11, 10.
[12] Iowa Code § 147.55.

In sum, *Otto* and *Vazzo* resulted in awards of attorney's fees to Liberty Counsel for our work in vindicating our clients' First Amendment rights. *King* and *Pickup* have been abrogated by the United States Supreme Court in *NIFLA v. Becerra*. The First Amendment protections in *NIFLA* were underscored (again) in *303 Creative LLC v. Elenis*, which cited Liberty Counsel's most recent appearance before the United States Supreme Court, the 9-0 decision *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). *Shurfleff* resulted in the City of Boston paying more than $2.125 million in attorney's fees to Liberty Counsel for the City's violation of our client's rights. The City of Boston received a letter much like this one, from the undersigned, prior to the commencement of litigation that lasted five years before final judgment. Had the City of Boston heeded that request, it would have saved the taxpayers considerable resources.

So that there is no doubt: **the speech ban passed by the City of Waterloo is unconstitutional.** Therefore, Liberty Counsel requests that the City Council repeal Ordinance 5701. **I am requesting a written response on behalf of the City of Waterloo by *August 1, 2023* regarding this request, confirming that the City has repealed the Ordinance.** If I do not receive this response, I will conclude that the City Council is indifferent to the concerns expressed herein, and Liberty Counsel will take further action to prevent continued irreparable harm to cherished liberties. Thank you for your attention to this request.

Sincerely,



Richard L. Mast†

cc:
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