

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
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.: 8:17-cv-02896-CEH-AAS

Plaintiffs,)

INJUNCTIVE RELIEF SOUGHT

v.)

CITY OF TAMPA, FLORIDA,)

Defendant)

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S REQUEST TO TAKE JUDICIAL NOTICE**

Pursuant to M.D. Fla. Local Rule 3.01 and Fed. R. Evid. 201(e), Plaintiffs, Robert L. Vazzo, LMFT, and David H. Pickup, LMFT, individually and on behalf of their patients (collectively "Plaintiffs"), by and through the undersigned counsel, hereby submit their Response in Opposition to Defendant, City of Tampa's ("City") Request to Take Judicial Notice. (Dkt. 24-26, "Requests"). For the following reasons, the Court must decline to take judicial notice.

INTRODUCTION

The City has requested that this Court take judicial notice of a voluminous amount of materials that the City considers entirely a public record. (Dkt. 24-26). Because the City has made that request, Plaintiffs are "entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Fed. R. Evid. 201(e). Plaintiffs object to this Court taking judicial notice of the documents contained within the City's Request. The City requests that this Court judicially notice objectionable material that cannot survive the ordinary evidentiary standards. Indeed, the City requests that this Court take judicial

notice of (1) position statements of ideological opponents of sexual orientation change efforts (“SOCE”) counseling that support efforts, such as Ordinance 2017-47, to suppress a counselor’s right to offer, and a client’s right to willingly receive, such counseling; (2) statements of citizens in the City who oppose SOCE counseling and support the Ordinance; and (3) statements of citizens purporting to share the stories of other individuals not appearing before the City (or the Court). The City argues that such documents and testimony are proper for judicial notice because they are part of the public record. (*See, e.g.*, Dkt. 25, at 2). These purported records are improper candidates for judicial notice because they are either subject to reasonable dispute (and disputed by Plaintiffs’ submitted evidence), contain rampant and inadmissible hearsay and double hearsay, and are irrelevant. This Court should decline the City’s judicial notice request.

LEGAL ARGUMENT

Rule 201 of the Federal Rules of Evidence permits a court to take judicial notice of certain facts, but the “fact **must** be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b) (emphasis added). Importantly, “the taking of judicial notice of facts is, as a matter of evidence law, **a highly limited process.**” *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997) (emphasis added). “The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved in the usual process of proving facts by competent evidence in district courts.” *Id.* Thus, to satisfy the requirements of Rule 201 and be a proper subject of judicial notice, “**indisputability is a prerequisite.**” *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (emphasis added). If a document is subject to dispute, judicial notice is thus improper. *Id.*

Additionally, the City bears the burden to prove that each and every one of its submissions

qualifies for judicial notice. *See, e.g., United States v. Stinson*, No. 6:14-cv-1534-Orl-22TBS, 2016 WL 8488240, *9 (M.D. Fla. Aug. 26, 2016) (“The party requesting judicial notice bears the burden of persuading the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source whose accuracy cannot reasonably be questioned.”); *Couch v. Broward Cnty.*, No. 11-62126-CIV, 2012 WL 2007148, *1 (S.D. Fla. June 5, 2012) (same). Because the City seeks to have this Court take judicial notice of matters that are irrelevant, subject to reasonable dispute, and constitute hearsay, the City cannot meet that burden. Indeed, “[c]aution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules.” *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009); *see also In re Annis*, 78 B.R. 962 (W.D. Miss. 1987) (inadmissible evidence may not be bootstrapped into evidence by asking the court to take judicial notice). The City’s attempts to circumvent the evidentiary rules by judicial notice should thus be rejected and its requests denied.

I. IT IS AN ABUSE OF DISCRETION TO TAKE JUDICIAL NOTICE OF THE IRRELEVANT TESTIMONY OF IDEOLOGICAL SUPPORTERS OF THE ORDINANCE.

The seminal requirement of all evidence submitted to the Court is relevance. Fed. R. Evid. 402 (“irrelevant evidence is not admissible”). As a matter of black letter law, this fundamental requirement may not be circumvented by use of the judicial notice procedure. Indeed, “it is generally agreed that courts may not take judicial notice of irrelevant facts.” *Ballard v. Bank of America Corp.*, No. 1:13-cv-04011-ODE-RGV, 2014 WL 11970543, * (N.D. Ga. Sept. 11, 2014). Both the Eleventh Circuit and this District have often held that judicial notice cannot be used to admit irrelevant evidence. *See, e.g., Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277 (11th Cir. 1999) (to take judicial notice of the statements in a public record, they must be relevant to satisfy

Rule 201); *BRE Mariner Marco Town Ctr., LLC v. Zoom Tan, Inc.*, 682 F. App'x 744, 748 n.3 (11th Cir. 2017) (refusing to take judicial notice of irrelevant facts); *Vallot v. Cent. Guld Lines, Inc.*, 641 F.2d 347, 350 (5th Cir. 1981) (affirming district court's refusal to take judicial notice of official public records where requesting party did not establish relevance);¹ *United States v. Stinson*, No. 6:14-cv-1534-Orl-22TBS, 2016 WL 8488240, *9 (M.D. Fla. Aug. 26, 2016) ("The Court may deny a request for judicial notice of facts that are not relevant."); *Wigfall v. Saint Leo Univ., Inc.*, No. 8:10-CV-02232-T-24-TGW, 2012 WL 717868, *4 (M.D. Fla. Mar. 6, 2012) ("The Court therefore declines to take judicial notice of the [public] records because Plaintiffs did not supply the Court with the necessary information to discern their relevance"); *Correa v. BAC Home Loans Servicing LP*, No. 6:11-cv-1197-Orl-22DAB, 2012 WL 1176701, *4 (M.D. Fla. Apr. 9, 2012) (refusing to take judicial notice of irrelevant public records); *United States v. Falcon*, 957 F. Supp. 1572, 1585 (S.D. Fla. 1997) ("a court may refuse to take judicial notice of facts that are irrelevant to the proceeding").

Not only do the rules prohibit use of judicial notice to admit irrelevant evidence, the Eleventh Circuit has unequivocally held that **it is an abuse of discretion to do so**. *See, e.g., United States v. Cofield*, 272 F.3d 1303, 1307 n.4 (11th Cir. 2001) ("it was an abuse of discretion to rely on a [judicially noticed] record as it had no relevance to the proceedings"). Thus, to justify admission via judicial notice, the City bears the burden to demonstrate that all matters contained in its Requests are relevant to the case *sub judice*. It has not and cannot do so, and it would be an abuse of discretion to judicially notice the irrelevant out-of-court testimony of ideological supporters of the Ordinance.

¹ *Vallot* is binding on this Court. *See Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Here, the City requests that this Court take judicial notice of testimony from various residents and non-residents concerning the Ordinance. (Dkt. 26-1 to 26-4). Such testimony represents nothing more than irrelevant opinions from individuals both opposing and supporting the Ordinance. (*Id.*). The City seeks to rely upon these irrelevant opinions to establish its contention that SOCE counseling can be “harmful” to minors. (Dkt. 23, at 28) (“public comment offered at City council meetings provides **additional evidence** that SOCE counseling can pose critical health risks to minors” (emphasis added)). The City cannot circumvent the evidentiary rules via judicial notice to bootstrap irrelevant and grossly incompetent testimony into its argument in favor of the Ordinance. Indeed, non-medical opinion from residents and non-residents is wholly irrelevant to the question of whether the First Amendment permits the City to impose a viewpoint and content-based restriction on the protected, voluntary, and welcomed speech of licensed counselors.

Contrary to the City’s contentions that this “additional evidence” would assist the Court, merely because individuals testifying in support of the Ordinance desire to suppress the protected expression of counselors engaged in SOCE counseling does not empower the government to infringe upon the bedrock protections of the First Amendment. Indeed, “the very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts.” *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Thus, the testimony of the residents and non-residents who testified in support of (and, also, in opposition to) the Ordinance is wholly irrelevant to the fundamental rights at issue in the instant litigation. Plaintiffs’ fundamental rights “may not be submitted to vote; they depend on the outcome of no elections.” *See id.* at 638. The testimony submitted by the City is thus irrelevant and improper for judicial notice. The City’s Request must be denied.

II. THE TESTIMONY CONTAINED IN THE CITY’S RECORDS CONTAINS INADMISSIBLE HEARSAY AND IS NOT A PROPER SUBJECT OF JUDICIAL NOTICE.

Likewise, the City cannot circumvent the evidentiary rules to bootstrap inadmissible hearsay into the record via judicial notice. *See, e.g., United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (court cannot take judicial notice of the veracity of allegations in submitted testimony outside of the instant litigation); *In re Presta*, No. 3:09-bk-1222-JAF, 2014 WL 2448444, * (M.D. Fla. May 28, 2014) (hearsay assertions “are not the proper subject of judicial notice”); *Turbyfill v. Scottsdale Indem. Co.*, No. 3:14cv283-RV/EMT, 2016 WL 741657, *2 (N.D. Fla. Feb. 24, 2016) (judicial notice does not “cure any customary objections involved in the admissibility of evidence, such as hearsay” (quoting *Galvan v. City of La Habra*, No. SACV 12-2103 JGB (RNBx), 2014 WL 1370747 (C.D. Cal. Apr. 8, 2014)); *S.E.C. v. Lauer*, No. 03-80612-CIV-MARRA, 2007 WL 1393917, *2 (S.D. Fla. Apr. 30, 2007) (court cannot take judicial notice of “facts” in a party’s submissions when “those statements are in fact unsworn hearsay allegations and are reasonably disputed”). That those statements are contained within the public record of the City does not alter this conclusion in the slightest. *See, e.g. In re Alpha Protective Servs., Inc.*, 531 B.R. 889, 907 (M.D. Ga. 2015) (while a court may take judicial notice of public records, “**it may not take judicial notice of hearsay allegations as being true merely because they are part of a [public record]**”) (emphasis added).

Here, the City contends that the public record, including testimony of individuals supporting the Ordinance in front of the City Council, is the proper subject of judicial notice and that it can serve as “additional evidence” of the City’s contentions concerning the truth of its purported findings. (Dkt. 26, at 8). But, that does not matter at all when the public record is composed entirely of hearsay and double hearsay from ideological supporters of the Ordinance.

(*See, e.g.*, Dkt. 26-2, at 3-4) (offering testimony of the purported statements of other individuals **not appearing before the City Council** to assert that SOCE counseling is harmful); (*Id.* at 7-9) (offering a purported statement of an individual **not appearing before the City Council** allegedly speaking about his purported experience with SOCE counseling, but specifically noting that the individual whose purported statements were offered “could not be here because he wishes to remain anonymous”); (*Id.* at 11-13) (offering the purported research and statements of individuals and organizations **not present before the City Council**); (*Id.* at 14-15) (offering testimony about the “story” and purported statements of an individual **not present before the City Council** that the resident **found on the internet**); (*Id.* at 16) (same); (*Id.* at 17-20) (offering the purported public statement of an organization **not appearing before the City**); (*Id.* at 21-22) (offering purported statements of the resident’s mother concerning SOCE counseling when the speaker’s was a child); (*Id.* at 27-28) (offering the purported statements of **someone the speaker purportedly knew in high school**).

Fatal to the City’s Requests, these statements are textbook hearsay and are inadmissible. *See, e.g., Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1181 (5th Cir. 1975) (defining hearsay as “the use of an out-of-court statement for the truth of matter asserted in the statement”); *United States v. Thompson*, 556 F. App’x 812, 821 (11th Cir. 2014) (same). In fact, most of the statements offered in the City’s submissions are rampant **double** hearsay, offered outside of this Court by speakers who desired to testify as to the purported statements of other individuals not appearing before the City or this Court. These comments are “inadmissible double hearsay” and this Court should refuse to consider them as probative evidence. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 & n.1 (11th Cir. 1999). Thus, the fact that an individual claims to have had a friend in high school who told him SOCE counseling was harmful

(or even that the “high school friend” purportedly participated in SOCE counseling) cannot be admitted to this Court, nor can any of the other rampant hearsay statements included in the City’s submissions. Accordingly, the City’s Request must be denied.

III. THE PUBLIC STATEMENTS OF THOSE IDEOLOGICALLY OPPOSED TO SOCE COUNSELING ARE NOT THE PROPER SUBJECT OF JUDICIAL NOTICE.

A. Public Records Cannot Be Judicially Noticed For the Truth Of Their Contents.

As the Eleventh Circuit and numerous courts have made plain, public records may be considered for judicial notice but “only for the purpose of determining what statements the documents contain, not to prove the truth of the [statements].” *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277 (11th Cir. 1999); *see also Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996) (same); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (court may only take judicial notice of public records for purposes of the fact that the documents were filed, not for their truth). Here, the City attempts to use the “articles, reports, position statements, policy statements, [and] resolutions” offered by certain organizations ideologically opposed to SOCE counseling to assert that it has a cognizable interest in adopting the Ordinance. (Dkt. 23, at 1-3); (Dkt. 24 to 24-7) (submitting ideological position statements from various organizations for judicial notice). But, to make such an assertion, the City carries the burden to demonstrate the truth of the assertions of these ideological statements and the burden to demonstrate that such ideological statements somehow give the City a compelling interest in prohibiting protected speech, even in the context of Plaintiffs’ motion for preliminary injunction. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (holding that the government bears the burden of demonstrating a compelling interest when opposing preliminary injunctive relief); *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (same). The

City's Request to judicially notice these position statements to prove their truth is plainly prohibited. The City cannot bootstrap inadmissible evidence into the record by resorting to the judicial notice procedure.

B. The Public Statements Of Ideological Organizations Supporting The Ordinance Are Subject To Reasonable Dispute.

As the plain language of Rule 201 makes abundantly clear, judicial notice is only proper if the facts offered are "not subject to reasonable dispute." Fed. R. Evid. 201(b)(2). As the Eleventh Circuit has also unequivocally held, "**indisputability is a prerequisite.**" *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (emphasis added). Here, not only are the City's submissions subject to reasonable dispute, but they are disputed by the record evidence already submitted in this case. (Dkt. 1, Verified Complaint, ¶¶ 40-46) (noting that Dr. Nicholas Cummings, a past President of the American Psychological Association, has personally counseled thousands of individuals seeking to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity and had tremendous success; that the assertions that SOCE counseling is harmful are unsupported; and that efforts to ban SOCE counseling harms patients). With this record evidence, the City cannot seriously contend that the ideological statements of certain organizations opposed to SOCE counseling are somehow beyond the bounds of reasonable dispute. They are not. For a fact to be beyond reasonable dispute, it must be such that "only an unreasonable person would insist on disputing it." *United States v. Jones*, 29 F.3d at 1553. But, a past president of one of the largest mental health organizations in the country certainly cannot be considered an unreasonable man. The City has failed to carry its burden to demonstrate that the submissions it has made to this Court are not subject to reasonable dispute.

Moreover, as Plaintiffs' Verified Complaint points out, some of the organizations' proffered statements are even disputed internally. (Dkt. 1, Verified Complaint, ¶¶ 29-39) (noting

that the APA Report – cited by the City in the Ordinance – does not even support the conclusion that SOCE counseling is harmful); (*Id.* ¶ 31) (noting that the APA Report specifically noted that “sexual orientation issues in children are virtually unexamined”); (*Id.* ¶ 32) (noting that the APA Report stated there was a lack of research on SOCE counseling with children); (*Id.* ¶ 34) (noting that the APA Report stated that there was “no clear indication of the prevalence of harmful outcomes”); (*Id.* ¶¶ 35-38) (noting that the APA Report indicated some benefits from SOCE counseling). Thus, documents and statements that are not only disputed by reasonable individuals with knowledge of SOCE counseling, but also disputed by their own language, cannot survive the dictates of Rule 201.

That these statements were entered into a legislative record does not alter this conclusion. Indeed, legislative facts are not a proper subject for judicial notice unless they are “established truths, facts or pronouncements that do not change from case to case but apply universally.” *United States v. Bowers*, 660 F.2d 527, 531 (5th Cir. 1981). Because the statements of these organizations are neither established truths, facts, or pronouncements nor universally applicable from case to case, they cannot be judicially noticed.

C. The Public Statements of Organizations Ideologically Opposed To SOCE Counseling Are Irrelevant And Not The Proper Subject Of Judicial Notice.

As Plaintiffs have demonstrated *supra*, fundamental rights are not subject to the vote of a majority of organizations or individuals that desire to suppress a certain form of speech. *See supra* Section I. As such, a show of hands from a variety of mental health organizations ideologically supportive of the Ordinance does not and cannot serve as any basis for upholding it under the First Amendment. Thus, the statements of certain organizations in support of the Ordinance is no more relevant than the support of the residents or officials of the City. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). For this Court to judicially notice such irrelevant facts

would be an abuse of discretion. *United States v. Cofield*, 272 F.3d 1303, 1307 n.4 (11th Cir. 2001).

The City's request must therefore be denied.

CONCLUSION

Because the City's submissions are improper subject of judicial notice, contain rampant hearsay and double hearsay, and seek to inject irrelevant matters into the record, this Court should deny the City's Requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2018, I caused a true and correct copy of the foregoing to be filed electronically with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic service system.

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