



Attorney-Client Memorandum

To: Peter Zanoni, City Manager
Via: Miles Risley, City Attorney
From: Aimee Alcorn-Reed, Assistant City Attorney
Date: November 29, 2021
Subject: Obligation to Draft Ordinance consistent with State and Federal Law in Response to Submission of proposed Initiative

Issue/Problem: Can the City, by ordinance, “require Corpus Christi hospitals, medical facilities, health care professionals and pharmacies to provide patients with information on COVID-19 early treatment protocols, and prescribe such medicines as Hydroxychloroquine, Ivermectin, Budesonide and other safe, FDA-approved drugs as suggested by such early treatment protocols” as requested by Item #4 of the Statement of Intent to Circulate Petitions calling for an Initiative from Samuel Fryer?

Short Answer: No. Requiring all medical professionals and facilities to provide the requested information would be “compelled speech,” which is generally prohibited by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Texas Constitution. To the extent that such compelled speech does not violate these constitutional provisions, it is preempted by state law, which regulates the practice of medicine and pharmacy. The requirement to prescribe specific medications would constitute regulation of the practice of medicine and pharmacy, which is preempted by state law.

Discussion & Conclusion:

On November 8, 2021, the City Secretary’s Office received a Statement of Intent to Circulate Petitions calling for an Initiative from Samuel Fryer. The City Secretary’s Office verified that the Statement of Intent contained the signatures of at least 50 registered voters in the City on November 12, 2021, and provided such notice to Mr. Fryer and to the City Attorney’s Office.

Article I, Section 4 of the City Charter provides that whenever a qualified statement of intent to circulate a petition for initiative is received, the City Attorney is charged with drafting “an ordinance in legal form, *consistent with the laws of the state and the United States*, incorporating in substance the text submitted.” To comply with this section, the City Attorney must first determine which requested provisions comply with state and federal law.

The Statement of Intent to Circulate Petitions asks the City Council to adopt an ordinance to:

- (1) Promote, inform, and educate the public of COVID-19 early treatment protocols developed by experienced physicians effectively treating COVID-19 patients and used successfully by United States-based doctors and telemedicine physicians;
- (2) Promote related risk reduction of SARS-CoV-2 infection and disease severity through prophylaxis measures;
- (3) Inform and educate the public of ways to improve their immune systems with a healthy diet, dietary supplements and exercise with physician consultation; and

- (4) Require Corpus Christi hospitals, medical facilities, health care professionals and pharmacies to provide patients with information on COVID-19 early treatment protocols, and prescribe such medicines as Hydroxychloroquine, Ivermectin, Budesonide and other safe, FDA-approved drugs as suggested by such early treatment protocols.

The City Attorney's office has drafted an ordinance containing the substance of Requests #(1) through #(3). However, Request #4 cannot be included in an ordinance "consistent with the laws of the state and the United States" because it would, at least in part, violate the 1st and 14th Amendments of the U.S. Constitution and Article I, Section 8 of the Texas Constitution. To the extent that any of the requirements in request #4 do not violate these constitutional provisions, such requirements would be preempted by state laws governing the practice of medicine, pharmaceuticals, health care professionals, and health care facilities or federal laws governing the prescribing of medicines.

Compelled Speech Doctrine. The First Amendment of the United States Constitution, which is applied to the states and local governments through the Equal Protection Clause of the Fourteenth Amendment, generally protects the right to freedom of speech in this country. Fundamental to the right to free speech is the freedom not to speak, as discussed in multiple cases by the United States Supreme Court. *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (finding that a government entity cannot require public school students to salute the flag), *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down a law that prohibited New Hampshire residents from covering the state motto "Live Free or Die" on their vehicle license plates).

Despite this general prohibition on compelled speech, the Court has upheld professional regulations that incidentally burden speech. *See Planned Parenthood v. Casey*, 505 U.S. 833, 882-885 (1992). Such regulations are allowed to require certain information be provided to obtain informed consent for a medical procedure so long as the compelled speech is (1) truthful, (2) non-misleading, and (3) relevant to the medical procedure at issue. *Id.* at 882-883. That case considered a regulation that required certain disclosures in order to obtain informed consent for an abortion, which the Court determined, in a plurality opinion, was part of the "practice of medicine, subject to the reasonable licensing and regulation of the State." *Id.* at 884. This exception is limited, however, to speech by licensed professionals, such as physicians or pharmacists. *Id.* at 885. Accordingly, the First and Fourteenth Amendments prohibit the government from compelling any speech by non-licensed medical professionals or facilities. The risks involved in passing and enforcing an ordinance that compelled speech in violation of the First and Fourteenth Amendments are severe. In the event of a lawsuit pursuant to 42 USC § 1983, even if no damages are found, the City could be liable for costs and attorneys' fees in addition to its own litigation costs.

Preemption by State and Federal Laws governing Practice of Medicine and Prescribing of Medications. Like the United States Constitution, the Texas Constitution, in Article I, Section 8, prohibits the passage of any law that limits "the liberty of speech." An ordinance compelling speech would infringe upon the rights of Texans to speak "their own opinions on any subject" in violation of that section. As the City is a political subdivision of the State of Texas, it is required to comply with state law, including the provisions of the Texas Constitution. To the extent that any compelled speech might be allowed in the regulation of a licensed profession, as it would be under the First and Fourteenth Amendments, such regulation is preempted by state law regulating the practice of medicine and pharmacy as discussed in the next paragraph.

While home-rule municipalities generally have discretion in adopting ordinances, municipalities do not have the authority to regulate a subject area that has been preempted by the State. *See Dall.*

Merch. 's & Concessionaires Ass'n. v. City of Dallas, 852 S.W.2d 489 (Tex. 1995). The Texas Occupations Code provides for the regulation of the practice of medicine and pharmacy. *See* Texas Occupations Code §151.003 (providing that the “primary means of licensing, regulating, and disciplining physicians” lies with the Texas Medical Board); and Texas Occupations Code §554.002 (providing that the Texas State Board of Pharmacy regulates the practice of pharmacy).

Additionally, hospitals and medical facilities are regulated by the Texas Health and Human Services Commission in accordance with the Texas Administrative Code and the Texas Health and Safety Code. Accordingly, regulation of medical professionals and facilities is preempted by state law. Because the City does not have the authority to regulate the practice of medicine or pharmacy, it cannot, in accordance with the *Casey* decision, compel medical professionals or facilities to provide any specified information. Additionally, the City cannot require a medical professional to prescribe specific medications to his or her patients, as such regulation related to the practice of medicine is left to the State alone.

A medical provider “shall recognize the limitations of their ability and shall not offer services outside the provider's scope of practice or use techniques that exceed their professional competence.” 25 Texas Admin. Code § 448.202. Accordingly, a physician cannot prescribe treatments for COVID-19 if treating this virus is not part of the scope of that physician’s practice. As the proposed ordinance does not limit which medical professionals are required to prescribe the medications, it violates state law by requiring all physicians to prescribe the early treatment protocols to COVID-19 patients even if such physicians do not routinely treat patients with viral infections as part of the scope of their practice. Additionally, the ordinance purports to require all medical professionals to prescribe medications even though many medical professionals (such as nurses, pharmacists, nurse assistants, etc.) lack such prescription authority pursuant to state law.

In a recent case, the 342nd District Court in Fort Worth ordered Texas Health Huguley Hospital to grant privileges to a doctor who had prescribed Ivermectin to a patient at the hospital for purposes of administering the medication. The hospital argued on appeal that the order violated state and federal law by requiring the hospital to allow a physician to provide services outside of the scope of her normal practice as an otolaryngologist. The hospital also argued order forced it to either commit contempt of court for not allowing the doctor privileges to administer the medication or violate state and federal law by granting her such privileges outside of its standard processes as required. The Second Court of Appeals in Fort Worth found that the trial court erred and vacated the order on November 18, 2021. This finding shows that even a State District Court, much less a municipality, does not have the power to order a physician or a hospital to provide a specified treatment to a patient against their accepted standards of practice.

In sum, the City has no authority under state or federal law to “require Corpus Christi hospitals, medical facilities, health care professionals and pharmacies to provide patients with information on COVID-19 early treatment protocols, and prescribe such medicines as Hydroxychloroquine, Ivermectin, Budesonide and other safe, FDA-approved drugs as suggested by such early treatment protocols.” The other three provisions requested in the proposed initiative have been included in the draft ordinance for City Council’s review on December 7, 2021.