UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, and DAVID H. PICKUP, LMFT, individually and on behalf of his patients, Plaintiffs, v. CITY OF TAMPA, FLORIDA, Defendant, v. EQUALITY FLORIDA, Intervenor-Defendant (Motion Pending)	No. 8:17-cv-02896-CEH-AAS

PROPOSED INTERVENOR-DEFENDANT EQUALITY FLORIDA'S
AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

The City Council of Tampa, Florida, passed Ordinance No. 2017-47 ("the Ordinance") unanimously on April 6, 2017. It prohibits licensed mental health providers from engaging in practices seeking to change the sexual orientation or gender identity of their minor patients within Tampa city limits. The City made a legislative determination that such practices, commonly referred to as "conversion therapy," pose a critical health risk to LGBTQ minors. This determination was supported by "overwhelming research" and the consensus of leading health organizations. Ordinance, *supra*, at 4.

Eight months later, Plaintiffs sued and moved for a preliminary injunction, asserting that the Ordinance violates their rights under Florida law and the United States Constitution.

Plaintiffs' constitutional claims have been squarely rejected by two federal circuit courts hearing challenges to state laws virtually identical to the Ordinance. In *Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2014), the Ninth Circuit held that California's law regulated professional conduct and, as such, did not raise First Amendment concerns. *Id*. at 1229. The court upheld the law as fully warranted by the strong professional consensus that conversion therapy is harmful to minors. *Id*. ("Pursuant to its police power, California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful.").[1]

Likewise, in *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3rd Cir. 2014), the Third Circuit upheld New Jersey's conversion therapy law. The court subjected New Jersey's law to intermediate scrutiny, which the court concluded it readily survived in light of the overwhelming professional consensus rejecting conversion therapy as unethical, ineffective, and unsafe. *Id*. at 237–240.

[1] Throughout this memorandum, internal citations, quotation marks, and alterations are omitted, and emphasis is added unless otherwise indicated.

The only Eleventh Circuit case to address a similar regulation, *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011), held that requiring a counseling student at a state university to comply with professional standards that prohibit the use of conversion therapy does not violate the First Amendment. The decision in *Keeton* is completely consistent with *Pickup* and *King* and fully supports enforcement of the Ordinance here.

Wollschlaeger v. Governor, 848 F.3d 1293 (11th Cir. 2017), which struck down a law that barred physicians from asking patients about gun ownership, is not to the contrary. In *Wollschlaeger*, the court recognized that there is a crucial difference between a professional regulation that incidentally burdens some protected speech, like the statutes in *Pickup* and *King*, and a regulation that directly restricts the information and advice that professionals may give to their clients, like the statute prohibiting doctors from asking their patients about gun ownership or discussing its dangers. *Id.* at 1309. The court held that the statute could not survive intermediate scrutiny, especially in light of the almost complete absence of any evidence demonstrating that Florida gun owners required such protection. *Id.* at 1312.

Unlike the law in *Wollschlaeger,* the Ordinance does not prohibit professional speech. The Ordinance regulates the provision of conversion therapy to minors. Its sole purpose is to protect minor patients from a harmful practice, and it specifies that therapists are free to "express[] their views to patients [and] recommend[] [conversion therapy] to patients." Ordinance, *supra*, at 4.

Like the government action in *Keeton*, the Ordinance has only an incidental impact on speech and does not prevent therapists from expressing their opinions. It is a valid exercise of the City's power to protect its residents from harm.

ARGUMENT

I. THE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT'S SPEECH CLAUSE

Under Eleventh Circuit precedent, the Ordinance should be assessed under rational basis review, like other regulations of professional activity that incidentally limit some speech while protecting the public from harmful professional practices. But even under the intermediate scrutiny applied to laws that directly regulate professional speech, the Ordinance easily passes muster. Neither the Supreme Court nor any federal court of appeal has ever applied strict scrutiny to such laws. Nonetheless, the harms caused by these therapy practices for minors are so great, and the Ordinance is so narrowly tailored to address them, that it would survive strict scrutiny.

A. The City Has Legislative Authority To Regulate Medical Practitioners In Order To Protect the Health and Well-being of Its Residents

Under well-settled law, the City has the legislative authority to protect the health of its residents by regulating the dangerous practice of conversion therapy**.** Indeed, "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985). As the Supreme Court has explained, "[t]he promotion of safety of persons . . . is unquestionably at the core of the State's police power," which extends to "state and local governments." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

Those police powers provide wide latitude to require health care professionals to adhere to medical standards, and those regulations are generally permissible so long as they are reasonable. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (holding that states may act to safeguard "the integrity and ethics of the medical profession" and to protect "vulnerable groups . . . from abuse, neglect, and mistakes" at the hands of medical practitioners);

Keeton, 664 F.3d at 877 (holding that a state university counseling program may require counseling students to adhere to professional standards recognizing that conversion therapy is harmful and prohibiting counselors from imposing their personal religious views on clients). The Ordinance is just such a reasonable professional regulation.

The corollary of this principle is that patients do not have a constitutionally protected right to medically unsound treatment offered as a commercial service, and state-licensed therapists do not have a right to offer practices that are ineffective and unsafe. *See, e.g.*, *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider."); *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (holding that there is no privacy right for terminally ill patients to access treatments whose safety had not yet been tested). As the D.C. Circuit has noted, "[n]o circuit court has acceded to an affirmative access claim." *Id.* at 710 n.18.

B. The Ordinance Is Permissible Under the First Amendment As A Reasonable Regulation of Professional Conduct That At Most Only Incidentally Restricts Some Speech

Laws enacted pursuant to a state or locality's police power are generally entitled to "a presumption of legislative validity." *Kelley*, 425 U.S. at 247. Moreover, as the Eleventh Circuit has repeatedly recognized, regulations that protect the public from harmful or unethical professional practices are generally subject only to rational basis review even when they incidentally restrict some speech.

"A statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the

incidental effect of observing an otherwise legitimate regulation." *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011). Under *Locke*, when a professional regulation "governs "occupational conduct, and not a substantial amount of protected speech," it is not subject to heightened scrutiny under the First Amendment. *Id.*; *accord Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1430 (11th Cir. 1998). In contrast, a regulation that directly restricts the opinions or information professionals may communicate to their clients or to the public is generally subject to intermediate scrutiny under the First Amendment. *Locke*, 634 F.3d at 1191; *see also King*, 767 F.3d at 230.

In *Wollschlaeger*, the Eleventh Circuit adhered to this distinction between regulations that incidentally restrict professional speech and those that restrict such speech directly. 848 F.3d at 1309. The court cited the California law barring conversion therapy for minors as an example of the former: "Importantly, . . . the law in *Pickup*—like the law in *Locke*—did not restrict what the practitioner could say or recommend to a patient or client." *Id.* The court expressly likened the statute in *Pickup* to the licensing requirement in *Locke*, which it had upheld as a permissible professional conduct regulation under rational basis review. *Id.*

By contrast, the law in *Wollschlaeger* expressly prohibited physicians from inquiring about or keeping records of patient firearm ownership or harassing them because of such ownership. *Id.* at 1307. Because it directly prevented doctors from asking certain questions or sharing certain information with their patients, it was subject to heightened scrutiny. *Id.* at 1311–12.

Under that legal analysis, the Ordinance here, which is virtually identical to California's law, is similarly constitutional. The Ordinance regulates the provision of conversion therapy to minors. Its sole purpose is to protect minor patients from a harmful practice, not to prohibit

particular inquiries, record keeping, or any other expression. To eliminate any doubt on that score, the Ordinance specifies that therapists are free to "express[] their views to patients [and] recommend[] [conversion therapy] to patients." Ordinance, *supra*, at 4. Because the Ordinance has at most only an incidental impact on professional speech, it is subject to ordinary rational basis review.

In *Dana's Railroad Supply v. Attorney General*, 807 F.3d 1235 (11th Cir. 2015), the Eleventh Circuit similarly affirmed that professional or commercial regulations that have only an incidental impact on speech are assessed under rational basis review. The court applied heightened scrutiny to the unusual commercial regulation in that case, but it did so expressly because the law directly regulated *only* speech, not conduct; it prevented merchants from using a particular word, but did not require them to change their behavior in any way. *See id.* at 1251 ("We rule today only on a law that, though it purports to regulate commercial behavior, has the sole effect of banning merchants from uttering the word *surcharge*[.]").

The court stressed that its analysis of this unusual law should not be misconstrued as suggesting that ordinary commercial regulations that incidentally restrict some protected speech are subject to heightened scrutiny. "Laws that target real-world commercial activity need not fear First Amendment scrutiny. Such run-of-the-mill economic regulations will continue to be assessed under rational-basis review." *Id.* Here, the Ordinance targets real-world professional activity and seeks to protect youth from very real-world harms. Consequently, it should be assessed under rational basis review.

The Supreme Court also recently affirmed the critical distinction between (1) professional regulations that have only an incidental impact on speech and (2) laws that directly regulate professional speech. In *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144

(2017), the Court explained that a "typical price regulation" does not trigger any heightened First Amendment scrutiny, even though it "would indirectly dictate the content of [some] speech" by requiring business owners to communicate the price through "written or oral communications." *Id.* at 1150–51. Instead, such a "law's effect on speech would be only incidental to its primary effect on conduct, and 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was . . . carried out by means of language, either spoken, written, or printed.'" *Id.* at 1151 (citing *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006)).

In contrast to typical commercial price regulations, the regulation in *Expressions Hair Design* did not regulate prices, but rather controlled "how sellers may communicate their prices," which was a direct regulation of speech, subject to heightened scrutiny. 137 S. Ct. at 1151. *Id.* Here, the Ordinance simply prevents mental health practitioners from subjecting minor patients to a specific discredited treatment. Its effect on speech is "incidental to its primary effect on conduct." *Id.* As such, it is subject only to ordinary rational basis review, which it plainly survives.

C. The Ordinance Also Satisfies Intermediate Scrutiny

As the Third Circuit correctly held in *King*, a law barring conversion therapy for minors easily satisfies intermediate scrutiny, which requires only that it "directly advance a substantial government interest" and be "drawn to achieve that interest." *Wollschlaeger*, 848 F.3d at 1311–12. The government is not required to employ the least restrictive means; the fit need only be reasonable, not perfect. *Id.* at 1312.

1. Tampa Has A Compelling Interest In Protecting Youth From Harm

The City's interest in "protecting the physical and psychological well-being of minors," Ordinance, *supra*, at 4, is not only substantial, but compelling. Governments have a compelling interest in the health and well-being of their citizens. *Goldfarb v. Va. State Bar*, 421 U.S. at 792; *Watson v. Maryland*, 218 U.S. at 176. That interest is at its height when the government seeks to protect minors, who often lack the capacity and resources to protect their own interests, and who are "especially vulnerable to [the] practices" barred by the Ordinance. *King*, 767 F.3d at 238.

To survive intermediate scrutiny, the professional regulation must be aimed at a harm that is real and not just conjectural. *Wollschlaeger*, 848 F.3d at 1316; *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). The court does not review the legislature's empirical judgment *de novo*; rather, the court's task is to determine whether the legislature has "drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997). The Ordinance easily meets this test.

This record shows the City relied on "overwhelming research" in determining that conversion therapy poses real dangers to its youth. Ordinance, *supra*, at 4. The detailed legislative findings summarize that research and the conclusions of well-known, reputable professional and scientific organizations—including the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, and the U.S. Department of Health and Human Services—all of which support the City's determination that conversion therapy counseling is ineffective and poses critical health risks. *Id.* The potential harms to children and adolescents are particularly serious, including that conversion therapy is typically experienced by them as rejection, which is highly correlated with depression, anxiety,

suicidality, substance abuse, and unsafe health behaviors. *See* Substance Abuse & Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 20–20 (2015) (hereinafter "SAMHSA Report").

As the Third Circuit correctly recognized in *King*:

> Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject. Such evidence is a far cry from the "mere speculation or conjecture" our cases have held to be insufficient.

767 F.3d at 239.

Plaintiffs' only response to this voluminous evidentiary record is to quibble with some of the wording of a single report issued by the American Psychological Association (APA) in 2009. Dkt. 3 at 15 (citing Am. Psychological Ass'n, *Appropriate Therapeutic Responses to Sexual Orientation* 91 (2009) (hereinafter "APA Report")). Read as a whole, the conclusions of the APA Report that conversion therapy is ineffective and unsafe, particularly for minors, are clear.

Moreover, subsequent research and clinical experience have corroborated these risks, particularly for youth. As noted in the City's legislative findings, in 2015, the U.S. Substance Abuse and Mental Health Services Administration published a report summarizing this evidence and rejecting conversion therapy in children and adolescents. Ordinance, *supra*, at 3 (citing SAMHSA Report, *supra*, at 1).

Plaintiffs complain that the research showing the harms of conversion therapy is not absolutely conclusive. But the First Amendment does not require the government to delay action to protect citizens from serious threats of harm until it possesses conclusive scientific proof. *King*, 767 F. 3d at 239. *Wollschlaeger* provides a good example of the conjectural, unsupported restrictions that intermediate scrutiny is designed to prevent, where six anecdotes were

insufficient to demonstrate a sufficient need to protect firearm-owning patients from their doctors. 848 F.3d at 1312–13.

By contrast, the evidence undergirding the Ordinance is not merely anecdotal. Indeed, it far exceeds the single report relied upon by the Florida Bar in restricting direct-mail solicitation for lawyers, a restriction upheld under immediate scrutiny. *See Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 626–27 (1995).

2. The Ordinance Is Narrowly Tailored To Advance That Interest

The Ordinance is narrowly tailored to advance the City's compelling interest in protecting its youth from the risks posed by conversion therapy. By its plain terms, the Ordinance only prevents Plaintiffs from doing one specific thing: "practic[ing] conversion therapy efforts on any individual who is a minor." Tampa, Fla., Code of Ordinances § 14-312; *see also Pickup*, 740 F.3d at 1230.

The Ordinance does not prohibit Plaintiffs from practicing conversion therapy efforts on adults. Ordinance, *supra*, at 4. It does not prohibit Plaintiffs from speaking to the public in favor of conversion therapy, recommending conversion therapy to their patients, or referring minors to unlicensed counselors. *Id.* The scope of the Ordinance is narrowly tailored to effectuate the City's interest in protecting youth from an ineffective and potentially harmful practice and restricts no more speech than necessary to serve that interest. *See King*, 767 F.3d at 240; *Pickup*, 740 F.3d at 1223.

Plaintiffs' sole alternative suggestion—informed consent—is inadequate to accomplish that. As the Third Circuit recognized in *King*, "hostile social and family attitudes" may pressure vulnerable minors into signing informed consent forms despite their best interests. 767 F.3d at 240 (quoting APA Report, *supra*, at 17).

Plaintiffs' claim that existing ethical standards for these professionals render the Ordinance unnecessary also has no merit. The very fact that Plaintiffs still maintain that they are entitled to subject minors to conversion therapy demonstrates the compelling need for a specific prohibition.

D. Plaintiffs' Claim That The Ordinance Warrants Strict Scrutiny Has No Merit

Plaintiffs' argument that the Ordinance warrants strict scrutiny disregards the established legal framework for analyzing a government's exercise of its police power to protect the public form harmful professional conduct. No court has ever applied strict scrutiny to such a law, and this Court should not do so here. Nonetheless, the City's determination that conversion therapy poses a serious risk to minors is so well-supported, and the Ordinance is so narrowly tailored, the Ordinance would satisfy strict scrutiny.

1. Plaintiffs Misunderstand Viewpoint Discrimination

Plaintiffs argue that the Ordinance is subject to strict scrutiny under the First Amendment because it supposedly restricts the "viewpoint" of therapists who wish to practice conversion therapy on minors. But as the Eleventh Circuit has already recognized, requiring adherence to professional standards prohibiting conversion therapy does not constitute viewpoint discrimination. *Keeton*, 664 F.3d at 874–75. In *Keeton*, a counseling student alleged that a state university had engaged in impermissible viewpoint discrimination by disciplining her for seeking to treat clients, in violation of the American Counseling Association's (ACA) Code of Ethics, based on her personal view that conversion therapy can change a person's sexual orientation. The Eleventh Circuit rejected that claim:

> All students are taught the ACA's fundamental principles, including that counselors must support their clients' welfare, promote their growth, respect their dignity, support their autonomy, and help them pursue their own goals for counseling. Further, [the school's] curriculum requires that all students be

> competent to work with all populations, and that all students not impose their personal religious values on their clients, whether, for instance, they believe that persons ought to be Christians rather than Muslims, Jews or atheists, or that homosexuality is moral or immoral. As such, [the school's] curriculum and the generally applicable rules of ethical conduct of the profession are not designed to suppress ideas or viewpoints but apply to all regardless of the particular viewpoint the counselor may possess.

Id. at 874.

The Court explained that "Keeton remains free to express disagreement with ASU's curriculum and the ethical requirements of the ACA, but she cannot block the school's attempts to ensure that she abides by them if she wishes to participate in the clinical practicum, which involves one-on-one counseling, and graduate from the program." *Id.*

That analysis applies equally to the Ordinance here. The Ordinance is not designed to suppress any ideas or viewpoints, but rather applies to all licensed mental health professionals regardless of their particular viewpoints. Similarly, Plaintiffs remain free to express disagreement with the Ordinance and the professional standards that it enforces, but they cannot block the City's enforcement of those professional standards to protect Tampa youth.

Moreover, as the Third Circuit explained in *King*, doctors implicitly communicate a viewpoint any time they prescribe or apply a particular treatment for a patient. 767 F.3d at 237. If Plaintiffs' novel free speech arguments were correct, then any regulation of medical practice would be subject to strict scrutiny. *Id.* "Such a rule would unduly undermine the State's authority to regulate the practice of licensed professions." *Id.*; *see also Pickup*, 740 F.3d at 1229 (same). This Court should similarly reject Plaintiff's argument.

Plaintiffs also erroneously claim that *Wollschlaeger* "rejected the approach taken by" *Pickup* and *King*. Dkt. 3 at 13. Plaintiffs place undue weight on a few sentences of dicta in the *Wollschlaeger* opinion expressing "serious doubts about whether *Pickup* was correctly decided."

848 F.3d at 1309. Read in context, it is plain the court was troubled only by the *Pickup* court's conclusion that the statute did not affect any protected speech *at all*, "even though it covered the verbal aspects of [conversion] therapy." *Id*. Nothing in the opinion indicates the Eleventh Circuit would have reached a different result on the ultimate question of the statute's validity.

2. The Cases Cited by Plaintiff Do Not Support The Application Of Strict Scrutiny

The cases cited by Plaintiffs do not establish that the Ordinance should be subject to strict scrutiny. These cases struck down laws that restricted speech for reasons unrelated to protecting public health or safety, unlike the Ordinance here.

In *NAACP v. Button*, 371 U.S. 415 (1963), the statute prevented NAACP representatives from seeking out potential plaintiffs at community meetings. That impaired NAACP attorneys' ability to vindicate important legal rights and advocate for racial equality. The statute violated the First Amendment because it blocked an important form of political advocacy. *Id*. at 431.

Here, the Ordinance does not prevent Plaintiffs from communicating with potential patients or otherwise expressing their views regarding conversion therapy. Nor does it interfere with any political advocacy or expression. Instead, the Ordinance prevents licensed professionals from subjecting minor patients to ineffective and unsafe therapy—professional conduct that the City legislatively found harmful to patients, based on substantial evidence and the consensus of medical and mental health associations.

In *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 538 (2001), the Supreme Court struck down a law prohibiting federally-funded legal services lawyers from advising their clients that a welfare law might be unconstitutional or participating in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." As the Third Circuit subsequently explained, the statute in *Velazquez* was subject to "more demanding

scrutiny" because it was not "enacted pursuant to the State's interest in protecting its citizens from ineffective or harmful professional services." *King*, 767 F.3d at 235. Instead, Congress sought "to insulate certain laws from constitutional challenge." *Id.* Such a law, the court noted, "is designed to advance an interest unrelated to client protection" and, as such, "is more than just a regulation of professional speech." *Id.* at 235.

In contrast, the Ordinance's only purpose is to protect minor patients from harmful professional practices. It permits therapists fully to "express[] their views to patients [and] recommend[] [conversion therapy] to patients." It is a quintessential professional regulation and serves no purpose "unrelated to client protection." *King*, 767 F.3d at 235.

In *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), the Ninth Circuit upheld an injunction barring enforcement of a federal criminal drug policy that punished doctors for communicating with their patients about the medical uses of marijuana. 309 F.3d at 632. In *Pickup*, the Ninth Circuit distinguished such a prohibition on "doctor-patient communications *about* medical treatment" from a law that merely restricts a particular medical treatment. The Ninth Circuit held that, unlike the policy in *Conant*, California's statute narrowly barred the use of conversion therapy on minors and thus did not directly restrict protected speech. Rather, it "allows discussions about treatment, recommendations to obtain treatment, and expressions of opinion about [conversion therapy] and homosexuality." *Pickup*, 740 F.3d at 1229.

Finally, Plaintiffs erroneously claim that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), created a sweeping new rule that "content-based laws must satisfy strict scrutiny, even if targeted at licensed professionals." Dkt. 3 at 12. *Reed* did not address, much less change, the Court's longstanding framework for analyzing the government's exercise of police powers to impose regulations that incidentally restrict some professional speech.

In *Reed*, the Court considered a law that directly regulated outdoor signs based entirely on their content. Finding no compelling basis for those distinctions, the Court struck down the law under strict scrutiny. *Reed*, 135 S. Ct. at 2224–25.

But, as the Eleventh Circuit recently recognized (immediately after citing *Reed*), "the general rule that content-based restrictions trigger strict scrutiny is not absolute. Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of . . . the greater need for regulatory flexibility in those areas." *Dana's R.R. Supply*, 807 F.3d at 1246. That is certainly the case here.

In sum, Plaintiffs' contention that the Ordinance is subject to strict scrutiny has no footing in the law. Nonetheless, for the reasons explained above, the Ordinance would also pass muster under that test, which requires that a regulation must be narrowly tailored to achieve a compelling governmental interest. *See Reed*, 135 S. Ct. at 2218. Here, Tampa's interest in protecting the health and well-being of minors is compelling; the City's determination that conversion therapy endangers their health and well-being is supported by voluminous evidence and the consensus of medical experts; and the Ordinance is narrowly tailored to preclude only the actual provision of conversion therapy by licensed providers, who remain free to discuss it with their patients and others.

E. The Ordinance Does Not Violate the Right To Receive Information

For the same reasons the Ordinance does not violate Plaintiffs' right to free speech, it does not violate the right of minors to receive information. As an initial matter, Plaintiffs agree with the City that Plaintiffs lack standing to assert this claim on behalf of their patients. But in

any case, the claim has no merit. The Ordinance expressly permits therapists to talk with patients about conversion therapy and to share any information they wish. Ordinance, *supra*, at 4.

F. The Ordinance Is Not Unconstitutionally Vague

Even when a law regulates speech, it need not be absolutely clear or provide perfect guidance to survive a vagueness challenge. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). It need only provide people with a reasonable opportunity to understand what conduct it prohibits. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The Ordinance does so.

The Ordinance includes an extensive and precise definition of the conduct it does and does not prohibit. Ordinance, *supra*, at 4. Moreover, "conversion therapy" and "SOCE" are terms of art within the professional counseling community and describe a distinct practice in which Plaintiffs themselves claim to specialize. Dkt. 1 at 13, 15; *see also King*, 767 F.3d at 241; *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1363–64 (E.D. Cal. 2012) (quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993)).

Plaintiff Vazzo uses an "extensive informed consent form" with his patients that "outlines the nature of SOCE counseling" and "explains the controversial nature of SOCE counseling." Dkt. 1 at 67. Plaintiff Pickup "has particular expertise and experience in the area of SOCE counseling" prohibited under the Ordinance. *Id.* at 80. There is thus no question that Plaintiffs in particular, and counselors in general, understand what the Ordinance prohibits.

Plaintiffs' litany of hypothetical questions is unavailing. "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill*, 530 U.S. at 733; *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982) (law must be "impermissibly vague in all of its applications").

Moreover, the law itself provides clarity about Plaintiffs' hypotheticals. *Pickup*, 42 F. Supp. 3d at 1366 (California's law does not prohibit a therapist from merely mentioning conversion therapy, recommending a book on conversion therapy, or referring minors for conversion therapy); *King v. Christie*, 981 F. Supp. 2d 296, 328 (D.N.J. 2013) (same analysis regarding New Jersey statute). That is even more clear here, where the Ordinance specifies that therapists are free to "express[s] their view to patients [and] recommend[] [conversion therapy] to patients." *Ordinance*, *supra*, at 4.

G. The Ordinance Is Not Unconstitutionally Overbroad

A speech regulation is overbroad only if "a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). Plaintiffs assert that the Ordinance is overbroad because it prohibits them from providing conversion therapy to minors even when minors and their parents request and consent to it. Dkt. 3 at 19.

But Plaintiffs fail to demonstrate how that renders the Ordinance unconstitutional. *See Glucksberg*, 521 U.S. at 728 (holding there is no constitutional right to medical care the government has deemed harmful). Plaintiffs' overbreadth challenge is nothing more than a disagreement with the City's legislative determination, based on "overwhelming evidence," that informed consent is insufficient to protect minors from an inherently ineffective and dangerous practice. *See King*, 767 F.3d at 241; *Pickup*, 740 F.3d at 1235 (rejecting argument that California's law was overbroad given its "plainly legitimate sweep").

H. The Ordinance Is Not An Unconstitutional Prior Restraint

Finally, Plaintiffs' claim that the Ordinance is a prior restraint of expression has no merit. No health and safety regulation of this type has been evaluated as a prior restraint, and for good

reason: "[T]he regulations [the Supreme Court has] found invalid as prior restraints have had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Ward*, 491 U.S. at 795 n.5 (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). In short, they involved permitting or licensing requirements for protests, parades, publishing, or some other form of First Amendment activity, as do all of Plaintiffs' cases.

By contrast, the Ordinance regulates treatment, not the expression of opinions. *Pickup*, 740 F.3d at 1230 (holding that California statute "does not restrain Plaintiffs from imparting information or disseminating opinions"). Under Plaintiffs' theory, any professional regulation that touches on speech, however slightly, would be a "prior restraint" subject to strict scrutiny. Such a novel rule would negate the well-established police powers of governments to regulate professional and commercial practices to protect their citizens.

II. THE ORDINANCE DOES NOT VIOLATE PLAINTIFFS' FIRST AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION

Neutral laws of general applicability need only satisfy rational basis review under the First Amendment's Free Exercise Clause. *Keeton*, 664 F.3d at 879–80. This is true even of laws that have the incidental effect of burdening a particular religious practice. *Id.*; *cf. City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (rejecting statutory application of strict scrutiny to laws that burden free exercise).

The Ordinance is both neutral and generally applicable. Its plain language underscores its purpose, which is not to target religiously motivated conduct but rather to preclude a therapeutic practice that has been determined to pose a critical health risk to LGBT youth. *See* Ordinance, *supra*, at 4. It prohibits the provision of conversion therapy to minors, regardless of whether a specific provider is motivated by religion or anything else. *See id.* at § 14-312; *see also Welch v. Brown*, 834 F.3d 1041, 1045 (9th Cir. 2016) (rejecting second challenge to California conversion

therapy ban). Far from evincing hostility toward religion, the Ordinance creates an express exemption for religious leaders providing religious counseling. Tampa, Fla., Code of Ordinances § 14-311.

The fact that Plaintiffs or their minor clients' interest in such therapy may be driven by religious belief is not sufficient to impute religious animus to the City. *See King*, 767 F.3d at 242–43. Indeed, aside from the conclusory assertion that the Ordinance "targets Plaintiffs' and their clients' beliefs," Dkt. 1 at 24, Plaintiffs allege no facts to prove that the Ordinance was motivated by impermissible animus and therefore have failed to state a valid Free Exercise claim. *See Keeton*, 664 F.3d at 1380 (finding no free exercise violation where plaintiff "has not established that [the challenged regulation] is aimed at particular religious practices"); *Welch*, 834 F.3d at 1047 (same).

III. THE ORDINANCE DOES NOT VIOLATE FLORIDA'S CONSTITUTIONAL LIBERTY OF SPEECH CLAUSE

The protections of Section 4 of Article I of the Florida Constitution, which prohibits laws "passed to restrain or abridge the liberty of speech," Fla. Const. art. I § 4, are coextensive with those afforded by the First Amendment. *Café Erotica v. Fla. Dep't of Transp.*, 830 So. 2d 181, 183 (Fla. Dist. App. Ct. 2002). Thus, the Ordinance does not violate Florida's Liberty of Speech Clause for the same reasons that it does not violate the First Amendment's Speech Clause.

IV. THE ORDINANCE DOES NOT VIOLATE FLORIDA'S CONSTITUTIONAL "RIGHT TO FREE EXERCISE AND ENJOYMENT OF RELIGION" CLAUSE OR FLORIDA'S RELIGIOUS FREEDOM RESTORATION ACT

Article I of the Florida Constitution forbids laws "prohibiting or penalizing the free exercise [of religion]" but also specifies that "[r]eligious freedom shall not justify practices inconsistent with public morals, peace or safety." Fla. Const. art. I § 3. This plain language

provides less protection than that provided by the First Amendment. *Warner v. City of Boca Raton*, 267 F.3d 1223, 1226 n.3 (11th Cir. 2001).

Warner thus rejected the argument that the Florida Constitution requires strict scrutiny of any law that burdens religious practice. *Id.* at 1226 & n.3. Here, because conversion therapy is a practice "inconsistent with public safety," it falls squarely within the list of practices expressly excluded from the Florida Constitution's protection. *See* Fla. Const. art. I § 3.

Plaintiffs have also failed to state a valid claim under Florida's Religious Freedom Restoration Act of 1998 (FRFRA), Fla. Stat. §§ 761.01–.061. Plaintiffs have failed to allege facts that meet the threshold requirement of showing that the Ordinance places a "substantial burden" on the free exercise of religion. The Florida Supreme Court has interpreted "substantial burden" narrowly to require proof that a law "either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004).

The Ordinance does neither. Plaintiffs have asserted no facts alleging that the Ordinance compels them to engage in an activity their religion forbids. Nor have they alleged that their religion requires them, or anyone else, to practice conversion therapy on their clients generally.

Plaintiffs are free to express their religious views—they are simply precluded from engaging in the prohibited therapy with minors.

V. THE ADOPTION OF THE ORDINANCE WAS NOT *ULTRA VIRES* OR VOID *AB INITIO*

Florida is a home rule state, and the Florida Constitution explicitly authorizes municipalities to "exercise any power for municipal purposes except as otherwise provided by law." Fla. Const. art. 8 § 2(b). Under its home rule powers, Tampa may prevent mental health care providers from subjecting minors to a harmful practice within its borders.

The Florida legislature has recognized that "the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act" except "[a]ny subject expressly prohibited by the constitution" or "[a]ny subject expressly preempted to state or county government by the constitution or by general law." Fla. Stat. § 166.021. Tampa is a municipality with a home rule charter formed pursuant to this provision. Tampa, Fla., Code of Ordinances § 1.01.

Plaintiffs erroneously claim that Chapter 491 of Title XXXII of the Florida Statutes preempts Tampa's authority to enact the Ordinance. Inj., ECF No. 3, at 21. Nothing in Chapter 491 expressly prohibits Tampa from imposing civil penalties on mental health providers.

As a result, Plaintiffs must meet the heavy burden of showing implied preemption. But, due to the ease with which the Florida Legislature can expressly preempt local authority when it so chooses, Florida courts are reluctant to conclude that a municipality is preempted from exercising its local powers in the absence of an express exemption. *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 (citing *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. Dist. Ct. App. 1996)).

To establish an implied preemption, Plaintiffs must show both "the legislative scheme is so pervasive as to evidence an intent to preempt the particular area" and that "strong public policy reasons exist for finding such an area to be preempted by the Legislature." *Id.* at 1019.

Plaintiffs cannot meet either of those burdens here. Even a cursory evaluation of Chapter 491 shows that the Florida Legislature did not intend to preempt localities from protecting their residents from fraudulent or harmful practices by mental health providers. Chapter 491 contains only 26 provisions, the bulk of which relate to licensure procedures and requirements. *See* Fla. Stat. §§ 491.005–.0085.

The only portion of Chapter 491 that even arguably touches the same subject matter as the Ordinance is Section 491.009, which enumerates several offenses that could result in discipline for providers—including primarily the denial or revocation of their licenses. That the Legislature did not intend this list to be exhaustive is evidenced by its declared intent to "assist the public in making informed choices of [mental health] services by establishing *minimum* qualifications for entering into and remaining in the respective professions." Fla. Stat. § 491.002.

By contrast, the vehicle insurance regulatory regime deemed pervasive by the Florida Supreme Court in *Classy Cycles, Inc. v. Bay County* involved 43 provisions (including 93 definitions) spread across three chapters, one of which contained two express preemption clauses. 201 So. 3d 779, 784–85, 788 (2016). Bay County's attempt to add its own regulations would have needlessly complicated an already "pervasive scheme of regulation, coverage requirements, and limitation of liability." *Id.* at 788. That is not the case here.

Likewise, there are no strong public policy reasons for finding the protection of Tampa's youth from conversion therapy to be preempted by the Legislature. Like other municipalities, Tampa has a compelling interest in the health and well-being of the young people within its own borders. Local officials are best situated to understand the needs and vulnerabilities of their locality's own youth and to take the appropriate actions to protect them. Plaintiffs' own filings vindicate the City's concern that Tampa youth are vulnerable to licensed therapists who seek to subject them to the unethical and harmful practices banned by the Ordinance. Especially where the immediate risk to local youth is so clear, there is no basis for finding that implied preemption exists.

VI. THE ORDINANCE DOES NOT VIOLATE THE FLORIDA PATIENT'S BILL OF RIGHTS

Plaintiffs' final claim is that the Ordinance violates the Florida Patient's Bill of Rights and Responsibilities (FPBRR), Fla. Stat. § 381.026. This claim has no merit because the FPBRR expressly precludes any private right of action. *Id.* ("This section shall not be used for any purpose in any civil or administrative action and neither expands nor limits any rights or remedies provided under any other law.").

Moreover, even if FPBRR created a private right of action, it would not give Plaintiffs the right to provide conversion therapy. FPBRR affirms that Florida patients have the "right to impartial access to medical treatment or accommodations regardless of . . . religion," including "complementary or alternative health care treatments." Fla. Stat. § 381.026(4)(d)(1), (3). But as the definition of those treatments in Section 456.41 makes clear, they include only treatments "designed to provide patients with an *effective* option to the prevailing or conventional treatment methods[.]" Fla. Stat. § 456.41(2)(a).

Plaintiffs cannot show that conversion therapy constitutes an "effective option." To the contrary, as the City legislatively determined, it is not only ineffective, but also potentially dangerous—particularly for minors. Ordinance, *supra*, at 4.

CONCLUSION

For the reasons stated above, as well as those set forth by the City of Tampa, Interveners respectfully ask that the Court dismiss Plaintiffs' complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 12, 2018, the foregoing was electronically filed with the Clerk of Court by using the CM/ECF system, which will also send a notice of electronic filing to all counsel of record.

/s/ Sylvia Walbolt
Attorney