

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**ROBERT L. VAZZO, LMFT, individually
and on behalf of his patients, et al**

Case No. 8:17-cv-02896- CEH-AAS

Plaintiffs,

v.

**CITY OF TAMPA, FLORIDA, and
SAL RUGGIERO, in his official capacity
As Manager of the City of Tampa
Neighborhood Enforcement Division**

Defendants

**DEFENDANTS' RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendants, City of Tampa, Florida (“City”) and Sal Ruggiero, in his official capacity as Manager of the City Neighborhood Enforcement Division, file this Response and Memorandum of Law in Opposition to Plaintiffs’ Motion for Preliminary Injunction (Doc. 85):

THE ORDINANCE

On April 6, 2017, Tampa City Council passed Ordinance No. 2017-47, relating to conversion therapy on patients who are minors (“the Ordinance”). On April 10, 2017, Mayor Bob Buckhorn approved the Ordinance. The City has previously requested this Court take judicial notice of a certified copy of the Ordinance (Doc. 24, Ex. 1-7), and this Court has issued an Order stating that “it is appropriate to take judicial notice of the City’s certified copy of Ordinance 2017-47.” (Doc 51, p.4.) Consistent with this Court’s Order, Defendants request that this Court take judicial notice of the certified copy of the Ordinance

in connection with its review of the Plaintiffs' Motion for Preliminary Injunction (Doc. 85). The intent of the Ordinance is expressly set forth in § 14-310 which provides as follows:

The Intent of this Ordinance is to protect the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers, including but not limited to licensed therapists. These provisions are exercise of police power of the City for the public safety, health, and welfare; and its provisions shall be liberally construed to accomplish that purpose.

(Doc. 24-1, p.5.) The Ordinance cites to numerous medical and mental health organizations which have found that sexual orientation change efforts ("SOCE") therapy, including conversion therapy and reparative therapy, may pose a serious threat to the health and well-being of the affected persons. Moreover, according to the Ordinance, many such organizations have also concluded that there is a lack of credible evidence that SOCE therapy is effective. Specifically, the Ordinance cites to articles, reports, position statements, policy statements, a resolution and other publications, from such prominent medical and mental health organizations as the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation,¹ the American Psychological

¹ Although Plaintiffs cite to select portions of the 2009 Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation ("APA Report") in support of their position, there are other portions of the APA Report that support the Defendants' concerns that SOCE therapy can pose serious health risks. For example, and without limitation, in the summary of the APA Report it states that "studies ... indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts." (Doc. 24-2, p.9.) In the conclusion of the APA Report, it further provides that "We found that there was some evidence to indicate that individuals experienced harm from SOCE." (Doc. 24-2, p.10.) The APA Report also provides that: "the peer-refereed empirical research on the outcome of efforts to alter sexual orientation provides little evidence of efficacy and some evidence of harm." (Doc. 24-2, p. 2.) Moreover, to the extent that there is a lack of absolute certainty as to the adverse impact of conversion therapy, it would be imprudent to require

Association, the American Psychoanalytic Association, the American Academy of Child & Adolescent Psychiatry, the Pan American Health Organization, the American School Counselor Association, the Substance Abuse and Mental Health Services Administration (a division of the U.S. Department of Health and Human Services), the American College of Physicians, the American Medical Association, the World Psychiatric Association, the National Association of Social Workers, and the Agency for Healthcare Research and Quality.² (The articles, reports, position statements, policy statements, resolution, and other publications, which are cited in the Ordinance, are attached to the certified copy of the Ordinance previously filed of record by the City.³) The Ordinance also cites to two federal appellate decisions wherein the courts upheld the validity of a statute prohibiting licensed professionals from engaging in SOCE therapy with minors.⁴

The Ordinance further provides that:

... City Council hereby finds the overwhelming research demonstrating that sexual orientation and gender identity change efforts can pose critical health risks to lesbian, gay, bisexual, transgender or questioning persons, and that being lesbian, gay, bisexual, transgender or questioning is not a mental disease, mental disorder, mental illness, deficiency, or shortcoming

(Doc. 24-1, p.5.) The Ordinance also goes on to state that the City has a “compelling interest in protecting the physical and psychological well-being of minors including, but

the Defendants to conduct studies on children, subjecting them to conversion therapy, to prove with certainty that conversion therapy poses serious harms. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (Supreme Court refused to require Congress to present studies where minors were intentionally exposed to indecent television broadcasts, isolated from all other indecency, to establish the harmful effects of the broadcasts).

² See “Whereas Clauses” on pages 1-4 of the Ordinance which, pursuant to section 1 of the Ordinance, are incorporated therein by reference. (Doc. 24-1, p.2-6.)

³ Doc. 24.

⁴ See page 4 of the Ordinance (Doc. 24-1, p.5), citing to *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014) and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013).

not limited to, lesbian, gay, bisexual, transgender and questioning youth, and in protecting its minors against exposure to serious harm caused by sexual orientation and gender identity change efforts” (Doc. 24-1, p.5.) Further, the Ordinance provides:

... the City does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders. This ordinance does not prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults; nor does it prevent minors from seeking SOCE from mental health providers in other political subdivisions or states outside of the City

(Doc. 24-1, p.5.) The Ordinance further states that:

... the City Council finds minors receiving treatment from licensed therapists in the City of Tampa, Florida, who may be subject to conversion or reparative therapy are not effectively protected by other means, including, but not limited to, other state statutes, local ordinances, or federal legislation

(Doc. 24-1, p.5.) Turning to the definitions in the Ordinance, the term “Conversion therapy or reparative therapy” is defined as follows:

Conversion therapy or reparative therapy means, interchangeably, 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 support and 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.**

(Doc. 24-1, p.6.) (Emphasis supplied.) The term “Minor” is defined “to mean any person less than 18 years of age.” (Doc. 24-1, p.7.) The term “Provider” is defined as follows:

Provider means any person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training under chapters 456, 458, 459, 490 or 491 of the Florida Statutes, as such chapters may be amended, including but not limited to, medical practitioners, osteopathic practitioners, psychologists, psychotherapists, social workers, marriage and family therapists, and licensed counselors. **A Provider does not include members of the clergy who are acting in their roles as clergy or pastoral counselors and providing religious counseling to congregants, as long as they do not hold themselves out as operating pursuant to any of the aforementioned Florida Statutes licenses.**

(Doc. 24-1, p.7.) (Emphasis supplied.) Finally, with respect to the “conversion therapy prohibited,” the Ordinance states: “It shall be unlawful for any Provider to practice conversion therapy efforts *on any individual who is a minor* regardless of whether the Provider receives monetary compensation in exchange for such services.” (Doc. 24-1, p.7.) (Emphasis supplied.)

MEMORANDUM OF LAW

STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

The requirements for obtaining a preliminary injunction are well settled: “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). Moreover, as the Court reiterated recently: “a preliminary injunction is an ‘extraordinary remedy never awarded as of right.’” *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (*quoting Winter*, 555 U.S. at 24). *See also Regions Bank v. Kaplan*, 2017 WL 3446914*2 (M.D. Fla. 2017) (preliminary injunction is an extraordinary and drastic remedy); *AMP Enterprises Inc. v.*

City of Tampa, 1998 WL 1969504 (M.D. Fla. 1998) (court denied motion for preliminary injunction seeking to enjoin enforcement of a City ordinance which was enacted to protect the physical and psychological well-being of minors.).”⁵ In the case *sub judice*, Plaintiffs cannot carry their burden to establish any, let alone all, of the above requirements necessary for a preliminary injunction.

ARGUMENT

I. PLAINTIFFS CANNOT PROVE LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs cannot prove a likelihood of success on the merits of this action. First, Plaintiffs lack standing to assert claims on behalf of third parties, and Plaintiff Pickup lacks standing to assert claims on his own behalf. Second, Plaintiffs fail to state a claim upon which relief can be granted. Indeed, Plaintiffs have failed to cite to any judicial decision that has found invalid a statute or ordinance which prohibits licensed professionals from engaging in SOCE therapy with minors. To the contrary, the only judicial decisions that have addressed the validity of these laws have found them to pass constitutional muster.⁶ And third, even if Plaintiffs’ Amended Complaint does state a claim for relief, applying the applicable law to the record before the court, Plaintiffs do not – and cannot – establish their right to preliminary injunctive relief.

⁵ In *AMP Enterprises*, where an injunction was sought to enjoin enforcement of a City ordinance which regulated dance halls, and which was enacted to protect the physical and psychological well-being of minors, the court stated: “The City of Tampa maintains an interest unique to elected officials in preserving the quality of life in the community and the health, welfare and morals of the citizens.” 1998 WL at 1969504*1.

⁶ See *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014) *cert. den.* 135 S. Ct. 2048 (2015); *Doe v. Governor of the State of New Jersey*, 783 F.3d 150 (3d Cir. 2015) *cert. den.* 138 S. Ct. 1155 (2016); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) *cert. den.* 134 S. Ct. 2871 (2014); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2017) *cert. den.* 137 S. Ct. 2093 (2017).

Plaintiffs cannot establish third-party standing

Plaintiffs lack standing to assert claims on behalf of third parties. In *King*, where the plaintiffs argued that the district court erred by concluding that they lacked standing to bring claims on behalf of their minor clients, the Third Circuit rejected that argument and concluded that “Plaintiffs lack standing to pursue claims on behalf of their minor clients.” 767 F.3d at 244. In reaching that conclusion, the court first addressed the limited circumstances in which one can obtain third-party standing and stated in relevant part:

“It is a well-established tenet of standing that ‘a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.’” *Pennsylvania Psychiatric Soc’y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 (3d Cir. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed.2d 411 (1991)). “Yet the prohibition is not invariable and our jurisprudence recognizes third-party standing under certain circumstances.” *Id.* (citations omitted.) To establish third-party standing, a litigant must demonstrate that (1) she has suffered an “injury in fact” that provides her with a “sufficiently concrete interest in the outcome of the issue in dispute”; (2) she has a “close relation to the third party”; and (3) there exists “some hindrance to the third party’s ability to protect his or her own interests.” *Powers*, 499 U.S. at 411, 111 S. Ct. 1364 (internal quotation marks and citations omitted).....

767 F.3d at 243. The court later stated: “Plaintiffs have failed to establish that their clients are ‘hindered’ in their ability to bring suit themselves ... Further, we note that minor clients have been able to file suit pseudonymously in both *Pickup* and *Doe v. Christie*, - F. Supp.3d -, 2014 WL 3765310 (D.N.J. July 31, 2014)....” 767 F.3d at 244. Similarly, in this case, Plaintiffs have failed to allege each of the elements necessary to obtain third-party standing.

Plaintiff Pickup lacks standing

Plaintiff Pickup is “currently seeking licensure in Florida ...” (Doc. 78, p.22, ¶ 113.) Thus, because Pickup currently lacks standing to challenge the validity of the Ordinance in a jurisdiction where he is not licensed to practice, his claims are premature at best.

The Supreme Court, in *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013), in addressing the requirements for standing, held that:

To establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’ ... Although imminence is a concededly somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly impending*.’ ... Thus, we have repeatedly reiterated that ‘threatened injury must be *certainly impending* to constitute injury in fact,’ and that [a]llegations of possible future injury’ are not sufficient.

(Emphasis in original.) (Citations omitted.). Here, it is impossible to know when Plaintiff Pickup will successfully complete all necessary requirements and when, if at all, the State of Florida may provide him with a license. Accordingly, Plaintiff Pickup fails to satisfy the requirements for standing as articulated by the Supreme Court in *Clapper*.

Count I fails to state a claim upon which relief can be granted

Count I of the Amended Complaint, which alleges the Ordinance violates Plaintiffs’ right to freedom of speech under the First Amendment, fails to state a claim upon which relief can be granted. In *King*, the Third Circuit held that the enactment of a statute prohibiting licensed counselors from engaging in SOCE therapy with clients under age eighteen did not violate the counselors’ First Amendment free speech rights. In reaching

that conclusion, the court applied an intermediate scrutiny standard of review and found that the statute advanced the government's interest of protecting minors from ineffective and/or harmful professional services and was not more extensive than necessary to serve that interest. The court stated in relevant part:

...Even when applying intermediate scrutiny, however, we do not review a legislature's empirical judgment *de novo* – our task is merely to determine whether the legislature has 'drawn reasonable inferences based on substantial evidence.' *Turner Broad Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195, 117 S. Ct. 1174, 137 L. Ed.2d 369 (1997)

We conclude that New Jersey has satisfied this burden. **The legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm Many such organizations have also concluded that there is no credible evidence that SOCE counseling is effective....**

We conclude that this evidence is substantial. 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

....
... a state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm. See *United States v. Playboy Entm't Grp, Inc.*, 529 U.S. 803, 822 (2000) It is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority figure that her sexual orientation – a fundamental aspect of her identity – is an undesirable condition. Further if SOCE counseling is ineffective – which, as we have explained, is supported by substantial evidence – it would not be unreasonable for a legislative body to conclude that a minor would blame herself if the counselor's efforts failed.... We therefore conclude that [the statute] 'directly advances' New Jersey's stated interest in protecting minor citizens from harmful professional practices.

Lastly, we must determine whether [the statute] is more extensive than necessary to protect this interest. To survive this prong of intermediate scrutiny, New Jersey 'is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest.' *Greater New Orleans Broad Ass'n, Inc. v.*

United States, 527 U.S. 173, 188, 119 S. Ct. 1923, 144 L. Ed.2d 161 (1999) (citing *Board of Tr. Of State Univ. of New York v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed.2d 388 (1989)). Thus, New Jersey must establish ‘a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’ *Id.*... (Quotation and citations omitted.)

767 F.3d at 238-239 (footnote omitted) (emphasis supplied).

The Court’s rationale in *King* is extremely relevant to the resolution of this case for three critical reasons: (1) the legislative findings of City Council - which are contained in the certified copy of the Ordinance of which this Court has taken judicial notice (Doc. 51, p. 4) - refer to numerous medical and mental health organizations that have found SOCE therapy may pose a serious threat to the health and well-being of the affected persons, and many such organizations have concluded there is a lack of credible evidence that such therapy is effective (Doc. 24-1); (2) the Ordinance expressly articulates a compelling interest in protecting the physical and psychological well-being of minors from exposure to serious harms and risks caused by conversion therapy by licensed providers (Doc. 24-1); and (3) the Ordinance is narrowly tailored to advance the compelling governmental interest. (Doc. 24-1.) In addition, *King* also confirmed that the City Council was entitled to rely on the empirical judgments of the professional organizations - concerning the efficacy and potential harmfulness of SOCE therapy - which are identified in the legislative findings of the Ordinance. (Doc. 24-1.)

The assertion by Plaintiffs that “informed consent” would be a less restrictive means to achieve the City’s interest is an argument that was rejected in *King*. 767 F.3d at 240. Moreover, in a number of other cases courts have recognized that minors, because of their young age, cannot consent to - or make informed decisions on – a variety of matters;

that parents do not have unfettered rights concerning their children; and that the government has a compelling interest in protecting the physical and psychological well-being of minors.⁷ In short, the Ordinance clearly passes constitutional muster under the intermediate scrutiny standard of review.

⁷ See *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) (“The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.”); *Sable Commc’ns of Cal., Inc v. FCC*, 492 U.S. 115, 126 (1989) (the state has a “compelling interest in protecting the physical and psychological well-being of minors,” which “extends to shielding minors from the influence of literature that is not obscene by adult standards.”); *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989) (city ordinance did not infringe on First Amendment rights in restricting admission to certain dance halls to persons between ages of 14 and 18, and a rational relationship existed between age restrictions for dance halls and city’s interest in promoting the welfare of teenagers); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion) (“State is entitled to adjust its legal system to account for children’s vulnerability and their need for ‘concern, ... and paternal attention’”); *Prince v. Massachusetts*, 321 U.S. 158, 168-169 (1944) (Supreme Court upheld statute prohibiting boys under age 12 and girls under age 18 from selling magazines, etc., on the street and held that state’s authority over children’s activities is broader than that over like actions of adults. In reaching that conclusion, the Court stated that:

... the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244; *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299, 33 L.Ed. 637. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as parens patriae may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.

321 U.S. at 166-167 (footnotes omitted); *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (where parents, individually and on behalf of their children, brought a §1983 and state law action against school district officials and employees, alleging curriculum materials intended to encourage respect for gay persons and couples violated both their free exercise right and their right to raise their children as they wished, the First Circuit affirmed the district court’s granting defendant’s motion to dismiss the federal claims for failure to state a claim upon which relief could be granted, and dismissed the state claims without prejudice); *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990) (Eleventh Circuit held state may, absent impermissible burden on adults, deny minors all access in any form to materials obscene as to them, but acceptable for adults; that minors have no right to view or in any way consume such material, even if they do not purchase or otherwise take control of it; and that state’s interest in protecting its youth justifies limited burden on free expression); *Schmitt v. State*, 590 So.2d 404, 410-411 (Fla. 1991) (Florida Supreme Court held “it is evident beyond all doubt that any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents and whether or not that conduct originates from a parent.”).

To support their claim for injunctive relief Plaintiffs place great reliance on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). But *Reed* is very different from this case. Specifically, *Reed* addressed a sign code only; it did not address whether a licensed professional may be prohibited from practicing conversion therapy on minors. Moreover, in *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015) *cert. den.* 137 S. Ct. 1452 (2017), a decision issued by the Eleventh Circuit **after** *Reed*, the court stated:

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 robustness of the speech and the need for regulatory flexibility in those areas ... For these categories of speech, the inquiry is more flexible, yet still searching standard of intermediate scrutiny. See *Cent. Hudson Gas v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564, 100 S. Ct. 2343, 2350, 65 L.Ed.2d 341 (1980) (describing the test for commercial speech); *Wollschlaeger*, 797 F.3d F. 3d at 893-897 (applying the same test to professional speech). Under intermediate scrutiny 'restrictions directed at commerce or conduct' may be upheld – assuming they further a substantial government interest and are narrowly tailored – even if they impose incidental burdens on speech.' *Sorrell*, 564 U.S. at -, 131 S. Ct. at 2664-65.

807 F.3d at 1246. (Emphasis supplied.) (Citations omitted.)

In deciding *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (also decided after *Reed*) the court applied heightened scrutiny, a standard similar to intermediate scrutiny. The court stated: “we need not decide whether strict scrutiny applies here, because ... provisions ... fail even under heightened scrutiny as articulated in *Sorrell*, 564 U.S. at 569-70, 131 S. Ct. 2653...” 848 F.3d at 1308. In *Wollschlaeger*, the court also noted: “When a statute is ‘susceptible’ to an interpretation that avoids constitutional difficulties, that is the reading we must adopt.” *Id.* at 1317; and “It is our ‘affirmative duty

to preserve the validity of legislative enactments when it is at all possible to do so,” *Id.* at 1318 (quoting *Coral Springs v. City of Sunrise*, 371 F.3d 1320, 1347-48 (11th Cir. 2004)).

It is also significant to note that the court in *Wollschlaeger* distinguished *Pickup* and stated:

... Importantly, however, the law in *Pickup* – like the law in *Locke* – did not restrict what the practitioner could say or recommend to a patient or client.... (explaining that the California law did not prevent mental health providers ‘from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic’ or from ‘recommending SOCE to patients, whether children or adults’) ...

... In any event, *Pickup* is distinguishable on its face and does not speak to the issues before us....

848 F.3d at 1309. Defendants also note that in *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011), which is favorably cited to in *Wollschlaeger*, the Eleventh Circuit stated: “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.” (Quotation and citations omitted.)⁸

In *Ocheese Creamery v. Putnam*, 851 F.3d 1228 (11th Cir. 2017), decided after both *Reed* and *Wollschlaeger*, the Eleventh Circuit observed that in *Wollschlaeger* the court “ultimately applied intermediate scrutiny”, 851 F.3d at 1240 n.7. The court further stated: “Challenges to restrictions on commercial speech are evaluated according to the rubric set forth by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed 2d 341 (1980).” 851 F.3d at 1234-35.

⁸ In *Locke*, the court also states: “States have a compelling interest in the practice of professions within their boundaries, and ... they have broad power to establish standards for licensing practitioners and regulating the practice of professions.” 634 F.3d at 1196. (Quotation omitted.)

The recent decision by the Court, in *National Institute of Family and Life Advocates* (“*NIFLA*”) v. *Becerra*, 138 S. Ct. 2361 (2018), also has tangential relevance and, thus, should be considered by this Court.⁹ Preliminarily, it should be noted that *NIFLA* is factually distinguishable from the case before this Court as well as the circuit court decisions in *King*, *Doe*, *Pickup*, and *Welch*. The *NIFLA* case does not involve the issue of whether a licensed professional may be prohibited from engaging in SOCE therapy with a minor. Rather, in *NIFLA*, the petitioners asked the Court to consider whether notice requirements of the California Reproductive Freedom Accountability, Comprehensive Care, and Transparency Act violated the First Amendment. The Court concluded that:

In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.

138 S. Ct. at 2375. The Court went on to find that: “California has not demonstrated any justification for the unlicensed notice that is more than ‘purely hypothetical’”, *Id.* at 2377, and that “Even if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech.” *Id.* In reaching these conclusions the Court noted: “this Court has not recognized ‘professional speech’ as a separate category

⁹ The *NIFLA* decision was issued by the Supreme Court the same day that the City filed its Motion to Dismiss the First Amended Complaint, on June 26, 2018. The City was unaware of the Supreme Court decision in *NIFLA* at the time it filed its Motion to Dismiss the First Amended Complaint on June 26, 2018 and, as such, the *NIFLA* decision was not addressed in the City’s Motion to Dismiss.

of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’ This Court has ‘been reluctant to mark off new categories of speech for diminished constitutional protection.’” *Id.* at 2371-2372 (citations omitted). At the same time, and of great significance to this case, the Court reaffirmed that: **“this Court has upheld regulations of professional conduct that incidentally burden speech. ‘The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.’** *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) **and professionals are no exception to this rule, see *Ohralik, supra*, at 456, 98 S. Ct. 1912.”** 138 S. Ct. at 2373. (Emphasis supplied.)

The Court also confirmed that:

This Court has afforded less protection for professional speech in two circumstances – neither of which turned on the fact that professionals were speaking. First, **our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’** *See e.g. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed.2d 652 (1985); *Milavetz Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250, 130 S. Ct. 1324, 176 L. Ed.2d 79 (2010); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-456, 98 S. Ct. 1912, 56 L. Ed.2d 444 (1978). Second, under our precedents, **States may regulate professional conduct even though that conduct incidentally involves speech.** *See, e.g., id* at 456. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884, 112 S. Ct. 2791, 120 L. Ed.2d 674 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ). But neither line of precedents is implicated here.

138 S. Ct. at 2372. (Emphasis supplied.) It is also important to emphasize that in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), which is favorably cited to by the Court in *NIFLA*, the Court stated that: “we instead have **afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values**”, 436 U.S. at 456 (emphasis supplied); and that “**the State**

does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.” *Id.* (Emphasis supplied.)

The bottom line is that *NIFLA* does not overrule established precedent of the Court. Rather, *NIFLA* recognizes and reaffirms the well-established precedent wherein the Court has held that: “The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech” (quoting *Sorrell*, 564 U.S. at 567), “and professionals are no exception to this rule.” 138 S. Ct. at 2373; that “our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their commercial speech....”, 138 S. Ct. at 2372; and that “under our precedents States may regulate professional conduct even though that conduct incidentally involves speech....” *Id.* Accordingly, under *NIFLA*, to the extent that this Court finds - as it should - that the Ordinance regulates professional conduct and only incidentally burdens speech, this Court can - and should - uphold the Ordinance. Moreover, under the precedent articulated by the Court in *Ohralik*, and reaffirmed in *NIFLA*, the government does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. 436 U.S. at 456. This is extremely important here where the Ordinance is intended to regulate activity that is deemed harmful to the public. Finally, it should be noted that unlike the statute in *NIFLA*, where the Court found that the licensed notice cannot survive even intermediate scrutiny, the Ordinance here certainly passes muster under the intermediate scrutiny test.

With respect to the assertion by Plaintiffs, that the Ordinance discriminates on the basis of viewpoint, Defendants commend the Court’s attention to *Keeton v. Anderson-*

Wiley, 664 F.3d 865 (11th Cir. 2011). In *Keeton*, a case wherein a graduate student alleged violations of her First Amendment free speech and free exercise rights, the Eleventh Circuit recognized that requiring adherence to professional standards prohibiting conversion therapy does not constitute viewpoint discrimination. The case of *Legal Services Corporation v. Velazquez*, 121 S. Ct. 1043 (2001), which is cited by Plaintiffs and preceded *Keeton* by approximately ten years, is inapposite. *Velaquez* does not address conversion therapy, reparative therapy, or SOCE; rather, *Velaquez* pertained to a challenge to a restriction prohibiting legal recipients of Legal Services Corporation funds from engaging in representation involving efforts to amend or otherwise challenge the validity of existing welfare laws. Finally, in further opposition to the argument of viewpoint discrimination, Defendants note the Ordinance is intended to protect the physical and psychological well-being of any individual who is a minor, irrespective of the sexual orientation of the minor. Indeed, § 14-312 of the Ordinance expressly provides that “It shall be unlawful for any Provider to practice conversion **on any individual who is a minor**” (Doc. 24-1, p.7.) (Emphasis supplied.) In addition, far from censoring any viewpoint, the Ordinance states, at Doc. 24-1, p.5, that:

... the City does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders.

Plaintiffs’ vagueness argument fails as well. In *Hill v. Colorado*, 530 U.S. 703, 733 (2000), the Court stated: “speculation 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.” The Court has further held mathematical

certainty is not expected when interpreting a law for vagueness. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). See also *Pine v. City of West Palm Beach, Fla.* 2013 WL 5817651*8 (S.D. Fla. 2013) *aff'd* 762 F.3d 1262 (11th Cir. 2014) (in concluding an ordinance was not vague, the court quoted the Court for the proposition that: “When determining whether a law is vague, the Court will look to ‘what the Ordinance as a whole prohibits.’ *Grayned*, 408 U.S. at 110...”)). Given Plaintiffs’ obvious familiarity with SOCE (see Doc. 78, 85) Plaintiffs’ vagueness argument rings particularly hollow.

Plaintiffs’ overbreadth argument is also a red herring. As the Court stated in *United States v. Stevens*, 559 U.S. 460, 473 (2010), a statute is impermissibly overbroad if “‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 444 n.6.) In applying that standard, to the matter at hand, the Ordinance is not unconstitutionally overbroad.

With respect to Plaintiffs’ argument that the City improperly relied on a 2009 American Psychological Association Task Force Report (“APA Report”), this argument is also without merit. Preliminarily, it should be noted that in *King* the court pointed out that a legislative body is “entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review....” 767 F.3d at 238. In *King*, moreover, one of the studies relied upon was the APA Report. As set forth in *King*: “According to the legislature, for example, a 2009 report issued by the American Psychological Association (‘APA Report’) concluded ‘[S]exual orientation change efforts can pose critical health risks....’”

767 F.3d at 222. It should also be noted that the APA Report was also favorably cited to by the courts in *Doe*, 783 F.3d at 152; *Welch*, 834 F.3d at 1046; and *Pickup*, 740 F.3d at 1232. Finally, it should be noted that the APA Report states, at page 42, that “studies ... indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals including depression and suicidal thoughts.” (Doc. 24-2, p. 9.)

With respect to Plaintiffs’ assertion that there is no compelling governmental interest, the Ordinance expressly states that there is a “compelling interest in protecting the physical and psychological well-being of minors ... and in protecting its minors against exposure to serious harm caused by sexual orientation and gender identity change efforts” (Doc. 24-1, p.5.)

Finally, Plaintiffs’ assertion, that the Ordinance is an unconstitutional prior restraint is simply wrong. As stated in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), “the regulations we have 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.’” *Id.* at 795 n.5 (quoting *Se. Promotions, Ltd. V. Conrad*, 420 U.S. 546, 553 (1975)). The Ordinance does not fall into this category nor does it constitute a total prohibition on speech.

Count II fails to state a claim upon which relief can be granted

Count II of the Amended Complaint also fails to state a claim upon which relief can be granted. In *Doe*, where a minor child and his parents had brought an action against the Governor of New Jersey, challenging the constitutionality of a New Jersey statute that

prohibited state licensed counselors from engaging in SOCE therapy with minors, and plaintiffs alleged that the statute violated their First Amendment right to receive information, the Third Circuit rejected that argument and stated in relevant part:

...the First Amendment protects both the speaker and the recipient of information. *See Va. State Bd. Of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S. Ct. 1817, 48 L. Ed.2d 346 (1976). However, the cases interpreting the First Amendment do not contemplate that some speech may be restricted as to the speaker but not to the listener. The listener's right to receive information is reciprocal to the speaker's right to speak. *See id.; Bd. Of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867, 102 S. Ct. 2799, 73 L. Ed.2d 435 (1982) ([T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them.) As we concluded in *King*, [the statute] does not violate the counselor's right to speak, *see* 767 F.3d at 240, and, as a result, it does not violate Appellants' right to receive information.

783 F.3d at 155. Applying this legal principle to this case, count II cannot survive.

Count III fails to state a claim upon which relief can be granted

Count III of the Amended Complaint, which alleges that the Ordinance violates Plaintiffs' right to free exercise of religion, fails to state a claim upon which relief can be granted. In *King*, where plaintiffs' second constitutional claim was that the statute violated their First Amendment right to free exercise of religion, the court concluded that this claim also lacked merit. In reaching that conclusion, the court stated in relevant part:

Under the Religion Clauses of the First Amendment, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The right to freely exercise one's religion, however, is not absolute. *McTernan v. City of York*, 577 F.3d 521, 532 (3d Cir. 2009). If a law is 'neutral' and 'generally applicable,' it will withstand a free exercise challenge so long as it is 'rationally related to a legitimate government objective.' *Brown v. City of Pittsburgh*, 586 F.3d 263, 284 (3d Cir. 2009) (citation omitted). This is so even if the law 'has the incidental effect of burdening a particular religious practice or group.' *Id.* at 284 (*quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed.2d 472 (1993)).

The issue before us, then, is whether [the statute] is ‘neutral’ and ‘generally applicable.’ A law is ‘neutral’ if it does not target religiously motivated conduct either on its face or as applied in practice.’ ... ‘A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated....’

As a preliminary matter, [the statute] makes no explicit reference to any religion or religious beliefs, and is therefore neutral on its face. *See Lukumi*, 508 U.S. at 533-34, 113 S. Ct. 2217. Nevertheless, Plaintiffs argue that [the statute] covertly targets their religion

None of [the] ‘exemptions,’ however, demonstrate that [the statute] covertly targets religiously motivated conduct....

Accordingly, we conclude that [the statute] is neutral and generally applicable, and therefore triggers only rational basis review....

767 F.3d 216, 241-243. *See Welch*, 834 F.3d at 1044-1047 (statute prohibiting licensed mental health providers from engaging in SOCE with minors did not excessively entangle state with religion in violation of First Amendment’s Establishment Clause). In this case, the Ordinance must also pass muster. The Ordinance (1) is neutral and generally applicable, and does not target religiously motivated conduct on its face or as applied in practice,¹⁰ and

¹⁰ The Ordinance does not make any explicit reference to any religion or religious beliefs. Moreover, none of the exemptions to the Ordinance demonstrates that it covertly targets religiously motivated conduct. To the contrary, the Ordinance expressly states: “A Provider does not include members of the clergy who are acting in their roles as clergy or pastoral counselors and providing religious counseling to congregants, as long as they do not hold themselves out as operating pursuant to any of the aforementioned Florida Statutes licenses.” Doc. 24-1, p.7. The Ordinance also states, on page 4, that “the City does not intend to prevent mental health providers from ... referring minors to unlicensed counselors, such as religious leaders. This ordinance does not prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults” (Doc. 24-1, p.5.) The Defendants also note that the prohibition in the Ordinance against SOCE therapy with minors by a provider is neutral and applies to “*any individual* who is a minor.”(Doc. 24-1, p. 6.) (Emphasis supplied.) Finally, in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), where the Court held plaintiffs had not demonstrated a likelihood of success on the merits of their constitutional claim, the Court noted that “The Proclamation is expressly premised on legitimate purposes: ... The text says

(2) at a minimum, is rationally related to a legitimate governmental objective. Indeed, the Ordinance serves a compelling governmental interest and is narrowly tailored.

Counts IV and V fail to state a claim upon which relief can be granted

Counts IV and V – Plaintiffs’ constitutional challenges under the Florida Constitution – fail to state a claim for which relief can be granted for the same reasons the federal constitutional challenges lack merit and must be dismissed. *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1295 (S.D. Fla. 1999) *aff’d* 420 F.3d 1308 (11th Cir. 2005) (“Florida Courts have generally construed their state constitutional guarantees to be coextensive with their federal counterparts.”); *Allen v. Allen*, 622 So.2d 1369 (Fla. 1st DCA 1993) (finding concurrent violations of the Free Exercise Clause of both Art. I, § 3 and the First Amendment); *Fla. Cannery Association v. State of Fla.*, 371 So.2d 503, 517 (Fla. 2d DCA 1979).

Count VI fails to state a claim upon which relief can be granted

Plaintiffs’ allegations in count VI, that the City has no authority to enact the Ordinance because the Legislature preempted the field of regulation of mental health professionals and the field of disciplinary actions for licensed mental health professionals, fail to state a claim upon which relief can be granted.

Florida acknowledges two types of preemption: express and implied. *See D’Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017); *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). Express preemption requires

nothing about religion.” *Id.* at 2421. Similarly, in this case the Ordinance is premised on legitimate purposes, and the Ordinance does not make any explicit reference to any religion or religious beliefs.

a specific legislative statement that cannot be implied or inferred, and must be accomplished by clear language stating an intended preemption. *Browning*, 28 So. 3d at 886; *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006). Implied preemption occurs when “the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area, or field of operation, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.” *D’Agastino*, 220 So. 3d at 421. “In determining if implied preemption applies, the court must look ‘to the provisions of the whole law, and to its object and policy.’” *Browning*, 28 So. 3d at 886 (quoting *State v. Harden*, 938 So.2d 480, 486 (Fla. 2006)). However, courts “must be careful and mindful in attempting to impute intent to the Legislature to preclude a local elected governing body from exercising its home rule powers.” *D’Agastino*, 220 So. 3d at 421. See *Exile v. Miami-Dade County*, 35 So. 3d 118, 119 (Fla. 3d DCA 2010); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1019 (Fla. 2d DCA 2005) (“Courts are understandably reluctant to preclude a local elected governing body from exercising its local powers.”) ; *Randolph v. Family Network on Disabilities of Florida, Inc.*, 2012 WL 71719 (M.D. Fla. 2012) (in granting motion to dismiss, district court upheld enforcement of ordinance prohibiting discrimination on basis of sexual orientation despite argument it was impliedly preempted by the Florida’s Civil Rights Act; and court stated “Because the ordinance and statute can coexist, there is no preemption.” *Id.* at 71719*3.).

Irrespective of whether one applies an express preemption analysis or an implied preemption analysis, Plaintiffs cannot state a claim upon which relief can be granted. Plaintiffs fail to allege any actual legislative statement expressly prohibiting local

governments in the state from enacting ordinances prohibiting conversion therapy. In addition, an examination of the provisions cited by Plaintiffs - Chapter 491 of the Florida Statutes and Section 64B4 of the Florida Administrative Code - reflect that they are completely silent as to any pervasive scheme evidencing a legislative attempt to preempt the City from prohibiting conversion therapy within its jurisdiction. Chapter 491 reflects, moreover, that the intent is directed to “establishing minimum qualifications for entering into and remaining in the respective professions”. Section 491.002, Fla. Stat.¹¹

It is also both instructive and significant that Chapter 456, entitled “Health Professions And Occupations: General Provisions”, expressly provides in § 456.003, (denominated “Legislative intent; requirements”) that:

(2) The Legislature further believes that such professions shall be regulated only for the preservation of the health, safety, and welfare of the public under the police powers of the state. Such professions shall be regulated when:
 ... (b) **The public is not effectively protected by other means, including, but not limited to, other statutes, local ordinances, or federal legislation.**

Fla. Stat. § 456.003(2)(b). (Emphasis supplied.) This provision clearly contemplates - and indeed should make clear - that municipalities are authorized, through local ordinances, to

¹¹ Section 491.009, Fla. Stat., also addresses various acts constituting grounds for denial of a license or disciplinary action. Although none of the acts identified specifically deal with conversion therapy, or reparative therapy or SOCE therapy, there is a generic provision under subsection (q) which addresses “performing any treatment or prescribing any therapy which by the prevailing standards of the mental health professions in the community, would constitute experimentation on human subjects, without first obtaining full, informed, and written consent.” To the extent that Plaintiffs were to argue that this generic provision could potentially apply to conversion therapy, or reparative therapy, or SOCE therapy, it should be noted that in *King, supra*, the court stated that “We are not convinced, however, that an informed consent requirement would adequately serve New Jersey’s interests. Minors constitute an ‘especially vulnerable population,’ ... and may feel pressured to receive SOCE counseling by their families and their communities despite their fear of being harmed....” 767 F.3d at 240. *See also Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (“the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.”) *Id.* at 2270 (quoting *Cruzan v. Director, Mo. Dept of Health*, 497 U.S. 261, 277 (1990)). In *Washington*, the Court also noted that “The State has an interest in preventing suicide, and in studying, identifying, and treating its causes.” 117 S. Ct. at 2272; and that the “State has an interest in protecting vulnerable groups” *Id.* at 2273.)

regulate such professions as appropriate. Accordingly, far from the City being preempted from enacting the Ordinance, this provision is consistent with the authority of the City to have approved the Ordinance.

Finally, the Supreme Court has recognized “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). (Emphasis supplied.) See *Craig v. Boren*, 97 S. Ct. 451, 458 (1976) (“The protection of public health and safety represents an important function of state and **local** governments.”) (Emphasis supplied.); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding city ordinance promoting welfare of teenagers).

Count VII fails to state a claim upon which relief can be granted

Count VII, which alleges the Ordinance violates Florida Patient’s Bill of Rights and Responsibilities, § 381.026, Fla. Stat., fails to state a claim upon which relief can be granted.

First, Plaintiffs are not “health care providers” under § 381.026. Rather, § 381.026(2) states: “As used in this section and s. 381.0261, the term: ... (c) ‘Health care provider’ means a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, or a podiatric physician licensed under chapter 461.” While the Legislature could have added “marriage and family therapists” under Chapter 491 as defined “health care providers,” it chose not to despite numerous revisions to § 381.026 following its enactment in 1991, and the same definition of “marriage and family therapist” existing under § 491.003(5) since 1987. See Laws of Fla., ch. 87-252 § 15.

Second, and of significance, the language in § 381.026(3) expressly states that “[t]his section shall not be used for any purpose in any civil or administrative action....” (Emphasis supplied.) Pursuant to this provision, Plaintiffs may not assert a claim against Defendants under the Florida Patient’s Bill of Rights and Responsibilities.

Finally, even assuming arguendo that Plaintiffs were “health care providers” under § 381.026, and that the statute were to have created a private cause of action, Plaintiffs would still fail to state a claim upon which relief could be granted. Although Fla. Stat. § 381.026(4)(d)(3) provides that patients have the right to treatment including “complementary or alternative health care treatments, in accordance with the provisions of s.456.41”, the term “complementary or alternative health care treatment” is defined to mean “any treatment that is designed to provide patients with an **effective** option to the prevailing or conventional treatment methods....” Fla. Stat. § 456.41(2)(a) (Emphasis supplied.) Plaintiffs cannot demonstrate that conversion therapy is an effective option. As reflected in the legislative findings in the Ordinance, there is a lack of credible evidence that conversion therapy is effective and, indeed, conversion therapy may pose a serious threat to the health and well-being of the affected persons. (Doc. 24-1.)

Count VIII fails to state a claim upon which relief can be granted

Count VIII, a claim under § 761.03 Fla. Stat., the Religious Freedom Restoration Act of 1998 (“FRFRA”), fails to state a claim upon which relief can be granted. The Florida Supreme Court, in examining FRFRA, has held: “a substantial burden on the free exercise of religion is one that 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). In applying this standard, the District Court of Appeal, in the Fifth District, has held that a law requiring a Muslim woman to remove her veil for photographs for her driver's license "merely inconvenienced" her religious beliefs, and did not substantially burden them under FRFRA. *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So.2d 48, 57 (Fla. 5th DCA 2006). See *Cambridge Christian School, Inc. v. Fla. High School Athletic Association, Inc.*, 2017 WL 2458314 (M.D. Fla. 2017);¹² *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp.2d 1207, 1214 (S.D. Fla. 2005) *aff'd* 144 Fed. Appx. 857 (11th Cir. 2005) (city's denial of a synagogue's conditional land use application did not substantially burden members' ability to worship according to their beliefs, and did not violate FRFRA).

In applying the foregoing case law to the matter at hand, Plaintiffs cannot establish the Ordinance rises to the level of a substantial burden on the free exercise of religion as defined by FRFRA, and as interpreted by the case law. Indeed, the Ordinance expressly provides: **"... This Ordinance does not prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults; nor does it prevent minors from seeking SOCE from mental health providers in other political subdivisions or**

¹² In *Cambridge Christian* the district court adopted, confirmed, and approved the Report and Recommendation of the magistrate judge, and granted defendant's motion to dismiss verified amended complaint, and denied plaintiff's motion for preliminary injunction. 2017 WL at 2458314*14. In the Report and Recommendation, it states that: "Here, Cambridge Christian alleges that FHSAA placed a substantial burden on its exercise of religion by denying the use of the stadium loudspeaker to permit the school community to come together in prayer. (Doc. 8, ¶124). Under the language of the statute, as well as the case law cited above, the undersigned concludes that Cambridge Christian cannot demonstrate that FHSAA's actions rose to the level of placing a substantial burden on Cambridge Christian's exercise of religion because the FHSAA's actions did not forbid or deny Cambridge Christian, or any of its members, from engaging in prayer." *Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc.* case no.:8:16-cv-2753-T-36AAS (Doc. 50, p.32.) (Defendants note that the district court decision was the subject of an appeal which is currently pending before the United States Court of Appeals for the Eleventh Circuit.)

states outside of the City of Tampa, Florida...” (Doc. 24-1, p.5.) (Emphasis supplied.)

Put simply, minors are not denied the opportunity to receive conversion therapy; rather, they can travel outside the City to receive conversion therapy, or they can receive conversion therapy in the City from unlicensed providers, such as religious leaders.

Plaintiffs’ claim is further without merit because the “City of Tampa has a **compelling interest** in protecting the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and questioning youth, and in protecting its minors against exposure to serious harms caused by sexual orientation and gender identity change efforts....” (Doc. 24-1, p.5.) (Emphasis supplied.)

Finally, Plaintiffs’ claim also fails because the Ordinance is narrowly tailored to advance the compelling governmental interest. It specifically states that:

... the City does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders. This ordinance does not prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults; nor does it prevent minors from seeking SOCE from mental health providers in other political subdivisions or states outside of the City.... [(Doc. 24-1, p.5.)]

II. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM

Plaintiffs cannot carry their burden in establishing that they are likely to suffer irreparable harm in the absence of preliminary relief. Plaintiffs fail to state a claim upon which any relief can be granted, and certainly not one that is irreparable. Moreover, any claim for monetary damages, by its very nature, negates their claim of irreparable harm. *See Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991).

Plaintiffs are further incapable of establishing irreparable harm because, manifestly, the Ordinance: (1) does not prevent Plaintiffs from administering conversion therapy to minors outside the City; (2) does not prohibit minors from seeking conversion therapy outside the City; (3) does not prevent unlicensed providers, such as religious leaders, from administering conversion therapy to minors in the City; and (4) “does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors such as religious leaders.” (Doc. 24-1, p.5.)

Finally, Defendants commend the Court’s attention to *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016), where the Eleventh Circuit held that: “A delay in seeking a preliminary injunction of even only a few months - though not necessarily fatal - militates against a finding of irreparable harm ... Indeed, the very idea of a *preliminary* injunction is premised on the need for speedy and urgent action to protect a plaintiff’s rights before a case can be resolved on its merits.” (Emphasis in original.) *See also Kazai v. Price*, 2017 WL 6270086 (M.D. Fla. 2017); *Regions Bank v. Kaplan*, 2017 WL 3446914 (M.D. Fla. 2017); *Antoine v. School Board of Collier County, Fla.*, 2017 WL 9674515 (M.D. Fla. 2017). In this case, Plaintiffs Vazzo and Pickup waited approximately eight months after the Ordinance was enacted before they filed their Complaint, and original motion for preliminary injunction, in December, 2017. (Docs. 1, 3, respectively.) Moreover, Plaintiff Soli Deo Gloria International, Inc. d/b/a New Hearts Outreach Tampa Bay, individually and on behalf of its members, constituents and clients, waited over a year

after the Ordinance was enacted, and more than five months after the initial Complaint was filed, to seek to challenge the Ordinance in May, 2018. (Doc. 71.)

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH AGAINST GRANTING PRELIMINARY INJUNCTIVE RELIEF

The balance of hardships, and consideration of public interest, clearly outweigh any threatened injury to Plaintiffs if the injunction is not issued. First, the Ordinance identifies numerous medical and mental health organizations which have found that SOCE therapy may pose a serious threat to the health and well-being of the affected persons, and many such organizations have also concluded there is a lack of credible evidence such therapy is effective. The Ordinance articulates the following legislative findings:

WHEREAS, as recognized by major professional associations of mental health practitioners and researchers in the United States and elsewhere for nearly 40 years, being lesbian, gay, bisexual, transgender or gender nonconforming, or questioning (LGBT or LGBTQ) is not a mental disease, disorder or illness, deficiency or shortcoming; and

WHEREAS, the American Academy of Pediatrics in 1993 published an article in its Journal, stating: "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation;"^[13] and

WHEREAS, the American Psychiatric Association in December 1998 published its opposition to any psychiatric treatment, including reparative or conversion therapy, which therapy regime is based upon the assumption that homosexuality is a mental disorder *per se* or that a patient should change his or her homosexual orientation;^[14] and

WHEREAS, the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation ("APA Task Force") conducted a *systematic* review of peer-reviewed journal literature on Sexual Orientation Change Efforts ("SOCE"), and issued its report in 2009, citing research that sexual orientation change efforts can pose critical health risks to

[13] <http://pediatrics.aappublications.org/content/pediatrics/92/4/631.full.pdf>

[14] https://www.camft.org/ias/images/PDFs/SOCE/APA_Position_Statement.pdf

lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources;[¹⁵] and

WHEREAS, following the report issued by the APA Task Force, the American Psychological Association in 2009 issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts, advising parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth;[¹⁶] and

WHEREAS, the American Psychoanalytic Association in June 2012 issued a position statement on conversion therapy efforts, articulating that "As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice" and that psychoanalytic technique "does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression," such efforts being inapposite to "fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes;"[¹⁷] and

WHEREAS, the American Academy of Child & Adolescent Psychiatry in 2012 published an article in its Journal stating that clinicians should be aware that there is "no evidence that sexual orientation can be altered through therapy and that attempts to do so may be harmful;" that there is "no medically valid basis for attempting to prevent homosexuality, which is not an illness;" and that such efforts may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts; and that, for similar reasons cumulatively stated above,

[¹⁵] <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>

[¹⁶] <http://www.apa.org/about/policy/sexual-orientation.pdf>

[¹⁷] <http://www.apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender>

carrying the risk of significant harm, SOCE is contraindicated^[18]; and

WHEREAS, the Pan American Health Organization, a regional office of the World Health Organization, issued a statement in 2012 stating: "These supposed conversion therapies constitute a violation of the ethical principles of health care and violate human rights that are protected by international and regional agreements." The organization also noted that conversion therapies "lack medical justification and represent a serious threat to the health and well-being of affected people;"^[19] and

WHEREAS, in 2014 the American School Counselor Association issued a position statement that states: "It is not the role of the professional school counselor to attempt to change a student's sexual orientation or gender identity. Professional school counselors do not support efforts by licensed mental health professionals to change a student's sexual orientation or gender as these practices have been proven ineffective and harmful;"^[20] and

WHEREAS, a 2015 report of the Substance Abuse and Mental Health Services Administration, a division of the U.S. Department of Health and Human Services, "Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth" further reiterates based on scientific literature that conversion therapy efforts to change an individual's sexual orientation, gender identity, or gender expression is a practice not supported by credible evidence and has been disavowed by behavioral health experts and associations, perpetuates outdated views of gender roles and identities, negative stereotypes, stating, importantly, that such therapy may put young people at risk of serious harm, and recognizing that, same-gender sexual orientation (including identity, behavior, and attraction) is part of the normal spectrum of human diversity and does not constitute a mental disorder;^[21] and

WHEREAS, the American College of Physicians wrote a position paper in 2015 opposing the use of "conversion," "reorientation," or "reparative" therapy for the treatment of LGBT persons, stating that "[a]vailable research does not support the use of reparative therapy as an effective method in the treatment of LGBT persons. Evidence shows that the practice may actually cause emotional or physical harm to LGBT individuals, particularly adolescents or young persons;"^[22] and

^[18] [http://www.jaacap.com/article/S0890-8567\(12\)00500-X/pdf](http://www.jaacap.com/article/S0890-8567(12)00500-X/pdf)

^[19] http://www.paho.org/hq/index.php?option=com_content&view=article&id=6803%3A2012-therapies-changesexual-orientation-lack-medical-justification-threatenhealth&catid=740%3Apress-releases&Itemid=1926&lang=en

^[20] https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_LGBTQ.pdf

^[21] <http://store.samhsa.gov/shin/content/SMA15-4928/SMA15-4928.pdf>

^[22] <http://annals.org/article.aspx?articleid=2292051>

WHEREAS, In 2016, the American Medical Association issued policy statement H-160.991, which expressly opposed the use of “reparative” or “conversion” therapy for sexual orientation or gender identity;[²³] and

WHEREAS, The World Psychiatric Association issued a policy statement in March, 2016 on Gender Identity and Same-Sex Orientation, which stated, “There is no sound scientific evidence that innate sexual orientation can be changed. Furthermore, so-called treatments of homosexuality can create a setting in which prejudice and discrimination flourish, and they can be potentially harmful. The provision of any intervention purporting to ‘treat’ something that is not a disorder is wholly unethical;”[²⁴] and

WHEREAS, The National Association of Social Workers (“NASW”) issued a policy statement stating that “No data demonstrates that reparative or conversion therapies are effective, and in fact they may be harmful.” The NASW went further and stated that “conversion and reparative therapies are an infringement to the guiding principles inherent to social worker ethics and values;” [²⁵] and

WHEREAS, The Agency for Healthcare Research and Quality issued a clinician’s guideline for practitioners who work with children and adolescents based on research provided by the American Academy of Child and Adolescent Psychiatry. It stated that “There is no empirical evidence that adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness, and caring, which are important protective factors against suicidal ideation and attempts;” [²⁶]

(Doc. 24-1, p. 2- 5.)²⁷ Similar legislative findings were favorably considered by the courts in *Doe*, 783 F.3d at 152-53, *King*, 767 F.3d at 221-222, 238, *Welch*, 834 F.3d at 1046, and

[²³] <https://www.ama-assn.org/delivering-care/policies-lesbian-gay-bisexual-transgender-queer-lgbtq-issues>

[²⁴] http://www.wpanet.org/WPA_in_News.php

[²⁵] <https://www.naswdc.org/diversity/lgb/reparative.asp>

[²⁶] <https://www.guideline.gov/summaries/summary/38417>

²⁷ The aforesaid legislative findings, which are contained within the Whereas Clauses of the Ordinance, “are adopted as if set forth fully [t]herein” pursuant to Section 1 of the Ordinance. (Doc. 24-1, p.6.) A copy of each of the publications identified in the Ordinance are attached to the certified copy of the Ordinance which was previously filed of record by the City. (Doc 24.)

Pickup, 740 F.3d at 1223-1224. In addition, public comment offered at City Council meetings provides additional evidence that SOCE therapy can pose critical health risks to minors. Although Defendants acknowledge there were some individuals that offered public comment in opposition to the Ordinance, the record reflects a substantial number of individuals offered public comment in favor of the Ordinance. Some of the individuals that spoke in favor of the Ordinance include a clinical psychologist, an associate professor of internal medicine and pediatrics at University of South Florida board-certified in internal medicine and pediatrics, another psychologist, an ordained minister, an individual who had been subjected to conversion therapy, a pastor, a representative of Equality Florida, and others, that expressed very significant concerns about serious potential harms associated with conversion therapy and its impact on minors.²⁸

²⁸ Defendants request the Court take judicial notice of transcripts of excerpts of City Council meetings held on February 16, 2017, March 2, 2017, March 16, 2017 and April 6, 2017 where public comment was offered on the subject of the Ordinance. (Doc. 26.) In particular, Defendants commend the Court's attention to public comments offered by the following individuals who have specialized knowledge concerning the matter:

- (1) Gary Howell (Doc. 26-3, p. 3-5)
- (2) Dr. Brian Knox (Doc. 26-4, p. 13-15)
- (3) Nancy Britton (Doc. 26-4, p. 22)

Defendants also request the Court take judicial notice of DVDs of the City Council meetings on February 16, 2017, March 2, 2017, March 16, 2017 and April 6, 2017. (Doc. 27.) Further, Defendants request the Court take judicial notice of a certified copy of File Nos. E2017-48, E207-8 CH 14 and E2017-8 CH 19 pertaining to the adoption of the Ordinance. (Doc. 25.) This certified file includes, among other documents, (1) a letter dated March 12, 2017 from Jessica Anne Deeb, LCSW, LLC., a licensed clinical social worker, received and filed at the March 16, 2017 City Council meeting, which states in relevant part: "It is my professional opinion that conversion therapy (also known as reparative therapy) is diametrical to the objective of therapy itself and is harmful, especially to minors." (Doc. 25-1, p.17.); and (2) a letter dated February 28, 2017 from Susan W. Long, Ph.D., received and filed by at the March 2, 2017 City Council meeting, where Dr. Long states in relevant part: "The use of Conversion Therapy, Reparative Therapy or Sexual Reorientation Therapy 'has been rejected by all of the established and reputable American medical, psychological, psychiatric and professional counseling organizations.'... 'A very large number of professional medical, scientific and counseling organizations in the U.S. and abroad have issued statements regarding the harm that reparative therapy can cause, ...'" (Page one of letter authored by Dr. Long, Doc. 25-1, p. 33) (emphasis in original) (citations omitted). Finally, Defendants note that in the Court's Order, dated March 15, 2018, the Court stated: "The City's construed motions for judicial notice (Docs. 24-27) are **GRANTED** to the extent that the court judicially notes that the City's Clerk file, transcripts, and DVDs are official public materials related to Ordinance 2017-47. The court does not take judicial notice of the truth of the statements contained in the

Allowing licensed providers to administer conversion therapy to minors in the City, pending trial, could cause minors irreparable harm including suicidal ideation and attempts, substantial psychological pain and depression, and these injuries may not be undone if the injunction were subsequently vacated. Conversely, although Plaintiffs may not administer conversion therapy to minors in the City pending trial, the Ordinance does not prohibit Plaintiffs from administering conversion therapy to minors outside the City. Moreover, minors who wish to avail themselves of conversion therapy can seek such therapy outside the City. In addition, the Ordinance does not prevent unlicensed providers, such as religious leaders, from administering conversion therapy to minors or adults in the City. Finally, the Ordinance makes clear there is no prohibition in the City against counseling that provides support and 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 of a minor. (Doc. 24-1, p.5-6)

CONCLUSION

For all of the above reasons Plaintiffs' Motion for Preliminary Injunction (Doc. 85) should be DENIED.

Respectfully Submitted,

/s/ Robert V. Williams

Robert V. Williams, Esquire

City's Clerk file, transcripts, or DVDs. The City may submit with the Clerk of Court a true and correct copy of its DVDs of City Council meetings held on: February 16, 2017; March 2, 2017; March 16, 2017; and April 6, 2017." (Doc. 51, p.6.) The City thereafter filed the DVDs with the Clerk of the Court. (Doc.53.)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of July, 2018, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of Court. Service will be effectuated on all counsel of record via the Court's ECF/Electronic Service System.

/s/ Robert V. Williams
Robert V. Williams, Esquire