UNITED STATES DISTRICT COURT
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, and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY, individually and on behalf of its members, constituents and clients,	)	Case No. 8:17-cv-2896-T-02AAS
Plaintiffs,	)	
v.	)	
CITY OF TAMPA, FLORIDA,	)	
Defendant.	)	

PLAINTIFFS' POST-HEARING MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, pursuant to the Court's directive at the preliminary injunction hearing on November 15, 2018 (Doc. 136), file this post-hearing memorandum of law in support of Plaintiffs' Motion for Preliminary Injunction (Doc. 85), organized as a summary of points and authorities. These points and authorities supplement the arguments already submitted to the Court in Plaintiffs' briefing (Docs. 85, 114) and at the preliminary injunction hearing.

Point 1. Plaintiffs Need Only Show a More Likely Than Not Probability of Prevailing.

Defendants' urging of a "clear and convincing" likelihood of success standard is legally unsupportable. Under binding Eleventh Circuit precedent, Plaintiffs' likelihood of success showing requires only a probability of prevailing:

> **In our opinion the word "substantial" does not add to the quantum of proof required to show a likelihood of success on the merits.** The requirement of a substantial likelihood of success was established in the Fifth Circuit in *Buchanan v. United States Postal Service*, 508 F.2d 259, 266 (5th Cir.1975). . . . Fifth Circuit precedent handed down before September 30, 1981, is binding on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc). *Buchanan* supports its requirement of a substantial likelihood of success by citing Wright and Miller, *Federal Practice and Procedure*, § 2948, which requires plaintiff to show "the probability that plaintiff will succeed on the merits." **The word likelihood is synonymous with probability.**

Shatel Corp. v. Mao Ta Lumber & Yacht Corp., 697 F.2d 1352, 1355 n.2 (11th Cir. 1983) (emphasis added). "[T]he definition most often applied in this Circuit's precedent is the 'more likely than not' standard." *In re Terazosin Hydrocholride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1301 (S.D. Fla. 2005).[1]

Point 2. *Siegel v. Lapore* Does Not Alter the *Elrod* Principle That Irreparable Harm Is Presumed in Speech Suppression Cases Under the First Amendment.

The Eleventh Circuit case *Siegel v. LePore*, 234 F.3d 1163 (11th Circ. 2000), does not change the irreparable injury analysis applicable to Plaintiffs' First Amendment claims. The *Siegel* court explicitly acknowledged the principle applicable to Plaintiffs, that irreparable injury "may

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[1] *See also TAS Energy, Inc. v. Stellar Energy Americas, Inc.*, No. 8:14-cv-3145-T-30MAP, 2015 WL 6156149, *3 (M.D. Fla. Oct. 19, 2015) ("[I]n the context of reviewing the granting of a preliminary injunction, the term 'substantial likelihood of success' equates to the term 'probability' of success on the merits." (quoting *Shatel Corp.*)); *Creative Touch Interiors, Inc. v. Nicholson*, No. 6:14-cv-2043-Orl-40TBS, 2015 WL 12672126, *2 (M.D. Fla. Jan. 9, 2015) (noting standard for preliminary injunction merely requires "some probability of success on the merits"); *cf. Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) ("[A] movant . . . must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) . . . .").

be presumed" for "certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether." 234 F.3d at 1178. But the *Siegel* court was not raising the irreparable injury bar for First Amendment claims with its "imminent likelihood" language. Rather, the court was distinguishing First Amendment claims of actual speech suppression, where irreparable injury is presumed, from the Due Process and Equal Protection claims before it, in rejecting the overly broad proposition that "a violation of constitutional rights always constitutes irreparable harm." *Id.* at 1177–78. The Siegel court did not disagree with the Supreme Court's admonition in *Elrod v. Burns*, cited in Plaintiffs' briefs, that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 247, 373 (1976).[2] Under the Ordinance, the "likelihood that pure speech will be

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[2] To be sure, as authority for its "imminent likelihood" language, the *Siegel* court cited cases upholding the *Elrod* principle while clarifying the distinction between First Amendment and other constitutional rights. *See, e.g.*, *Ne. Florida Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283 (11th Cir. 1990); *Hohe v. Casey*, 868 F.2d 69 (3d Cir. 1989). *Siegel*, 234 F.3d at 1177–78. In *City of Jacksonville*, the Eleventh Circuit made the same distinction it later would make in *Siegel*, between constitutional rights in general and First Amendment rights in particular:

> "No authority from the Supreme Court or the Eleventh Circuit has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely **equal protection violation**. . . . The only area of constitutional jurisprudence **where we have said that an on-going violation constitutes irreparable injury is the area of first amendment** and right of privacy jurisprudence."

896 F.2d at 1285 (emphasis added). In *Hohe*, the Third Circuit addressed the difference between claims of government suppression of speech, such as the claims asserted by Plaintiffs in this case, and claims of incidental government inhibition of speech made by nonmembers of a state employee union based on their objection to indirectly supporting viewpoints they oppose through deductions of union fees from their paychecks:

> It is well-established that [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. But the assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood

chilled or prevented altogether" is more than "imminent"—it is a present reality for all SOCE counseling speech that Plaintiffs would speak but for the Ordinance.

Not surprisingly, neither Defendants nor their amicus have cited a single **First Amendment** case holding that a "delay" of eight months or less in bringing a constitutional challenge precludes a finding of irreparable harm. Moreover, given the limited availability of qualified counsel willing to represent Plaintiffs in such an unpopular cause, any "delay" is understandable and excusable even if constitutionally relevant.

Point 3. <u>Tampa's "You Can Take Your Protected Speech out of Our City" Does Not Ameliorate Plaintiffs' Irreparable Injury.</u>

"'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). Saying that Plaintiffs may avoid irreparable injury simply by going to "some other place" ignores this central premise of the First Amendment.

In *Schad*, a New Jersey borough banned nude dancing and argued it could do so because nude dancing was "amply available in close-by areas outside the limits of the Borough." 452 U.S. 61, 76 (1981). But because the borough's zoning ordinance only applied to the borough, and was not part of a larger scheme that selectively permitted nude dancing, it could only be analyzed

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> of success on the merits. Rather the plaintiffs must show a chilling effect on free expression. It is purposeful unconstitutional [government] suppression of speech [which] constitutes irreparable harm for preliminary injunction purposes. Accordingly, it is the direct penalization, as opposed to incidental inhibition, of First Amendment rights [which] constitutes irreparable injury.

868 F.2d at 72–73 (alterations in original) (citations and internal quotation marks omitted). The *Siegel* Court's "imminent likelihood" language, for which it cites *City of Jacksonville* and *Hohe*, must be understood in the context of not only the distinction between First Amendment and other constitutional rights, but more importantly the distinction between direct speech suppression claims ("imminent likelihood") and indirect forced viewpoint support claims.

within the confines of the borough itself. *See id.* Viewed within those confines, it was simply a ban of nude dancing; nude dancing's possible legality in "some other place" nearby was irrelevant. *See id.* In the same way, Tampa cannot argue that the potential ability for Plaintiffs to provide SOCE counseling in "some other place" somehow means Plaintiffs are not injured by Tampa's unconstitutional ban on Plaintiffs' counseling speech.

Point 4. <u>A Facial Challenge on First Amendment Grounds Does Not Require Unconstitutionality in Every Application.</u>

"To ultimately succeed on the merits [of their facial challenge, Plaintiffs] theoretically [have] 'to establish that no set of circumstances exists under which [the Ordinance] would be valid, or that [the Ordinance] lacks any plainly legitimate sweep.'" *Bruni v. City of Pittsburgh*, 824 F.3d 353, 362 (3d Cir. 2016) (quoting *United States v. Stevens*, 559 U.S. 460, 472–473, (2010)). "In the First Amendment context, [however,] the Supreme Court has softened that daunting standard somewhat, saying that a law may also be invalidated on its face 'if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* (quoting *Stevens*, 559 U.S. at 473).

Thus, "[t]he [Supreme] Court has often considered facial challenges simply by applying the relevant constitutional test to the challenged statute, **without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid**." *Id.* at 363 (emphasis added). "Where a statute fails the relevant constitutional test (such as strict scrutiny . . .), **it can no longer be constitutionally applied to anyone**—and thus there is no set of circumstances in which the statute would be valid." *Id.* (citations and internal quotation marks omitted) (emphasis added). Moreover, "[t]he Supreme Court and [the Eleventh Circuit] consistently have permitted facial challenges to prior restraints without requiring a plaintiff to show that there are no conceivable set of facts where the application of the particular government

regulation might or would be constitutional." *United States v. Frandsen*, 212 F.3d 1231, 1236 (11th Cir. 2000); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1331–32 (11th Cir. 2001).

Point 5. The Remedy for an Overbroad Ordinance Is to Invalidate It.

"The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law . . . ." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (citations and internal quotation marks omitted); *see also id.* ("Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces [the threat that an overbroad law may deter or chill protected speech]."); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("[A]ny enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.").

Point 6. The Court Cannot Save the Ordinance by Limiting or Rewriting It.

"In considering a facial challenge, this Court may impose a limiting construction . . . only if [the Ordinance] is 'readily susceptible' to such a construction. *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). Moreover, the Court must "not rewrite a . . . law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish [lawmakers'] incentive to draft a narrowly tailored law in the first place." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (alteration in original) (citations and internal quotation marks omitted). The Ordinance's total ban on "conversion therapy" is not susceptible to a limiting construction to cover, for example, only aversive or coercive therapy. Only rewriting the Ordinance could accomplish

such a limitation, and it would be improper for the Court do what Tampa should have done in the first place.[3] *See also* **Point 15**, *infra*, regarding Tampa's potential rewriting remedy.

Point 7. <u>There Must Be A Remedy for A Violation of the Florida Patient's Bill of Rights and Responsibilities.</u>

The Court should reject the City's argument that Plaintiffs cannot make any claim under the Florida Patient's Bill of Rights and Responsibilities, because that would leave the Bill of **Rights** without any remedies, which the law abhors. (Doc. 84 at 24; Doc. 99 at 26.) As Chief Justice Marshall famously noted, "**[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy**, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (emphasis added); *id.* at 163 ("It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever the right is invaded."). The Eleventh Circuit considers it "**a monstrous absurdity** in a well organized government, **that there should be no remedy** although a clear and undeniable right should be known to exist," and has not hesitated to fashion a remedy because violation of this principle "resonates of injustice." *CSX Transp., Inc. v. Brotherhood of Maint. of Way Empls.*, 327 F.3d 1309, 1329 (11th Cir. 2003) (emphasis added).

To the extent the Bill of Rights can be construed to prohibit direct actions against a physician for violating a patient's rights, that is **not** Plaintiffs' claim in this case. As briefed by Plaintiffs (Doc. 114 at 43–44), Tampa violated the rights of Plaintiffs' minor clients by denying them access to voluntary SOCE counseling. In accordance with the foregoing authorities, Plaintiffs' minor clients must have an equitable remedy against Tampa's *ultra vires* act.

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[3] Plaintiffs do not concede Tampa has the authority to draft any ordinance prohibiting any modality of SOCE, given the State of Florida's preemption of the field. However, Plaintiffs do acknowledge that they would lack standing to challenge an aversive-only or coerced-only therapy ban, since they have no interest in such therapies and such a ban would have no effect on them.

Point 8. **The APA Report Discloses Anecdotal Evidence of Benefits from SOCE at Least Equivalent to Anecdotal Evidence of Harm, and More Benefits Perceived by Religious Individuals.**

In its post-hearing memorandum, Tampa repeats no fewer than three times the patently false recitation from the Ordinance that there is "overwhelming" evidence supporting it.[4] (Doc. 143 at 2, 4.) Indeed, given the lack of empirical research on the outcomes of SOCE, the Task Force authors of the APA Report looked to participants' perceptions of SOCE, "in order to examine what may be perceived as being helpful or detrimental by such individuals, **distinct from a scientific evaluation of the efficacy or harm** . . . ." (Doc. 134-17 at 49 (emphasis added).) This review of anecdotal evidence, which by definition cannot be overwhelming, did not favor one outcome over the other: "[S]ome recent studies document that there are people who perceive that they have been harmed through SOCE, just as other recent studies document that there are people who perceive that they have benefited from it."[5] (Doc. 134-17 at 42 (citations omitted).)

Nonetheless, the Task Force found several reported benefits of SOCE perceived by participants: "(a) a place to discuss their conflicts; (b) cognitive frameworks that **permitted them**

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[4] *See, e.g.*, Doc. 134-17 at 3 ("**[T]he recent SOCE research cannot provide conclusions regarding efficacy or safety** . . . ."); *id.* at 42 ("**[T]he recent studies do not provide valid causal evidence of the efficacy of SOCE or of its harm** . . . ."); *id.* at 42 ("Thus, **we cannot conclude how likely it is that harm will occur from SOCE**."); *id.* at 72 ("**There is a lack of published research on SOCE among children**."); *id.* at 73 ("**We found no empirical research on adolescents who request SOCE** . . . .") (all emphases added).

[5] The Constitution does not allow the City simply to weigh the unempirical, anecdotal accounts of harm and benefit and decide which one wins:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

United States v. Stevens, 559 U.S. 460, 470 (2010).

to reevaluate their sexual orientation identity, attractions, and selves in ways that lessened shame and distress and increased self-esteem; (c) social support and role models; and (d) **strategies for living consistently with their religious faith and community**." (Doc. 134-17 at 49 (emphasis added) (citations omitted).) "Participants described the social support aspects of SOCE positively." (*Id.*)

The Task Force also observed that perceptions of harm may correlate specifically to "aversion techniques." (Doc. 134-17 at 41 ("Early research on efforts to change sexual orientation focused heavily on interventions that include **aversion** techniques. Many of these Studies did not set out to investigate harm. Nonetheless, these studies provide some suggestion that harm can occur from **aversive** efforts to change sexual orientation." (emphasis added)).)

The Task Force also found that individuals' religious beliefs shape their experiences and outcomes:

> [P]eople whose motivation to change was strongly influenced by their Christian beliefs and convictions were **more likely to perceive themselves as having a heterosexual sexual orientation after their efforts.** [T]hose who were less religious were more likely to perceive themselves as having an LGB sexual orientation after the intervention. **Some . . . concluded that they had altered their sexual orientation, although they continued to have same-sex sexual attractions.**

(Doc. 134-17 at 50 (emphasis added) (citations omitted).) "The participants had multiple endpoints, including LGB identity, 'ex-gay' identity, no sexual orientation identity, and a unique self-identity." (*Id.*) "Further, the findings suggest that some participants may have reconceptualized their *sexual orientation identity* as heterosexual . . . ." (*Id.* at 50.)

Point 9. **The APA Report Commends a Client-Directed Approach to Therapy for Clients with Unwanted Same-Sex Attractions, Commends More Research on Voluntary SOCE, *Recognizes that Minors Can Assent to SOCE Counseling*, and Condemns Only *Coercive* Therapies.**

For adults desiring "**to change their sexual orientation** or their behavioral expression of their sexual orientation, or both," the APA reported that "adults perceive a benefit when they are provided with **client-centered** . . . approaches" involving "identity exploration and development," "**respect for the client's values, beliefs, and needs**," and "permission and opportunity to explore a wide range of options . . . **without prioritizing a particular outcome**." (Doc. 134-17 at 4.) The Task Force elaborated:

> Given that there is diversity in how individuals define and express their sexual orientation identity, **an affirmative approach is supportive of clients' identity development without an a priori treatment goal concerning how clients identify or live out their sexual orientation or spiritual beliefs.** This type of therapy . . . can be helpful to those who accept, reject, or are ambivalent about their same-sex attractions. **The treatment does not differ, although the outcome of the client's pathway to a sexual orientation identity does.**

(Doc. 134-17 at 5 (emphasis added).) "For instance, the existing research indicates that possible outcomes of sexual orientation identity exploration **for those distressed by their sexual orientation** may be: LGB identities[,] **Heterosexual sexual orientation identity**[,] Disidentifying from LGB identities[, or] Not specifying an identity." (*Id.* at pg. 60 (emphasis added) (citations omitted).)[6]

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[6] In connection with its SOCE review and recommendations, the APA Report highlighted a problem with the sexual orientation terminology in the academic research:

> Recent studies of participants who have sought SOCE **do not adequately distinguish between sexual orientation and sexual orientation identity**. We concluded that the failure to distinguish these aspects of human sexuality has led SOCE research to obscure what actually can or cannot change in human sexuality. . . . **[S]ome individuals modified their sexual orientation identity** (e.g., individual or group membership and affiliation, self-labeling) **and other aspects**

A key finding from the Task Force's review "is that those who participate in SOCE, **regardless of the intentions of these treatments**, and those who resolve their distress through other means, **may evolve during the course of their treatment in such areas as self awareness, self-concept, and identity**." (Doc. 134-17 at 66 (emphasis added); *id.* at 61 ("Given . . . that many scholars have found that **both religious identity and sexual orientation identity evolve**, it is important for LMHP to explore the development of religious identity and sexual orientation identity." (emphasis added) (citations omitted)).)

The Task Force identifies the **same essential framework** "for children and adolescents who present a desire to change either their sexual orientation or the behavioral expression of their sexual orientation, or both, or whose parent or guardian expresses a desire for the minor to change."[7] (Doc. 134-17 at 5.) Specifically, for children and youth, "[s]ervices . . . should support and respect age-appropriate issues of **self-determination**; services should also be provided in the least restrictive setting that is clinically possible and should maximize self-determination. At a minimum, **the assent of the youth should be obtained, including whenever possible a developmentally appropriate informed consent to treatment**." (*Id.* (emphasis added).)

The Task Force also highlighted the ethical importance of client self-determination, encompassing "the ability to seek treatment, consent to treatment, and refuse treatment. **The informed consent process is one of the ways by which self-determination is maximized in**

> **of sexuality** (e.g., values and behavior). . . . **[I]ndividuals, through participating in SOCE, became skilled in ignoring or tolerating their same-sex attractions. Some individuals reported that they went on to lead outwardly heterosexual lives, developing a sexual relationship with an other-sex partner, and adopting a heterosexual identity**.

(Doc. 126-22 (APA Rep.), pgs. 3–4 (emphasis added).)

[7] The APA Report defines "*adolescents* as individuals between the ages of 12 and 18 and children as individuals under age 12." (Doc. 126-22 (APA Rep.), pg. 71 n.58.)

psychotherapy." (Doc. 134-17 at 68 (emphasis added); *see also id.* at 6 ("LMHP **maximize self-determination** by . . . providing effective psychotherapy that explores the client's assumptions and goals, without preconditions on the outcome [and] **permitting the client to decide the ultimate goal of how to self-identify and live out her or his sexual orientation**. . . . [T]herapy that increases the client's ability to cope, understand, acknowledge, and integrate sexual orientation concerns into **a self-chosen life** is the measured approach.").)

The Task Force viewed the concept of self-determination as equally important for minors: "It is now recognized that **adolescents are cognitively able to participate in some health care treatment decisions**, and such participation is helpful. [The APA] encourage[s] professionals to seek the assent of minor clients for treatment." (Doc. 134-17 at 74 (emphasis added) (citations omitted); *see also id.* at 77 ("The ethical issues outlined [for adults] are also relevant to children and adolescents . . . .").) The ability of minors to consent to mental health treatment is also confirmed in Florida law. *See, e.g.*, Fla. Stat. § 394.4784(2) (providing certain minors "age 13 years or older . . . **shall have the right to request, consent to, and receive outpatient crisis intervention services including individual psychotherapy, group therapy, counseling, or other forms of <u>verbal therapy</u> provided by a licensed mental health professional**" (emphasis added)).

In light of this strong self-determination ethic regarding youth, the Task Force "recommend[ed] that when it comes to treatment that purports to have an impact on sexual orientation, LMHP assess the adolescent's ability to understand treatment options, provide developmentally appropriate informed consent to treatment, and, at a minimum, **obtain the youth's assent to treatment**." (*Id.* at 79 (emphasis added).) "LMHP should strive to maximize

autonomous decision making and self-determination and **avoid coercive and involuntary treatments**."[8] (*Id.* at 76 (emphasis added).)

Apart from recommending against coercive, involuntary, and residential treatments, the Task Force **did not recommend the end of all SOCE**. Rather, without empirical evidence of SOCE efficacy or harm, the Task Force merely recommended that clients not be lead to **expect** a change in sexual orientation through SOCE. (Doc. 134-17 at 66.) Indeed, The Task Force cited literature expressly cautioning **against refusing SOCE** therapy for a client who requests it.

> LMHP who turn down a client's request for SOCE at the onset of treatment without exploring and understanding the many reasons why the client may wish to change may instill hopelessness in the client, who already may feel at a loss about viable options. . . . **[B]efore coming to a conclusion regarding treatment goals, LMHP should seek to validate the client's wish to reduce suffering and normalize the conflicts at the root of distress**, as well as create a therapeutic alliance that recognizes the issues important to the client.

(Doc. 134-17 at 56 (emphasis added) (citation omitted).)

The Task Force also called for more research on SOCE. (Doc. 134-17 at 91 ("Any future research should conform to best-practice standards for the design of efficacy research. Additionally, **research into harm and safety is essential**."), pg. 91 ("**Future research** will have to better account for the motivations and beliefs of participants in SOCE."), pg. 91 ("**This line of research should be continued and expanded to include conservatively religious youth and their families**.") (all emphases added).) The Task Force's call for future research squarely rejected the suggestion by some that "SOCE should not be investigated or practiced until safety issues have been resolved." (Doc. 134-17 at 91.)

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[8] The APA Report defines "*coercive treatments* as practices that compel or manipulate a child or adolescent to submit to treatment through the use of threats, intimidation, trickery, or some other form of pressure or force." (Doc. 134-17, pg. 71 n.59.) It defines "*involuntary treatment* as that which is performed without the individual's consent or assent and which may be contrary to his or her expressed wishes." (*Id.* at 71 n.60.)

Point 10. <u>The City Failed to Show That the Ordinance Was the Least Restrictive Means Available *at the Time of Enactment*.</u>

As briefed by Plaintiffs (Doc. 114 at 26–27), Tampa fails strict scrutiny on its legislative record for its Ordinance because, among other reasons, the record fails to show the City "**seriously** undertook to address the problem with less intrusive tools readily available to it." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540. As presented at the hearing (Hrg. Tr. 78:1–82:11; Doc. 140-1 at 45), discovery now confirms Tampa cannot meet its narrow tailoring burden under *McCullen*.

Importantly, the City cannot satisfy *McCullen* with any after-the-fact justification or rationalization, because "a municipality must now also prove that, **before adopting** a regulation that 'significantly' burdens speech, **it either attempted or 'seriously considered' and 'reasonably rejected' less intrusive alternatives**." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 379 (3d Cir. 2016) (Fuentes, J., concurring) (emphasis added). Thus, to pass narrow tailoring, Tampa would have to show that, **at the time of enactment**, "**substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**." *Bruni*, 824 F.3d at 370 (emphasis added). Having unequivocally admitted through its deponents that the City never even considered anything other than the outright, complete ban it ultimately enacted (Dep. Guido Maniscalco, Doc. 133-2, at 100:14–102:9), the City cannot possibly meet its burden.

Point 11. <u>The Existence of Article III "Case or Controversy" is Determined at the Case Level, Not the Individual Plaintiff Level.</u>

The Court need not scrutinize the standing of each Plaintiff. "In order for this court to have jurisdiction over the claims before [it], at least **one named plaintiff** must have standing for each

of the claims. *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1536 (11th Cir. 1994) (emphasis added). "The threshold case-or-controversy inquiry is whether there existed **a named plaintiff** with standing to raise the issue before the court." *Thurston v. Dekle*, 531 F.2d 1264, 1269 (5th Cir. 1976) (emphasis added), *vacated on other grounds*, 438 U.S. 901 (1978). *See also Carey v. Population Serv., Int'l*, 431 U.S. 678, 682 (2010) ("We conclude that [plaintiff-appellee] has the requisite standing and therefore have no occasion to decide the standing of the other appellees."); *Vill. of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit."); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003 n.10 (11th Cir. 2004) ("It is, however, sufficient if one plaintiff has standing to raise the . . . claims."); *In re Florida Cement & Concrete Antitrust Litig.*, No. 09-2387-CIV-ALTONAGA/Brown, 2011 WL 13174536, *1 (S.D. Fla. Feb. 24, 2011) ("**It is settled law that as long as one plaintiff has standing, the Court has subject matter jurisdiction over the case**." (emphasis added)).

Point 12. <u>The City Abandoned Any Argument That Its Ordinance Satisfies Strict Scrutiny.</u>

The City has made no attempt prior to or at the hearing to show the Court that its Ordinance satisfies strict scrutiny.[9] (Doc. 99 at 8–16; Hrg. Tr. at 123:21–25.) Plaintiffs have shown, however, both that strict scrutiny applies to Tampa's Ordinance, and that the Ordinance fails the test. (Doc. 85 at 11–19; Doc. 114 at 13–27.) By not attempting to argue how the Ordinance could satisfy strict scrutiny in the event the Court applied it, the argument is abandoned. *See Raybon v. Alabama*

[9] The City's lone, perfunctory footnote regarding strict scrutiny in its post-hearing memorandum (Doc. 143 at 2 n.2) cannot avoid its waiver. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 (11th Cir. 2007) ("We will not address this perfunctory and underdeveloped argument.").

Space Sci. Exhibit Comm'n, No. CV-17-S-372-NE, 2018 WL 4184580, at *11 (N.D. Ala. Aug. 31, 2018) ("Issues and contentions not raised in a party's brief are deemed abandoned." (citing *Chapman v. AI Transport*, 229 F.3d 1012, 1027 (11th Cir. 2000) (*en banc*)); *Ramsey v. Bd. of Regents of Univ. Sys. of Georgia*, No. 1:11-CV-3862-JOF-JSA, 2013 WL 1222492, at *29 (N.D. Ga. Jan. 30, 2013) ("When a party fails to address a specific claim, or fails to respond to an argument made by the opposing party, the Court deems such claim or argument abandoned."), *aff'd*, 543 Fed. Appx. 966 (11th Cir. 2013).

Point 13. Tampa and *Amicus Curiae* Equality Florida Have Utterly Failed to Engage with the Holding of *King* or the Binding Admission in the City's Training Materials That "Conversion Therapy" Is "Professional Speech."

Neither at the hearing, nor in their respective post-hearing memoranda, do Tampa or a*micus curiae* Equality Florida engage with the unequivocal language from *King* presented to the Court by Plaintiffs (Doc. 140-1 at 3–7) that SOCE counseling is speech, not conduct. Nor does either address the binding factual admission from the City's own training materials that "Conversion Therapy is a form of 'professional speech.'" (Doc. 140-1 at 16 (citing *King*).) Tampa and its *Amicus* fail to address *King* and the training materials because they cannot.

Equality Florida, instead, uses its *amicus* privilege to mischaracterize Plaintiffs' speech based onn outside materials neither produced nor tested in discovery, or considered by Tampa in enacting its Ordinance. (Doc. 142.) The unrefuted allegations in the Amended Complaint (Doc. 78) are the only proof before the Court as to Plaintiffs, and therefore control.

Point 14. The Ordinance Is Not Narrowly Tailored Because It Is Wildly Underinclusive.

If the purpose of the Ordinance is to protect children and youth from the purported harms of SOCE counseling, it is "'wildly underinclusive,'" further undermining any notion of narrow tailoring. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (hereinafter, "*NIFLA*") (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 802

(2011)). The Ordinance regulates only licensed professionals, and expressly excludes "conversion therapy" offered by unlicensed religious counselors and clergy. If Tampa genuinely believes all "conversion therapy" is harmful to minors, then exempting unlicensed religious counselors and clergy from regulation makes no sense. Indeed, the APA Report on which Tampa ostensibly relies not only fails to present empirical evidence of harm from **any** kind of SOCE counseling, its non-empirical, anecdotal reporting of harm expressly does not differentiate between SOCE from licensed professionals and SOCE from unlicensed religious organizations or persons. (Doc. 134-17 at 2 n.**.[10]) If the City has any legitimate authority to regulate behavior by adults that is considered harmful to children, whether those adults are religious, or part of a religious institution, is irrelevant. Thus, Tampa cannot justify the underinclusivity of its Ordinance on any claimed difference in harm between licensed SOCE and unlicensed religious SOCE, still further undermining any notion of narrow tailoring.

Point 15. <u>Tampa's Deigning to Allow Some Protected Speech Under the Ordinance Does Not Save It.</u>

Tampa cannot justify its prohibition of protected speech under the Ordinance by deigning to allow other protected speech. *See McCullen*, 134 S. Ct. at 2536 ("That misses the point.") That Plaintiffs could put up billboards or buy radio ads to promote protected speech that the Ordinance prohibits is irrelevant. The City does not have to lock Plaintiffs up or tape their mouths shut to violate the Constitution.

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[10] "In this report, we use the term sexual orientation change efforts (SOCE) to describe methods (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) that aim to change a person's same-sex sexual orientation to other-sex, **regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved**." (Doc. 134-17 at 2 n.** (emphasis added).)

Nor is the Ordinance saved, as urged by Equality Florida, by its ostensible allowance of "therapy that seeks to assist minors in exploring or understanding their sexual orientation or gender identity, whether fluid or not." (Doc. 142 at 6.) This argument highlights both the Ordinance's vagueness problem and Equality Florida's (willful) ignorance of the literature. Neither Tampa's officials nor Equality Florida can explain to the Court when "exploring or understanding" becomes change. Furthermore, as shown *supra* in **Point 9**, client goals, self-concept, and identity can evolve (change) during treatment, and client outcomes differ, **without any predetermined therapy goals and regardless of the therapy intentions**. To be sure, despite paying lip service to the concepts of exploration and understanding, Equality Florida favors the prohibition of any conversation with a therapist that could allow a minor to pursue the goals, self-concept, and identity the minor wants.

Point 16. Neither the Public Interest nor the Balance of Harms Precludes Injunctive Relief Against the Unconstitutional Ordinance.

It is axiomatic that "the enforcement of an unconstitutional law vindicates no public interest." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) (citing *ACLU v. Ashcroft*, 322 F.3d 240, 251 n. 11 (3d Cir. 2003), *aff'd, Ashcroft v. ACLU*, 542 U.S. 656 (2004)). Given that there is no evidence of harm from SOCE in Tampa prior to enactment of the Ordinance, there is no public interest supporting the City's code enforcement or legal department officials wielding the unconstitutional Ordinance, and no plausible risk of harm to anyone from enjoining it. Furthermore, if this unconstitutionally broad Ordinance were enjoined, Tampa theoretically remains free to attempt a narrow, constitutional ordinance that prohibits only unprotected conduct while allowing Plaintiffs' protected talk therapy. *See Swartzwelder v. McNeilly*, 297 F.3d 228, 242 (3d Cir. 2002) (holding balance of interests favored injunction because, "[w]hile the preliminary injunction may impinge on significant interests of the City, **the**

preliminary injunction leaves the City free to attempt to draft new regulations that are better tailored to serve those interests." (emphasis added)).

To be sure, this is exactly what happened in Massachusetts immediately after *McCullen*. Within just **thirty-four days** after Massachusetts' buffer zone was invalidated for lack of narrow tailoring, the Commonwealth enacted a new, narrower abortion facility access statute. *See* Mass. Gen. Laws Ann. ch. 266, § 120E 1/2 (eff. July 30, 2014). From start to finish, Tampa's Ordinance took approximately seventy-five days to enact, and counsel boasted with the speed of that process. (Hrg. Tr. at 116:3–117:8.) There is no reason why Tampa could not try to beat that time with a new ordinance.[11]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this December 3, 2018, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Roger K. Gannam
Roger K. Gannam
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[11] *But see supra* note 3.