



West Virginia

P O Box 3952
Charleston WV 25339-3952

(304) 345-9246
www.acluww.org

October 19, 2021

Mayor Jenny Selin, City Manager A. Kim Haws,
and the Morgantown City Council
sent via email

cc: City Attorney Ryan Simonton, esq.
sent via email

Re: An Ordinance amending article 153 governing the Human Rights Commission
to prohibit Conversion Therapy

Mayor Selin, City Manager Haws, and members of the Morgantown City Council:

I am writing to you regarding an ordinance restricting conversion therapy that is scheduled to be taken up this evening on second reading at the Morgantown City Council meeting.

The American Civil Liberties Union of West Virginia seeks to protect the constitutional rights and civil liberties of all West Virginians. Recently, prior to the passage of a similar ordinance in Charleston, some questions were posed about the constitutionality of the proposed ordinance restricting conversion therapy. Those questions have also been raised regarding the proposed Morgantown ordinance.

We believe—as we did when a similar bill was proposed in Charleston—that it may be beneficial for our organization, as a group that routinely advocates for free and robust speech, to weigh in on the issue of constitutionality. After careful analysis, it is our position that this proposed ordinance is tailored sufficiently to survive a constitutional challenge.

Any government restriction of speech or conduct necessarily implicates First Amendment concerns and must be examined in that light. For example, if a physician wished to publicly advocate for a treatment, no matter how dangerous or ill-advised, the physician’s speech would be entitled to robust protection under the First Amendment. *See Lowe v. SEC*, 472 U.S. 181, 232 (White, J., concurring). However, when speech is considered to be “incidental to conduct,” and within the confines of a direct provider-patient relationship, it is subject to a lower level of scrutiny. *See e.g., Pickup v. Brown*, 740 F.3d 1208, 1226 (noting that “communication that psychoanalysis is entitled to constitutional protection, but it is not immune from regulation”). The proposed ordinance here, as drafted, falls into the latter category.

Our reading of the proposed ordinance indicates that, at most, it limits speech incidental to conduct and the restrictions apply only in the context of professional practice. The ordinance would apply only to licensed providers, which would not impinge on religious freedom concerns for clergy, and does not restrict providers from expressing support for conversion therapy so long as such practices are not part of the direct care a provider is offering to a minor. The ordinance, as drafted, does not prevent individuals or organizations subject to the ordinance from providing to parents or guardians referrals to other non-Charleston providers. It is tailored specifically to reach conduct that is within the confines of a provider’s

professional practice: conduct within a provider-minor client relationship that seeks to change an individual's sexual orientation or gender identity.

While opponents of this specific proposed ordinance may point to a recent Supreme Court case, *National Institute of Family and Life Advocates v. Becerra*, for the proposition that such restrictions are unlawful, it is important to note that Justice Thomas, in his opinion for the majority of the Court in that case, in fact *reaffirmed* that governments may regulate professional conduct. *See Becerra*, 138 S. Ct. 2361, 2372 (2018) (citing *Ohralik v Ohio State Bar Ass'n*, 436 U.S. 447, 448 (1978), and *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992)). Neither *Becerra* nor any other Supreme Court case has overturned settled case law restricting conversion therapy. In fact, the Supreme Court has, as recently as 2019 (notably, post-*Becerra*), declined review of issues in cases challenging decisions affirming restrictions on conversion therapy. *See e.g., Pickup v. Newsom*, 139 S. Ct. 2622 (2019) (denying petition for writ of certiorari); *King v. Murphy*, 149 S. Ct. 1567 (2019) (denying, for the third time, a petition for writ of certiorari). Opponents of conversion therapy restrictions also point to a decision in the Eleventh Circuit, *Otto v. Boca Raton*, wherein a 3-judge panel, divided 2-1, found a conversion therapy ban to be unlawful and in violation of the First Amendment. *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020). It is important to note that this case is an outlier, not binding on the Fourth Circuit, that the decisions in other circuits stand, and that the Eleventh Circuit may still decide to undertake a review *en banc*, which would necessitate a review of the panel's decision by the full Court of Appeals.

I hope this letter provides council with sufficient information to address constitutional concerns councilmembers or community members may have with regards to the proposed ordinance. Please do not hesitate to contact me if I could be of additional assistance in your consideration of this issue. I can be reached via email at lstark@acluwv.org.

Sincerely,



Loree Stark
Legal Director, ACLU-WV