ALAN WILSON
ATTORNEY GENERAL

February 16, 2022

The Honorable Josh Kimbrell, Member
South Carolina Senate
502 Gressette Senate Building
Columbia, SC 29202

Dear Senator Kimbrell:

You question "a proposed ordinance by the Columbia City Council" which you believe "presents a real danger to religious liberty in our capital city." By way of background, you state the following:

> [t]his ordinance that unanimously passed first reading, and which is expected to be adopted by City Council, will prohibit professional therapists from offering any form of therapy that attempts to change the sexual orientation of LGBTQ minors. This ordinance will impose a fine on professional counselors if they do not affirm LGBTQ preferences, even if doing so would violate the therapist's deeply held religious beliefs. I believe this to be unconstitutional on its face, as similar ordinances in cities like Boca Raton. Florida have been found unconstitutional by the 11th Circuit Court.

You are of the opinion that the Ordinance "violates the First Amendment rights of the citizens of South Carolina who reside in the City of Columbia." We agree that a court is most likely to so find.

Law/Analysis

The City of Columbia adopted Ordinance No. 2021-021 by a 4-3 vote in June of 2021. A number of Council findings were included, as follows:

> WHEREAS, conversion therapy, also known as reparative therapy, ex-gay therapy, or sexual orientation and gender identity change efforts, is a range of discredited practices aimed at changing one's sexual orientation or gender identity; and
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> WHEREAS, a national community of professionals in education, social work, health, mental health and counseling including the American Academy of Child and Adolescent Psychiatry have determined that there is no scientifically valid evidence that supports the practice of conversion therapy; and,

> WHEREAS, such professionals have determined that there is no evidence that conversion therapy is effective or that an individual's sexual orientation or gender identity can be changed by conversion therapy; and,
>
> WHEREAS, such professionals have also determined that conversion therapy is not only ineffective, but is substantially dangerous to an individual's mental and physical well-being and has also been shown to contribute to depression, self-harm, low self-esteem, family rejection, and suicide; and,
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> WHEREAS, all minors in the City of Columbia, including LGBTQ individuals under the age of 18 that reside within City limits, that seek therapy or treatment to assist them in understanding their individual development of gender identity or their sexual orientation should be free from exposure to the serious harms and risks caused by conversion therapy or reparative therapy; and,
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> WHEREAS, the City Council of the City of Columbia has a responsibility to protect the health, safety, and welfare of all people in our community, especially the physical and psychological well-being of minors, including LGBTQ youth; . . . .

The City contends it "has a compelling interest in protecting [pursuant to its police power] the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers." Columbia's Ordinance defines "conversion therapy" or "reparative therapy" as follows:

> *Conversion therapy or reparative therapy* means any practice or treatment that seeks to change an individual'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 shall not include counseling that provides support and 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 development, including sexual orientation-neutral treatment interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change sexual orientation or gender identity.

According to this definition, "'conversion therapy' shall not include counseling that provides support and 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 development, including sexual orientation-neutral treatment interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change sexual orientation or gender identity." Other terms are also defined by the Ordinance.

Columbia makes it unlawful "for any provider, who is licensed by the City to engage in business, to provide conversion therapy or reparative therapy to a minor within City limits."

Violation of the Ordinance is deemed "a civil infraction" for "each separate and distinct offense," and is punishable by a fine not to exceed $500.00 for such separate offense.

It is well established that a "municipal ordinance is a legislative enactment and is presumed to be constitutional." Aakjer v. City of Myrtle Beach, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010), citing Southern Bell Telephone & Telegraph Co. v. City of Spartanburg, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). Accordingly,

> [t]he burden of proving the invalidity of a municipal ordinance is on the party attacking it. . . . This State's Constitution provides that the powers of local governments should be liberally construed. See S.C. Const. art. VIII, § 67.

The Aakjer Court then went on to say that

> [t]o determine the validity of a local ordinance, this Court's inquiry is twofold: (1) did the local government have the power to enact the local ordinance, and if so, (2) is the ordinance consistent with the constitution and general law of this State. See Beachfront Entertainment Inc., v. Town of Sullivan's Island, 379 S.C. 602, 605, 666 S.E.2d 912, 913 (2008).

Id.

In Beachfront, the Court applied the foregoing test with respect to a town ordinance which imposed a $500 fine and/or 30 days in jail for smoking in places which were not illegal under state law. Our Supreme Court concluded that the ordinance was invalid "because it criminalizes conduct that is not illegal under state law." 379 S.C. at 606, 666 S.E.2d at 914.

The Court, in Beachfront Entertainment, analyzed the situation as follows:

> [a]s we held in Foothills Brewing [Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008)], Article VIII, § 14, of our State Constitution requires uniformity regarding the criminal law of this State and local governments may not criminalize conduct that is legal under a statewide criminal law. See also Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1966). Here, the State has not preempted the regulation of indoor smoking; a local government may therefore criminalize indoor smoking, but only to the extent consistent with State law. See City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) (local governments may not enact ordinances that impose greater or lesser penalties than those established by state law). Town's ordinance is invalid in that it imposes a criminal penalty for smoking in places where smoking is not illegal under State law.
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> Town contends, however, that the offending provision regarding a thirty-day jail term should be severed pursuant to the ordinance's severance clause and the remaining fine be construed as a civil penalty. We disagree. The fine imposed under the ordinance is $500. A violation of the provisions of the Clean Indoor Air act

> restricting indoor smoking is a misdemeanor punishable by a fine of $10 to $25. See S.C. Code Ann. § 44-95-50 (2002). The fine imposed by Town's ordinance is substantially greater than the criminal fines imposed under the Clean Indoor Air Act for tobacco smoking offenses and cannot be construed as simply a civil fine.
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> Accordingly, we find the penalty provision of the ordinance unconstitutional because it conflicts with State criminal law by imposing a criminal penalty for conduct that is not illegal under State law.

379 S.C. at 606, 666 S.E.3d at 915 (footnotes omitted). The Court deemed Foothills as not dispositive in that the ordinance there "did not constitute a criminal law because a violation of the ordinance was designated an 'infraction' and the only penalty imposed was a fine. In this respect, the ordinance in Foothills Brewing is different from the ordinance here which imposes a fine and/or thirty days in jail." Id. at n. 2.

A number of cases have challenged regulation or proscription of conversion therapy on constitutional grounds. We first note that in 2018, the United States Supreme Court issued its opinion in National Inst. Of Family and Life Advocates v. Becarra, 585 U.S. _____, 138 S.Ct. 2361 (2018) ("NIFLA"). In NIFLA, the Court struck down a California law requiring clinics that provide pregnancy services to publicize certain notices on the grounds that the ordinance violated those clinics' First Amendment right to freedom of speech. According to one scholar,

> [t]he Ninth Circuit had previously upheld the law, finding that it regulated a category of speech called "professional speech" and was thus entitled only to intermediate scrutiny. . . . The Court defined professional speech that occurs between a professional and their client "in the context of their professional relationship. . . ." As such, the Court only analyzed the statute under intermediate scrutiny, as opposed to strict scrutiny. The Supreme Court criticized the Ninth Circuit's opinion for holding that all speech uttered by a professional is always entitled to intermediate scrutiny. . . . In reaching its decision, the Supreme Court noted that other circuit courts have reviewed professional speech under intermediate scrutiny. Of those circuit court decisions, two involved the constitutionality of conversion therapy laws. . . .
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> The NIFLA decision raises serious questions regarding the constitutionality of conversion therapy bans: Do laws banning conversion therapy violate the First Amendment? And what level of scrutiny applies when deciding this question?

The author concluded that conversion therapy bans "should be reviewed under intermediate scrutiny and are constitutional." Hampton, "The First Amendment and The Future of Conversion Therapy Bans In Light of National Institute of Family and Life Advocates v. Harris," 35 Berkeley Journal of Gender, Law and Justice, 169, 170-71 (2020).

However, in Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020), the Eleventh Circuit held otherwise. That case is illustrative of a court concluding that an ordinance prohibiting conversion therapy for minors is violative of the First Amendment. In Otto, as here,

the city ordinance at issue penalized violations "with a fine not exceeding $5000. . . ." 981 F.3d at 859. The Eleventh Circuit cited the NIFLA decision, noting that "[t]he Supreme Court has consistently rejected attempts to set aside the dangers of content-based speech regulations in professional settings. . . ." Id.

Otto also rejected applying a test of intermediate scrutiny as the governing First Amendment standard:

> [s]trict scrutiny ordinarily applies to content-based restrictions of speech, and this case is no different. That means we must consider whether the ordinances are "narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L. Ed.2d 236 (2015). Laws or regulations almost never survive this demanding test, and these ordinances are not outliers. Forbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee. Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L. Ed.2d 212 (1972).

Id. at 861-62.

In Otto, the Court concluded that the Boca Raton ordinance was content-based. According to the Court, "[w]e cannot see how the regulations here can be applied without considering the content of the banned speech." Id. at 863:

> [t]he regulations are plainly "speaker-focused and content-based restrictions on speech":
>
> They limit a category of people-therapists – from communicating a particular message. Id. Consider again the similarities to Wollschlaeger [v. Gov. of Florida, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc)]. There, a Florida law prevented doctors from speaking to their patients about firearm ownership. See id. at 1302-03. Whether a doctor violated that law turned solely on the content of the message conveyed to the patient. Here too. Whether therapy is prohibited depends only on the content of the words used in that therapy, and the ban on that content is because the government disagrees with it. And whether the government's disagreement is for good reasons, great reasons or terrible reasons has nothing at all to do with it. All that matters is that a therapist's speech to a minor client is legal or illegal under the ordinances based solely on its content.

Id. at 863. Thus, the Eleventh Circuit held that the ordinance was unconstitutional, as violative of the First Amendment, as follows:

> [t]his 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 – 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. . . .

Id. at 871-872.

Reflective of the other side of the coin are those cases which uphold legislation prohibiting conversion therapy on First Amendment grounds. A good example is Doyle v. Hogan, 411 F.Supp.3d 337 (D.Md. 2019). In Doyle, the Court cited a Fourth Circuit decision – Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Balt., 879 F.3d 101, 109 (4th Cir. 2018) – for support of the principle that "government regulations of professional practices that entail and incidentally burden speech receive deferential review. Id. at 344. Doyle viewed the issue differently than Otto, concluding that the ordinance in question regulated conduct more than speech, and thus the ordinance "lands on the conduct end of the sliding scale." Id. at 345. According to the Court,

> Plaintiff's arguments that conversion therapy cannot be characterized as conduct are unpersuasive. During the motions hearing, Plaintiff argues that some therapists, such as aversive therapy, clearly involve conduct and, as such, should be differentiated from talk therapy. However, conduct is not confined merely to physical action. Plaintiff asserted at the motions hearing that he wishes to conduct speech-based conversion therapy when the change goal originates with his minor client. If his client presents with such a goal, Plaintiff would presumably adopt the goal of his client and provide therapeutic services that are inherently not expressive because the speech involved does not seek to communicate Plaintiff's views. Thus, Plaintiff's argument fails to demonstrate how speech therapy is any more expressive, and thus less in the nature of conduct then aversive therapy.

Id. at 345-46. The Court in Doyle cited the Fourth Circuit decision in Capital Associated Indvs., Inc. v. Stein, 922 F.3d 198, 209 (4th Cir. 2019) to the effect that "'intermediate scrutiny strikes the appropriate balance between the States police powers and individual rights [ ]' when evaluating conduct regulations that incidentally impact speech.'"

The District Court of Maryland, in Doyle, found that the conversion therapy legislation met the intermediate scrutiny standard as the "'least restrictive means for advancing Maryland's purposed interests or that the statute is otherwise narrowly tailored. '" However, the Court concluded that the statute in question was limited in that

> . . . the statute prohibits only speech uttered in the process of conducting conversion therapy when it is conducted by licensed practitioners on minors. Additionally, the statute prohibits only speech uttered in the process of conversion therapy. As stated above when analyzing whether the speech prohibited by § 1-212.1 is conduct, because the statute allows licensed practitioners to express their views about and recommend conversion therapy to their minor clients, it regulates only the speech necessary to advance Maryland's goal of protecting minors. . . .

Id. at 347-48.

Thus, the courts are in disagreement regarding the regulation of conversion therapy under the First Amendment. The validity of any ordinance or statute will, no doubt, depend upon whether the court applies strict scrutiny – a test under which is virtually impossible to survive – or intermediate scrutiny. Accordingly, it is difficult to predict how a court would rule with respect to the constitutionality of the Columbia ordinance. Under well-recognized principles, the Columbia ordinance is, of course, presumed constitutional until a court concludes that the presumption has been overcome and the law is invalid. Nevertheless, as in Otto, we cannot imagine how the Ordinance could be applied without regulating the content of the speech between therapist and client. While this Office agrees that the First Amendment may well be violated in this instance by the Ordinance in question, it will be up to a court to so decide, applying the presumption of validity.

An additional concern regarding the ordinance is implied field preemption. Our Supreme Court has applied this doctrine in numerous instances. In Aakjer, supra, for example, the Court stated the following:

> [a]n ordinance is preempted under implied field preemption when the state statutory scheme so thoroughly and pervasively covers the subject as to occupy the field or when the subject mandates statewide uniformity. See South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006). The General Assembly addressed motorcycle helmet and eyewear requirements in S.C. Code Ann. §§ 56-5-3660 and 56-5-3670 (2009) respectively. The statutes require all riders under age twenty-one to wear a protective helmet and utilize protective face goggles or a face shield. The Helmet Ordinance, in contrast, requires all riders, regardless of age, to wear a helmet and eyewear.

388 S.C. at 133, 694 S.E.2d at 215. The Court concluded that "the City Helmet Ordinance fails under implied field preemption due to the need for statewide uniformity. . . . 388 S.C. at 136, 694 S.E.2d t 216.

And, in Terpin v. Darlington County Council, 286 S.C. 112, 114, 332 S.E.2d 771, 773 (1985), the Court found that an ordinance regulating fireworks was impliedly preempted:

> [t]he General Assembly has created an extensive system for controlling the possession, sale, storage and use of fireworks in South Carolina.
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> . . . .
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> The challenged ordinance has penalty provisions and concerns a matter provided for by the general law. Nowhere does the general law on fireworks provide for enactment by regulatory ordinances by counties. The ordinance is thus invalid. The respondent contends that the county acted with its police power and that the ordinance is valid so long as it does not conflict with provisions of the general law. We disagree; we are bound by the express terms of § 4-9-30(4).

Id. See also Town of Hilton Head Is. v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992) ["Municipalities have no authority to set aside the structure and administration of any governmental service or function, the responsibility for which rests with the State government or which requires statewide uniformity. S.C. Const. art. VIII, § 14. The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity."] See also Wilson ex rel. State v. City of Columbia, 434 S.C. 206, 863 S.E.2d 456 (2021) [discussing preemption]; Foothills Brewing Concern, Inc. v. City of Grvlle; 377 S.C. 355, 660 S.E.2d 264 (2008) [validity of local ordinance is a two-step process; where state has preempted a particular area, municipality lacks power to regulate the field].

In Vazzo v. City of Tampa, 415 F.Supp.3d 1087, 1096 (M.D. Fla. 2019), the Court concluded that a conversion therapy ordinance was impliedly preempted by state law:

> [t]here is no grant of authority by the Florida Legislature to municipalities to substantively regulate healthcare treatment and discipline. The State, not localities, occupies this field. Just as in Classy Cycles, here there is nothing local or unique to Tampa about SOCE that would suggest the statewide, uniform medical regulation regime should vary because of Tampa's peculiarities, and should vary across the State, from town to town and from county to county. The matter legislated against – SOCE ("Sexual Orientation Change Efforts") is statewide, not Tampa-specific. And, a uniform and statewide system of healthcare, treatment and practitioner discipline already exists, for sound reasons. Implied preemption is a disfavored remedy because cities have broad powers to address municipal concerns. But substantive regulation of psychotherapy is a State, not a municipal concern.

Given this case, as well as the South Carolina cases to the same effect, a court could follow the same analysis with respect to the Columbia Ordinance. There is no doubt that state law pervasively regulates various forms of therapy, including psychotherapy. See e.g. § 40-55-50 ("Acts constituting practice as psychologist" including various forms of therapy).

Finally, we note that a South Carolina case, Connor v. Town of Hilton Head Is., 314 S.C. 251, 442 S.E.2d 608 (1994), is particularly relevant to our analysis. There, Hilton Head adopted an ordinance making it unlawful to own or operate a "sexually-oriented business," defined to

include a nightclub or bar where nude or semi-nude dancing is performed and alcoholic beverages are served and also to participate in nude or semi-nude dancing. The Court struck down the ordinance as beyond the power of the municipality to adopt and as violative of the First Amendment.

The Court noted that "[s]tate laws governing nudity do not prohibit nude dancing per se." 314 S.C. at 254, 442 S.E.2d at 609. However, the Court concluded that Art. VIII, § 14 of the State Constitution, which provides that state criminal laws and penalties and sanctions not be set aside by local governments, would be construed "to prohibit a municipality from proscribing conduct that is not unlawful under State criminal laws governing the same subject." Id. Inasmuch as "Town has criminalized conduct that is not unlawful under relevant State law, we conclude Town has exceeded its power in enacting the ordinance in question." 314 S.C. at 254, 442 S.E.2d at 610.

Further, in Connor, the Court held that the ordinance was conduct-based and violated the First Amendment. The Court reasoned:

> [t]he First Amendment generally prevent government from proscribing expressive conduct because of disapproval of the ideas expressed. R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L. Ed.2d 305 (1992). Content-based regulations are presumptively invalid. Id. Town's ordinance specifically targets the sexual or erotic message of nude dancing which is constitutionally protected expressive conduct. Unlike the statute in Barnes [v. Glenn Theatre, Inc., 501 U.S. 560 (1991)] the ordinance here is not a valid restriction on nude dancing because it is not content-neutral. . . .

314 S.C. at 255, 442 S.E.2d at 610. Thus, the Connor case combined the issues at play here: the authority of the municipality to adopt the ordinance and whether the regulation at issue was content-neutral. See Barnes, supra. In the Connor Court's view, "Town's ordinance violates the First Amendment because it totally suppresses a protected form of expressive conduct." 314 S.C. at 256.

Conclusion

While courts have reached varying conclusions regarding whether an ordinance [or statute] banning conversion therapy violates the First Amendment, we think a court is likely to conclude that the First Amendment is infringed by the Columbia ordinance. The Eleventh Circuit decision in Otto, which concluded that the First Amendment is violated in such circumstances, is well reasoned, and follows the Supreme Court's decision in NIFLA. As the Court in Otto concluded, "[p]eople 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." We agree.

The NIFLA Court had recognized that "professional speech" is "not a separate category of speech and "is not unprotected merely because it is uttered by 'professionals.'" According to the NIFLA Court, "content-based regulations 'in the fields of medicine and public health'" can be particularly dangerous. 138 S.Ct. at 2374. In our view, the Columbia ordinance is content-based, and thus would be subject to strict scrutiny. Under such an exacting standard, the Columbia ordinance is likely to be struck down by a court. As discussed above, our Supreme Court invalidated a Hilton Head ordinance prohibiting nude or semi-nude dancing as content-based. Thus, it is our opinion that a South Carolina court would likely follow these decisions and deem the Columbia ordinance invalid as violative of the First Amendment.

In addition, there is the issue of the power of a local government to regulate or legislate in an area which is also regulated or licensed by the State. Our Supreme Court has consistently held that a local government is impliedly preempted under its Home Rule powers as to any regulation "which requires statewide uniformity." See S.C. Const. Art. VIII, § 14. In Vazzo v. City of Tampa, the District Court concluded that the regulation of conversion therapy is prohibited at the local level because the "substantive regulation of psychotherapy" is "a state, not a municipal concern." Thus, a court, employing this analysis, may well deem that an ordinance, such as that adopted by of the City of Columbia, is impliedly preempted as an attempt to regulate a statewide area of concern rather than a local matter. Moreover, inasmuch as a $500 fine is imposed for each "offense," a court may see the ordinance as making unlawful a lawful activity under state law. See Connor, supra.

Of course, our opinion herein expresses no view either favoring or opposing conversion therapy or an ordinance banning such activity. Such are policy questions for the General Assembly. We strongly support equal dignity for all. We simply advise herein with respect to what a court is most likely to conclude if, the Columbia ordinance, or one similar to it, is challenged in court. We believe a court is likely to hold that the Columbia ordinance is invalid as suppressing free speech and also that the ordinance is an effort to exercise powers which a municipality does not possess. Moreover, the Columbia ordinance is likely overly broad, and even void for vagueness. It would, of course, be up to a court to invalidate the ordinance as such authority does not rest with this Office.

While we appreciate and respect the efforts of the City of Columbia in protecting equal dignity for all persons, the City cannot adopt an ordinance that likely violates the State and federal Constitutions. The right to free speech and free expression and thought cannot be undermined or violated, even for a salutary purpose.

Sincerely,

Robert D. Cook
Solicitor General