Center FOR Christian Virtue
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ALLIANCE DEFENDING FREEDOM
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CEA
Christian Employers Alliance

LEGAL MEMORANDUM

DATE: October 25, 2022

RE: Legal Analysis of the Proposed Amendment to Bowling Green, Ohio's Antidiscrimination Ordinance

Councilman Nick Rubando has introduced legislation that would amend Bowling Green's antidiscrimination ordinance to expand the protected class of "sex" to include "sexual or reproductive health decisions." While framed as a measure to help women, the proposed amendment would hurt them because it would force organizations that help women into an ultimatum—either violate their mission statements or stop helping people. That sort of ultimatum would compromise community access to critical support and services related to, among other things, pregnancy, childcare, and mental health.

In much the same manner, the proposed amendment is unconstitutional because it would force organizations to employ people and provide services contrary to their missions and core convictions. Passing an unconstitutional amendment could cost the people of Bowling Green hundreds of thousands of dollars in legal fees and damages.

I. The proposed amendment will not protect women; it will hurt them.

In 2009, the City of Bowling Green enacted an antidiscrimination ordinance that made it illegal for employers to discriminate in employment or in the provision of products and services because of an individual's sex or pregnancy, among other protected characteristics.[1] Penalties for violating the ordinance include criminal penalties[2] and civil penalties.[3]

Recently, Bowling Green Councilman Nick Rubando, spurred on by "college students and suburban moms," introduced an amendment to expand protections under Bowling Green's anti-discrimination ordinance.[4] He said that the amendment would add additional protections for "people's reproductive healthcare decisions, breastfeeding mothers, as well as pregnant people or those seeking to become pregnant."[5] Specifically, Councilman Rubando's amendment would expand "sex" to include "sexual or reproductive health decisions." And his amendment would

[1] City of Bowling Green, Ohio, Code of Ordinances, § 39.01.
[2] *Id.* at § 39.09.
[3] *Id.* at §§ 39.08, 39.11.
[4] Larson McLaughlin, Jan, *BG Council Debates Anti-Discrimination Amendment for Reproductive Rights*, BG INDEPENDENT MEDIA (Oct. 3, 2022), https://bgindependentmedia.org/bg-council-debates-anti-discrimination-amendment-for-reproductive-rights/.
[5] *Id.*

define such decisions as those relating "to the use or intended use of products or services for . . . pregnancy or its termination . . . [and] hormone therapy including that which alters gender expression or affirms gender identity, or medical treatments that affirm gender identity."

While Councilman Rubando may intend to protect women, the proposed amendment would have the opposite effect—less access to important resources, less options for people in need, and less protections for everyone. For example, consider HerChoice in Bowling Green. HerChoice is a pregnancy center which offers free services including pregnancy tests, nurse appointments, limited ultrasounds (to verify viability), limited STI testing for both men and women, parenting classes, post-abortive counseling, and necessary material items. HerChoice is also a faith-based organization with a pro-life mission. Yet the proposed amendment would force HerChoice to employ people who don't share HerChoice's pro-life mission. It would also force HerChoice to provide services contrary to its mission such as abortion referrals. Under the amendment, refusal to comply would risk a lawsuit, civil fines, and criminal penalties.

In effect, the proposed amendment sends the following message to HerChoice: if you want to serve pregnant women and their families, then you must employ people who advocate for abortions, and you must provide abortion-related services. If you refuse, you must stop helping people or risk lawsuits, fines, and criminal convictions. Nobody benefits from this sort of ultimatum, least of all families who need most what HerChoice provides to the Bowling Green community.

The same is true for other organizations such as counseling centers. Many of them have missions and core convictions opposed to the transgender ideology that is foundational to gender-affirming therapy. Yet the proposed amendment would send a similar message to these centers: if you want to help people with their mental health issues, then you must adopt an ideology that violates your mission statement. Otherwise, you face severe consequences. That cannot and should not be the message that Bowling Green sends to community organizations that want nothing more than to help those in need.

Aside from imposing ultimatums that force good people to either violate their core convictions or stop helping others, the proposed amendment is unconstitutional.

II. The proposed amendment will coerce employers to employ people and provide services contrary to their beliefs and missions, which is a violation of the right to expressive association under the First Amendment to the United States Constitution.

The First Amendment includes a "right to associate with others in pursuit of a wide variety political, social, economic, educational, religious, and cultural ends."[6] It is well-settled law that the First Amendment protects a nonprofit organization's right to associate with others—and express itself to others—in accord with its mission statement.[7] Moreover, the right to expressive

[6] *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (quotation omitted).
[7] *Id.* at 648–50 (finding that the Boy Scouts of America, a nonprofit organization, has a First Amendment right to associate in accord with its mission statement).

association implicitly includes the right not to associate with others.[8] For example, the U.S. Supreme Court held that the Boy Scouts of America, as an expressive association, had a right to limit its membership in accord with its mission statement.[9]

A. The proposed amendment will significantly hinder the ability of pregnancy centers, counseling centers, and other organizations to accomplish their missions and express their messages.

If the Boy Scouts have a right to limit their membership and leadership in a manner consistent with its mission statement, then so do other organizations, including counseling centers and pregnancy centers. In fact, in *Our Lady's Inn v. City of St. Louis*, a Missouri federal district court struck down a St. Louis ordinance that forced a pregnancy center to employ people who held beliefs contrary to its pro-life convictions and mission.[10] In 2017, St. Louis enacted an ordinance that prohibited discrimination in employment and housing based on a person's "reproductive health decisions."[11] Our Lady's Inn, a pro-life pregnancy center that provides housing for women seeking alternatives to abortion, sued St. Louis on First Amendment grounds.[12] The court found that the ordinance, as applied to Our Lady's Inn as an expressive association, violated the right to association because it forced Our Lady's Inn to employ individuals who oppose its pro-life mission.[13]

The Bowling Green proposed amendment would likewise unlawfully coerce pregnancy centers and other nonprofits to employ people who oppose their missions under pain of criminal and civil penalties. And as the court in *Our Lady's Inn* ruled, the First Amendment does not allow for such coercion—no ordinance can force a pregnancy center, counseling center, or any other nonprofit to employ people who hold beliefs contrary to its mission. For that reason, the proposed amendment is unconstitutional.

The court's reasoning in *Our Lady's Inn* also extends beyond employment. The Bowling Green's antidiscrimination ordinance prohibits an employer from denying "the full enjoyment" of the goods and services that it provides based on a person's sex.[14] It also expands the protected class of sex to include decisions related to reproductive health. Under the proposed amendment, therefore, a pro-life pregnancy center would be coerced into providing services that violate its right to act and express itself in accord with its mission.

For instance, suppose a pregnant woman turns to a pro-life pregnancy center in Bowling Green for support, resources, and services related to pregnancy. The pregnancy center offers supportive services and informs the pregnant woman of alternatives to abortion. However, the pregnant woman insists on an abortion and asks the center for a referral. The pregnancy center declines to provide a referral because it goes against its mission and commitment to protect

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[8] *Id.* at 647.
[9] *Id.* at 656.
[10] *See Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 823 (E.D. Mo. 2018).
[11] *Id.* at 819.
[12] *Id.* at 818–19.
[13] *Id.* at 823.
[14] City of Bowling Green, Ohio, Code of Ordinances, §§ 39.01, 39.03(A).

innocent life. Under the proposed amendment, the pregnancy center could be convicted, fined, and sued because its refusal stemmed from the pregnant woman's decision to pursue an abortion. But under *Our Lady's Inn,* just as it violates the First Amendment to force a pro-life pregnancy center to employ people who oppose its mission, it is also a violation to force a pro-life pregnancy center to provide an abortion referral or pro-abortion related services.

B. The proposed amendment fails strict scrutiny.

Because the proposed amendment would violate the right to expressive association, it must pass strict scrutiny to survive.[15] Strict scrutiny is the "most demanding test known to constitutional law."[16] To pass strict scrutiny, the city must show that the proposed amendment serves compelling interests "of the highest order,"[17] and is "narrowly tailored" to serve those paramount interests.[18] In other words, there must be an "actual problem" to be solved instead of an imagined problem manufactured from mere speculation[19]

There is no problem that needs solving. For one, the current ordinance already includes pregnancy as a protected class.[20] For another, there is no need for the proposed amendment. For example, supporters of the proposed amendment, when asked why it was necessary, could not cite one instance of discrimination based on a reproductive health decision. Instead, they justified the proposed amendment by citing to a generic interest in eradicating abstract discrimination. Controlling law requires much more than this to sustain the proposed amendment. An imagined problem is not sufficient to create a compelling interest in combatting discrimination, and efforts to justify the proposed amendment on those grounds are fatal to the law's survival.[21]

Neither is the proposed amendment narrowly tailored. A law that is narrowly tailored "targets and eliminates no more than the exact source of the evil it seeks to remedy."[22] Not so here. In the absence of any documented problem or harm, the proposed amendment is a blunt and clumsy instrument, hitting in several directions to impose its so-called "cure" on everyone, including pro-life organizations that simply want to serve people in accord with their missions. Such clumsiness is unacceptable and unconstitutional.[23]

The current ordinance exempts any "religious corporation, organization, or association."[24] But this could be interpreted to include only churches and religiously affiliated organizations,

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[15] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).
[16] *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).
[17] *Church of the Lukumi Bablue Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).
[18] *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).
[19] *Id.* at 822.
[20] City of Bowling Green, Ohio, Code of Ordinances, § 39.01
[21] *Our Lady's Inn*, 349 F. Supp. 3d at 822 (finding that general public concern voiced by city council member to justify law was not a compelling interest); *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."); *Brown v Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (state must show regulation is "actually necessary to the solution").
[22] *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal citations omitted).
[23] *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801 (1988) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").
[24] City of Bowling Green, Ohio, Code of Ordinances, § 39.06(D).

excluding charitable and mission-minded organizations that don't have an explicit religious affiliation.[25]

Many pregnancy and counseling centers do not hold themselves out as religious for a variety of reasons. As such, it is unlikely that they could rely upon the exemption. This uncertainty is sufficient to chill First Amendment rights. Pregnancy centers and counseling centers should not have to sue, be sued, or face indictment in order to find out whether the exemption applies to them. Indeed, such uncertainty should caution any reasonable lawmaker from passing the proposed amendment.

Finally, pro-life pregnancy centers are not the only employers in Bowling Green whose right to expressive association is in constitutional peril. In fact, the proposed amendment would force pro-abortion organizations to employ people and provide services contrary to their missions. Further, nonprofit employers may not be the only ones with a First Amendment claim. For instance, one federal court recognized that expressive associations aren't necessarily limited to political and charitable organizations: "there is no requirement that an organization be primarily political (or even primarily expressive) in order to receive constitutional protection for expressive associational activity."[26]

III. The proposed amendment violates employers' right to free speech under the First Amendment to the United States Constitution.

A. The proposed amendment unconstitutionally regulates speech based on content, discriminates based on viewpoint, and cannot survive strict scrutiny.

The proposed amendment is unconstitutional for another reason: it prohibits speech based on content, discriminates based on viewpoint, and cannot survive strict scrutiny. A content-based restriction on speech "draws distinctions based on the message a speaker conveys" and it "cannot be justified without reference to the content of the regulated speech."[27]

The proposed amendment is a content-based restriction on speech. The current ordinance prohibits employers from printing or publishing "any discriminatory notice or advertisement relating to employment."[28] The combination of the current ordinance and proposed amendment would ban speech involving a "particular subject matter,"[29] namely "sexual or reproductive health decisions." However, it would not ban other content, permitting employers to ask for employee

[25] Oddly, the ordinance itself opens the door to a narrower interpretation of "religious corporation" because it provides a specific exemption for two religious schools—"Bowling Green Christian Academy" and "St. Aloysius School." A plain reading of the terms "religious corporation, organization, or association" would (and should) cover a religious school. Yet the specific exemption for two religious schools could be used by an activist judge to impose a narrow reading of the religious exemption. As the negative-implication canon of statutory interpretation says, "[t]he expression of one thing implies the exclusion of others." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012); *United States v. Giordano*, 416 U.S. 505, 514 (1974) (applying the negative-implication canon to conclude that a term not included in the statute implies that it should be excluded).
[26] *Pi Lambda Phi Fraternity, v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3d Cir. 2000)
[27] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).
[28] City of Bowling Green, Ohio, Code of Ordinances, § 39.02(A)(6).
[29] *Reed*, 135 S. Ct. at 1227.

compliance with all other subjects outside of decisions relating to reproductive health. For example, employers may provide notices that require a dress code or certain workplace behavior, but they would be prohibited from conveying messages to employees about abortion, contraception, or human sexuality.

The proposed amendment also discriminates based on viewpoint. Viewpoint discrimination prohibits the government from "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[30] Here, the proposed amendment targets the "particular views taken by speakers on a subject,"[31] namely, reproductive health decisions. For example, under the proposed amendment, the ordinance's ban on discriminatory notices and advertisements would prevent an employer with a pro-life mission from requiring its employees to comply with its code of conduct regarding abortion. In fact, such employers would be chilled from expressing support for the sanctity of life or from gaining agreement by employees that such conduct matters to their employment status.

Speech restrictions that discriminate based on viewpoint must pass strict scrutiny.[32] And for the same reasons already explained above, the proposed amendment cannot overcome that hurdle.[33] Therefore, it would be unconstitutional were it to become law.

Conclusion

The proposed amendment would limit access to services and impose ultimatums on good people who simply desire to serve others in need. It would also be unconstitutional in several ways. Were the proposed amendment to pass, the City of Bowling Green would likely face lawsuits that would cost Bowling Green taxpayers hundreds of thousands of dollars in legal costs and damages.

[30] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).
[31] *Id.*
[32] *Rosenberger*, 515 U.S. at 829.
[33] *See supra* at 4-5.