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

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

Dear Council Members:

We write to you regarding troubling reports that the City of La Crosse has determined that the best use of limited municipal resources is to wade into some of the most profound ontological, moral, and religious debates of our age—the meaning and proper ends of sex, gender, and sexual attraction—declare one side the “winner,” and investigate and punish those who dare to voice opposing views. Those who face government penalty include parents and teachers, priests and ministers, counselors and physicians—citizens of La Crosse who seek to protect and care for those children who may come to them for guidance on these important questions.

We are speaking about Ordinance No. 5220, which is styled as a “Conversion Therapy” ban but in reality functions as little more than an official municipal prohibition on speech the City finds disagreeable. The City initially passed the Ordinance on June 9, 2022. As we explain below, the proposal is unconstitutional or otherwise void on multiple grounds. If it receives definitive approval in its present form or a substantial equivalent, the City can expect a lawsuit.

But our understanding is that the City is now—unsurprisingly, on the advice of counsel—reconsidering the wisdom of its campaign against free speech, religious liberty, and the rights of parents. So we are sending this letter to assist the City in its decision-making. Below we explain why Ordinance No. 5220 is indeed illegal on multiple grounds. We encourage the City to abandon this project entirely rather than engage in a doomed attempt to fix the unfixable.

### **LA CROSSE’S SPEECH SUPPRESSION ORDINANCE**

Shorn of its “Intent and Purpose” statements, the Ordinance is simple. It makes it “unlawful for any person to practice conversion therapy with anyone under 18 years of age.”

The ordinance contains two definitions. “Person” is defined to include “any natural person, individual, corporation, unincorporated association, proprietorship, firm, partnership, joint venture, joint stock association, or other entity or business organization.” “Conversion therapy” is defined as follows:

any practices or treatments offered or rendered to consumers, including psychological counseling, that seeks [sic] to change a person's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender.

Conversion therapy does not include counseling that provides assistance to a person undergoing gender transition, or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change an individual's sexual orientation or gender identity.

Although the Ordinance does not prescribe a penalty, its prohibition is situated within Chapter 32 ("Offenses and Miscellaneous Provisions") of the City of La Crosse Municipal Code of Ordinances, which provides that "a violation of this chapter is a Class B offense as provided in section 1-7." Section 1-7(c)(2), in turn, establishes that the penalty for a Class B offense is "a forfeiture of not less than \$50.00 nor more than \$1,000.00 and the costs of prosecution," and Section 1-7(h) additionally authorizes the Common Council to "refuse to issue or not renew any license or permit to the owner of the premises, after conducting a public hearing thereon." Under Section 1-7(f) "each and every day that a violation of this Code occurs, continues and/or remains present constitutes a separate offense."

The Ordinance is enforceable by the Chief of Police and "[s]uch other City officers or City employees who are assigned enforcement responsibilities for this chapter." Section 32-1(b). At the May 31, 2022 meeting of the Judiciary & Administration Committee regarding the Ordinance, the City's Assistant Chief of Police confirmed that if there were complaints about violations of the Ordinance, the City's Police Department would investigate the violation and if appropriate take enforcement action.

### **THE ORDINANCE VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE**

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This proscription applies via the Fourteenth Amendment to "a municipal government vested with state authority" like La Crosse. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

Pursuant to the Free Speech Clause, La Crosse "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Such a "[c]ontent-based law[]" is "presumptively unconstitutional" and will receive the strictest judicial review. *See id.* To be clear, "a speech regulation targeted at specific *subject matter* is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169. Municipal discrimination against a particular *viewpoint*, in contrast, is a "more blatant" and "egregious form of content

discrimination” that is likewise prohibited. *Id.* at 168 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

The City’s ordinance is clearly content-based and even discriminates against disfavored viewpoints. For example, counseling aimed at “chang[ing] behaviors or gender expressions” is made illegal whereas counseling that “provides assistance to a person undergoing gender transition, or counseling that provides acceptance, support, and understanding of a person or facilitates a person’s coping, social support, and identity exploration and development” is permitted. The Ordinance draws “distinctions . . . based on the message a speaker conveys” and thus is presumptively unconstitutional. *See id.* at 163-64 (sign code restrictions “depend[ed] entirely on the communicative content of the sign” and thus were content-based.).

Before addressing why the Ordinance will not meet strict scrutiny, we note that the City cannot justify the ordinance by reference to a supposed “professional speech” category somehow exempted from the rules just discussed. For one thing, the Ordinance does not limit itself to the speech of “professionals” and indeed is designed to sweep as broadly as possible. But more importantly, in 2018 the Supreme Court observed that it had never “recognized ‘professional speech’ as a separate category of speech” and declined to “treat[] professional speech as a unique category that is exempt from ordinary First Amendment principles.” *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371-72, 2375 (2018). It emphasized the “danger of content-based regulations ‘in the fields of medicine and public health, where information can save lives,’” *id.* at 2374 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)), adding that “[t]hroughout history, governments have ‘manipulat[ed] the content of doctor-patient discourse’ to increase state power and suppress minorities.” *Id.* (quoting Paula Berg, *Toward A First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. Rev. 201, 201 (1994)) (alteration in original). In short, “[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields,” and the Supreme Court has indicated that the government’s role is to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *Id.* at 2374-75 (quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014)).

So the Ordinance is unquestionably subject to strict scrutiny (if not automatic invalidation as viewpoint discrimination, *see, e.g., Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”)), regardless of whether it is viewed in its application to parents, ministers, or counselors.

With respect to the application of strict scrutiny, the City must “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Reed*, 576 U.S. at 171 (quoting *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). “It is rare that a regulation restricting speech because of its content will ever be permissible.” *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799 (2011) (*United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000)). The City’s ordinance is no exception.

The Ordinance itself declares its purpose: “to protect the health, safety and welfare of the people of the City of La Crosse, especially the physical and psychological well-being of minors, including

non-binary, lesbian, gay, bisexual and transgender youth, and to protect them against the exposure to serious harms caused by conversion therapy.” Of course we do not dispute as a general matter that the City has a legitimate interest in protecting its minor citizens. But as the United States Court of Appeals for the Eleventh Circuit recently made clear in its decision concluding that a similar ordinance violated the First Amendment, “legitimate authority to protect children . . . ‘does not include a free-floating power to restrict the ideas to which children may be exposed,’” and “while protecting children is a crucial government interest, speech ‘cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.’” *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 868 (11th Cir. 2020) (first quoting *Brown*, 564 U.S. at 794-95, then quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975)).

The Ordinance also fails to actually further the interest to which it is directed. For example, contrary to the insinuations of the Ordinance, there is no one-size-fits-all approach when a child experiences gender dysphoria.<sup>1</sup> The causes of transgenderism and gender dysphoria are still largely unknown. *E.g.*, Kenneth J. Zucker, *Gender Dysphoria in Children and Adolescents*, in *Principles and Practice of Sex Therapy* 395, 402–05 (6th ed., 2020)<sup>2</sup>; Stephen B. Levine, *Reflections on the Clinician’s Role with Individuals Who Self-identify as Transgender*, *Arch. Sex. Behav.* (2021).<sup>3</sup> Mental health professionals disagree about the proper approach when a child experiences gender dysphoria. *See, e.g.*, Zucker, *supra*, at 406–09 (surveying competing treatment approaches). Some mental health professionals believe that children experiencing gender dysphoria can learn to find comfort with their biological sex and therefore support psychotherapy to help identify and address the underlying causes of the dysphoria. *E.g.*, Zucker, *supra*, at 414–15; Levine, *supra*. Other medical and psychiatric professionals believe that the best response is to “affirm” a child’s perceived gender identity and to support a social transition to that identity.

But some mental health professionals believe that socially transitioning to a different gender identity during childhood, and “affirmation” of an alternate identity by adults, can become self-reinforcing and have profound long-term effects on the child’s psyche and identity. *E.g.*, Kenneth J. Zucker, *The Myth of Persistence: Response to “A Critical Commentary on Follow-Up Studies & ‘Desistance’ Theories about Transgender & Gender Non-Conforming Children” by Temple Newhook et al.*, 19:2 *Int’l J. of Transgenderism* 231 (2018). Multiple studies have found that the vast majority of children (roughly 80–90%) who experience gender dysphoria ultimately find comfort with their biological sex and cease experiencing gender dysphoria as they age—assuming they do not transition. *E.g.*, Zucker, *Gender Dysphoria, supra*, at 407 (summarizing studies); Levine, *supra* (same).

In other countries, public health officials are retreating from at least certain forms of “gender-affirming” care for minors. This past February, Sweden’s National Board of Health and Welfare “issued an update on its service guidelines for children and youth with gender dysphoria, citing

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<sup>1</sup> “Gender dysphoria” refers to the psychological distress often associated with the mismatch between a person’s biological sex and his or her perceived gender identity. *See, e.g.*, World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* at 2 (7th Version 2012), available at [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf) (“WPATH Guidelines”).

<sup>2</sup> Available at <https://www.scribd.com/document/516620519/Principles-and-Practice-of-Sex-Therapy-Sixth-Edition-by-Kathryn-S-K-Hall-Yitzchak-M-Binik>.

<sup>3</sup> Available at <https://doi.org/10.1007/s10508-021-02142-1>.

‘uncertain science’ and ‘no definite conclusions about the effect and safety of the treatments’ as reasons to conclude that ‘the risks outweigh the benefits at present.’<sup>4</sup> The National Academy of Medicine in France has urged caution in treating pediatric gender dysphoria, “draw[ing] attention to the fact that hormonal and surgical treatments carry health risks and have permanent effects, and that it is not possible to distinguish a durable trans identity from a passing phase of an adolescent’s development.”<sup>5</sup> The National Health Service in England recently announced the closing of the country’s only youth gender clinic, citing an external review the leader of which questioned, among other things, “whether most adolescents prescribed [puberty-blocking] drugs were given the support to reverse course, should they choose to.”<sup>6</sup> Yet such support might well be made illegal under La Crosse’s proposed ordinance.

Even among those in the “affirming” camp, there is no consensus on whether children should be allowed or encouraged to transition socially to a different gender. The World Professional Association for Transgender Health (“WPATH”), for example, a transgender advocacy organization that strongly endorses transitioning, has acknowledged that “[s]ocial transitions in early childhood” are “a controversial issue” and that “health professionals” have “divergent views” on this issue.<sup>7</sup> WPATH has also recognized that “[t]he current evidence base is insufficient to predict the long-term outcomes of completing a gender role transition during early childhood.”<sup>8</sup> Given the lack of evidence and divergent views on this sensitive issue, WPATH has recommended that health professionals defer to *parents* “as they work through the options and implications,” even if they ultimately “do not allow their young child to make a gender-role transition.”<sup>9</sup>

Against this lack of consensus, the City has completely failed to demonstrate that banning counselors, ministers, and parents from suggesting that a child not immediately “change” his or her “gender identity” or “gender expressions” will in fact harm the health or safety of the child. Obviously, the City’s Common Council has no special expertise in this area, which is why it cannot even bring itself to assert in the Ordinance that such actions *will* cause harm, only that there is the “potential” for harm based in part on “anecdotal reports.” Indeed, the one study the Ordinance specifically cites does not purport to focus on gender identity at all, and explicitly refuses to reach a conclusion even on the likelihood of harm resulting from efforts to change sexual orientation.<sup>10</sup> This is not sufficient to survive strict scrutiny. *See, e.g., Otto*, 981 F.3d at 868 (“ambiguous proof” does not satisfy strict scrutiny (quoting *Brown*, 564 U.S. at 800)).

Even if the City had met its burden of demonstrating that the Ordinance will further the prevention of harm in select areas, the Ordinance is not “narrowly tailored” toward that end—it is hardly

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<sup>4</sup> Madeleine Kearns, *Florida is Following Europe’s Lead on Gender-Dysphoria Guidelines*, National Review (Apr. 27, 2022), <https://www.nationalreview.com/2022/04/florida-is-following-europes-lead-on-gender-dysphoria-guidelines/>.

<sup>5</sup> Society for Evidence Based Gender Medicine, *National Academy of Medicine in France Advises Caution in Pediatric Gender Transition* (Mar. 3, 2022), <https://segm.org/France-cautions-regarding-puberty-blockers-and-cross-sex-hormones-for-youth>.

<sup>6</sup> Azeen Ghorayshi, *England Overhauls Medical Care for Transgender Youth*, The New York Times (July 28, 2022), <https://www.nytimes.com/2022/07/28/health/transgender-youth-uk-tavistock.html>.

<sup>7</sup> WPATH Guidelines at 17.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, 9, 42 (2009).

tailored at all and instead appears drafted to cast as wide a net as possible. On one hand, it is wildly overinclusive. If a pastor, in a sermon, directs his congregation to meditate on the well-known line of Genesis, “God created man in his own image . . . male and female he created them,”<sup>11</sup> has he engaged in an “effort[]” to “change . . . gender expressions” with respect to a minor in his church who rejects the “gender binary”? If a Catholic parent expresses to her child well-settled teaching of that church that “men and women who have deep-seated homosexual tendencies” must “be accepted with respect, compassion, and sensitivity” and that “[e]very sign of unjust discrimination in their regard should be avoided,” but that “[u]nder no circumstances can [homosexual acts] be approved,”<sup>12</sup> has she sought to “change” the “behavior[]” of her child? The Ordinance simply declares actions like these, and many more, “conversion therapy” and therefore illegal, with little regard for whether this is the type of speech or conduct described in the Ordinance’s “purpose” section (and the unidentified “articles and reports” it references) and truly the type of harmful action the City means to target. On the other hand, the Ordinance is similarly underinclusive. For instance, it *never* prohibits counseling “that provides assistance to a person undergoing gender transition,” even when it is clear that that transition may or will harm the child.

In sum, the City has made no attempt at all to justify its decisions regarding what speech is and is not permissible. This Ordinance cannot surmount the standard that would be applied to it in court and is invalid.

### **THE ORDINANCE VIOLATES THE FIRST AMENDMENT’S RELIGION CLAUSES AND THE WISCONSIN CONSTITUTION’S FREEDOM OF CONSCIENCE CLAUSES**

Even were the Ordinance to survive free speech review, it would fall under the standard imposed by the First Amendment’s Religion Clauses, which likewise applies to the States via the Fourteenth Amendment. *See, e.g., Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 215 (1963).

Many of those individuals and entities who would fall within the sweep of the Ordinance’s prohibition base their speech in whole or part on sincere religious beliefs relating to sexual orientation and gender. Churches and religious schools, for example, face possible punishment for simply expressing the teachings of their faiths. But the Supreme Court has made clear that “the Religion Clauses protect the right of churches and other religious institutions to decide matters ‘of faith and doctrine’ without government intrusion.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 186 (2012)). This means that “[s]tate interference in that sphere would obviously violate the free exercise of religion, and *any attempt* by government to dictate or *even to influence* such matters would constitute one of the central attributes of an establishment of religion.” *Id.* (emphases added). It is difficult to see how the City’s Ordinance, which forces religious adherents to choose between their faith and government penalty, withstands this language. It is a *blatant* government attempt to influence matters of faith.

The Ordinance is inconsistent with the First Amendment in another way. Under Supreme Court case law the Ordinance is automatically invalid if it was accompanied by “‘official expressions of hostility’ to religion.” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022) (quoting

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<sup>11</sup> Genesis 1:27.

<sup>12</sup> Catechism of the Catholic Church 2357-58.

*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018)). Here, despite good faith disagreement on grounds of conscience by religious adherents to the ideological viewpoint endorsed by the City, members of the La Crosse Common Council and Judiciary & Administration Committee disparaged those who disagreed with them. One member appeared to liken the type of speech outlawed here to watching his neighbor’s son get beaten by his parents; another suggested it was “an abuse”; reference was made to the need to preserve a “safe space.” The cumulative impact of these statements and others like them was that opponents to the Ordinance are violent and dangerous. We question what additional attitudes and statements discovery will reveal, but regardless the above rhetoric alone was inappropriate and discloses a hostility to religious views that requires invalidation of the Ordinance.

The City is also subject to the Wisconsin Constitution’s protection of religious beliefs. Article I, Section 18 of that document provides in relevant part that “[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted . . . .” Our Supreme Court has repeatedly emphasized that in drafting this religious liberty provision, “Wisconsin’s framers ‘use[d] the strongest possible language in the protection of this right.’” *James v. Heinrich*, 2021 WI 58, ¶38, 397 Wis. 2d 517, 960 N.W.2d 350 (quoting *Coulee Cath. Sch. v. Lab. & Indus. Rev. Comm’n, Dep’t of Workforce Dev.*, 2009 WI 88, ¶59, 320 Wis. 2d 275, 768 N.W.2d 868) (alteration in original). The result is a safeguard “more prohibitive than the First Amendment of the United States Constitution.” *Id.* (quoting *King v. Vill. of Waunakee*, 185 Wis. 2d 25, 59, 517 N.W.2d 671 (1994)). Specifically, Wisconsin Courts automatically apply strict scrutiny to laws burdening sincere religious beliefs. *Id.* at ¶39. As already shown, the Ordinance will not pass this “exceptionally demanding” test. *Id.* at ¶45 (quoting *Holt v. Hobbs*, 574 U.S. 352, 364 (2015)).

### **THE ORDINANCE VIOLATES THE FOURTEENTH AMENDMENT’S PROTECTION OF PARENTAL RIGHTS**

The Ordinance also applies by its terms to parents, implicating one of the oldest and most fundamental liberty interests protected by the Fourteenth Amendment, namely the right of parents to direct the upbringing and care of their children. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925). The U.S. Supreme Court has described this right as “essential to the orderly pursuit of happiness by free men” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), “commanding,” *Santosky v. Kramer*, 455 U.S. 745, 759 (1982), “far more precious . . . than property rights,” *May v. Anderson*, 345 U.S. 528, 533 (1953), and “established beyond debate as an enduring American tradition,” *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

The Ordinance directly and substantially infringes on this right, prohibiting parents from passing their values and beliefs on to their children under threat of financial penalty. Because the right infringed is fundamental, strict scrutiny applies and, once again, the Ordinance must fall. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997).

## **THE ORDINANCE VIOLATES THE FOURTEENTH AMENDMENT'S PROHIBITION ON VAGUENESS**

With all of the above constitutional problems, we suspect that the City may attempt to argue that the Ordinance is not actually meant to apply to each of the situations discussed. But this simply raises an additional constitutional problem. The Ordinance is so vaguely drafted that it violates due process by failing to provide adequate notice of what speech is actually prohibited. *See, e.g., Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982).

For example, the Ordinance permits “counseling that provides . . . understanding of a person” or that “facilitates . . . a person’s . . . identity exploration” but bans counseling that “seek[s] to change an individual’s . . . gender identity.” How does that language apply to speech directed toward a biological male who thinks he may wish to socially transition to a female gender identity but is not sure (one obvious reason to obtain counseling)? Is the phrase “your doubt suggests that transition at this time may be unwise” lawful “identity exploration” or an unlawful attempt to “change” the person’s gender identity? Is there a mens rea requirement? Or what if the minor has already transitioned but now wants to “detransition,” as a growing group of young people who previously transitioned do? If the counselor assists, is she now illegally “seek[ing] to change” the individual’s new gender identity (potentially illegal), or simply “provid[ing] acceptance” regarding the minor’s old gender identity (potentially permissible)? How is either party to know which “gender identity” is the “default,” if the minor him or herself is unsure? Is La Crosse’s police department going to make the final call?

The Ordinance is not even clear regarding to whom it applies. It references “consumers,” which may suggest “[s]omeone who buys goods or services for personal, family, or household use.” *Consumer*, Black’s Law Dictionary (11th ed. 2019). But the drafters then conspicuously struck the provision applying the prohibition to services rendered “for a fee” (*i.e.* purchased). What is intended?

Other puzzles could be added to those already provided. The Ordinance permits counselors to “address . . . unsafe sexual practices” but as noted bars attempts to “change behaviors.” Who decides when a particular practice falls into one category (an unsafe sexual practice) or the other (a safe sexual behavior)? What of the Ordinance’s application to “corporation[s]”? Is advertising—including advertising that could be construed as an attempt to “change behaviors”—covered by the Ordinance (a “practice[] . . . offered . . . to consumers”)? Must it be directed toward minors or need it only be seen by them?

Given that financial penalties attach to violations of the Ordinance, these are not small flaws. Aside from a failure to provide adequate warning of prohibited speech, this vagueness “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.” *Flipside*, 455 U.S. at 498 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)).

## **THE ORDINANCE IS PREEMPTED BY STATE LAW**

Even if there were no constitutional problems at all with the City’s Ordinance, there is an even more fundamental problem with the City’s effort to regulate counseling and related speech: the City lacks authority to do so in the first place since the Legislature has already accepted that responsibility.

Generally speaking, in contexts such as this one, “where ‘the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith’ because ‘a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden.’” *DeRosso Landfill Co. Inc. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996) (quoting *Fox v. Racine*, 225 Wis. 542, 546, 275 N.W. 513 (1937)) (emphasis added). “Inconsistent” in this setting includes an ordinance that “logically conflicts with state legislation” or that “defeats the purpose of state legislation.” *Id.*

Relevant here, the Legislature has set up comprehensive regulatory schemes for professions such as counseling. For instance, Wis. Stat. ch. 15 creates state entities like the Medical Examining Board, the Psychology Examining Board, and the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board. Wis. Stat. § 15.405(7), (7c), (10m). The Legislature has directed each board to “promulgate rules . . . for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.” Wis. Stat. § 15.08(5)(b). These boards have done so.

Taking just one example, the Psychology Examining Board has promulgated extensive rules of professional conduct while acknowledging that “[t]he practice of psychology is complex and varied and, therefore, *allows for a broad range of professional conduct.*” Wis. Admin Code § Psy 5.01 (emphasis added). The Board sets forth 34 acts that constitute unprofessional conduct and that may lead to disciplinary proceedings, leaving other types of conduct unaddressed. *See id.* The clear implication of the design of these statutes and regulations is that the Legislature and Board are the ones charged with regulating the practice of psychology, not random municipalities. The City may not simply conclude that it knows better than both the Legislature and the boards charged with oversight of these professions and then layer requirements on top of those provided for in state law, apparently to be enforced by the La Crosse police.

In fact, the Legislature’s preferences are even clearer than that. Just a few years ago, the Marriage and Family Therapy, Counseling, and Social Work Examining Board proposed a rule with language similar to that contained in the Ordinance.<sup>13</sup> The Legislature, exercising its prerogative as the entity that created that board in the first place, blocked the rule from taking effect (it may have been motivated by the obvious constitutional problems discussed).<sup>14</sup> The notion that an individual municipality can now turn around and tell the Legislature that the municipality is, in effect, going to resurrect the rule for a subset of counselors anyway is incoherent.

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<sup>13</sup> See Clearinghouse Rule CR 19-166, [https://docs.legis.wisconsin.gov/code/chr/all/cr\\_19\\_166](https://docs.legis.wisconsin.gov/code/chr/all/cr_19_166).

<sup>14</sup> See, e.g., Todd Richmond, *Wisconsin Legislature moves to protect conversion therapy*, AP News (March 16, 2021), <https://apnews.com/article/legislature-wisconsin-environment-bills-pollution-0064041ccc8d46c18fdd9421a3589eb3>.

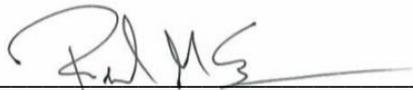
Numerous other examples of the manner in which the Ordinance disrupts the carefully-calibrated choices of the Legislature and its agencies could no doubt be provided but are not necessary here. Any such municipal ordinance purporting to deal with this area is preempted. *See, e.g., Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶66, 373 Wis. 2d 543, 892 N.W.2d 233 (“The logic inherent in the legislature's decision to define the right [to carry a concealed firearm] as all-encompassing, subject only to carefully delimited exceptions, is that the right is meant to extend as far as is not inconsistent with its internally-defined limitations.”).

**LA CROSSE SHOULD ABANDON ITS SPEECH SUPPRESSION EXPERIMENT**

We need not doubt the City’s good intentions. But the City’s foray into the sphere of censorship was ill-considered and poorly executed and is not salvageable. On this last point, we understand that the City has contemplated limiting the Ordinance so that it only applies when money changes hands. That might reduce the number of individuals to whom the Ordinance applies, but it would not solve most of the legal problems discussed.

We urge the City to instead abandon this project and return its focus to local issues within its remit. As mentioned above, if it declines to do so and adopts a ban in the same form as the Ordinance or a substantial equivalent, it will find itself facing a lawsuit.

Sincerely,



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