IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLOIDA
Tampa Division

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, DAVID H. PICKUP, LMFT, individually and on behalf of his patients,	)	Civil Action No.:_____
Plaintiffs,	)	**INJUNCTIVE RELIEF SOUGHT**
v.	)	
CITY OF TAMPA, FLORIDA,	)	
Defendant	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 65 and M.D. Fla. L.R. 4.06, Plaintiffs, ROBERT L. VAZZO, LMFT, individually and on behalf of his clients ("Vazzo") and DAVID H. PICKUP, LMFT, individually and on behalf of his clients ("Pickup") (collectively "Plaintiffs"), by and through counsel, respectfully move this Court to enter a preliminary injunction enjoining Defendant, CITY OF TAMPA, FLORIDA ("City" or "Defendant"), together with its officers, agents, servants, employees, and others who are in active concert or participation with them, from enforcing CITY OF TAMPA ORDINANCE 2017-47 (the "Ordinance" or "Ordinance 2017-47") pending the outcome of this lawsuit.

MEMORANDUM OF LAW IN SUPPORT

Since time immemorial, the relationship between a client and licensed mental health professional has represented a sacred trust. In this vital relationship, mental health professionals are tasked with providing essential care to their clients and with forming critical therapeutic alliances. This therapeutic alliance is designed to facilitate the foundational principle of all mental

health counseling: the client's fundamental right to self-determination. Throughout the history of this learned profession, clients have provided mental health professionals with their goals, desires, and objectives that conform to their sincerely held religious beliefs, desires and concept of self, and mental health professionals have provided the counseling that aligns with the client's right to self-determination. That unique relationship has, until now, been protected, revered, and respected as sacrosanct and inviolable.

With Ordinance 2017-47, the City has now stormed the office doors of mental health professionals, thrust itself into the therapeutic alliance, violated the sacred trust between client and counselor, and run roughshod over the fundamental right of client self-determination and the counselor's cherished First Amendment liberties. The City's justification for such unconscionable actions: it does not like the goals, objectives, or desires of those clients who would seek to reduce their unwanted same-sex attractions, behaviors, or identity ("SSA"). The First Amendment demands more, and the City's actions have caused, are causing, and will continue to cause irreparable injury to Plaintiffs' fundamental and cherished liberties. A preliminary injunction should issue.

STATEMENT OF FACTS

A. ORDINANCE 2017-47.

On April 6, 2017, the City Council enacted Ordinance 2017-47, which was signed into law by Mayor Buckhorn on April 10, 2017, and took immediate effect upon the Mayor's signature. (Verified Complaint, "VC" ¶¶ 22-24). Section 5 of the Ordinance provides that "[i]t shall be unlawful for any Provider[1] to practice conversion therapy efforts on any individual who is a minor

[1] The Ordinance defines "Provider" as "any person who is licensed by the State of Florida to provide professional counseling," and includes licensed marriage and family therapists such Plaintiffs. (VC ¶ 27).

regardless of whether the Provider receives monetary compensation in exchange for such services." (*Id.* ¶ 25). Section 4 defines "conversion therapy efforts" ("SOCE counseling") as:

> any counseling, practice, or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex. 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 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 sexual orientation or gender identity.

(*Id.* ¶ 26).

All purported violations of this Ordinance constitute a separate offense and carry a $1,000.00 fine for the first offense, and $2,000.00 for each and every subsequent violation. (*Id.* ¶ 28). The State of Florida, which is the government body vested with exclusive jurisdiction to regulate licensed mental health professionals, has refused to prohibit SOCE counseling despite numerous attempts of political officials ideologically opposed to such counseling. (*Id.* ¶¶ 191-195). Despite not being prohibited by the State, Plaintiffs now risk losing their professional license for engaging in SOCE counseling in the City. Fla. Stat. Ann. § 491.009(1)(c); Fla. Admin. Code r. 64B4-5.001(c).

B. PLAINTIFF ROBERT L. VAZZO, LMFT.

Plaintiff, Robert L. Vazzo, LMFT, is a licensed marriage and family therapist and is licensed to practice mental health counseling in California, Florida, Nevada, and Ohio. (VC ¶ 64). In his current practice, Vazzo specializes in SOCE counseling, including the areas of unwanted same-sex attractions, pedophilia, hebephilia, ephebophilia, and transvestic fetishism. (*Id.* ¶ 66). His practice includes approximately 17-25 clients each week and ten percent of those clients are minors seeking SOCE counseling. (*Id.*). Many of Vazzo's clients who desire SOCE counseling

profess to be Christians with a sincerely held religious belief that homosexuality is harmful and destructive, and therefore seek SOCE counseling to live a lifestyle in congruence with their faith and to conform their identity, attractions, and behaviors to their sincerely held religious beliefs. (*Id.* ¶ 68). Vazzo has never received any complaint or report of harm from any of his clients seeking and receiving SOCE counseling, including the many minors that he has counseled. (*Id.* ¶ 69). In fact, all of Vazzo's clients who have engaged in SOCE counseling for at least one year have experienced some degree of positive change with respect to their unwanted SSA. (*Id.*).

Vazzo has had numerous clients in Florida, provides counseling to clients in Florida, and constantly receives inquiries from all over the State concerning SOCE counseling. (*Id.* ¶ 72). Vazzo has been contacted by individuals in the City who desire to engage in SOCE counseling with Vazzo, including a fifteen-year-old minor client seeking SOCE counseling from Vazzo. (*Id.* ¶¶ 73-74). Vazzo's client desires to receive SOCE counseling from a licensed professional counselor with expertise in this particular area. (*Id.*). Vazzo's client struggles with unwanted SSA and desires to engage in SOCE counseling with Vazzo to reduce or eliminate the client's unwanted SSA. (*Id.* ¶ 75). Vazzo is prohibited from providing SOCE counseling because of the Ordinance, and his client is prohibited from receiving such counseling from a licensed professional. (*Id.* ¶ 76).

C. PLAINTIFF DAVID H. PICKUP, LMFT.

Plaintiff, David H. Pickup, LMFT, is a licensed marriage and family therapist and is licensed to provide mental health counseling in California and Texas. (VC ¶ 77). Pickup is currently engaged in the process required for licensure as a marriage and family therapist in Florida. (*Id.* ¶ 78). Pickup specializes in providing heterosexual minors and adults with authentic Reparative Therapy, which includes the psychological industry standards of Psychodynamic,

Cognitive-Behavioral and EMDR methods to help them reduce or eliminate unwanted SSA. (*Id.* ¶ 79).

Pickup has particular expertise in SOCE counseling because of his personal experience and success with reparative therapy for unwanted SSA. (*Id.* ¶¶ 80-81). When he was 5 years old, he was sexually molested by a 16-year-old boy. (*Id.* ¶ 81). When he reached puberty and for many years after, he was sexually attracted to men. (*Id.*). For all of those years, he carried a feeling of immense and crushing shame for his same-sex attractions. (*Id.*). For 20 years following puberty, Pickup became clinically depressed twice, dealt with immense anxiety, experienced obsessive compulsive disorder, and knew that he was very confused about his sexual orientation and gender identity. (*Id.* ¶ 82). Pickup eventually found a course of counseling that was tremendously helpful to his mental health issues. (*Id.* ¶ 83). Pickup engaged in authentic Reparative Therapy with the late Dr. Joseph Nicolosi and participated in Dr. Nicolosi's counseling for many years, which he credits for saving his life. (*Id.* ¶ 83).

This counseling, a form of SOCE counseling, helped Pickup get rid of the shame that he had for experiencing unwanted SSA, and led to the dissipation of his SSA. (*Id.*). SOCE counseling helped Pickup solidify his gender identity, which resulted in a profound increase in his self-confidence as a man and in his self-esteem. (*Id.*). SOCE counseling allowed Pickup to understand the nature and source of his same-sex attractions, and allowed him to do the deep emotional work that he needed to do to understand those unwanted feelings. (*Id.* ¶ 84). As part of the counseling, Pickup learned the importance of healthy male relationships and his sexual attractions to women increased. (*Id.*). Pickup saw a real and profound change in his sexuality that resulted from the SOCE counseling, and he pursued training to offer others the chance to achieve the profound and live-saving assistance he found in such counseling. (*Id.* ¶ 85).

D. IRREPARABLE INJURY TO PLAINTIFFS VAZZO, PICKUP, AND CLIENTS.

Vazzo and Pickup have incurred monetary expense to lease office space in the City to offer and provide SOCE counseling to clients in the City, including minors. (VC ¶ 87). Consistent with his First Amendment rights, Vazzo desires to advertise, offer, and provide his counseling, including SOCE counseling, to clients and potential clients in the City, including minors. (*Id.* ¶¶ 88-90). When he finishes his licensing requirements, Pickup desires to advertise, offer, and provide his counseling, including SOCE counseling, to clients and potential clients in the City, including minors. (*Id.*). Vazzo and Pickup would like to be able to offer religious leaders, organizations, and ministries their expertise and experience in SOCE counseling. (*Id.* ¶ 91).

Both Vazzo and Pickup have received inquiries from various potential clients in the City, including minors, who desire to receive SOCE counseling. (*Id.* ¶ 92). Because of the Ordinance, Vazzo and Pickup are prohibited from advertising, offering, or providing SOCE counseling to clients and potential clients, including minors, in the City. (*Id.* ¶¶ 93-95). The Ordinance has thus violated Vazzo and Pickup's cherished First Amendment rights and significantly chilled their constitutionally protected expression. (*Id.* ¶¶ 97-100).

LEGAL ARGUMENT

Injunctive relief is appropriate where, as here, Plaintiffs show that (1) they have a substantial likelihood of success on the merits, (2) irreparable injury will result absent injunctive relief, (3) the balance of the equities tips in their favor, and (4) the injunction would serve the public interest. *See*, *e.g.*, *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). Plaintiffs easily meet these requirements, and the preliminary injunction should issue.

I. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Ordinance Unconstitutionally Discriminates On The Basis Of Viewpoint.

A viewpoint-based restriction on private speech has never been upheld by the Supreme Court or any court. Indeed, a finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667 (2011). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 106 (2001) ("The restriction must not discriminate against speech on the basis of viewpoint."). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. In fact, **viewpoint-based regulations are always unconstitutional**. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 394 (1993) ("'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'" (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984))); *McCullen v. Coakley*, 134 S. Ct. 2518, 2549 (2014) (Alito, J., concurring) ("if the law discriminates on the basis of viewpoint, it is unconstitutional"). *See also Searcy v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989) (the government "may not discriminate between speakers who will speak on the topic merely because it disagrees with their views").

The Ordinance is a textbook example of viewpoint discrimination. On its face, the Ordinance purports to allow licensed therapists to discuss the subject of sexual orientation, but explicitly prohibits only one particular viewpoint on that subject, namely that unwanted SSA can be reduced or eliminated to the benefit of the client. The Ordinance defines "conversion therapy" in such a way that it is clear that Defendant is targeting only one viewpoint, *i.e.*, SOCE that seeks

to "eliminate or reduce sexual or romantic attractions or feelings **toward individuals of the same gender or sex**." (VC, Ex A at 5, §4 (emphasis added)). Similarly, the Ordinance permits a counselor to accept and facilitate SSA, even if the minor client is merely questioning such feelings, but prohibits a counselor from counseling a minor client to change unwanted SSA. (*Id.*). Under no circumstances may the counselor counsel a minor client to change unwanted SSA.

The plain text of the Ordinance demonstrates that it only prohibits SOCE counseling for minor clients who wish to reduce or eliminate behaviors, identity, or expressions that differ from their biological sex. That this is true cannot be questioned because the Ordinance specifically exempts counseling that "provides support and assistance to a person undergoing gender transition." (VC, Ex. A at 5, § 4). To undergo "gender transition," one has to be – at minimum – seeking to change from one gender to the other. To transition is to change. So, under the Ordinance, if a minor client wants to undergo radical surgery to alter their appearance or genitalia, the City has no problem with a counselor providing counseling to assist in that change. But, if a minor client merely wants to speak with a counselor about unwanted feelings concerning their gender identity or expression, the counselor is absolutely prohibited from engaging in such counseling if it aids the minor in reducing unwanted other-sex identity, behaviors, or expressions. If this is not viewpoint discrimination, it would be difficult to imagine what could ever qualify.

The Supreme Court and several other courts have invalidated regulations of professional speech as unconstitutional viewpoint discrimination. *See Sorrell*, 131 S. Ct. 2653 (2011); *Legal Servs. Corp. v. Valazquez*, 531 U.S. 533 (2001); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). In these cases, the courts recognized the axiomatic truth that the government is not permitted to impose its viewpoint on speakers, even professional speakers subject to licensing requirements and regulation.

In *Velazquez*, the Court addressed a federal limitation on the legal profession which operated in materially the same viewpoint-based manner as does the Ordinance and prevented legal aid attorneys from receiving federal funds if they challenged welfare laws. *Velazquez*, 531 U.S. at 537-38. The effect of this funding condition was to "prohibit advice or argumentation that existing welfare laws are unconstitutional or unlawful," and thereby exclude certain "vital theories and ideas" from the lawyers' representation. *Id.* at 547-48. The Court invalidated the regulation on its face. *Id*. at 549.

In *Conant*, several physicians and their patients brought a First Amendment challenge to a federal policy that punished physicians for communicating with their patients about the benefits or options of marijuana as a potential treatment. *Conant*, 309 F.3d at 633. The Ninth Circuit began its analysis by recognizing that the doctor-patient relationship is entitled to robust First Amendment protection.

> An integral component of the practice of medicine is the communication between a doctor and a patient. **Physicians must be able to speak frankly and openly to patients**. That need has been recognized by courts through the application of the common law doctor-patient privilege.

Id. at 636 (emphasis added). Far from being a First Amendment orphan, the court noted that such professional speech "may be entitled to the strongest protection our Constitution has to offer." *Conant*, 309 F.3d at 637 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).

The court held that the ban impermissibly regulated physician speech based on viewpoint:

> The government's policy in this case seeks to punish physicians on the basis of the content of doctor-patient communications. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger the policy. Moreover, the **policy does not merely prohibit the discussion of marijuana; it condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient**. Such condemnation of particular views is especially troubling in the First Amendment context.

Id. at 637-38 (emphasis added). The court rejected as inadequate the government's justification that the policy prevented clients from engaging in harmful behavior, and permanently enjoined enforcement of the policy. *Id.* at 638-39.

The Ordinance operates almost identically to the federal policy enjoined in *Conant*. Just as the policy in *Conant* prohibited physicians from speaking about the benefits of marijuana to a suffering patient, so the Ordinance prohibits counselors from speaking about the benefits of SOCE with a client distressed about his SSA, as that would be perceived as an effort to change a person's sexual orientation. Both policies expressed governmental preference and favor for the message it approved over the private message of the healthcare provider with which it disagreed. Both should suffer the same constitutional demise.

B. The Ordinance Unconstitutionally Discriminates Against Content.

"Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (same). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both distinctions are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 135 S. Ct. at 2227. Put simply, the Supreme Court handed down a firm rule: **laws that are content based on their face must satisfy strict scrutiny**. *Id.*; *see also id.* at 2233 ("As the Court holds, what we have termed 'content-based' laws must satisfy strict scrutiny.") (Alito, J., concurring).

Importantly, this firm rule mandating strict scrutiny of facially content-based restrictions applies regardless of the government's alleged purpose in enacting the law. *Id.* "On its face, the [law] is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the [law] to determine whether it is subject to strict scrutiny." *Id.* In so holding, the High Court rejected the lower court's rationale that the alleged purpose behind enacting the content-based law can justify subjecting it to diminished constitutional protection. *Id.* "But this analysis skips the crucial first step . . . determining whether the law is content neutral on its face." *Id.* at 2228. The answer to that question, the Court said, is dispositive of the level of scrutiny applicable to the regulation of speech. *Id.*

Indeed, "**[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech**." *Id.* (emphasis added). Indeed, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 2229.

This rule also applies to content-based restrictions of the speech of licensed professionals.

> Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the regulation of professional conduct rendered the statute consistent with the First Amendment, observing that **it is no answer to say that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression**.

Id. (citing *NAACP v. Button*, 371 U.S. 415, 438-39 (1963)) (emphasis added). The en banc Eleventh Circuit, too, has unequivocally stated that the prohibition on content-based laws applies equally in the context of laws targeting the speech of licensed professionals. *Wollschlaeger v.*

Florida, 848 F.3d 1293, 1307 (11th Cir. 2017 (en banc) ("Speech is speech, and it must be analyzed as such for purposes of the First Amendment") (quoting *King v. Governor of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014)); *id.* at 1308 (rejecting Florida's contention that it can prohibit certain types of speech because it is merely a regulation of licensed professionals) ("Keeping in mind that no law abridging freedom of speech is ever promoted as a law abridging freedom of speech . . . we do not find the [state's] argument persuasive.").

Thus, content-based laws must satisfy strict scrutiny, even if targeted at licensed professionals. *Reed*, 135 S. Ct. at 2229. **There are no exceptions**. Indeed, the notion that a content-based restriction on speech is presumptively unconstitutional is "so engrained in our First Amendment jurisprudence that last term we found it so 'obvious' as to not require explanation." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991). "Regulations that permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Id.* at 116 (quoting *Reagan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)). Furthermore, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000). The burden is on the City to prove it satisfies strict scrutiny, but it cannot meet that burden here. *Id.* at 813.

1. There is No Compelling Government Interest for the Ordinance.

a. Previous cases provide no compelling interest.

The City purports to assert a compelling government interest in the fact that two federal courts have upheld similar prohibitions enacted by other states. (VC, Ex. A at 4 & n.15) (citing *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013); and *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014)). The City's reliance on such cases is utterly misplaced and cannot serve as a

basis to support the Ordinance. Indeed, the Eleventh Circuit has explicitly rejected the approach taken by those courts. *See Wollschlaeger*, 848 F.3d at 1309 ("**There are serious doubts about whether *Pickup* [*v. Brown*] was correctly decided**. As noted earlier, **characterizing speech as conduct is a dubious constitutional enterprise**." (emphasis added)). The Eleventh Circuit concluded that "we do not think it is appropriate to subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review," as the Ninth Circuit had done in *Pickup v. Brown*. *Id.* at 1311.

In *Wollschlaeger*, the en banc Eleventh Circuit invalidated portions of Florida's Firearm Owners' Privacy Act (FOPA), which prohibited physicians from "making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home." *Id*. at 1302-03. The Court found that the provisions regulated speech on the basis of content by restricting (and providing disciplinary sanctions for) speech by medical professionals on the subject of firearm ownership. *Id*. Specifically, the court noted that because the restrictions "apply only to the speech of doctors and medical professionals, and only on the topic of firearm ownership," they were "speaker-focused and content-based restrictions." *Id.* at 1307. The Eleventh Circuit found that the provisions could not even satisfy intermediate scrutiny, let alone the strict scrutiny required for presumptively unconstitutional content-based regulations. *Id*. This binding holding from the en banc Eleventh Circuit eviscerates the City's purported interest or justification for the Ordinance.

b. The City's paternalism provides no compelling interest.

The City also asserts that it has a compelling interest in preventing minors from receiving SOCE counseling because it could potentially be harmful to them. This assertion is not only based on intentional misrepresentations of various studies, *see infra* Section I.B.1.c., but is also

insufficient as a matter of settled law to serve as a compelling interest. In *Wollschlaeger*, the en banc Eleventh Circuit noted that laws targeting the content of certain doctor-patient or counselor-client communications cannot be justified by the "paternalistic assertion that the policy was valid because patients might otherwise make bad decisions" if left to determine the best course of counseling for themselves. *Wollschlaeger*, 848 F.3d at 1310. Indeed, just because the City "may generally believe that doctors and medical professionals should not ask about, nor express views hostile to, [a certain topic or course of counseling], it 'may not burden the speech of others in order to tilt the public debate in a preferred direction.'" *Id.* at 1313-14 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-79 (2011)). Where, as here, "[t]he record demonstrates that some patients do not object to questions and advice about [the prohibited content of speech], and some even express gratitude for their doctor's discussion of the topic," a law is unconstitutional if it "does not provide for such patients a means by which they can hear from their doctors on the topic." *Id.* at 1313.

Here, the City puts forward nothing more than paternalistic views that counselors should not engage in certain discussions with their clients on the subject of unwanted SSA, even when the minor client desires such counseling. (VC, Ex. A at 4-5 and 5, § 3) (asserting that the City's interest is in preventing minors from receiving the SOCE counseling the City finds inadvisable, even when the minor clients and their parents desire such counseling and have benefitted from it). While the City may prefer to tilt the debate in favor of those advocating against SOCE counseling, **it** "**does not have carte blanche to restrict the speech of doctors and medical professionals on a certain subject without satisfying the demands [of the First Amendment]**." *Wollschlaeger*, 848 F.3d at 1314 (emphasis added). The Ordinance is thus unconstitutional and unsupported by any compelling government interest.

c. The City's reliance on certain studies provides no compelling interest.

The City also relies on the 2009 American Psychological Association Task Force Report on Appropriate Therapeutic Response to Sexual Orientation ("APA Report") as justification for the Ordinance. (VC, Ex. A at 1-2). However, the APA Report does not support the City's conclusions. In fact, the APA Report specifically noted that the research is inadequate to draw **any** conclusions concerning SOCE counseling. Thus, despite the City's claims that SOCE counseling was found to be harmful to minors, the APA Report specifically noted that "sexual orientation issues in children are **virtually unexamined**." (VC at ¶ 31 and Ex. B at 91 (emphasis added)), and noted that "[t]here is a lack of published research on SOCE among children." (VC ¶ 32 and Ex. B at 72). The APA Report also concluded that "there is a dearth of scientifically sound research on the safety of SOCE. **Early and recent research studies provide no clear indication of the prevalence of harmful outcomes**." (*Id.* at 42) (emphasis added).

Because of the lack of scientifically valid research, the APA Report also noted that it could make no conclusions about SOCE counseling for those minors who request it. (VC ¶ 33 and Ex. B at 73) ("We found no empirical research on adolescents who request SOCE."). The APA Report also noted that its conclusions are not based on specific studies from individuals, including minors, who request SOCE counseling, and stated that its conclusions were thus necessarily limited. (VC ¶ 33 and Ex. B at 76). Moreover, contrary to the City's conclusions, **the APA Report noted that it found evidence of benefit to individuals seeking such counseling**. (VC ¶ 35). The APA Report specifically noted that "for some, sexual orientation identity [is] fluid or has an indefinite outcome" (*id.* ¶ 37), and that "[s]ome individuals report that they went on to lead outwardly heterosexual lives, developing a sexual relationship with an other-sex partner, and adopting a heterosexual identity." (*Id.* ¶ 38). The City's conclusions concerning harm are not supported.

2. The Ordinance is Not Narrowly Tailored.

Even if the City could articulate a compelling interest for the Ordinance's total prohibition on SOCE counseling, which it cannot, the Ordinance would still fail strict scrutiny because it is not narrowly tailored. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). There must be a 'fit between the . . . ends and the means chosen to accomplish those ends.'" *Wollschlaeger*, 848 F.3d at 1312 (quoting *Sorrell*, 564 U.S. at 572). "[G]overnment may regulate the area of First Amendment freedoms only with narrow specificity." *Id.* at 1320 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

Even if the State could ban an entire mode of therapy—such as SOCE counseling—it could not do so simply to suppress a particular idea. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate a ['mode of speech'] based on hostility—or favoritism—towards the underlying message expressed."). As shown above, the Ordinance was based on a political preference to ban such counseling, not on scientific evidence of harm. There are other less restrictive and content-neutral alternatives. *See id.* at 395 ("The existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of such a statute, casting considerable doubt on the government's protestations that the 'asserted justification is in fact an accurate description of the purpose and effect of the law.'" (citations omitted)).

The Ordinance is not necessary to prevent harm because existing Florida law and all of the ethical codes of the professions engaging in this form of counseling already prohibit practices that actually harm patients. Licensed marriage and family therapists are already prohibited by law from "[m]aking misleading, deceptive, untrue, or fraudulent representations in the practice of any profession licensed, registered, or certified" by Florida's Marriage and Family Therapy Board. *See*

Fla. Stat. Ann. § 491.009(1)(l). They are prohibited by law from engaging in any practice that is harmful to clients or patients, such as "[f]ailing to meet minimum standards of performance in professional activities when measured against generally prevailing peer performance." Fla. Stat. Ann. 491.009(1)(r).

Existing Florida law regulating professional counselors also imposes upon them a legal obligation to abide by the other ethical requirements of their profession. *See* Fla. Stat. Ann. § 491.001(1)(t). These ethical obligations include ethical codes promulgated by the American Association of Marriage and Family Therapists and its ethics code ("AAMFT Code"). Standard 1 of the AAMFT Code mandates that counselors not harm their clients or engage in practices that might do so. (VC ¶ 58). Standard 1.1 of the AAMFT Code prohibits licensed marriage and family therapists, such as Vazzo and Pickup, from discriminating against clients based on their sexual orientation or gender identity (*Id.* ¶ 59). If violated, these provisions come with legal sanction under existing Florida law. *See* Fla. Admin. Code § 64B5-5.001. Thus, the City's assertion that no other alternatives could prevent the alleged harm (VC Ex. A at 4), is demonstrably fallacious.

The Ordinance is not designed to protect minors from the alleged harms of SOCE counseling. It is a politically motivated attempt to harm one group of professionals who hold a particular viewpoint regarding counseling, particularly SOCE counseling, and an effort to prohibit those counselors from providing any information or counseling on the fact that SOCE can and does help people reduce or eliminate their unwanted SSA. The fact that children are already protected from harmful and dangerous therapies (*see* VC ¶¶ 51-63) reveals that the City's underlying goal is not about protecting minors. Minors are already protected by these ethical rules, so there is no need for unconstitutional suppression of viewpoint and content. Under *R.A.V.*, the

Ordinance is not narrowly tailored as a matter of settled law because the City had content-neutral alternative means of preventing the alleged harm. *R.A.V.*, 505 U.S. at 395.

Separate and apart from existing laws and ethical codes, informed consent would also be a less restrictive means to achieve the City's purported interest. When legislation virtually identical to the Ordinance was being debated in California, several mental health organizations recognized that this type of "legislation is attempting to undertake an unprecedented restriction on psychotherapy." (*See* VC Ex. E at 1). These mental health organizations proposed informed consent language that would have been much more narrowly tailored than the unprecedented intrusion into the relationship between counselor and client, but it was rejected. (*Id.*). A complete ban on SOCE counseling or a viewpoint regarding SSA is not the least restrictive means to achieve any governmental interest. Total prohibitions on constitutionally protected speech are "hardly an exercise of narrow tailoring." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). Such extreme measures are invalid and should be enjoined.

C. The Ordinance Is Unconstitutionally Vague.

A law is unconstitutionally vague and overbroad if it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). The State's policies "must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to take." *Id.* at 393. "Precision of regulation" is the touchstone of the First Amendment. *NAACP v. Button*, 371 U.S. 415, 435 (1963). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). While all regulations must be reasonably clear, "laws which threaten to inhibit the exercise of constitutionally protected"

expression must satisfy "a more stringent vagueness test." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Thus, a law must give "adequate warning of what activities it proscribes" and must "set out explicit standards for those who apply it." *See Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (citing *Grayned*, 408 U.S. at 108). The Ordinance fulfills neither requirement, and thus forces both those enforcing the Ordinance and mental health professionals to guess at its meaning and differ as to its application both when diagnosing and when engaging in a form of counseling with a minor client.

The Ordinance leaves licensed professionals without answers concerning numerous questions: Does a counselor violate the Ordinance when the counselor simply raises the existence of SOCE with a minor client distressed about his SSA? Does recommending a book that discusses change of SSA or provides stories of people who did change their SSA violate the law? Does referring minor clients to an unlicensed counselor for SOCE while maintaining oversight of the client violate the Ordinance? Do professional counselors unwilling to counsel in a manner affirming homosexual practices have to effectively close their mouths at the mere mention that a minor patient might have experienced some form of unwanted SSA? The Ordinance leaves licensed counselors uncertain whether a particular practice or even a particular statement with a minor client will cost them thousands of dollars in fines and loss of their license. The First Amendment demands more.

D. The Ordinance Is Unconstitutionally Overbroad.

The Ordinance is overbroad because it completely bans under any circumstances counsel to any minor that seeks to change or reduce SSA, even when the minor and the parents seek and consent to such counsel. Instead of using a scalpel, the State took a chain saw to the First Amendment. "Because First Amendment freedoms need breathing space to survive, government

may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Laws as broad as the Ordinance are constitutionally suspect, because the courts "cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." *Id.* at 438. The Ordinance prohibits licensed counselors under any circumstances from engaging in "any efforts" to reduce or eliminate SSA in minors. The breadth of this prohibition is astounding, and renders the Ordinance unconstitutionally overbroad. Indeed,

> it is no answer to the constitutional claims asserted by petitioner to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. **For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights**.

Id. at 438-39 (emphasis added). The Ordinance bans Plaintiffs from providing counsel to their clients who knowingly, with informed consent, seek counsel to change SSA. This ban is "an unprecedented restriction of psychotherapy." (VC Ex E at 1). It chills more speech than is permissible and is thus unconstitutionally overbroad.

E. The Ordinance Is An Unconstitutional Prior Restraint.

Prior restraints against constitutionally protected expression are highly suspect and disfavored. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). In fact, "any system of prior restraints comes to this Court bearing the heavy presumption against its constitutional validity." *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

"[T]he Supreme Court and [the Eleventh Circuit] consistently have permitted facial challenges to prior restraints without requiring a plaintiff to show that there are no conceivable set of facts where the application of the particular government regulation might or would be constitutional." *United States v. Frandsen*, 212 F.3d 1231, 1236 (11th Cir. 2000). *See also, Horton v. City of St. Augustine*, 272 F.3d 1318, 1331-32 (11th Cir. 2001) ("the Supreme Court itself in

Salerno acknowledged [that prior restraints are the] exception to the 'unconstitutional-in-every-conceivable-application' rule") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

Total prohibitions on speech are prior restraints. *See, e.g.*, *Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360, 1364 (M.D. Fla. 2000) ("This Court also finds that . . . moratoria are governed by prior restraint analysis in the same manners as permitting schemes."); *D'Ambra v. City of Providence*, 21 F. Supp. 2d 106, 113-14 (D.R.I. 1998) (moratorium on protected expression that includes no indication of ending is a complete prohibition and invalid prior restraint); *ASF, Inc. v. City of Seattle*, 408 F. Supp. 2d 1102, 1108 (W.D. Wash. 2005) (total prohibitions on protected expression fail prior restraint analysis).

Here, as in *ASF*, the City "goes a step further in suppressing protected speech and prohibiting [SOCE counseling]." *Id.* The Ordinance states that SOCE counseling is prohibited in the City with regard to minors. There are no exceptions to such, and it forever forbids counselors from offering and minors from receiving such counseling. As this Court held in *Howard*, such bans are subject to prior restraint analysis. *Howard*, 109 F. Supp. 2d at 1364. The Ordinance cannot survive scrutiny.

F. The City's Adoption Of The Ordinance Was *Ultra Vires* And *Void Ab Initio.*

A local government enactment will be considered inconsistent with state law if (1) the Legislature "has preempted a particular subject area" or (2) the local enactment conflicts with a state statute." *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010). The Ordinance meets both criteria. The State has impliedly preempted the field of regulation of mental health professionals through enactment of a comprehensive licensing and disciplinary scheme in the Florida Statutes, Title XXXII, Chapter 491. Furthermore, the Ordinance

conflicts with Florida law by purporting to make illegal a form of counseling which the Florida legislature permits.

Preemption is implied when "the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme." *Sarasota*, 28 So.3d at 886. When determining if implied preemption applies, the court must look at the provisions of the policy as a whole, the nature of power exercised by the legislature, the object sought to be attained by the statute, and the character of the obligations imposed by the statute. *Classy Cycles, Inc. v. Bay Cnty.*, 201 So.3d 779, 784 (Fla. 2016). In *Classy Cycles*, an operator of a local motor vehicle business sought a declaratory judgement that local ordinances relating to insurance requirements for certain motor vehicles exceeded the scope of authority of local government. *Id.* at 781. The court held that the local ordinances were unconstitutional because the insurance requirements had been impliedly preempted by the State. *Id.* at 788-90. The court reasoned that the State had created a pervasive and extensive scheme of regulation and that the local ordinances were "attempt[s] to regulate in an area well-covered by existing statutes." *Id.* at 788. Where, as here, the State has not specifically granted any authority to local officials to be involved with certain regulation, the State's extensive law in that particular area demonstrates implied preemption. *Id.*

The same is true of the Ordinance here, as Florida has enacted a pervasive scheme for regulating mental health professionals. (VC ¶¶ 191-195). Moreover, the Florida legislature has specifically considered – **and rejected** – a proposed statewide ban on SOCE, leaving no doubt that Florida does not approve or authorize the ban imposed by the City. (VC ¶ 195). Further still, Florida law expressly authorizes medical practitioners to provide, and guarantees patients the right

to receive, "complementary or alternative health care treatments," meaning treatment that is alternative to "prevailing or conventional treatment methods." (VC ¶¶ 201-205).

The Ordinance therefore conflicts with Florida law, including Section 491.009 and Rule 64B4-5.001, in purporting to impose additional fees and penalties and, more importantly, attempting to expand upon conduct that would subject a provider to discipline. The Ordinance purports to make illegal in Tampa a form of therapy that is legal elsewhere in Florida. (VC ¶¶ 195-196). The Ordinance is void as an *ultra vires* act in violation of Defendant's authority under the Constitution of the State of Florida.

II. PLAINTIFFS HAVE SUFFERED, ARE SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF.

Plaintiffs have suffered, are suffering, and will continue to suffer immediate and irreparable injury absent injunctive relief. Indeed, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006) (same); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) (same). The Eleventh Circuit has held that ongoing First Amendment violations constitute irreparable harm:

> The only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is the area of [F]irst [A]mendment …. The rationale behind these decisions was that chilled free speech …, because of [its] intangible nature could not be compensated for by money damages; in other words, plaintiffs could not be made whole.

Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (citations omitted).

The Ordinance is prohibiting Plaintiffs from engaging in certain discussions with their clients, and it does so in a flagrantly unconstitutional manner. The Ordinance prohibits only one viewpoint on an otherwise permissible topic. The Ordinance silences licensed counselors who wish

to engage in a course of counseling with consenting minor clients which aligns with the clients' sincerely held religious beliefs. Such a prohibition constitutes a deprivation of First Amendment rights and imposes immediate and irreparable harm on Plaintiffs and their clients.

Plaintiffs are being denied the ability to speak to their minor clients about available counseling which can assist them in reducing or eliminating unwanted SSA. If they violate the Ordinance's prohibitions, then Plaintiffs are subject to fines and the loss of their professional licenses. (VC ¶ 56). If they follow the Ordinance's requirements, then Plaintiffs will be subject to sanctions for violating other provisions of their ethical codes mandating that the clients have the right to self-determination and that the counselor should not impose an ideology on the clients. (*Id.* ¶¶ 57-60). The imposition of punishment for discussing a course of counseling desired by the clients is certainly a deprivation of constitutional rights, and constitutes *a priori* irreparable harm.

III. THE BALANCE OF THE EQUITIES FAVORS INJUNCTIVE RELIEF.

An injunction will protect the very rights the Supreme Court has characterized as "lying at the foundation of a free government of free men." *Schneider v. New Jersey,* 308 U.S. 147, 151 (1939). The granting of a preliminary injunction that enjoins enforcement of the Ordinance will not impose any harm on the City. As noted above, "even a temporary infringement of First Amendment rights constitutes a serious and substantial injury." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 72 (11th Cir. 2006). Thus, there is no question that Plaintiffs and their clients will suffer intolerable and irreparable injury to their cherished constitutional liberties, an injury which can never be redressed. Conversely, "there can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Washington Park,* 378 F.3d 613, 620 (7th Cir. 2004). That is because the government "has no legitimate interest in enforcing an unconstitutional [law]." *KH Outdoor,* 458 F.3d at 1272. As such, there can be no

comparison between the irreparable and unconscionable loss of First Amendment freedoms suffered by Plaintiffs and their clients absent injunctive relief and the non-existent interest the City has in enforcing unconstitutional ordinances. The balance of the equities tips decidedly in Plaintiffs' favor, and the preliminary injunction should issue.

IV. INJUNCTIVE RELIEF SERVES THE PUBLIC INTEREST.

The protection of First Amendment rights is of the highest public interest. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). This protection is *ipso facto* in the interest of the general public because "First Amendment rights are not private rights [but] rights of the general public [for] the benefit of all of us." *Machesky v. Bizzell*, 414 F.2d 283, 288-90 (5th Cir. 1969) (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). Indeed, "[i]njunctions protecting First Amendment freedoms are **always in the public interest**," *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (emphasis added), because "the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *Id.* Indeed, because there is no interest in enforcing unconstitutional laws, "'it is always in the public interest to protect First Amendment liberties.'" *KH Outdoor*, 458 F.3d at 1272 (quoting *Joelner v. Vill. Of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004)).

CONCLUSION

For the foregoing reasons, the preliminary injunction should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Preliminary Injunction and Memorandum in Support will be served on the Defendant City of Tampa via process server, along with the Complaint. An affidavit of service will be filed once service of process is effectuated.

Horatio G. Mihet
Attorney for Plaintiffs