WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
330 East Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141
414-727-WILL (9455)
Fax 414-727-6385
www.will-law.org

August 29, 2022

City of La Crosse Common Council
400 La Crosse St.
La Crosse, WI 54601

via first-class mail and email:
zzcouncilmembers@cityoflacrosse.org

Dear Council Members:

This letter supplements our earlier letter of August 22, 2022 regarding Ordinance No. 5220. It has come to our attention that on August 30, 2022, the City of La Crosse's Judiciary & Administration Committee will consider an amendment to the Ordinance which was proposed by the Legal Department of the City Council. We write briefly to convey our view that the Amendment would not render the City's proposed ordinance lawful and indeed solves very few of the many legal problems we earlier identified.

THE PROPOSED AMENDMENT

The Amendment essentially makes two changes to the Ordinance. First, it applies the prohibition on disfavored speech to "medical or mental health professionals" (as defined) rather than all persons. Second, it creates a referral process whereby allegations of a violation of the Ordinance are submitted in writing to the City, and the City in turn refers those allegations to the Department of Safety and Professional Services "for investigation and other actions it deems appropriate."

THE PROPOSED AMENDMENT WOULD NOT RENDER THE ORDINANCE LAWFUL

In our earlier letter we highlighted five major problems with the City's Ordinance: it violates freedom of speech, freedom of religion, and parental rights; it is impermissibly vague; and it is preempted by state law. The proposed Amendment solves none of these problems.

On speech, the Ordinance would still engage in impermissible content- and viewpoint-based discrimination. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-64 168-69 (2015). As we already pointed out, there is no exception in First Amendment case law for the policing of "professional speech," *see Nat'l Advocs. v. Becerra*, 138 S. Ct. 2361, 2371-72, 2374-75 (2018), so limiting the Ordinance's reach to the speech of medical and mental health professionals does not make the Ordinance constitutional. In fact, in *Otto v. City of Boca Raton, Fla.*, the case that struck down similar laws as unconstitutional under the First Amendment, the challenged ordinances were directed solely toward professionals and the plaintiffs were licensed marriage and family therapists. *See Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 859-60 (11th Cir. 2020). That didn't matter.

Likewise, the Amendment does little to address the application of strict scrutiny, which the Ordinance would not survive. The Ordinance as amended stills fails to demonstrate that its ban will further the stated goal of preventing harm, given the lack of consensus on these issues, and in any event the ban is not narrowly tailored toward doing so since it never prohibits certain counseling that may cause harm and always prohibits certain counseling even when it will not cause harm. At best, the Amendment reduces the Ordinance's overinclusiveness by no longer targeting parents and pastors. But even on that limited point the Ordinance is still overinclusive *with respect to the speech of mental health professionals*, which can overlap with the viewpoints that a parent or pastor might share. The Ordinance simply carves out an enormous amount of speech as impermissible without showing that each prohibited viewpoint will result in the type of harm the City means to target. The Amendment does nothing to fix this.

The Amendment does not address the other constitutional issues raised, either. The Ordinance still interferes in matters of faith and doctrine and burdens religious beliefs. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); *James v. Heinrich*, 2021 WI 58, ¶¶38-39, 397 Wis. 2d 517, 960 N.W.2d 350. Both mental health professionals who advise minors and the parents who engage them may wish for counseling to be infused with preferred religious values and tenets. The amended Ordinance would prevent that. And it would prevent parents from directing the upbringing of their children by selecting a counselor for their children that will counsel in accordance with their religious beliefs. *See, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

The amended Ordinance also remains unconstitutionally vague. *See, e.g., Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). It remains wholly unclear how counselors are supposed to navigate the Ordinance's definition of "conversion therapy," especially with respect to patients who are unsure whether they want to transition or who may wish to detransition. We refer you to the individual points we made in our previous letter.

Finally, the Ordinance is still preempted by the Legislature's comprehensive regulation of counseling-related professions. *See, e.g.*, *DeRosso Landfill Co. Inc. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996). The Amendment purports to resolve this problem by creating a referral process to the Department of Safety and Professional Services. It is unclear whether this process is meant to supplant the Ordinance's preexisting monetary penalty or supplement it, but it does not matter. The Ordinance's ban on certain types of counseling does not exist in state law, and the mere threat of investigation and potential loss of licensure—even if DSPS has no interest in cooperating with the City—is more than enough to chill targeted speech. In other words, the City will be regulating counseling as it sees fit in a manner inconsistent with what is provided for at the state level. That it cannot do.

LA CROSSE SHOULD ABANDON ITS SPEECH SUPPRESSION EXPERIMENT

Ultimately, the effect of the Ordinance is the same whether in its present form or as amended: a government entity is threatening its citizens with punishment if they voice a viewpoint the government disfavors. The fact that La Crosse's proposed amendment does virtually nothing to

correct the flaws of the Ordinance illustrates the point we made in our earlier letter: this Ordinance is not salvageable and the City should abandon its censorship project.

Sincerely,

Richard M. Esenberg
President & General Counsel
Wisconsin Institute for Law & Liberty

Anthony F. LoCoco
Deputy Counsel
Wisconsin Institute for Law & Liberty

Luke N. Berg
Deputy Counsel
Wisconsin Institute for Law & Liberty