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

ROBERT L. VAZZO, Plaintiff, vs. CITY OF TAMPA, FLORIDA; SAL RUGGIERO, Defendants.	: CIVIL NO.:	8:17-cv-2896-T-26AAS
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TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE AMANDA A. SANSONE
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

THE COURT: We are here on Case Number 8:17-cv-2896-T-26AAS, Robert Vazzo, David Pickup, and Soli Deo Gloria International, Inc., vs. City of Tampa and Sal Ruggiero.

Could counsel state their appearances starting with counsel for the plaintiffs.

MR. MIHET: Good morning, Your Honor, Horatio Mihet on behalf of the plaintiffs.

THE COURT: Good morning, Mr. Mihet.

MR. GANNAM: Good morning, Your Honor, Roger Gannam on behalf of the plaintiffs.

THE COURT: Good morning, Mr. Gannam.

MR. WILLIAMS: Good morning, Your Honor, Rob Williams on behalf of the City of Tampa and Sal Ruggiero.

THE COURT: Thank you, Mr. Williams, good morning to you.

MS. WALBOLT: Good morning, Your Honor, Sylvia Walbolt on behalf of Equality Florida, the amici.

MR. PORTER: Good morning, Your Honor, Brian Porter on behalf of Equality Florida.

MR. CLEMONS: Good morning, Your Honor, Tyler Clemons on behalf of the amicus, Equality Florida.

THE COURT: Thank you. In terms of logistics,

my plan was to start at 9:00; I had some last minute preparation that I was reviewing before coming out. And then we'll go until about noon. It's my understanding from the parties that this is expected to last all day. Is that still the case? Okay. Go up to about noon, take a break from noon until about 1:30, and then reconvene and go as late as we need to.

I have many questions today. I'm sure some of them will be answered without me even needing to ask them. Sometimes I come out and just start asking those questions in hopes that it streamlines and expedites things. As I have found, particularly in cases like this, it ends up not streamlining things because everyone still wants to say everything they came in prepared to say. So for that reason I am going to give each side as well as the amicus an opportunity to say what you would like to say first as an opening.

I also do not intend to time limit anybody and that includes Equality Florida. So to the extent that there is anything that you want to say, don't think that it's like an oral argument where there is a buzzer that's going to go off.

That said, I have read everything, I've read

the cases, I've read the briefs. The only thing I have not read is what was filed in the last two days, so all of these -- the filing of the discovery and the exhibits. I presumed that those were basically the exhibits that would be addressed today. Mr. Mihet is shaking his head yes, so I'm glad I did not take the time to read all of that in advance. Of course I will look at it today as we go through it and then also can study it more thoroughly in preparation for drafting an order in this case.

So with that said, there are cross motions because we have plaintiff's motion for a preliminary injunction and then we have the defendant's motions to dismiss.

Clearly for the motions to dismiss I am limited only to the complaint. In fact, I do anticipate entering separate orders. So having an order on the motion to dismiss -- I shouldn't say orders -- reports and recommendations or orders on the motion to dismiss and then also on the preliminary injunction so that it's very clear that for the motion to dismiss purpose I am just looking at the operative complaint.

But with that said, it seems to me in light of

the way the briefing was handled, that plaintiff should have an opportunity to go first, followed by the defendants and then Equality Florida.

So with that said, Mr. Mihet, if you would like to start.

MR. MIHET: Thank you, Your Honor. Good morning again. We appreciate the court giving us the entire day for today's hearing.

Just to inform the court, I have discussed it with Mr. Williams. If it were up to us, my colleague and I together would probably take the balance of the morning with our presentation, and then Mr. Williams will begin his after lunch. That's sort of how we see things, obviously subject to the court's direction and approval as we go along.

I would also say that we have prepared a series of PowerPoint slides for the court to walk the court through some of the evidence and the case law. And so I'm cognizant of the court likes to take a very active role in these kinds of hearings and we're prepared to try to answer all the court's questions. I just ask the court to be patient with me if the court takes me in a different topic than what my sequence is because it may take me some time

to get my bearings straight. But I also plan to ask the court if it has any questions as I finish one section before I move on to the next as well.

THE COURT: Okay.

MR. MIHET: So Your Honor, we're here this morning because the City of Tampa has figuratively invaded the counseling offices of Dr. Vazzo and Dr. Pickup and has banned what these doctors can say to their clients -- clients who have sought them out, clients who are there voluntarily, and clients who want to hear what these doctors and others like them have to say.

We will show the court today that the ordinance that we're here about today is unconstitutional because of its viewpoint discrimination and that in any event the ordinance is unconstitutional because the City of Tampa cannot show the required compelling interest and narrow tailoring for its profound intrusion onto plaintiff's speech.

Now, because the defendants cannot meet their burden of proving that their ordinance survives strict scrutiny or any scrutiny -- and we'll be talking about the level of scrutiny today -- we're asking the court to enjoin the ordinance and to

restore the plaintiff's constitutional liberties.

Now, Your Honor, at the beginning I think it's important to have some clarifications on the various types of counseling, the kinds of counseling that the plaintiffs wish to provide and what the ordinance bans. And the ordinance at issue here, Your Honor, indiscriminately bans all efforts to change sexual orientation or gender identity or related behaviors and expressions.

Be that as it may, it's important, it's critical for the court to understand at the outset that there are in fact two fundamental differences between the kinds of change efforts and counseling that are out there, and we'll show the court that the City of Tampa never even considered these differences before enacting its outright total, complete, indiscriminate ban.

The first fundamental difference, Your Honor, is that there are what are known as aversive and nonaversive change efforts. Now, aversive therapy is conduct-based, it's a form of therapy where an aversive or negative stimulus is paired with undesirable behavior in attempt to reduce or eliminate that behavior.

Now, in the APA report -- and we're going to

hear a lot today about the APA report, this is the 2009 task force report of the American Psychological Association. It was filed at Docket 134-17 -- it's actually been filed a lot in this case.

THE COURT: Right when you were saying that, I was thinking I could probably find it a bunch of times.

MR. MIHET: Most recently -- in some of the filings it was broken up in different documents because of its size, but at 134-17 it appears as one entire lot. And so we'll be talking a lot about this report today. It's the most significant report on change efforts. It's the report that all other reports and position statements cite to and rely upon to the extent that they rely upon any scientific research or reports.

So in this APA report the APA gives us some examples of aversive therapies and this is at page 22 of the report. What the APA says, "Behavior therapists tried a variety of aversion treatments, such as inducing nausea, vomiting or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts."

Your Honor, on the other hand, we have nonaversive therapy which is talk therapy that is carried out entirely and exclusively through speech, through conversation. The client talks; the doctor or the counselor listens, empathizes, asks questions, and talks the client through the goals that the client has set for herself or for himself.

Now, the evidence in this case is undisputed, Your Honor, that Dr. Vazzo and Dr. Pickup do not engage in aversive therapy. They don't wish to provide aversive therapy, they don't even know of anyone in the field who actually provides aversive therapy, let alone in the City of Tampa.

And Your Honor, if Tampa had banned only aversive therapy, then we would not be here today. Not because we would concede that the defendants have legal authority to enact a narrower ban. My colleague, Mr. Gannam, will cover the preemption issues and we think that they're completely preempted out of this field. But we wouldn't be here today because the plaintiffs wouldn't have standing to challenge a narrower ban on aversive therapy that doesn't cover what they wish to provide in the way that the actual ordinance that was enacted does.

Your Honor, the second fundamental distinction that we must be aware of as we embark on this discussion today is between voluntary and forced change efforts. Now, the APA report on page 71, particularly in the footnote definitions, talks about involuntary or coercive treatments which minors are forced to undertake against their will. And the APA contrasts this with voluntary counseling which the patient seeks, requests, and willingly receives. And the APA, on pages 74 through 77 of the report, encourages counselors to respect and observe the autonomy of their clients, even minor clients, to direct their own counseling.

And so once again with respect to this distinction, Your Honor, the evidence is undisputed in this case that Dr. Vazzo and Dr. Pickup only provide voluntary therapy that their clients seek, request, and willingly receive. They would never force any therapy, including SOCE counseling, on any patient who does not actually wish to be there, to participate, and to engage in the process.

And again, if the defendants had banned only forced involuntary therapy, we wouldn't be here for the same reasons that I have just discussed.

So now that we're clear on these two

distinctions and we're clear on what the plaintiffs do not do and do not wish to do, what is it that they want to do that is prohibited by this ordinance?

Your Honor, for that we look at the first amended verified complaint, this is Docket 78. And I would note that Your Honor has graciously given the parties an opportunity to conduct discovery prior to today's hearing. The City of Tampa decided to do no discovery in this case. And so what that means is that the City of Tampa does not have any evidence to contradict any of the sworn allegations in the verified complaint. Those are unrefuted before the court today.

Now, in paragraph 60 through 71 and 100 through 125 of the First Amended Verified Complaint, the plaintiffs demonstrate that they provide only nonaversive talk therapy exclusively through speech. They demonstrate that they only provide counseling to minors who seek, request, and voluntarily assert to talking with the plaintiffs. They demonstrate that they do not impose or seek to impose their own preconceived goals and desires on any client. And they also demonstrate that they don't condemn homosexuality, they don't treat it as a disease, as

something to be cured. The only thing they wish to do, Your Honor, is to listen and to support those clients whose unwanted same-sex attractions or gender confusions cause the clients distress and they want to help them work through that distress and work through the changes that the clients want to make.

What the plaintiffs do is client centered, client directed counseling. They only seek to assist the clients with their own goals and desires.

Now, for some clients, Your Honor, that desire does include the desire to reduce or eliminate their unwanted same-sex attractions or their confusion about gender identity. Or it includes desires to conform their behaviors to their own concept of self or to their own religious or moral convictions.

Now, critically, plaintiff's counseling is not some form of practice or procedure. It's not a standard mechanical off-the-shelf solution. They don't flip a switch, they don't hook up a patient to a machine, they don't administer an actual modality. They just engage in talking and listening. It's a conversation about the client's goals, about the client's needs, and about the client's priorities.

And so in that sense every conversation is

different. One client would come in and the next one can come in for the same general issues but the conversations could be completely different.

When the defendants and their amicus try to argue that plaintiffs are not engaged in speech but rather they're engaged in a practice akin to, you know, blood transfusion or shock therapy or some other conduct-based procedure, they have no evidence for that whatsoever. Plaintiffs' practice here -- and I use that word in quotes -- consists entirely of speech. It's not merely incidental to speech; it is speech.

Now, as already indicated, the ordinance here doesn't draw a distinction between voluntary or coerced counseling, or between aversive and nonaversive counseling. It indiscriminately imposes a total ban on all sexual orientation and gender identity change counseling.

And as I will show the court at the conclusions of my presentation today, it's that way for a reason. The City never even considered anything less than a total ban. The City never even considered a ban on only aversive or only coercive therapies. And we'll show the court the record evidence for that.

Now, the ordinance also does not differentiate between whose goal it is to change sexual orientation or gender identity or related behaviors and expression. For example, counseling is illegal if the intent to change is on the part of the counselor and the counselor initiates that. But, and this is critical, it is also illegal if the intent to change is on the part of the client and the counselor is merely seeking to assist and facilitate with the client's own goals to change.

We know that from the plain text of the ordinance which does not draw a distinct between whose goal it is to change in order for change therapy to be banned.

We also know that from defendant's deposition testimony, Your Honor. Mr. Simpson, who was the defendant's designee on the topic of how the defendants interpret and apply the ordinance, he testified at his deposition -- and his transcript by the way is filed at Docket 133-3, and this is on page 66, lines 8 through 21 of that transcript.

Question by my colleague, Mr. Gannam.

Question: So if the City determines that the therapist has adopted the client's goal of changing sexual orientation or gender identity, then it's the

therapist at that point is subject to liability under the ordinance for providing therapy the goal of which is to change sexual orientation or gender identity.

Answer: If the therapist has adopted the goal of changing sexual orientation or gender identity, then they have violated the ordinance.

Question: And just to clarify, that would be true even if the goal initially came from the client's request and not -- was not initiated by the therapist?

Answer: Yes.

Now, Your Honor, before we get into the meat of it, I want to say just a couple of things about the burdens of proof. In our brief we show the court that a pair of Supreme Court cases, Gonzalez and Ashcroft, dictate that the burdens of proof at the preliminary injunction stage track the burdens of proof at trial. And as such, it is the government defendants, not the plaintiffs, who bear the burden today of proving a compelling interest and narrow tailoring, proving the constitutionality of the ordinance.

Yes, the Supreme Court says that we as plaintiffs retain the overall burden of showing a

likelihood of success on the merits, but within that analysis the government defendants bear the burden of proofing the constitutionality of their ordinance. And if they cannot meet their burden of proof, then automatically we must be found to be likely to succeed on the merits. That's the import of Ashcroft and Gonzalez.

So Your Honor, it's not plaintiff's burden to demonstrate that voluntary change therapy is effective. It is not plaintiff's burden to demonstrate that voluntary change counseling is not harmful. Instead, it is the defendant's burden to show that the therapy they have banned, voluntary therapy, is harmful to such a degree that it must be banned.

Now, also in our PI reply brief, Docket 114, at pages 17 through 19, we have pointed to five Supreme Court cases -- that's *Janus*, *Turner Broadcasting*, *Edenfield*, *Landmark* and *Sable Communications*, and one Eleventh Circuit case, *Mason*, which together establish that defendants must discharge their burden with concrete evidence or empirical studies that demonstrate that the speech that they seek to ban actually causes the purported harms that they fear. They need to establish much

more than a hypothetical "may cause" relationship between the banned speech and the feared harm.

In other words, because this is a First Amendment case and we're dealing with a restriction on speech, the defendants cannot discharge their burden by pleading for legislative deference as they have in their briefs, nor by merely claiming that SOCE is harmful, nor by stating that other organizations claim that SOCE is harmful.

Instead, defendants must bring forth concrete evidence or studies that demonstrate that the voluntary nonaversive SOCE counseling that they have banned along with all the others, causes sufficiently serious and unavoidable harms in order to justify their ban. We will show the court today that defendants cannot possibly meet that burden.

Now, before we go into the studies, Your Honor, a few words on the level of scrutiny that the court should and must apply. And I want to spend a couple of minutes on the defendant's efforts to avoid strict scrutiny with their professional conduct argument.

Now, to dispose of this argument -- and the way we read their briefs we think this is their principal argument, Your Honor, for avoiding strict

scrutiny. To dispose of this argument, the argument that the ordinance regulates only professional conduct and not speech and therefore is not subject to strict scrutiny, the court need look no further than to defendant's own principal authority, *King vs. New Jersey*.

Now, the defendants, Your Honor, love *King*, the case. I mean, they have cited it essentially cover to cover. It appears in huge block quotes all over their briefs. *King* involved an SOCE ban that is virtually identical to the one that's before the court today. And yet, Your Honor, *King* itself eviscerated the defendant's conduct argument.

When you look at page 224 of *King*, the Third Circuit kind of sets things out where they outline the argument that's being made. Page 224 they say, "The parties agree that modern day SOCE therapy and that practiced by plaintiffs in this case is talk therapy that is administered wholly through verbal communication." And I just take a time out from the quote to say that's exactly the case in our case as well, Your Honor, that's the undisputed evidence before the court.

Now, the court continues and it says, "Though verbal communication is the quintessential form of

speech as the term is commonly understood, the defendants argue that these particular communications are conduct and not speech for purposes of the First Amendment because they are merely the tool employed by therapists to administer treatment. Thus the question we confront is whether verbal communications become conduct when they are used as a vehicle for mental health treatment."

That's exactly the same question that this court confronts today as a result of defendant's conduct argument.

Well, the Third Circuit went on at pages 224 to 225 to dispose of this contention. They said, "We hold that these communications are speech for purposes of the First Amendment amendment," and they say that the Supreme Court itself in *Holder vs. Humanitarian Law Project* settled the issue and that is communications by professionals do not become conduct simply because they were uttered by professionals.

Moving on to page 225, the Third Circuit says, "Given that the Supreme Court had no difficulty characterizing legal counseling as speech," that's the *Holder* case, "we see no reason here to reach the counterintuitive conclusion that the verbal

communications that occur during SOCE counseling are conduct."

And then they go on page 228, the Third Circuit says, "As we have explained, the argument that verbal communications become conduct when they are used to deliver professional services was rejected by the Supreme Court in the *Holder* case."

And they say something very interesting. The Third Circuit -- which, mind you, found against the plaintiffs, and we'll cover that -- but they say, "The enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." Those are the Third Circuit's assessment, Your Honor, not ours.

And finally a few wrap-up quotes from the Third Circuit on this issue. They say on pages 228 and 229, "To classify some communications as speech and others as conduct is to engage in nothing more than a labeling game." Then they say, "Simply put, speech is speech and it must be analyzed as such for purposes of First Amendment." And then finally, "Thus, we conclude that the verbal communications that occur during SOCE counseling are not conduct but rather speech for purposes of the First

Amendment."

Your Honor, respectfully, defendant's argument that their nearly identical SOCE ordinance bans only conduct and not speech is utterly without merit in light of defendant's own heavy, heavy reliance on *King*.

Now, another thing that *King* got right, Your Honor, was that the SOCE ban at issue in that case, having concluded that it was a ban on speech, they said that it discriminates on the basis of conduct. In fact, the Third Circuit says this wasn't even a close call. In footnote 20 of *King* the Third Circuit says, "We have little doubt in this conclusion. A3371 on its face prohibits licensed counselors from speaking words with a particular content; that is, words that seek to change a person's sexual orientation. Thus, as in the Humanitarian Law Project, the *Holder* case from the Supreme Court, plaintiffs wants to speak to minor clients and whether they may do so under a 3371 or under the ordinance here in our case depends on what they say.

So Your Honor, it's clear from defendant's own principal authority that the ordinance at issue here, number one, is a ban on speech, and number

two, indisputably it is a ban that is content-based, content-driven, not content-neutral.

Now, where the *King* court veered off course, Your Honor, was in its next conclusion which was that because the speech at issue was that of licensed professionals, the content-based restriction need not survive strict scrutiny because according to the *King* court, not only content-based restrictions must satisfy strict scrutiny. That's on pages 236 and 237. They basically said yes, this is a content-based restriction, but it's one of a different kind and we do not need to subject it to strict scrutiny.

Now, the Supreme Court has since then corrected *King*'s error twice. First in *Reed*, the Supreme Court held unequivocally that all content-based restrictions must be subjected to and must survive strict scrutiny without exception. And most recently at the end of its last term, this past June in the *NIFLA* case, the Supreme Court specifically named and rejected, abrogated both *King* and *Pickup* by name and held that there is no such thing as a lesser First Amendment standard applicable to the speech of professionals.

We see that on page 2371 of the *NIFLA* case

where the Supreme Court essentially sets out what had happened before, what had happened in *King* and in *Pickup*, specifically naming those two cases. It sets up the argument that had been made, the argument that the defendants are making before the court today, and then it says, "But this court has not recognized professional speech as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals."

This is the exact same argument that the defendants are making here and that was rejected in *NIFLA*. There is no way to read the Supreme Court's holding in *NIFLA* other than as an abrogation of *King* 's and *Pickup*'s holdings that professional speech can be subjected to a lesser standard.

To use a blunt pun, Your Honor, *NIFLA* has dethroned *King* and dropped off *Pickup*. They are no longer good case law, Your Honor.

And you know, this is a major point of disagreement between us and the City. The City continues to cite to *Pickup* and *King* as if they were good law. I don't the purport to claim that Westlaw always gets it right; I would just point to the court, you know, you can't even cite *King* or *Pickup* from Westlaw without seeing the huge red flag where

they say that both of those have been abrogated by *NIFLA*. We think that it's clear.

So, Your Honor, there is one paragraph in *NIFLA* where the defendants now hang their hat, this is where they seek refuge. And the court will recognize this paragraph because it appears as a block quote in both Mr. Ruggiero's motion to dismiss and again in -- that's Docket 91 at page 5 -- and then again in Tampa's briefing, Docket 99 at page 15, and even the Amicus, Florida Equality, all of them hang their hat on this paragraph in *NIFLA* where the court says -- after the court says that the precedents do not recognize a tradition for a category called professional speech, the Supreme Court says 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 -- that's the commercial speech exception to the *NIFLA* strict scrutiny straightjacket, Your Honor. And then the second one the court says, states may regulate

professional conduct even though that conduct incidentally involves speech. That is the conduct -- the true conduct exception to the *NIFLA* strict scrutiny straitjacket, Your Honor.

Very briefly let me show the court why neither of these two exceptions apply clearly to our situation here. First of all, commercial speech is that speech which, quote, "Does no more than propose a commercial transaction." That comes out of the Supreme Court in *Virginia State Board of Pharmacy*, and also in *Bolger*. Both of those are cited on page 9 of our PI reply brief at Docket 114.

And in *Wollschlaeger*, the en banc Eleventh Circuit draws a distinction -- tells us what to look for with respect to commercial speech specifically in the context of professionals. What the *Wollschlaeger* court says on page 1309 at footnote 4, they say, quote, "Although a professional may be viewed as engaged in the transaction of selling his professional advice, one must of course distinguish between the offer and the actual presentation of the professional advice, which is no more a commercial transaction than is the actual writing or reading a book or newspaper that is available for sale."

So Your Honor, according to the en banc

Eleventh Circuit, there may be a commercial speech aspect involved when a professional first presents his services to the client, tells the client how much is going to be charged for the services, and so on and so forth. But the minute that the conversation moves beyond that to the actual dispensation of professional advice, the en banc Eleventh Circuit tells us that is no longer a commercial speech.

And this is settled law, Your Honor, and there is no dispute here that what plaintiffs wish to provide in Tampa goes way more beyond advertising their services. It's undisputed that they actually want to sit down and to have meaningful substantive communications with their willing clients which cannot reasonably be characterized as mere commercial speech, a constitutional orphan.

And I would also point out here, and I think this is pretty significant, the ordinance expressly provides that change efforts are banned whether or not money changes hands. The ordinance says that all are prohibited even if they are being offered pro bono. So the ordinance on its face, even without the *Wollschlaeger* and the Supreme Court authority, goes well outside of the commercial

speech context. Clearly the first exception to *NIFLA* strict scrutiny straitjacket does not apply, and neither does the second, Your Honor.

With respect to the professional conduct exception, Your Honor, the Supreme Court clearly said that this exception, like the first, does not "turn on the fact that the professionals were speaking." That's in that very same paragraph; you can't cite one without seeing the other.

"Instead," the Supreme Court says, "it turns on what the professionals were doing," not saying, but doing. In other words, actual true conduct that is not speech can be regulated without strict scrutiny even if that conduct, quote, "incidentally involves speech."

And we see the Supreme Court cites to *Planned Parenthood of Southeastern Pennsylvania vs. Casey* as an example. There the conduct was an abortion procedure -- clearly conduct, clearly not speech.

Now, at issue also in that case were some informed consent things that had to happen in connection with the abortion procedure. And the court said look, the state can regulate the abortion procedure because it's conduct, and then if it's got a mere incidental effect on speech, well, that can

go into the same category in that case because it's the conduct that's the focus of the regulation.

The Supreme Court did not say -- most certainly did not say that the defendants could take what is clearly professional speech and then merely label it, repackage it as professional conduct to avoid strict scrutiny. That would be turning the ***NIFLA*** decision on its head, Your Honor.

And yet this is precisely what the defendants are seeking to do here. They say because it is professionals who are speaking, because they're using words to impart therapy during counseling, well then that counseling is conduct. Clearly their analysis and argument turns precisely on the fact that the professionals are speaking, which is exactly what the Supreme Court says you cannot do in ***NIFLA***.

Now, here as was the case in ***King***, the undisputed facts are that plaintiff's voluntary SOCE counseling takes place exclusively through speech -- we've already covered that. There is no conduct with incidental effects on speech; there is only pure speech.

Now, Your Honor, this situation I concede would be quite different if the defendants had

banned, for example, only aversive therapy, if they had banned let's say shock therapy, okay. That's conduct; that's not speech. And so if they had banned that and some counselor was administering shock therapy, that counselor couldn't come and say well yeah, but when I administer shock therapy, I also tell the client I am hooking you up to a machine, tell me how does this make you feel; there is speech involved. The counselor couldn't argue for strict scrutiny on a shock therapy ban because there is some speech going on at the same time. That's what the Supreme Court is trying to get at.

But that's not what we have here. What we have here is entirely different, a situation where the only thing that happens in the therapy that my clients wish to provide, which is what the City has banned, is speech. There is not conduct to which the speech is merely incidental; there is speech and only speech, Your Honor. That's undisputed from the verified complaint.

So by trying to label speech-only counseling as conduct, defendants fall right back into the labeling game, quote unquote, that their own authority, *King*, prohibits and derives even as on principle.

Now, defendants also run afoul of the Eleventh Circuit's en banc decision in *Wollschlaeger* on this point. Eleventh Circuit clearly teaches us that you cannot do what the defendants are attempting to do here.

First of all, the Eleventh Circuit says you cannot rely on *Pickup*, there are serious doubts about whether *Pickup* was correctly decided. And you know, without *King*, *Pickup* is the only case that remains that would lend any support to the City's conduct argument. The court says -- the en banc Eleventh Circuit says you cannot rely on *Pickup* for that proposition. Why? Because they say characterizing speech as conduct is a dubious constitutional enterprise.

This illustration from the Eleventh Circuit is so apropos. They say, "Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation."

Your Honor, and *Wollschlaeger* was a case that involved attempted regulation of what doctors could say to their patients, much like we have here. And in that case the government tried to justify the ban by saying it's conduct, it's not speech, because

it's uttered, the words are being uttered by doctors. The Eleventh Circuit says no, that's nonsense, you're regulating what comes out of doctor's mouths. We know that that's speech and that's no more incidental to speech than walking is to ambulation.

So Your Honor, I submit to you that notwithstanding their current litigation-driven position that the ordinance restricts only conduct, the defendants know that they are actually restricting speech. How do we know that they know this? Well, Your Honor, in discovery we uncovered this document. This is a PowerPoint presentation that the in-house counsel for the City of Tampa put together for the purpose of training the code enforcers on the ordinance, on how to enforce this particular ordinance. This was filed at 134-2 on the docket and we're looking specifically on page 10 of this PowerPoint presentation.

This is the only -- according to Mr. Simpson's deposition testimony, this is the only training that the City ever gave to the code enforcement officers on what this ordinance provides, on how it should be interpreted and how it should be enforced.

And this is pre-*NIFLA*, Your Honor, the City

tells its code enforcement officers that it can regulate conversion therapy. Why? Because in the first bullet point they say under the First Amendment certain categories of speech receive lesser judicial protections; and under the second bullet point, the City concedes. This is a factual admission about the nature of conversion therapy. This is not a legal conclusion; this is a factual admission that is binding on the City defendant. They say, out of their own mouth, "Conversion therapy is a form of professional speech." Not conduct, Your Honor; speech.

Before *NIFLA* the defendants knew that they were regulating professional speech. *NIFLA* comes along and all of a sudden now they're arguing to Your Honor that oh, this is not professional speech, Your Honor, this is professional conduct. Well, I submit to you nothing about the nature of so-called conversion therapy changed before *NIFLA* to after *NIFLA*. The only thing that changed was the Supreme Court's clear pronouncement that professional speech regulations must be subjected to strict scrutiny.

And now the defendants come in and say ah, well, wait a minute, we don't want to actually regulate professional speech, never mind what we

trained our code enforcers on; we regulate professional conduct.

Your Honor, I would note also this particular PowerPoint presentation was not provided to us initially with the document production before the depositions. We happenstance stumbled upon it while the opposing defendant Ruggiero. And clearly responsive to the requests that we propounded, clearly goes to a very central issue in this case, was not provided to us before the deposition. And Your Honor, I think to us the reason is fairly clear that the defendants would have much preferred that we and that the court not know about how they characterized their own ban and how they characterized conversion therapy before *NIFLA* came out.

Your Honor, moving on now, now that we know we're dealing with a ban on speech that is content-based and that must be subjected to strict scrutiny, before we even get to application of the strict scrutiny standard we have to consider whether or not the ordinance engages in viewpoint discrimination. Because the case law that we provided to the court basically makes very clear -- this was on page 7 to 8 of our preliminary

injunction brief, that's at Docket 85, the case law we provide -- *Sorrell, Rosenberger, Velasquez* -- the Supreme Court teaches that if you were to find that the ordinance engages in viewpoint discrimination, then the query stops there. There is no second step, there is no redeeming quality that could rescue a viewpoint discriminatory ordinance. The ordinance stopped there, we don't even get to strict scrutiny because even strict scrutiny could not save a viewpoint discrimination, it is that abhorrent to the ideals that we hold dear in this country and that we safeguard under the First Amendment.

And Your Honor, we think here that the ordinance is quite clearly a classic example of viewpoint discrimination. The ordinance bans only one: Reducing feelings or attractions towards individuals of the same sex. If you look at how the defendants define conversion therapy, in the first sentence of this definition that appears at Section 14-311 of the ordinance, they say, "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 towards individuals of the same gender or sex."

Your Honor, two things: Number one, the ordinance does not ban increasing feelings or attractions towards individuals of the same sex; it only bans one viewpoint, reducing feelings or attractions towards individuals of the same sex.

Let's suppose, for example, that a 17-year-old adolescent girl has been in a committed same-sex relationship for a couple of years. She comes in for counseling to Dr. Pickup or Dr. Vazzo and she says I'm worried that I may not be gay anymore; lately I felt attracted to the opposite sex, to boys, but I've invested so much in the relationship with my girlfriend, we had planned to get married when we turn 18, we want to adopt children, we plan on going to the same college with many of our friends. I really want this relationship to work out, this hypothetical client says to counselors in the City of Tampa. Please help me work through these issues so that I can increase my romantic feelings or attractions towards my same-sex partner. Your Honor, this is allowed. There is nothing in

the ordinance that would prohibit this kind of counseling at that point.

But if the same client comes in and tells the same counselors that she wants help to end her same-sex relationship, to decrease her feelings for her current partner because she wants to change to attain motherhood in a biological sense, well, that kind of counseling is clearly banned by the same ordinance. It is a one-way street.

And one other example, Your Honor, or one other issue that showcases viewpoint discrimination. The ordinance does not ban reducing feelings or attractions towards individuals of the opposite sex, only towards individuals of the same gender or sex. A 17-year-old girl who is bisexual, for example, comes into a counselor and says I want to be able to develop long-term committed relationships with someone and I cannot because I'm attracted to both sexes. I would like assistance in reducing my attractions to the opposite sex, boys, so that I can develop lifelong relationships with other girls, other females. That's permitted by this ordinance. Clearly so.

But if the same bisexual client comes in and says she wants help in developing a lifelong

relationship with boys, she wants to reduce her feelings for girls, well, now we run afoul of this ordinance. It is only a one-way street under this ordinance. This is a classic case of viewpoint discrimination. If this doesn't qualify as viewpoint discrimination, Your Honor, it would be difficult to conceive of what would qualify. And for the reasons that we describe, the inquiry ought to end there without even engaging in the strict scrutiny analysis.

But if the court were to find that the ordinance is not viewpoint discriminatory, then it should still enjoin it because the ordinance badly flunks the narrow tailoring test under strict scrutiny or really under any scrutiny.

With respect to narrow tailoring, with respect to compelling interest analysis within narrow tailoring, defendants cannot demonstrate a compelling need to ban voluntary nonaversive counseling that minors seek, request, and willingly receive.

First, when Councilman Maniscalco requested and sponsored the so-called conversion therapy ordinance, his intent was to ban what he thought of as, quote, "torture." This was coercive therapy

forced upon unwilling minors.

Your Honor, I'm going to show you a transcript from Mr. Maniscalco's deposition on this point. This was filed at Docket 133-2. And we're going to start at page 28 on the top. I'm sorry, page 27. Starting with page 27, we asked Councilman Maniscalco about an article that had been published which quoted him as wanting an ordinance to prohibit what he called "a form of torture." And so we set up the article on page 27, we asked him if the quote is accurate; he says that it does on the bottom of that page.

And then on Bates page 28 at the top we asked him what did he mean by a form of torture, what was involved in what he was seeking to ban. And he tells us, Your Honor, page 29, line 3, he says there are two things essentially. Let me see, line 3. Actually, let's see, page 28, line 19 on the bottom, okay. He answered here on line 3, he says on line 3: Answer. I think it's a harmful practice to minors because this conversion therapy is a ban for minors, so of course under 18, because of, you know, the one gentleman that committed suicide as a teenager, others stories that you read and hear, you know, beyond there's bullying in school. And then

you have this kind of mental abuse that could lead people down different paths -- alcoholism, drug addiction, even suicide.

Your Honor, he talks about electroshock therapy and verbal and mental abuse in one-on-one counseling where the minor is being forced to change against his or her will.

And if you look at --

THE COURT: Mr. Mihet, it's not showing on the screen. I have it pulled up from the docket, but to the extent that you want it on the --

MR. MIHET: Yeah, I wanted it to show. Hold on just one second. I wish I had known that.

THE COURT: Well, I had the luxury of following along. I don't think anyone else did.

MR. MIHET: There we go. On page 28, Your Honor, when we go down to line 19, we asked Councilman Maniscalco: Question. "What specific, you know, practices, things done to or that may have been done to minors did you have in mind when you said torture?

And he tells us, "Well, I mean, electroshock therapy, which is seen as -- you know, you don't hear about it as you would have 50 years ago, but even one-on-one counseling, you know, you can have

mental and verbal abuse because, you know, someone is who they are and they are essentially being forced to, you know, think another way."

So Councilman Maniscalco has two things in mind for his proposed ban: Electroshock therapy, which is aversive type of treatment, and what he calls mental or verbal abuse in one-on-one counseling where the client is being forced to change. That's his word, not mine. He says essentially being forced to change.

Now, Your Honor, on the bottom of page 29, we kind of are pretty clear what he means by electroshock therapy, but we wanted to get some more detail on this mental abuse and forced counseling that he was talking about. And so we asked him on the bottom of page 29 exactly what he meant by that. Page 30, line 7, he tells us. He says, starting with line 7 on page 30, "But then you're -- you know, you have a counselor that says, you know, you're going to burn in hell. You know, God doesn't forgive this. You know, society doesn't accept this. It's not normal, you know, two men together. It's Adam and Eve, not Adam and Steve. I mean, that's -- it's -- it is mental torture. It's the -- it's just like being bullied in high school, you

know, being called this or that. And, you know, it's a form of abuse; and I think that it's very harmful. And it's something that will, you know, psychologically stay with the person throughout their lives."

So Your Honor, he's very clear what he has in mind for this proposed ban. And Your Honor, just -- we asked him, hey, have you heard of anything like this happening in Tampa. On page 31 at the top, you see question, was anything like this happening in Tampa. And he again in his response tells us what he's heard is only stories that dealt with kids being sent away, being forced to engage in conversion therapy.

His answer starts on line 4 on page 31. Answer. "Kids that I went to high school with and what not, they wouldn't give me specifics of, you know, where they went. But it would be, you know, my father sent me away. My parents put me into counseling. Nothing specific as to, you know, who or -- whomever that counselor or licensed professional was. But, you know, their parents were not accepting of, you know, who they were or said they were. And that's that."

So he's very clear that what he is concerned

with, what he wants to ban are instances where parents can send away unwilling minors to these, you know, camps and the minors are being forced to undergo all these the horrific procedures, Your Honor.

Now, just because this is important and we wanted to exhaust Mr. Maniscalco's knowledge, we did so with several questions that follow and I think they're important to put into the record. Page 31, line 12, we asked: Apart from electroshock therapy and one-on-one counseling that is -- that is verbally or mentally abusive, as you've explained, were there any other practices or types of therapy that you had in mind when you used the word torture to describe conversion therapy?

Answer: No.

Question: And did you have any other practices or therapies in mind when you actually proposed to move forward with the ordinance?

Answer: No.

Question: So, you know, have you now told me all of the kind of practices or therapies that you had in mind when you use that word torture in this newspaper quote?

Answer, page 32, line 1: Yes, I have.

Question: And have you now also told me all of the practices or therapies you had in mind when you originally proposed the conversion therapy ban ordinance?

Answer: Yes, I have.

Clearly, Your Honor, that was the extent of what Councilman Maniscalco was attempting to do. The compelling interest that he saw was exclusively the need to protect minors from coercive and aversive forced therapy to which they were being subjected, allegedly, against their will and which involved either shock therapy or abusive language and tactics from the counselor.

Now, we know of course that the City ended up banning much more than what Councilman Maniscalco wanted because if it had banned only the practices that Councilman Maniscalco brought to the attention of the council, we wouldn't be here, Your Honor. My clients have absolutely no interest or desire in forcing therapy on any unwilling participant or in uttering any of the words that Councilman Maniscalco had in mind when he described some of those things. My clients also find some of those things abhorrent, Your Honor, and wouldn't engage in that kind of counseling. And.

So if the City wanted to ban that kind of counseling, the City could have banned it and we wouldn't have had a lawsuit, Your Honor. But that's not what the City did.

Now, also on the topic of compelling interest, it is equally clear that the defendants never received any complaints of any harms resulting to anyone in their jurisdiction from voluntarily nonaversive SOCE counseling.

Now, the City readily admits that it received no complaints about SOCE harms at all, even of the aversive forced kind, much less of the nonaversive voluntary kind.

And the City also that it made no effort whatsoever to determine if anyone had actually been harmed by any conversion therapy before it passed the ordinance.

We have, Your Honor -- let me go back to the PowerPoint here. We have a request for admission that we propounded on the defendants. This was filed at Docket 132-1 and it's on page 8 of that document. And we said, "Please admit that the City has not received any complaints that any minor was harmed by any SOCE counseling provided within the City."

Response: "This request is denied as worded. However, the City does admit that the City of Tampa, Florida has received no complaint that any minor has been harmed by SOCE counseling provided within the City limits of the City of Tampa."

Your Honor, I confess I read that admission about six different times in ways trying to determine how that's different from the question we asked and I haven't been able to ascertain that. But I think the extent of the admission, notwithstanding the first sentence, is quite clear.

And in fact, you will see in interrogatory 1, we asked an interrogatory but we said hey, if your response to the first request for admission is an unqualified admission, then you don't have to worry about answering interrogatory 1. And the City in its response to interrogatory 1 at the bottom of that same page says it deems its response to request for admission number 1 to be unqualified admission.

And so I think that's perfectly clear in the record the City had received no complaints whatsoever about any harms resulting from any SOCE counseling whatsoever, both aversive or nonaversive, both forced or voluntary.

Now, Your Honor, we also have the deposition

testimony again of Councilman Maniscalco. This is on page 41, starting with line 3 to line 22. And I should note, Councilman Maniscalco was the City's 30(b)(6) designee on the City's evidence of harm. So when we see here that he says "I don't know," what that means is that the City of Tampa does not know.

We asked him on page 41, line 3:

Question: At the time that you first brought this forward and asked for the staff report, did you ask anyone to investigate whether there had been any complaints in the City of Tampa of harm from conversion therapy?

Answer: No, I did not. I simply made that request for information to look at a ban. That was it.

Question: And would it have been your expectation in making that request for the City Attorney's Office or someone else within the City to conduct that kind of investigation to find out.

And he says no, I specifically requested a report on a conversion therapy ban, and that was it.

Question on line 18: Do you know whether, regardless of your expectations, anyone within the City did in fact undertake to investigate whether

there had been any complaints of harm?

Answer: No, I don't know.

That's the City's designee on this topic, Your Honor. And so what we know from the request for admission response and from this deposition testimony is that the City had no evidence whatsoever of any SOCE harms and made no attempts to find out whether or not this particular ordinance was even necessary in the City of Tampa.

We know that the ordinance was requested by Councilman Maniscalco solely to deal with aversive or forced involuntary abusive counseling. And yet despite the lack of evidence for any need for an outright total and indiscriminate ban on all change efforts, that is exactly what we got from the City of Tampa in this ordinance.

Now, the Supreme Court in *Turner Broadcasting Systems*, 1994 case that's been cited in our brief, says, quote, "A regulation that's perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."

Your Honor, this is a classic solution in search of a problem, a problem that did not exist in the City of Tampa but a problem that the defendants

decided to resolve anyways -- not with a targeted, focused ban that would have addressed Councilman Maniscalco's concern, but instead with an outright ban that runs roughshod over my client's rights. This is the very antithesis of a compelling interest.

Now, moving on to the overwhelming research, Your Honor. This is the justification that the City has put forth for the ordinance. And I've been speaking for a little over an hour and 20 minutes so when the court find it appropriate, I could use a 5 or 7-minute break. It doesn't have to be now, but at some point.

THE COURT: I was actually getting ready to pass a note to my courtroom deputy to see if our court reporter needed a break as well. Let's do this, let's take a 5-minute break. Let's aim to get back at -- all the clocks in here say different times. But let's take about a 5-minute break, aim to get back about 10:30, just a comfort break.

MR. WILLIAMS: Your Honor, before we actually break, does the court want me to wait until my presentation to address the discovery comments that Mr. Mihet -- I'm happy to do it when we return or I can do it in my presentation.

THE COURT: You know what, like water over a duck, I'm letting the discovery comments just fall right off my back. It's just part of the nature of the game. I knew you would have a very different perspective on those. So just assume that I'm taking all of that at face value and don't even feel the need to address that. There will be no sanctions orders, there's no discovery motion in front of me.

MR. MIHET: We're not requesting any, Your Honor.

THE COURT: Again, that's just my opportunity to tune out and gather my thoughts on the Hardy issue.

(Recess was taken from 10:25 until 10:33 a.m.)

THE COURT: Mr. Mihet, go ahead whenever you're ready.

MR. MIHET: Thank you, Your Honor. I have two sections left to cover in my presentation. I'll be moving into the overwhelming research claims right now, and then I'll spend possibly only about five or so minutes after that showing you the record evidence that shows that defendants did not consider anything other than a total ban as part of narrow tailoring. And then my colleague will address

preemption and enforcement. So we're doing very well on time. Thank you for your patience and indulgence.

The ordinance cites so-called overwhelming research, and the defendants in their Amicus repeat the mantra of overwhelming research as purported justification for this outright and indiscriminate ban on speech.

Now, as we have shown in our briefs and as we will recapitulate today, not a single one of the dozen or so sources cited by the ordinance contains any study showing that any SOCE counseling, let alone nonaversive voluntary counseling, actually causes harm, Your Honor. There is no study in the record that draws any causal relationship between SOCE counseling and harm. And I will demonstrate that to the court in just the next few minutes.

What the City posits instead are either studies that find claims of harm to be inconclusive, or ideological opinion statements -- not studies -- opinion statements of organizations that are bereft of any backup evidence of harm. This is not enough to justify or to satisfy, rather, defendant's burden under compelling interest analysis.

Now, when addressing these studies, I want to

do it in two phases. First I'm going to look specifically at the issue of gender identity change efforts, and then I'll come back and look separately at the SOCE, at the Sexual Orientation Change Effort studies. And the reason we need to do that separately is because, as I will show you in the studies, they are two separate and distinct concepts that the literature cautions and warrants against lumping together.

Just so we're clear, the ordinance bans both, without distinction, both sexual orientation, SOCE, and gender identity, GICE, counseling is banned.

Now, at their depositions the defendants confirm that they interpreted and apply the ordinance to prohibit two types of gender identity change efforts, and I'll show this to you before we go into the studies. Before I show you the science that rejects what the defendants have done, let's just be clear what they say their ordinance bans.

Two types. Number one, the ordinance they say bans a counselor from assisting an adolescent girl who has taken on the identity of a boy for a time and now wants to change her identity back to being a girl -- that is, to match her biological body -- I'll show you where defendants say that's banned.

And number two, they say that the ordinance bans a counselor from helping a boy who has adopted a cross gender identity -- that is, a girl -- from being comfortable with his own biological body, that is, with being a boy.

Mr. Ruggiero, who is the chief enforcement officer for the ordinance, at his deposition he told us that these scenarios are banned. I'm looking at Mr. Ruggiero's deposition transcript again for the record. This is Docket 133-1. Looking first at page 85, starting with line 11, I set out the example for him. I say, question, "Adolescent 17-year-old was born biologically as a female. For some time she identified as a male and lived with a male gender identity. That was in the past. Now she decides she wants to change her gender identity back to female to match her biological gender, and she decides she needs help with this change. She can't do it on her own. It's too difficult. There's too many mental issues involved. And so she goes to a counselor within the City of Tampa and says Mr. or Mrs. Counselor, I need your help. I need your counseling. I need your therapy to help me with this change that I want to make back from a male gender identity to a female gender identity.

The counselor says if that's your goal, if that's your desire, I'm willing to help walk you and talk you through that. Let's go do some counseling.

So they go do the counseling. And I asked Mr. Ruggiero if that is prohibited by the ordinance. You can see if you review the transcript on page 86 and 87, we get into discussion, well, who is making the complaint, how does this come to the City, he wants to talk about some other parameters.

But then on page 88 I say, starting with line 14, "If there are no other facts than what I've just told you, has a violation taken place or not?"

He says, "My answer is that there is a violation in that it needs to be referred to the legal department to see how we proceed."

Question, on line 22: "So your conclusion would be that the example that we talked about is a form of conversion therapy that is prohibited by the ordinance."

Answer: "That would, yes."

Your Honor, in a minute I will show you the studies that -- the defendant's own research studies that say that what they have banned is actually quite improper with respect to this particular example.

Before I do that, let me just show you the testimony with respect to the other example. This is also Mr. Ruggiero, the chief enforcer. On page 95, starting with line 2:

Question: Let's talk about another example. Instead of the 17-year-old adolescent girl, we've got a prepuberty child, say a 10-year-old, born as a boy but has expressed a female gender identity.

Moving on to line 10:

Question: Would the ordinance prohibit a therapist in the City of Tampa from encouraging that child to embrace his given male biological male identity and to align with his gender role?

Answer: Yes.

Question: It would?

Answer: Yes.

Your Honor, here's the problem with these two prohibitions with respect to gender identity change efforts. They were not supported by defendant's so-called overwhelming research. Instead, they're actually refuted.

First, back to the APA report, which as we've said is sort of the magnum opus on change counseling studies. All of the other position papers, to the extent they cite studies or rely on studies, cite to

this particular study.

Now, as the title of this APA report suggests, that's "Appropriate Therapeutic Responses to Sexual Orientation," this excludes gender identity change efforts. And it does so not only in its title but actually expressly so. When you look at page 9, the APA says, "Due to our charge, we limited our review to sexual orientation and did not address gender identity because the final report of another task force, the APA Task Force on Gender Identity and Gender Variance, was forthcoming."

So the 2009 APA report that's principally relied upon by the defendants, they don't even purport to address gender identity change efforts. They say that this is going to be looked at in another study.

So the defendants themselves cannot base any gender identity change effort ban on this report, and neither can any of the other organizations that followed purport to glean any support for a ban on GICE from this report.

Now, as the APA said, it did subsequently issue some guidelines that specifically deal with transgender and gender nonconforming people. They use TGNC nomenclature to refer to Transgender and

Gender Nonconforming.

Now, they said it was going to come in 2009; it took some time, it didn't actually come until 2015, December 2015 are the Guidelines For Psychological Practice With Transgender and Gender Nonconforming People. This has been filed at Docket 135-1.

What they say here, Your Honor, is first of all they say the construct of gender identity and sexual orientation are theoretically and clinically distinct, even though professionals and nonprofessionals frequently conflate them. They caution against conflating the two. We submit that what the government defendants have done here is conflate the two as well.

Now, after saying that they are distinct, the APA recognized the absence of research on gender identity change in children, which is quite different from defendant's claims of overwhelming research when you look at page 842 of these guidelines that came out in 2015 from the APA. Now, this is the APA, this is not some group of quackery, to employ one of the derogatory terms that has been used to describe my clients. This is the American Psychological Association. They say on page 842,

"Due to the evidence that not all children persist in a TGNC identity into adolescence or adulthood and because no approach to working with TGNC children has been adequately empirically validated, consensus does not exist regarding best practice with prepubescent children."

So what they're saying is things are still in flux, researchers are still looking at various ways of doing this.

Then on the same page, 842, they say there are two distinct approaches and they say in one of the approaches, the second approach, children are encouraged to embrace their given bodies and to align with their assigned gender roles. This includes enforcing and supporting behaviors and attitudes that align with the child's sex as assigned at birth prior to the onset of puberty. And what they say, Your Honor, is it is hoped that future research will offer improved guidance in this area of practice.

Your Honor, the APA doesn't say that this is an extremely dangerous practice that must immediately be ceased and banned. What they say instead is it's one of two approaches that people out there in the field are taking and we need to

have more research to determine what works best in this area.

Having no research and needing more research, Your Honor, is a world apart from having so-called overwhelming research, which is what defendants claim to have had, to ban this particular practice.

And so what's critical here also is that notwithstanding the APA's call for future research, they expressly sanctioned as imperative allowing a minor adolescent who has selected a gender identity different from his or her biological sex, to choose to return to their biological sex gender identity.

On page 848 of the same APA guidelines, the APA says, "Emphasizing to parents the importance of allowing their child the freedom to return to gender identity or another gender identity at any point cannot be overstated, particularly given the research that suggests that not all gender nonconforming children will ultimately express a gender identity different from that assigned at birth."

Your Honor, what did the defendants do? Did they allow the freedom for that 17-year-old adolescent girl who had been identifying as a boy to explore, to come back and to change back to being a

girl? Well, you saw it in their own deposition testimony: That is banned in the City of Tampa, notwithstanding what the APA says is an imperative goal to keep in mind and to allow and to foster.

Your Honor, other sources cited by the defendants as examples of overwhelming research, in quotes, in their ordinance also confirm the same lack of empirical research on the outcomes of gender identity change efforts that were documented by the APA.

We have something that was filed by the defendants at Docket 24-4. This is an article from the Journal of American Academy of Child and Adolescent Psychiatry, AACAP. And this is a document that is cited as one of the items of overwhelming research in the ordinance.

And what this particular document says on page 968, it says, Different clinical approaches have been advocated for childhood gender discordance. Proposed goals of treatment include reducing the desire to be the other sex, decreasing social ostracism, and reducing psychiatric comorbidity. There have been no randomized controlled trials of any treatment, Your Honor. What they say is there have been no studies to look at what's more

effective, one approach or the other.

On page 969 of the same document that the defendants themselves rely upon, they say here, Research treatment strategies based upon uncontrolled case studies have been described that focus on parent guidance and peer group interaction.

One, seeks to hasten the incidence of gender discordance in boys through eclectic interventions such as behavioral and milieu techniques, parent guidance, and school consultation, aimed at encouraging positive relationships with the father in male peers, gender typical skills, and increased maternal supports for male role taking and independence.

Your Honor, this is trying to help boys be boys, not withstanding their female gender identity inclination. This is what Sal Ruggiero, the chief enforcer of the defendant's ordinance, says that the defendants prohibit with their ordinance. Their own sources say that this is one of the valid treatment strategies being employed.

They go on to say on the same page, 969, Given the lack of empirical evidence from randomized controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential

risks of treatment and longitudinal evidence that gender discordance persists in only a small minority of untreated cases arising in childhood -- and this is critical -- further research is needed on predictors of persistence and assistance of childhood gender discordance as well as the long-term risks and benefits of intervention before any treatment to eliminate discordance can be endorsed, end quote, and I would add 'or banned.'

Your Honor, let's remember the burdens here. It is not plaintiff's burden to prove to the court that their methods and methodologies are effective or safe. Instead, it's defendant's burden to prove to the court with actual scientific studies that these procedures and this counseling that they have banned is harmful. And their own authorities say we can't say that at this point because we don't have enough research. That's the exact opposite of overwhelming research.

Now, one of the studies showing potential promise cited by AACAP in this particular document at footnote 100 is by a professor of clinical psychology at Columbia University by the name of Heino Meyer-Bahlburg. Now, Professor Bahlburg published an article which is called Gender Identity

Disorder in Young Boys: A Parent and Peer-Based Treatment Protocol. This was filed at Docket 135-2. And I will simply note that Professor Bahlburg is from Colombia University, again not a school of quackery, and he himself is frequently lauded and awarded prizes from LGBT organizations for his work in studying transgender issues. So he's no quack either.

Now, Professor Bahlburg describes in this particular study on page 372 -- well, he describes generally in the study the great success that he has had in helping young boys desist from a female gender identity and become comfortable with their male -- biological male bodies by doing the very same things that defendants have banned here; that is, talk therapy with the boys and their parents aimed at increasing male influences and male expressions so that the boys become more comfortable with being boys and they desist from a female gender identity.

He discusses on page 372 the tremendous success that he has had in these kinds of treatments, sanctioned by Colombia University, Your Honor; 91 percent success. In one particular study he says 10 out of the 11 cases showed such marked

improvement; only one did not and was therefore judged to be unsuccessful.

Now, Your Honor, it's a good thing Professor Bahlburg works in New York City and not in Tampa because if he were in Tampa the code enforcers in Tampa would shut him down under this ordinance.

You know, this is another mind boggling aspect of this ordinance that my colleague Mr. Gannam will address shortly, the idea that an untrained code enforcer with a high school diploma -- and that's not a slight on code enforcer, they fulfill an important function, but you'll see the testimony that says that they have high school diplomas and GED equivalents. The idea that they could come in and determine that Professor Bahlburg's treatment protocol violates the ordinance is breathtaking to the plaintiffs, Your Honor.

There is a reason why regulation of mental health professionals is left to the state, which employs licensed health professionals on disciplinary boards, and not local governments which have only untrained code enforcers in their enforcement arsenal. We're getting a little ahead of ourselves, I don't want to steal Mr. Gannam's thunder, but I just thought this would be an

appropriate place to juxtapose the expertise that someone like Professor Bahlburg has versus the code enforcers that are charged with enforcement in this case.

Now, I'll move on to the second aspect which is the so-called overwhelming research with respect to sexual orientation change efforts. But let me just conclude on gender identity by stating that the City has clearly mischaracterized the state of the research in its documents. When the APA and the AACAP conclude that no research existed and called for additional research on the various forms of treatment modalities out there, the City took that and concluded that the research was overwhelming, in quotes, and they banned the very practices that these organizations said might have promise but need further study to determine whether they can be endorsed or banned. This is reason alone to enjoin the overreaching ordinance.

Now, moving on to sexual orientation change efforts, back to the 2009 APA report, it makes clear, Your Honor, repeatedly and throughout, that it cannot and does not draw any conclusions with respect to claims of harm from any type of SOCE counseling, let alone voluntary, nonaversive SOCE

counseling. Just a couple of example here -- all of these three come from page 42 of the report.

The APA says, "We conclude that there is a dearth of scientifically sound research on the safety of SOCE." Elsewhere on that same page they say, "Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so."

And elsewhere on that same page, and this is critical, Your Honor, they say, "Thus we cannot conclude how likely it is that harm will occur from SOCE."

Your Honor, elsewhere they say also on page 42, the reason they can't conclude how likely it is that that harm will occur is because the nature of these studies, all of the studies that have been conducted thus far, precludes causal attributions for harm or benefit to SOCE.

Then moving on to page 90 and 91 of the same report, they say, "We concluded that research on SOCE has not answered basic questions of whether it

is safe or effective, and for whom. Any future research should conform to best practice standards for the design for efficacy research. Additionally, research into harm and safety is essential."

Let me just take a time out. They don't say research into harm and safety is overwhelming such that it must be banned; they say it's essential. Time back in.

"Certain key issues are worth highlighting. Future research must use methods that are prospective and longitudinal, allow for conclusions about cause and effect to be confidently drawn, and employ sampling methods that allow proper generalizations."

Your Honor, defendants have accused us of cherry picking two or three quotes from the APA report. But the truth is, Your Honor, that the report is riddled and littered with these kinds of disclaimers. I didn't show all of them to you today; there are many more than the ones I have identified which make absolutely clear that you cannot draw conclusions about benefits or harm when it comes to SOCE.

And so the truth is that it is defendants who are cherry picking examples of anecdotal so-called

evidence of harm which the APA says cannot be causally attributed to SOCE and they're trying to pass that along as overwhelming evidence of harm caused by SOCE. No doubt they will attempt to do so again today.

But when they point to instances in this report where they say that someone has reported that they were perceived to have been harmed or, you know, there has been an isolated report here or there of harm. Your Honor, what the APA tells us in all of the quotes I've set out for the court is that we cannot determine -- no one can determine whether the perceived harm in one instance occurred because of SOCE counseling or whether it occurred because someone -- you know to use the often quoted example, somebody walked under a ladder or in front of a black cat or some other thing. I mean, you just cannot tell. That's what it means when you say you cannot make a causal attribution of harm to SOCE. What they posit for the court as harm the APA says cannot be causally attributed to SOCE.

And so, Your Honor, the APA report concluded that there was no evidence of benefit or harm that can be attributed to SOCE. What the defendants have done essentially is to accept the first premise of

the APA; they say look, there is no evidence of benefit. So far the APA is in agreement with them. But then they reject the second equally important premise of the APA that says there is no evidence of harm either, and they say well, there is evidence of overwhelming harm, there is overwhelming evidence of harm. Your Honor, the defendants can't have it both ways. If the evidence of benefits is not creditable, then the evidence of harm cannot be creditable either.

And you know, instead of helping the APA's repeated calls that additional research is necessary in this field before conclusions can be drawn regarding harm or benefit, defendants have simply shut off the debate, shut down the debate. They've declared that existing research is already overwhelming research, and they have banned all SOCE. Now, in *NIFLA* the Supreme Court teaches us that's not science, that's totalitarianism.

Your Honor, this is another interesting feature of the APA report that I want to point out. This is on page 41 of the report under a section called Reports of Harm. What they say at the bottom of this particular slide, page 41, they say, "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." They can't say that there is a causal attribution, but they say some people have reported harm from aversive techniques, Your Honor.

Now, as we all know, defendants didn't ban only aversive techniques, they banned it all. And with respect to voluntary, nonaversive speech-only counseling that adolescents seek out and willingly receive, the APA has this to say about that. This is on page 73. The APA says, "We found no empirical research on adolescents who request SOCE."

Your Honor, those are the clients of Dr. Vazzo and Dr. Pickup who request SOCE. The APA says there is no research showing that any harm can causally be attributed to the kind of counseling that they voluntarily wish to engage in. "No research" is the exact opposite of "overwhelming research."

Your Honor, in the *Edenfield* case, the Supreme Court of the United States dealt with a situation where the government defendant, to support a ban on

a particular type of speech, was pointing to the report of an outside organization, an advocacy group called AICPA. But that report, like the APA report here, said that the organization was unaware of the existence of any empirical data supporting the theories of harm advanced by the government. And so on that basis the court found that the government could not meet its burden of showing concrete evidence of harm with actual scientific evidence, and that's what we have here as well.

Now, the APA report -- and I'm just about done with it, Your Honor -- at the very end, after the lengthy task force report, there is a resolution of the APA. It's included in Appendix A of the report. Now, the City cites -- in the ordinance cites to the resolution as a separate source document, separate and apart from the APA report. But it's part of the same document, it's filed at Docket 24-3, starting on page 53.

Your Honor, I'm not going to take the time -- this is what it looks like on the first page. These are the resolutions that come out of the APA task force report. I'm not going to take the time to go through it because I see that I'm running out, but I'll tell the court -- the court can search these

resolutions far and wide, from the top to the back, and the court will not find anywhere any iota of an indication that SOCE should be banned, must be banned. Instead, the APA in the resolution says things like don't use coercive methods, don't make guarantees of success, don't make guarantees of change. They call for more research. They leave the decision on whether or not to engage in SOCE to the providers themselves. The defendants take this resolution and extrapolate from it that they are entitled to enact an outright ban. None of that can be found in the resolution itself.

So Your Honor, since the APA itself could not conclude that SOCE counseling causes harm, it necessarily must follow that none of the other position papers cited by the defendants, which cite to the APA report, could draw that conclusion either. Or does it?

Let's look at just a couple of them, Your Honor. This is the Professional School Counselors Association Guidelines, filed by the defendants at Docket 24-4, starting on page 31. This is another key piece of evidence where defendants cite to overwhelming research. And we see in this last paragraph of this particular organization, they say

about one or two sentences into the last paragraph, 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. APA 2009.

They cite the APA 2009 report for the proposition that, quote, "These practices have been proven ineffective and harmful." But Your Honor, we know, having just spent a whole bunch of time, that the APA report proved no such thing.

And I guess they have missed the APA's disclaimer that they did not in any way address gender identity change efforts because they lumped those in as well in the same statement where they say that it's been proven ineffective and harmful.

Your Honor, I submit to you we're looking at an ideological echo chamber of sorts here, Your Honor, that's wholly detached from the APA report. You cannot read the APA report for the conclusion about which it is being cited and you will note that there is no other report or study that they cite. And that happens again and again in a lot of these position statements that they identify.

If we look at, for example, another one, this

is the American Psychoanalytic Association position statement. This is filed at Docket 24-4, starting on page 6. In this particular one in the first paragraph it says, The American Psychoanalytic Association affirms the right of all people to their sexual orientation, gender identity, and gender expression, without interference or coercive interventions attempting to change sexual orientation, gender identity or gender expression.

Your Honor, so far so good, my clients also affirm their rights. My clients only want to help their clients with the changes that they want to make. They have no interest in the kinds of coercive interventions that this position statement condemns here.

And when the defendants cited in the ordinance none of this carries through, there is no attempt to draw any kind of distinction between the voluntary interventions and the type of coercive interventions that are being attacked here.

This particular position statement, like most of the other ones, says nothing about clients who seek SOCE counseling, who voluntarily request it, and who voluntarily participate in it.

Your Honor, there are a few more of these

kinds of examples. We could spend the time to go through each one of them, but we're actually out of time so we can't spent the time. I submit to you it's not necessary for us to do that because the defendants have gone through all of them. And we asked them at the deposition what the state of their overwhelming research was -- and I'll conclude this section by showing you what the defendants said.

Your Honor, looking at the Maniscalco deposition, this is Councilman Maniscalco, who was the person who requested the ordinance and also, importantly, who was the 30(b)(6) designee of the defendants on the issues of the harms of SOCE and the state of the research and the compelling interest that the defendants purport to have.

Looking at page 110 of this.

THE COURT: I'm at 133-2, for the record.

MR. WILLIAMS: Okay. Page 110, starting with line 5. My question was, Does the City disagree with the statement that the likelihood of harm from SOCE cannot be determined?

Answer: I would -- well, I would agree with that because, once again, it's case by case. You don't know. You could have a hundred people and it could be 50/50, it. Could be 80/20. You don't

know.

Question: Let me ask you this. Does the City have a position about how likely it is that loneliness, for example, will result from SOCE counseling or conversion therapy?

Answer: Once again, you know, it would have no position because everybody is different. Everybody is going to react differently.

Question: So would it be true that the City of Tampa cannot say whether the likelihood of a negative outcome for a minor who receives SOCE is 50 percent or one percent or zero percent?

Answer: I can't come to a number because humans have free will, and people, you know, you don't know how someone is going to react or behave or change or what incidents in their lives will trigger whatever. So...

Question: The answer is no, the City can't tell what the likelihood is?

Answer: Nobody can.

Your Honor, then on page 111, 14 to 19.

Question: Can the City say how likely it is that feelings of rejection or depression will result in SOCE counseling on a minor?

Answer: The only time is to talk to people

that have been through it and see from there. But you can never get a definitive number.

And one last one on 112, Your Honor, starting with line 7.

Question: I do want to ask you just to specifically answer the question I asked, which is does the City know how likely it is that suicidal thoughts will occur as a result of SOCE?

Answer: No, nobody knows.

Your Honor, that's consistent with the APA report from 2009, it's consistent with the state of the research in 2009, with the state of the research in 2017 when the ordinance was enacted, and with the state of the research today. When asked the question can you tell how likely someone is to encounter negative outcomes including things that the defendants assert as reasons, as compelling interests for the ordinance -- loneliness, depression, suicidal thoughts -- the City itself says no, nobody knows.

Your Honor, that is the very antithesis of overwhelming research, and we submit on that basis on this record that defendants cannot possibly satisfy their heavy burden of justifying their outright ban.

Let me conclude, Your Honor, by showing the court that defendants never even considered anything other than an outright ban. Before I get there, let me just recap. Under strict scrutiny the defendants are required to demonstrate that the ordinance is the least restrictive means available to them. That's *Boos vs. Berry*, *Ward vs. Rock Against Racism*, both cited in our briefs.

To satisfy the narrow tailoring prong of their strict scrutiny burden, defendants must show that they, quote, "Seriously undertook to address the problem with less intrusive tools readily available to them." That comes out of *McCullen vs. Coakley*, Supreme Court case decided in 2014.

We have in our brief several cases standing for the proposition that defendants can only discharge that burden of narrow tailoring, of showing that they seriously undertook to address the problem by showing that either, "They have tried substantially less restrictive alternatives that failed, or that alternatives were closely examined and ruled out for good reason." That comes out of the *Bruni* case out of the Third Circuit which is applying the *McCullen* Supreme Court teaching on this.

So Your Honor, what the case law says is that the defendants cannot come to you today after the fact and dismiss all these other alternative less restrictive measures as ineffective or as not working. What they have to show you instead is that before they passed the ordinance, they actually sat down and considered these less restrictive alternatives and either tried them and found them unsuccessful or seriously considered them and rejected then for good reason. That we know that they cannot do and the reason we know that is because we asked them what exactly they considered before they passed the ordinance.

And this is what they told us, this is Commissioner Maniscalco again, Docket 133-2, page 100, starting with line 14.

Question: So I'll ask the same question then just to make sure we've covered all the possibilities. Am I correct that the City did not consider banning only aversive treatments versus nonaversive treatments?

Answer: No. We were specific in asking for a conversion therapy ban. We looked at other cities and it was comprehensive where it covered the therapy in general, not one or the other. It was

just a comprehensive ban that covered everything.

Question: So am I correct that the City did not consider banning only aversive treatments versus nonaversive treatments?

Moving on to page 101, line 1.

Answer: We specifically asked for a comprehensive ban.

Question: From the very beginning?

Answer: From the beginning it was a ban on conversion therapy in general.

Question: And so -- and I'm sorry if I'm beating a horse. I just want to make sure the record is clear. The City did not consider at any point banning aversive treatments?

Answer: We didn't -- we didn't ask that. We specifically asked for a ban on everything.

Question: And I understand you've said that.

Answer: Yeah.

Question: But, given that this ordinance was considered, debated to some extent, commented on over a period of weeks between four different meetings, at any point did the City consider only banning aversive treatments?

Answer: No.

Question: At any point did the City consider

banning only coercive treatment while leaving voluntary treatment allowed?

Answer: No.

Question: At any point did the City consider banning only involuntary treatments as opposed to voluntary treatments?

Answer: No. It was a general ban covering everything.

Last passage here on page 102 starting with line 1.

Question: From the beginning when you first proposed looking into the ordinance to the time of enactment, it was always a comprehensive ban of everything that was considered?

Answer: Yes. And that would reflect in the unanimous votes all the way through. So I think there was a general understanding by all council members that we want a complete ban. We never debated anything else because we specifically wanted the complete ban.

Your Honor, that is crystal clear and I submit to you that my colleague, Mr. Williams, cannot now come here and dismiss the alternatives that we have suggested such as a ban on only aversive therapy or a ban on only coercive or involuntary therapy. He

didn't dismiss them as being ineffective to address the City's purported compelling interests because they were never even considered by the city council prior to passing of the ordinance. And so whether or not they're effective today really doesn't matter any more -- we believe that they are, we've shown that they care, but it really doesn't matter any more because the City flunks the narrow tailoring test *ab initio* by having failed to consider these alternatives when it was constitutionally required to consider them before the enactment.

So Your Honor, that is what I have to say about that. Unless or if the court has some questions about what I've said, otherwise I'm at a stopping point.

THE COURT: I've been keeping kind of my running list of questions, but I think it may make more sense to have the parties finish the presentations and then we can start addressing all the questions in a manner that invites both sides to be able to give their thoughts after I've heard both sides of it.

MR. MIHET: Sure. And if time permits today, obviously I would like a chance to do some rebuttal at the end after Mr. Williams has a chance to

respond.

THE COURT: So any understanding is next Mr. Gannam is going to speak on preemption and I believe there was another --

MR. MIHET: Enforcement, yes.

THE COURT: Just in terms of timing, we do need to stop at noon, I have another matter that I have to address and that's why we'll come back at 1:30.

Something for counsel to consider and discuss over the break, I am prepared to go as late as we need to go today. I don't know that everyone else in the courthouse wants us going as late as I'd be maybe willing to go. I don't know that you all want to go as late as I would be willing to go. When we originally had set this, we had also discussed the possibility that it may need to continue for a second day, and I do have tomorrow available as well should this need to continue. You all are in a much better position of knowing how much more you have today than I am.

So that's something that perhaps during the lunch break you all can discuss and also compare your availability as to what makes the most sense in the event that we don't finish today.

MR. MIHET: We're happy to discuss. I'll say if it looks like it's possible to wrap up at a reasonable hour today, 5:00, 5:30, that would be our strong preference because some of us did not plan to be here tomorrow. But obviously this is important and if it doesn't look like we can finish in time, we'll make whatever adjustments need to be made.

MR. WILLIAMS: Your Honor, before we break, may I inquire. I have unfortunately because of the timing and because tomorrow I have a major hearing in another matter that I could not change, court ordered, tomorrow is not available to me. If we do go into a second day, does Your Honor have time next week or the week after?

THE COURT: Not next week, but we can look through the calendar, we can do all of that off the record so that we are giving our court reporter a break during that. But let's maybe if you all could -- what we can do is I can have Ms. Morgan and I can look at the calendar and give you all some dates that would work after Thanksgiving. Again, we can continue to be optimistic we'll wrap up today, but we should also be realists.

Go ahead, Mr. Gannam. But Mr. Williams, I guess the short answer is I will not force you to be

here tomorrow if you're unable to be here tomorrow.

MR. WILLIAMS: I'd be happy to change that one and finish this one, but I don't think Judge Stephens would agree with that.

THE COURT: I had a couple state court judges call me and say do you really have this set for this date because someone keeps telling me they can't be here. I don't know. And I usually say yes, I do.

Okay, go ahead.

MR. GANNAM: Thank you, Your Honor, may it please the court, Roger Gannam for the plaintiffs. I'm going to continue the discussion on narrow tailoring that Mr. Mihet covered, with a specific issue of enforcement, enforcement of this ordinance.

The defendants fail narrow tailoring for the separate and additional reason that their ordinance cannot as a practical matter be enforced to remedy any purported harms that the plaintiffs claim to have in view. And our guiding principle here is from the case of *McClullen v. Coakley* from the Supreme Court. The quote is up on the screen. The *McCullen* court said, "The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated

with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrificing speech for efficiency.'"

It is our position, Your Honor, that the City of Tampa here has done exactly that by enacting this ban without having qualified or trained or competent enforcement officials ready to enforce it. And by competent I simply mean lacking in training or experience or the necessary qualifications.

The inability to enforce the ordinances is basically admitted by the testimony of the City's officials, which I will walk the court through. The conclusion is that the City's code officials are objectively eloquent to investigate and make determinations about appropriate mental health therapeutic practices which they would be asked to do in this case. And this fatally flawed process could never satisfy constitutional and narrow tailoring.

So first, Your Honor, the City's code enforcement and legal officials are neither qualified nor trained to enforce the ordinance regulating the practices of licensed mental health

providers. First, as alluded to by Mr. Mihet, the only educational requirement for all levels of code enforcement is a high school diploma or GED, and they receive no training on mental health counseling.

The deposition excerpt on the screen is from Mr. Ruggiero, the City's head of code enforcement, starting on page 19, line 24, through page 20, line 25.

Question: So to be a code enforcer in the City of Tampa, including a senior inspector or supervisor, all you need is a high school diploma or the equivalent and the code inspector certification?

Answer: Correct.

Question: Okay. And just for clarity, from now on when I refer to a code enforcer, I mean to include the three senior inspectors and six supervisors in that umbrella unless I say otherwise. Okay?

Answer: Understood.

Question: Have the City of Tampa code enforcers received any training on any mental health issues?

Answer: No.

Question: Have the City of Tampa code

enforcers received any training on any issues that might arise in family therapy?

Answer: No.

Question: Have they received any training with respect to any issues that might arise in the context of counseling?

Answer: No.

Question: Okay. And if I asked the same questions for yourself, would the answer be no as well?

Answer: Yeah. Correct.

Question: You haven't had any training in those fields either?

Answer: No.

Continuing on, Your Honor, to Mr. Ruggiero's deposition, page 69, line 16, through page 70, line 7.

Question: Okay. Your code enforcers are trained to deal with tangible things they observe, like, the tallness of the grass or existence of trash on a particular property, right?

Answer: Yes.

Question: They're not trained to deal with things that are in the arena of mental health, correct.

Answer: Correct.

Question: They're not trained to know whether a particular mode of therapy is conversion therapy or something else?

Answer: I would -- I would agree.

Question: Okay. They're not trained to know whether or not a child struggling with gender identity confusion has reached a point where they embraced the identity of an opposite sex or whether they're still exploring it, correct?

Answer: Correct.

And Your Honor, to be clear, this absence of training, this absence of experience on the part of the code officials has real life consequences on their competency to enforce this ordinance.

Continuing with Mr. Ruggiero at page 77, lines 7 through 10.

Question: Now, is it necessary for you to know what the ordinance prohibits in order for you to be able to carry out your duties and responsibilities in enforcing it?

Answer: Yes.

Moving on, page 78, line 17, to 79/8.

Question: Okay. Does -- I don't see in the-- in the ordinance a definition for sexual orientation

or gender identity. What do you understand those terms to mean as the person entrusted with enforcing the ordinance?

Answer: What was the question again?

Question: Sure. I don't see a definition in the ordinance for sexual orientation or gender identity. My question is what do you understand those terms to mean?

Skipping to line 16 on page 79.

Answer: To me it's a decision by an individual that -- who they want to identify with, a male or a. Female, who they want to be their partner.

Question: And what about gender identity? What does that term mean?

Answer: Well, a particular individual that wants to identify themselves -- maybe they're a female. They want to identify as a male or vice versa. That's the best I can do.

Question: How are the two terms different? How is it different from gender identity?

Answer: I don't think I'm qualified to answer that.

Question: Okay. Why not?

Answer: Because it's not something I deal

with every day. I'm not involved with that determination of, you know, what you're getting at. I'm not involved in that.

The answer from the chief code enforcement official from the City of Tampa is basically I'm not qualified to answer that question, and yet that's a fundamental concept in this ordinance that would be required to be understood in order to enforce it.

Continuing on from Mr. Ruggiero at page 100, line 12, through 101, line 25.

Question: So I believe your testimony was that if this boy that we've been talking about hasn't yet reached a decision to identify as a girl and receives counseling and decides to remain a boy, there is no violation of the ordinance, right? Is that what you told me earlier?

Answer: Yeah. I'm just going to say it's like -- in my opinion, it's exploratory.

Question: Okay.

Answer: -- and nothing -- yeah.

Question: Okay. I understood that. We're clear. But if the same boy actually reaches the point where he identifies as a girl --

Answer: Okay.

Question: -- and then seeks and receives

voluntarily counseling to assist him to change back to be a boy, I believe in that scenario you testified earlier that that would be a violation of the ordinance.

Answer: Yes.

Question: Right?

Answer: Yes.

Question: So in those two examples the difference is whether or not the boy has actually reached the point where he identifies as a girl or whether he is still exploring, right?

Answer: Yes.

Question: Okay. Is that a determination that you would be able to make based on your expertise and your training and your qualifications?

Answer: No.

Question: Is that a determination that any of your code enforcement officers would be able to make based on their training and experience and expertise?

Answer: No.

Code enforcement officials, including the head of all code enforcement, are not qualified to interpret the fundamental concepts in the ordinance as we'd illustrated and yet, if we continue on,

Mr. Ruggiero was asked this ultimate question, page 25, lines 8 through 11:

Question: Whose responsibility is it under the City code to issue a notice of violation when there is a code enforcement violation?

Answer: Oh, it's us. Yeah, it would be my folks.

With neither the competence nor training to enforce the ordinance, what is code enforcement supposed to do? We'll enter the training from the legal department.

The court has already seen one slide from this training presentation by Jerrod Simpson of the City Attorney's Office. This is Plaintiff's Exhibit 2 filed at Docket 134-2, page 15. It was authenticated by Mr. Simpson as his slide at his deposition, page 95, line 24, through 95, line 13, and also discussed by Mr. Ruggiero, page 24, line 4, through page 23, line 13.

This slide instructs all the code enforcement personnel who were required to attend this training: "All possible conversion therapy cases must be referred to legal for review prior to the issuance of a Notice of Violation."

Mr. Ruggiero was asked why is this is the

case, what is the purpose for this policy? In his deposition, page 34, lines 10 through 13:

Question: Okay. What did this training that Mr. Simpson provided in August 2017 for the code enforcement officials consist of?

Answer: Basically an overview of the ordinance and then basically the determination that if we do get a case, bring it to the legal department first.

So there was no training for the officials responsible for policing therapists on the substance of determining whether a change in sexual orientation was attempted; "just call legal" was the extent of the training. And again we asked the question why.

Mr. Ruggiero, page 24, lines 16, through page 25, line 7:

Question: And why is it that complaints under this ordinance would be routed through to the legal department?

Answer: Well, number one, this is a situation where the code investigators, they're not -- they don't handle this type of thing. The legal department would be the one that would -- if it went to prosecution, you know, they would oversee it. So

we would get them involved to see, you know, number one, do we have a complaint here? Does it meet any -- any probable cause under the ordinance? Any other questions that we might have to get involved in, things that he would have -- he could answer that when he comes. But just things that he would have to prove if there was going to be a case made --

Answer: Okay.

Question: -- that type of thing.

The critical point here, Your Honor, is the code investors don't handle this kind of thing. His meaning is clear; code officials can't handle this kind of thing.

So how can the legal department help the officials enforce this ordinance? Again we go to the deposition of Mr. Simpson, the City attorney, page 67, line 20, through page 68, line 17.

Question: Well, what does gender identity mean in this ordinance?

Answer: Gender identity isn't defined in the ordinance.

Question: How does the City interpret it?

Answer: The City would interpret it based on Webster's Ninth Dictionary.

Question: And what does Webster's Ninth Dictionary say?

Answer: I don't know off the top of my head. But I -- if you want to pull it up, we can look at it.

Question: I'm asking you, you know, as the City's designee to answer questions about interpretation of the ordinance.

Answer: Right.

Question: So as we sit here right now do you know how the City would interpret gender identity as this term is used in this ordinance?

Answer: Based on Webster's Ninth Edition.

Question: Is that something you've looked at before?

Answer: I have not looked -- I mean, I think, at some point I looked at the definition of gender identity in Webster's Ninth. But I can't recall -- you know, I can't recite to you what Webster's Ninth says about gender identity.

So all calls have to go to legal first before any Notice of Violation can be issued. The legal department's solution is to get out the dictionary. Apparently the code enforcement officials can't even be entrusted to do that.

And this isn't just coming from the City's 30(b)(6) witness on interpretation and enforcement; this is actually one of the two actual attorneys who will field that call from code enforcement.

Mr. Simpson testified to this at page 115, line 8, through page 116, line 3 of his deposition.

Now, I can only imagine that the conversation between code enforcement and the legal department would be something like Abbott and Costello -- who's on first, what's on second, third base -- I don't know, let's get out our dictionaries and find out what this ordinance means.

So the final question then is what about the special master, the ultimate decision-maker in a therapy ban case? Go to Mr. Simpson, page 104, lines 9 through 16.

Question: Are any of the special masters currently on the City's roster role for special masters licensed mental health providers?

Answer: I don't know.

Question: Is there any plan in connection with the conversion therapy ordinance to recruit or appoint a special master who is a licensed mental health provider?

Answer: There's no -- not that I'm aware of.

There is no plan, Your Honor, to make sure that the final decision-maker even, the special magistrate, is trained or qualified to make the determinations that code enforcement and legal are utterly unable to make. The only thing certain about the City's enforcement plan is that it will make it above the law. This enforcement plan is not a constitutional fit with the supposed compelling interests City claims as required by McCullen. This is the antithesis of narrow tailoring.

Next, Your Honor, I'm going to deal with the issue of preemption. It's our position, Your Honor, that the state's regulation of licensed health professionals, including licensed mental health professionals, is pervasive and that there is a strong public policy requiring the state to be the sole regulator in this field.

These are the principles espoused in *Sarasota Alliance for Fair Elections vs. Browning* which is on the slide on the screen. I'll read from the case:

"Preemption is implied when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the legislature. Implied preemption is

found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme. In determining if implied preemption applies, the court must look to the provisions of the whole law, and to its object and policy. The nature of the power exerted by the legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute are all vital to this determination."

To the first point in this analysis, Your Honor, state regulation of licensed mental health providers is pervasive. As we showed on the slide on the screen, Your Honor, the first principle to keep in mind here is that the pervasive regulation needs to be in a subject area, not on one specific point. I just put up a section of our brief just to remind the court that we've presented here that it's not the area of conversion therapy that we must find pervasive regulation by the state, but we must find it more generally in the subject area of regulation of licensed mental health counselors. That's the relevant inquiry here.

Now, the City contends that the question

should be whether there is a legislative statement prohibiting local governments from enacting ordinances prohibiting conversion therapy. But the subject matter in this area is regulation of mental health professionals, not what the City says which is that one subset of an entire course of counseling for one subset of a particular issue relating to that course of counseling has to be persuasively regulated.

Under the City's logic, a municipality would be empowered to enact any regulation it wants to by simply saying well, we don't find that the state has specifically addressed that point.

I'm going to show the court now -- walk the court through the persuasive regulation of mental health counselors, of licensed mental health providers such as the plaintiffs, to show the court why it's persuasive and satisfies that prong of the preemption inquiry.

First, Florida Statute Chapter 456 sets forth the general provisions related to the regulation and licensure of health professionals and occupations. Specifically in Florida Statute 456.003(2)(b), which is on the screen, the legislature identified the absence of local regulation as a justification for

the state to authorize the State Department of Health to establish boards and regulatory bodies to ensure that such professions are regulated to protect the health, safety and welfare of the public, as the legislative said in this statute.

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 the public is not effectively protected by other means including but not limited to other state statutes, local ordinances, or federal legislation.

Now, contrary to what the City argues about this statute, this statement of legislative intent is what the legislature put forward to justify its entry into and occupation of the field of health professional regulations because no preexisting local ordinance was there to protect the public.

This is the state legislature's statement that there isn't something in the local ordinances to accomplish what we want to accomplish, so we're going to do it without police power. And as the following sections -- statutory provisions and Florida Administrative Code provisions show, that's

exactly what the state did, and it did it pervasively.

Quick summary of what the state law provides. This is on the screen, several bullets. Chapter 491 more specifically regulates professionals in clinical social work, marriage and family therapy, and mental health counseling. For example, 491.003 defines the practice of marriage and family therapy and identifies who marriage and family therapy may be rendered to and it restricts the use of specific methods, techniques or modalities within the practice of marriage and family therapy to those people who are appropriately trained in it.

This section similarly regulates the practice of clinical social work and mental health counseling.

Section 491.004 creates within the State Department of Health the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling. I'll call it the "state board." It's composed of nine members, six of which must be licensed professionals in those three practice fields. This section also grants rulemaking authority to the state board to implement Chapter 491.

Section 491.005 imposes licensure requirements for clinical social work, marriage and family therapy, and mental health counseling professionals, including requirements for education, experience, passage of a theory and practice examination, and knowledge of the laws and rules governing the practice of clinical social work, marriage and family therapy, and mental health counseling.

Then 441.009 specifies grounds for discipline of licensed clinical social work, marriage and family therapy, and mental health professionals, and this includes false, deceptive or misleading advertising, or obtaining a fee or thing of value on the representation that beneficial results from any treatment will be guaranteed, such as for example fraudulent misrepresentation of what's possible through SOCE counseling.

It also imposes discipline for failing to meet the minimum standards of performance and professional activities which measured against generally prevailing peer performance, such as the standards set forth by the APA in its 2009 report and recommendations in which it entrusts the discretion to be knowledgeable about what the state of the empirical record is and to provide

appropriate counseling based on that information.

The APA report even suggests that a licensed mental health provider simply share what's in that report with their patients. These are all things that the state already contemplates through its pervasive scheme of discipline for licensed mental health professionals.

Now, turning to the administrative code, the rules made by the state board, Florida Administrative Code Subtitle 64B4 contains the rules implemented by the state board to implement Chapter 491. Example, 64B4-3.003 specifies the respective theory and practice, licensure examinations to be administered to social work, marriage and family therapy, and mental health counseling professionals, such as the specific examination developed by the Examination Advisory Committee of the Association of Marital and Family Therapy Regulatory Board for marriage and family therapists such as the plaintiffs in this case.

Also, 64B4-5.001 provides for the determination of violations and imposition of discipline on the grounds provided by Florida Statute 491.009 that we covered before. Again, this specifically covers the same areas of false,

deceptive or misleading advertising, and failing to meet minimum standards of performance for professional activities.

Importantly, these determinations of violations and imposition of discipline against licensed social work, marriage and family therapists, and mental health counseling professionals, are made by the state board, six members of which are licensed professionals in those respective fields themselves. In other words, the state board, the body tasked with carrying out discipline, for finding out and determining whether violations have occurred, they're licensed professionals themselves and that's required by statute.

Now we look at what licensed marriage and family therapists and these other professionals have to know. Florida Administrative Code Section 64B4-3.0035, it specifies how these three types of professionals shall demonstrate knowledge of the laws and rules for licensure, and it lays it out here.

An applicant shall complete a course consisting of a minimum of 8 hours which shall include the following subject areas. We have

Chapter 456 Florida statutes, Chapter 90.503 Florida statutes, Chapter 394 Florida statutes, Chapter 397 Florida statutes, Chapter 415 and 39 Florida statutes, Chapter 491 Florida statutes, and Chapter 64B4 of the Florida Administrative Code.

And in addition, this laws and rules course that these licensed providers must take, it must provide integration of the above subject areas into the competencies required for clinical practice and must include interactive discussion of clinical case examples applying the laws and rules that govern the appropriate clinical practice.

And we should note here, Your Honor, nowhere in this requirement are local ordinances mentioned as part of this extensive regulation -- extensive requirements for knowledge of laws and rules for these licensed professionals. There simply isn't room for local ordinances in the state statutory scheme.

Now, this foregoing regulation of licensed health providers in general, and licensed mental health providers specifically, including education, experience, licensure, practice and discipline, administered by a state board of licensed professionals is pervasive and implies an intent by

the Florida legislature to occupy the field to the exclusion of local regulation.

Now, the second prong of the test for preemption is the strong public policy requirement requiring the state to be the sole regulator. And what we've put on the slide now is again an excerpt from our briefing, Part 4E2. This is in our combined response to the motion to dismiss and reply in support of preliminary injunction.

The first principle here, Your Honor, is that there is a suggestion by the City that somehow the licensure and the regulation of licensed professionals, including medical and mental health professionals, has been a matter of local concern, citing to a Hillsborough County case where we submit -- that was a federal case making the distinction between federal and state regulation when it used the term "local," and not simply state and local regulation like we're talking about here in this context for preemption. We've cited several cases making it clear that regulation of these professionals is indeed a matter of state concern.

Second, given that the legislature has mandated that determinations of whether licensed professionals have met the minimum standards of

their profession must be made by similarly licensed professionals on the state board. It defies reason to assert that the legislature intended to allow unlicensed city code enforcement officials to make the highly specialized professional practice determinations regarding sexual orientation and gender identity therapies for which there are no empirical bases for measuring safety and efficacy.

As we showed above, the City's code enforcement and legal officials responsible for enforcement are not trained or qualified even to interpret the central concepts -- sexual orientation and gender identity.

Third, the absence of any regulation of professions or professionals in general and in mental health profession and professionals specifically by the City, especially when viewed in light of the City's purported compelling interest, confirms there's a strong public policy favoring regulation by the state alone.

THE COURT: Before you move from that point, and I guess this is really more geared to the slide that listed the different types of licensed professionals, I appreciate -- because there has not been a case provided to me -- that there has not

been a determination as to Chapter 491 and whether there is an implied preemption.

Were these other professionals, or perhaps other professionals subject to licensure, perhaps not in the health field but in other fields, have there been findings by court that the statutory scheme that the state has enacted has -- and I'm setting aside explicit, we're just talking about implicit -- but has been implicitly preempted to the state by virtue of how pervasive it is.

MR. GANNAM: I'm not aware of a case that makes that holding, Your Honor. All we have is -- there aren't very many cases on implied preemption --

THE COURT: I agree with you. We did our best to look, too.

MR. GANNAM: We have the test which points to pervasiveness of the regulation and whether there is a strong public policy that supports the state being the sole regulator.

And we think when we look at not only -- we're dealing here with these three categories of counselors that happens to include licensed marriage and family therapists because that's what our clients are. But when you look at the broader

regulation of the Florida statute, all health care professionals are subject to these similar pervasive regulations. We think the state has preempted this field to itself to the exclusion of local government because, again, pointing to just the inability of the local governments to approach the level of competency of the state boards that itself consist of licensed professionals to try to regulate these fields.

And I think another point that is salient here, and the next couple of slides I was going to sort of point to this, is that the reason there is not a case on this particular issue is I don't think local governments ever tried before because they know that they're not in a position to regulate this field. We think that the overall record, all the circumstances in this case suggested by my colleague, Mr. Mihet, is that this was a politically motivated passage of a statute, sort of an echo chamber is the word he used. This same ordinance essentially has been adopted in many places, none of which -- none of these municipalities have engaged in the kind of narrow tailoring required by the constitution and none of them can point to any sanction in or authorization in the Florida

constitution or Florida statutes to do this.

We think again that the reason there have been no cases on this particular issue is that local governments haven't tried to do this before. It's only in this particular area of so-called conversion therapy that local governments have felt emboldened to do so. And I think that's because of the political climate we're in, not because of any change in the law or express legal authorization to do it.

Just to put a bow on this particular point, Your Honor, we go again to the deposition testimony of Mr. Ruggiero, the chief code enforcement official in the City of Tampa, page 71, lines 15 through page 72, line 9.

Question: Does your code enforcement division enforce any other ordinances with respect to mental health counselors?

Answer: No.

Question: Okay. The only ordinance that you enforce with respect to mental health counseling is the conversion therapy ordinance?

Answer: Yes.

Question: Does your department enforce any ordinances that attempt to regulate other modes of

therapy besides conversion therapy?

Answer: No.

Question: Conversion therapy is the only mode of therapy that your department enforces and regulates?

Answer: Yes.

Question: Is it fair to say then that your code enforcers have no experience or expertise in enforcing other regulations against mental health counselors and mental health professionals?

Answer: Yes.

And on the same point, the testimony of Jerrod Simpson, the assistant city attorney, page 111, lines 13 through 25.

Question: Would you consider a complaint to a violation of the conversion therapy ban to be a complicated or unusual case?

Answer: Yes.

Question: And why?

Answer: Well, it's usual because it's the only thing in the code that deals with this, things of this nature for the department.

Question: When you say "things of this nature" do you mean mental health issues or counseling issues?

Answer: Right. With mental health and with LGBT issues, those are not -- those are obviously not day-to-day everyday issues for the code enforcement department.

Putting this all together, Your Honor, as a matter of public policy, untrained, unexperienced, unqualified city officials have no business trying to enforce an ordinance like this. The state's regulation of licensed health professionals, including licensed mental health professionals, is persuasive and there is a strong public policy requiring the state to be the sole regulator. Thus, this field of regulation is implied preempted to the state.

At this point, Your Honor, I want to reserve some time during the rebuttal, after the City makes its presentation, to discuss particularly the issue of standing. We think it makes sense because we'll hear what they have to say challenging standing of our clients. So I would like to save that issue for rebuttal, if that's okay with the court. I can address it any time, but I think that would make more sense in the scheme of things and since it's noon now.

THE COURT: That would be fine in response to

the motion to dismiss argument. We're right at the noon spot, so let's go ahead and take our break.

What I will do is Ms. Morgan and I, before I head to my meeting, will look quickly at the calendar and just come up with a list of possible dates in November and unfortunately I guess a little bit in December that work for the continuation of this, to the extent that we don't wrap up today, just so that going into the lunch hour you all know kind of what you're looking at in terms of timing. So we will do that quickly and Ms. Morgan will bring that out to you and then we'll be in recess until 1:30.

(Lunch break.)

THE COURT: Whenever you're ready.

MR. WILLIAMS: Thank you, Your Honor. I'm reminded of an admonition that Chief Judge William Terrell Hodges gave me 40 years ago and that is "be brief." And I'm going to try to do that.

THE COURT: Someone in the back is saying they can't hear you.

MR. WILLIAMS: Then I shall be briefly loud, how is that, or loudly brief. I apologize. Let me start then again.

THE COURT: I'm having no problem hearing you.

MR. WILLIAMS: Just to repeat, I'm reminded of Judge William Terrell Hodges' admonition to me as a much younger lawyer to be brief because we judges are smarter than you lawyers give us credit for. And certainly I give this court a lot of credit because I know you're prepared.

So we have spent a great deal of time on both sides preparing for this argument, but more importantly or equally importantly preparing our written submissions. And I know the court has all of that and it would be repetitive to just go through it all, so forth and so on.

So with that in mind, I'll deal with some of the specific issues that are out there. But I do want to start, Your Honor, with the simple proposition that this case is about an ordinance that was enacted by the City of Tampa to protect minors and only minors from harm as a result of conversion therapy. And I want to make that point very clear from the outset because that is all this case is about as far as the City is concerned and Mr. Ruggiero.

A little history is important because I know that Mr. Mihet went into Mr. Maniscalco's involvement, so let me do that anecdotally because I

didn't bring his deposition but I don't think they'll have any issue with this.

This ordinance came into conception in January, late January of 2017, as a result of suggestion to Mr. Maniscalco and Mr. Maniscalco then took it to the city council and the city council approved a motion unanimously to have the City Attorney's Office look into this ordinance and to report back with a provided ordinance in the event that the City Attorney's Office deemed it valid, constitutionally enforceable, and something that they, the City Attorney's Office, could present to the city council as an ordinance that could be addressed by the city council.

The city council then, after that was done and one of the assistant city attorneys provides a verbal report at that time, the city council then unanimously, at Councilman Maniscalco's request, to have a public hearing -- in fact, two public hearings as that's the way it's done here in the City of Tampa.

Those public hearings were held two weeks apart and well attended, well advertised. Well attended by both sides of the aisle, if I may use that analog, and each person had the right to speak

for three minutes as is the rule in the City. And on the first public hearing at the vote at the end of that hearing, all seven of the council members voted unanimously to enact the ordinance. And the same is true of the second public hearing. And not long after that, Mayor Bob Buckhorn signed it into law. The whole process was I think two and a half months, give or take.

Now, the reason I say that is because a number of the cases that Your Honor has read and that we have submitted refer to the concept of federalism. And that is that the federal courts should respect what the local legislative bodies -- in this case a city council -- has enacted because it is the will of the people and that's our democracy.

And I wanted the court to know that this is not a willy-nilly process, it was a very deliberate process and a very thorough process that this ordinance was enacted.

It went into law on April 9th, I believe, April 10th of 2017. And the lawsuit that initiated -- the action that is the hearing here today was not filed until December -- early December of 2017, nine months later, eight or nine months later.

The plaintiffs filed their motion for preliminary injunction along with their original complaint in December of 2017 and that hearing on that motion was scheduled not until June of this year. So from the time of the enactment of the ordinance in April of 2017 until the original scheduled hearing on the motion for preliminary injunction, was well over a year, well over a year.

The time from the enactment until the lawsuit, as I said earlier, was eight or nine months. And then on the eve of that hearing in June the plaintiffs filed an amended complaint which had the effect of cancelling the hearing that was scheduled in early June and led to the hearing that we have today because they filed an amended preliminary injunction motion.

The discovery that we spent so much time on -- two separate hearings, or maybe three, I'm having a hard time remembering, to be honest with you --

THE COURT: I think the last one I ended up ruling without a hearing. I decided to put you all out of your misery and not make you come back here for a hearing.

MR. WILLIAMS: Well, I wasn't in misery. I'm sure Mr. Mihet wasn't in misery. But thank you

anyway because from experience all too much time is spent on discovery and not enough time on the merits.

In any event, here we are in November of 2018, almost two years from the time that -- I mean, almost 20 months away from the date that the ordinance went into effect.

That temporal connection I think has significance to Your Honor's decision as to the entry of a preliminary injunction, but I won't dwell on that because I think it's self-evident and Your Honor knows that component of the law.

Now, returning to where I started and given that history, I think it is critical for me to once again say the purpose of this ordinance was to protect minors, and minors only, from a procedure that the city council deemed to be very harmful to the minor citizens of the City of Tampa. And that's where it stopped.

Now, just as an aside, you recall the request for admission that Mr. Mihet put up and said that he couldn't figure out what the difference was. That's my fault, I put the City limits because I like to be very specific about those things, given the fact that I've had that issue in other cases, that's the

only difference. But the point is that it's the City of Tampa and it's for minors only.

And I want to also reenforce the fact that this ordinance was based upon 10 -- I believe 10 separate empirically created studies from organizations that don't need any introduction, and it was on that basis that the ordinance was drafted and enacted.

Now, I say that simply because Mr. Mihet put up Mr. Maniscalco's deposition and he picked the parts he wanted you to read. I urge Your Honor to read the whole thing. Mr. Maniscalco is a very bright young man and in his testimony he told Mr. Mihet -- or Mr. Gannam; I frankly can't remember so my apologies. But in any event, Councilman Maniscalco told them that he read all of those studies, as did Mr. Simpson, Jerrod Simpson, who is the assistant city attorney who was primarily involved in the drafting of the ordinance. They both testified that they had read all -- reviewed all of those studies.

So when you cherry pick Mr. Maniscalco's deposition, that's unfair to Mr. Maniscalco because the ordinance was based on his review of the entire array of studies.

And as Your Honor probably knows, all of those studies were referenced specifically in the ordinance and when the city council voted unanimously to adopt the ordinance, enact the ordinance, obviously as a matter of law I think we can say they vouched for the contents of those studies. Whether or not they read them at all like a contract you sign it, you're stuck with it. I have no idea, to be candid, whether all of them read the studies. I'm sure some of them read one or more of them, but I don't know that for a fact.

Studies are really critical to the City's position because unlike some of the case law that I think they cite, the foundation for the ordinance was thought through very, very carefully and not in a willy-nilly fashion. And the reason for that is because our children are precious. I happen to have a newly minted teenager, so it resonates with me quite a bit.

And in enacting the ordinance, the city council was implementing the quintessential act of federalism. Local culture, local thinking, local values are enacted and implemented through a local ordinance that is restricted to the locality -- in this case, the City limits of the City of Tampa.

So the next question then becomes is it a valid and constitutionally acceptable ordinance? That's what this case is about from the plaintiff's point of view.

Your Honor is probably familiar with other lawsuits throughout the country and frankly a recent hearing down in West Palm Beach by Judge Rosenberg. So this is not the plaintiff's first case.

The question then --

THE COURT: Let me just say one thing. I am very aware of all of the published decisions that I've read that's been cited to me. I am aware of the existence of the South Florida lawsuit because, well, one, I get these notices of every federal court case filed in the district court, but also it became an issue during our discovery.

I have been purposely shielding myself off of any news about what the outcome is in that hearing. I know the hearing happened. I don't know -- I don't think an order has been entered. And I purposely have not listened to that transcript, I haven't tried to listen to the hearing, I wanted to decide this issue as my own silo, without that influence. In fact, my instructions to my law clerk, because we both get the same listserv of all

of the decisions that are coming out, is if you see that the decision has come out, let me know not to read the email that day so I won't read it. So I'm not aware of anything that was argued down in South Florida.

MR. WILLIAMS: I'm aware of the argument taking place, but other than that I'm reasonably ignorant myself, Your Honor.

THE COURT: I would imagine it's somewhat similar. But again I don't know, I don't know what questions were asked or not asked.

MR. WILLIAMS: Nor do I. But I'm sure it's very similar because the Palm Beach County ordinance is very similar to this county. In substance it's almost identical, for that matter.

In any event, what is the standard of review that Your Honor should utilize in assessing the constitutional validity of this ordinance? That goes to the heart of the plaintiff's challenge in this case.

There are three levels of review that could apply, but the one that does apply, clearly, is the intermediate level of scrutiny which is not strict scrutiny on the one level, it's not rational basis on the other level.

The intermediate standard of review applies because by applying Eleventh Circuit law, it is the only standard that could apply and still comport to what the Eleventh Circuit has taught us about the First Amendment and these kinds -- any kind of ordinance that involves the First Amendment.

I'm going to refer the court to the *Wollschlaeger* case which is an Eleventh Circuit case and I refer to it simply because I think it is indeed very instructive. Although the *Wollschlaeger* case is factually very different from this case, and the *Wollschlaeger* court, the en banc Eleventh Circuit, found that the Florida statute that was at issue there was not constitutional in large part, that is not the point of my position here. Because that statute covered a totally different subject matter and was more affirmative as opposed to prohibitory.

What is important about *Wollschlaeger* is that -- I'm anticipating almost their rebuttal but I think I ought to do that because *Wollschlaeger* made the point that *Pickup*, which is a case that we rely on, and I'm anticipating that rebuttal, did not provide a principled doctrinal basis for distinguishing between utterances that are truly

speech on the one hand and those that are somehow treatment or conduct.

What we have here is a very principled doctrinal position that answers that question straight up. This case involves an ordinance that prohibits communications which are part and parcel -- inherently part and parcel of a procedure -- conversion therapy -- that the peer reviewed articles that I alluded to earlier have clearly determined to be very harmful. And it is that principled doctrinal approach that the city council took, and that is the approach that the City is taking before Your Honor.

Interestingly -- and perhaps I've focused on it way too much, but not to me -- the Eleventh Circuit in *Wollschlaeger* refers to the more analogous and more persuasive Ninth Circuit case, *Conant vs. Walker*, 309 F.3d 629. It's a 2002 case.

And what's important about that is that *Wollschlaeger* involved a statute that was passed by the state legislature. And the predicate for passing that statute was six anecdotal comments or stories by I guess six politicians. That was it. There were no empirical studies that were involved, there was nothing of any kind, it was six anecdotal

stories, and that was the basis for that statute in the first place.

That is clearly not the case as far as the ordinance that the City of Tampa passed in the beginning of 2017, and it is clearly the opposite of what was the case in *Wollschlaeger*. But it is very consonant with what happened in *Conant vs. Walters.* Because in this case the basis, as I said earlier, was in fact a very empirically based situation which the *Wollschlaeger* case I would respectfully submit would require from any legislative body in order to pass the heightened scrutiny test.

Now, in order to pass the heightened scrutiny test on regulations that purport to restrict speech -- which this is not. This ordinance restricts a procedure, a regulatory procedure to prevent harm from minors and minors only, and any communicative attribute to that procedure is merely incidental to the regulatory process that is embodied in the ordinance itself. I want to repeat that. This ordinance is an ordinance that governs and regulates a professional procedure, not the speech; the speech is simply incidental to the process itself or the procedure itself. And that kind of ordinance I believe under *Wollschlaeger* or virtually any federal

case that devolves upon this issue is constitutionally valid because otherwise you would never be able to as a legislative body, state, federal, or local in particular, to regulate any profession or any subject matter. It's impossible to divorce communication incidental to the regulatory process.

And that is an important ingredient of our position. One court has taken the position that it is called occupational conduct. I think the better way to put it and that is *Lock v. Shore*, which is also cited, but I think professional procedure is the better way to do it in this case.

Now, in order to pass heightened scrutiny, intermediate scrutiny, all that needs to happen is that the legislative body have a compelling interest to protect the subject matter that they are enacting; in this case, protecting minors from SOCE or conversion therapy, and that in their efforts to accomplish that objective they do so as narrowly as is reasonable given the nature of the subject matter at hand.

In our submissions we have -- let me, if I may -- we have made it very clear that we are relying in many respects on the ordinance itself and

that is as it should be. To go back to what I said earlier, when the ordinance was drafted by the Tampa City Attorney's Office they did so with an eye in mind of the existing law at the time. And in that ordinance which we set forth in our motion to dismiss, the first amended complaint, and I think we repeat it probably in our submission as it relates to this hearing -- and I'm going to take the time to read this into the record.

The intent of the ordinance expressly set forth in Section 14-310 provides as follows: The intent of this ordinance is to protect the physical and psychological wellbeing of minors, including but not limited to gay, lesbian, bisexual, transgender, or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers. These provisions are exercised with the police power of the City for public safety, health and welfare, and its provisions shall be liberally construed to accomplish that purpose.

It's very straightforward, very self-evident. It is the exercise of home rule. It is the exercise of responsible legislation.

Now, the ordinance further says the city

council hereby finds the overwhelming research demonstrating that sexual orientation and gender identity change efforts can pose critical health risks -- and then it goes on.

I'm not going to dwell on that at length because Ms. Walbolt has a number of things to say about that and probably is in a better position to explicate that than I.

But I'm referring to the overwhelming research which the plaintiffs denigrate, as they have in their morning presentation -- which is their prerogative, I suppose. But the overwhelming research is just that: Overwhelming.

Now, let me refer back to what I said about Councilman Maniscalco. Counsel cherry picked some of those research documents and they are very thick, as research documents tend to be. But if Your Honor were to take the time -- and I can assure you it will take some time -- to go through all of those research papers, you will see that the gravamen of all of those papers is that conversion therapy is potentially very dangerous and can lead to -- and again, this resonates with me as a new father of a teenager -- things up to suicide. And they talk about that.

At the city council public hearings -- there were two of them -- members of the community who reside in the City of Tampa told personal anecdotal stories about that kind of experience that they had or some member of their family or friend or whatever. So anecdotally supporting what the city council was relying on in terms of passing this ordinance.

So the city council had not only 10 separate different empirical studies to rely on, but they had anecdotal evidence from members of the public to support and reenforce this is a real serious danger and this ordinance should be enacted.

Now, the City clearly has a compelling interest to protect the physical and psychological wellbeing of minors and they say so in this ordinance.

And then to go to the question that I started with and that is, is there a compelling interest -- clearly there is. A compelling interest that is supported by not only empirical studies but anecdotal evidence. Clearly that compelling interest, the first prong, has been satisfied here.

But then the city council, obviously aware of First Amendment issues in anything of this ilk, goes

on to say what it doesn't cover, i.e., it starts to narrow the focus of how it's going to achieve the objective of preventing and protecting the physical and psychological wellbeing of minors in the City of Tampa. The City says in the ordinance, The City does not intend to prevent mental health providers from speaking to the public about SOCE. In other words, Mr. Vazzo or Dr. Vazzo, Dr. Pickup, who I don't think has standing, but just for purposes of this discussion, doesn't prevent them from giving lectures to the public about the benefits and perhaps the detriments of conversion therapy. It doesn't, as the ordinance goes on to say, prevent them from expressing their views to patients -- or clients, as I think Mr. Mihet referred them to.

So in a counseling session, Mr. Mihet alluded to something different, but Dr. Vazzo and Dr. Pickup can say to a minor or an adult, here's my view on this stuff. So we're not prohibiting any of that kind of speech either.

The ordinance then says "does not prevent mental health providers from recommending SOCE to patients." So they can recommend it. They can recommend conversion therapy to their clients.

It does not prevent mental health counselors

from administering the procedure of SOCE or conversion therapy to any person who is 18 years or older, i.e., not a minor. And that age is a standard age of demarcation in the state of as long as I've lived here, which is almost 60 years.

And the ordinance does not prevent counselors from referring minors to unlicensed counselors such as religious leaders. In short, a child can go to see his or her rabbi, priest, minister, or anybody else that they may have a lot of faith in for whatever reason.

And it goes on to say that the ordinance does not prevent unlicensed providers such as religious leaders from administering the procedure, SOCE, conversion therapy, to children or adults. In other words, if you're not licensed, you're not prohibited by this statute. Nor does it prevent minors from seeking conversion therapy, SOCE, from mental health providers in other political subdivisions outside the City of Tampa -- which goes to my city limits addition to that request for admission.

In short, a minor can come out to where I live in the county and if there is a counselor that provides SOCE out where I live, the minor can certainly see that counselor and receive that

procedure.

The definition of conversion therapy says -- this is Document 24-1, page 5 -- conversion therapy does not include counseling that provides support and assistance to a person undergoing gender transition. It does not include a person undergoing counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping. It does not prevent social support and development including sexual orientation-neutral interventions to prevent and address unlawful conduct or unsafe sexual practices, as long as that counseling does not seek to change sexual orientation or gender identity, which is the core issue that is being addressed.

The point being that by the definition of conversion therapy, Your Honor, or by the ordinance itself prior to that, has purposely and very objectively told any mental health counselor this is what you can do without violating this ordinance.

It then also says -- the ordinance says the city council finds minors receiving treatment from licensed therapists in the City of Tampa who may be subject to conversion or reparative therapy are not effectively protected by other means including but

not limited to state statutes, federal legislation, et cetera. In short, we the city council, as elected representatives of the City of Tampa and the population of the City of Tampa, have determined that we should enact this ordinance so that we can specifically assure ourselves that we have protected our minors from what they believe is I think a very harmful and perhaps pernicious activity.

The ordinance also says that a provider does not include members of the clergy who are acting in that role as clergy or pastoral counselors or providing religious counseling, as long and they do not hold themselves out to be operating pursuant to a licensed mental health counselor -- with minors. With minors. With minors.

The ordinance also goes on to say a number of other things that are coorelative of what I have taken the tedious time to read into the record.

The point of my presentation as far as this is concerned is to make sure that the record and Your Honor is clear that, A, this was an ordinance that was deliberately thought through and supported before it was enacted; B, it was that deliberative process that led the city council to determine that they did have a compelling interest to protect

minors from this procedure, and that they were careful to make sure that they kept their eye on any constraints under the First Amendment, if any, by narrowing and circumscribing who, what, and so forth.

Now, having said all of that, I would submit to the court that the First Amendment really doesn't reach this ordinance because this ordinance isn't speech. This is not an ordinance that prohibits speech in any way, shape, or form. It prohibits a procedure, a form of therapeutic procedure and nothing more. The fact that communication might take place is, as the courts have said in these situations, purely incidental to the fact that a legislative body has decided to regulate that form of procedure to protect its population, its minors in this case.

So therefore our position is that you really don't have to reach First Amendment issues to deny the motion for injunction, preliminary injunction, and for that matter grant the motion to dismiss.

I'm going to let Ms. Walbolt focus on the more compelling interest stuff because, as I said earlier, she is on top of that and I think will make a very helpful addition to what we're talking about

here.

The case law that is cited by the plaintiffs refers to some recent Supreme Court cases, *Reed*, *NIFLA*, and I don't know that it would be a good utilization of the court's time for me to sit up here and try to go through all of those cases and distinguish them and so forth. But I will say this. The facts and circumstances and holdings of *Reed* and *NIFLA* really in my opinion don't have much of a bearing on this case. The cases are legion with any number of different fact components.

But this case is about this ordinance, this case is about these facts, and the facts of this case are totally different from those in *NIFLA,* and the facts are different with a big distinction, a constitutional distinction. And the facts of those cases are outlined in the cases themselves and I'm not going to take the time -- both *Reed* and *NIFLA*.

Reed, for example, just to teach on it, was about a sign in a suburb of Phoenix, Arizona, that didn't involve any back and forth communication whatsoever, it was just a sign ordinance. And that is nothing even remotely close to what we have here. And because of that and the rationale set forth in that case, the *Reed* case has little if any bearing

on Your Honor's decision in this case. Instead, as I said earlier, Your Honor is I think required to apply heightened scrutiny, and I've already resolved on that.

There is no strict scrutiny that would be applied to an ordinance that consists entirely of the very reason for the class of communication at issue that is proscribed. Again, conduct, procedures, actual procedures, versus the speech. Strict scrutiny simply doesn't apply to that, cannot apply to that, and that's the RAV case which is very well written in my opinion. We've cited that.

Let me next turn to what the plaintiffs are seeking here and that is a preliminary injunction of an ordinance that is now almost two years old -- 18 months, I would guess, 18, 19 months. They have provided no evidence whatsoever of irreparable harm. They have provided no explanation as to why they did not try to obtain a retraining order, TRO, much less quickly try to get a preliminary injunction. This case will have to proceed on the merits eventually. For that reason alone, Your Honor should deny their motion for preliminary injunction.

The issue of standing was alluded to earlier today and in our briefs, our submissions addressed

that. Very quickly, the law as it relates to standing on behalf of third parties is I think very clear and there is no standing there.

Dr. Pickup, to my knowledge, is still not licensed in the state of Florida and I will end our discussion on that because, again, it's well outlined in our submission.

Preemption. And then I'm going to come back, if Your Honor please, to the issues in this case to wrap it up.

THE COURT: And I do have a lot of questions on some of these issues, but again my thought is I'll let you finish, I'll let Ms. Walbolt speak, and then as I raise different topics that I have questions about, each of you can provide your thoughts and we can address them.

MR. WILLIAMS: Well, hopefully the court appreciates the fact that I'm trying to truncate my presentation because I don't want to get overly repetitive and perhaps save some time so we can answer those questions although not carry it to another day, although I'm prepared to do that, of course, as is Ms. Walbolt.

The preemption argument is frankly just flawed on both sides of the coin. There are two types of

preemption in the state of Florida and in general; one is express and one is implied. The plaintiffs have pointed to no statute promulgated by the state of Florida, or enacted by the state of Florida I should say, or administrative code provision that expressly preempts this ordinance. Quite to the contrary, this ordinance as I said earlier is the exercise of a well-established doctrine upon rule in the state of Florida. And they can point to nothing that is enacted as a state statute which says the prohibition of conversion therapy is restricted to the state and the state alone is preempted. There is nothing out there. We have looked long and hard for it.

That then relegates us to implied preemption. First and foremost, implied preemption as Your Honor is well aware is very disfavored by the courts of the state of Florida, whether state or federal. And that's as it should be because going back to the home rule concept, localities should be able to enact ordinances that those localities, based on their own values and their own thinking, deem necessary and appropriate in order to protect their citizens. This ordinance is a classic example of that and there is no basis whatsoever for this

court, respectfully, to rule that this ordinance is impliedly preempted under the law that devolves upon this court in the state of Florida.

I can go through a lot of case law, but I don't think it's necessary. I think the law is very clear and Your Honor should have no difficulty in my opinion in rejecting their preemption argument.

Before I get back to the merits of this case, let me let Ms. Walbolt stand up.

I represent Sal Ruggiero. Mr. Ruggiero, just as a little background, is a 30-year member of the police department here in Tampa and then after he retired he was asked to become the head of enforcement and he has been in that position for a number of years. I forget how long, but he's been there for a while. He's an experienced police officer, an experienced law enforcement officer. For reasons that have perplexed me, the plaintiffs saw fit to join him as a party defendant.

I filed a motion on his behalf -- I represent him individually -- and that motion is still pending. And to be very specific, if I can find it I'll direct Your Honor's attention to it --

THE COURT: Actually, on this -- I view this as a very discrete issue and I'll just go ahead and

cut you off on this, Mr. Williams. I fully agree with your position on the motion to dismiss for Mr. Ruggiero. I did -- and I'll give Mr. Mihet or Mr. Gannam an opportunity to address this issue and this is maybe one minor issue we can resolve today. I shouldn't say minor; minor in the grand scheme of things of this case; very major to Mr. Ruggiero.

In looking at the response to Mr. Ruggiero's motion to dismiss, I did look at all of the cases that were cited and what plaintiffs is citing is cases saying that it is appropriate for them to include an official in their official capacity in a lawsuit. And I don't disagree with that general premise. However, all the cases that plaintiffs were citing were cases where they were either state level cases so the state wasn't including due to the Eleventh Amendment, or it was otherwise just government officials. In fact, one case, for example, had the secretary of state and then the supervisors of elections for all over the state.

None of those cases that the plaintiff cited had a situation where it was a local government and then an individual with supervisory authority -- a local government official, I should say, at the same time being sued in their official capacity.

So on this more narrow issue, the narrow issue of Mr. Ruggiero and whether it is appropriate that he be a defendant in this case, it did seem to me that all of the plaintiff's cases were distinguishable and readily distinguishable and that really it was duplicative to have both Mr. Ruggiero in his official capacity and the City of Tampa being sued.

So Mr. Williams, you're welcome to stay at the podium, but I just want to ask Mr. Gannam and Mr. Mihet if they would like to respond at least to this narrow issue of Mr. Ruggiero.

MR. WILLIAMS: I only raise it now, Your Honor, because I don't want to forget.

THE COURT: Sure. Well, it's always nice to feel like we're accomplishing something in the day, even if --

MR. MIHET: Your Honor, on behalf of the plaintiffs, to respond to that particular issue, we think the cases that we cited do stand for the general proposition of the appropriateness of including the state official. Specifically in our case, Your Honor, this is the official responsible for enforcement of this ordinance and as our discovery has shown, he possessed key information,

he possessed key knowledge about how this ordinance would be enforced and that we believe it makes him an appropriate party in this case.

The cases that we cited all come after or at least I think most of them come after Monell, so we don't think that Monell forecloses absolutely the inclusion of Mr. Ruggiero and we think that it was appropriate to include him in this case.

THE COURT: Okay. And again, I'm just looking at your cases. The *Socialist Workers Party vs. Leahy*, that one the defendants were the Florida Secretary of State and the Florida Supervisors of Elections for various counties. The *ACLU vs. The Florida Bar* with the Florida Bar and the Judicial Qualifications Commission together. And then the Sixth Circuit case, *Russell v. Lundergan-Grimes*, that was state and county officials, but again no local government.

When I compared those with the case law that is binding on me in *Busby v. Orlando*, and then also the *Leah Family Partnership* case, which although is not binding on me, I'm familiar with it because I'm the magistrate judge assigned to that case. It does seem to me those cases speak -- specifically *Busby* speaks to how having a municipal officer sued in

their official capacity and then also the direct suit against that municipality, that those are equivalent, so it's really unnecessary to have both and it's duplicative.

So I will do some further research on it and I will look into it further, but at this point -- and I will be entering a written report and recommendation on that narrow issue that will be separate and apart, frankly because I think I can get it out much faster than I'll be able to address the other issues before me.

But I do at this point, barring further research, intend to recommend to Judge Jung that Mr. Ruggiero be dismissed from this action based on the binding precedent of *Busby* as well as the *Leah Family Partnership* case.

And again, I have reviewed plaintiffs' cases, but each of those seemed different in that it didn't involve the local government with an official of that local government also being sued at the exact same time.

MR. MIHET: Thank you, Your Honor, we're await your order on that.

THE COURT: Again, your 14 days isn't triggered by my oral comments; that's something that

once the report and recommendation comes out, that will trigger the 14 days. I guess I'm giving a sneak peek of where my mind is, at least on that issue.

MR. MIHET: Thank you, Your Honor.

THE COURT: Go ahead, Mr. Williams.

MR. WILLIAMS: Your Honor, forgive me, but Mr. Ruggiero had asked me whether I would raise that today and I didn't want to forget. It is very personal to him, of course.

Two things that I want to raise before I allow -- give up the podium for Ms. Walbolt. The plaintiffs argued that this ordinance was not viewpoint neutral. We disagree very strenuously. And the reason we disagree is because if Your Honor were to take a look at the *Keaton* case which we have cited, Eleventh Circuit case, it shows that the fact -- in that case there was a procedure or rule or a practice that was embodied in the university's practice and the plaintiffs in that case made the same kind of argument, perhaps not exactly, but close enough.

The Eleventh Circuit said no, this is not enough to have a viewpoint issue disqualify that particular rule, et cetera. And I urge Your Honor

to read the *Keaton* case because I think it is very instructive as a response to their earlier argument. And I'll leave that for Your Honor to review. There are many cases on the issue, but that is an Eleventh Circuit case that I think is, as I said, is very instructive.

Last, but not least, I would like to address, particularly given the fact that we've just talked about Mr. Ruggiero, the lengthy discussion that plaintiff's counsel made as it related to enforcement. Frankly, enforcement is a non-issue when it comes to the constitutionality of this particular statute, and I want to make that position very clear, but I do want to address it in terms of the way they portrayed the record.

I happened to obviously be at all of those depositions and so I remember them vividly, they weren't that long ago. If Your Honor reads those depositions in their totality, particularly Mr. Ruggiero's, you will see that from the very beginning the clear policy decision by the City was because of the nature of this ordinance -- it was new, there had been no complaints, granted, don't argue that point, that's irrelevant as well. This is an ordinance to prevent, it is prophylactic, we

don't want there to be any complaints and that's why we're passing the ordinance.

But the policy of the City of Tampa was very clearly that if a complaint should be presented to one of the personnel in that department headed by Mr. Ruggiero, it would be referred to the City Attorney's Office for review and ultimately a decision as to whether or not to pursue that complaint or not.

Now, counsel seemed to suggest that because these investigators are simply high school graduates, they're just not qualified to do anything. I was surprised that they would take that position because the smartest people I know are just high school graduates.

But aside from that, aside from that, the policy itself solves that problem because the City is saying to the investigative body, We want to be involved in these decisions, we want to be involved in the decision to charge or not charge because of the facts and circumstances that can vary in a myriad of different ways. And that's as it should be.

On a personal level I will tell Your Honor that I was the City prosecutor for the City of

Temple Terrace back in the '70s and I got calls from police officers daily; should I do this, should I do that. I enjoyed that process; it taught me a great deal as a young lawyer. Later on in life I've done a lot of white collar criminal defense and that same process takes place between FBI agents, DEA agents, ATF agents, and what not in interacting with assistant United States attorneys as to whether or not to make that charging decision. And it is a very intricate process, in my experience, particularly at the U.S. Attorney's Office, and sometimes takes years before they make that decision.

What the City policy embodies is a process that is historically tried and true at all levels from the night court at City of Temple Terrace that I was the prosecutor for, and the U.S. Attorney's Office here in this district or in any other district.

So to suggest that there is something wrong, constitutionally or otherwise, with the enforcement department collaborating with the City Attorney's Office to make a good decision on this particular complaint and the facts and circumstances underlying that complaint, I think is a red herring. In many

ways, but certainly from a constitutional point of view it is a red herring. It is irrelevant.

Having said that though, I wanted to make clear that the City of Tampa's policy in my opinion, in the City's opinion, is a valid and not only valid but very helpful approach to these kinds of issues.

I've been up here for an hour, so I'm going to sit down if I may, unless Your Honor has specific questions right now, and I'll allow Ms. Walbolt to address other issues.

THE COURT: Okay. Let's see, we've been going for about an hour, so why don't we take a brief break. That will give you an opportunity, Mr. Williams, to remove your items from the podium and give Ms. Walbolt an opportunity to get set up. Let's take a break until 35 after, so a little more than a 5-minute break.

MR. WILLIAMS: One caveat if I might, Your Honor. I'm sure they will tell me if I've blundered or not, so if I have, I'll come back and correct it.

THE COURT: That's fine. You'll have plenty of opportunities to speak again. Thank you.

(Recess was taken from 2:26 until 2:37 p.m.)

THE COURT: Go ahead, Mr. Williams.

MR. WILLIAMS: I don't think I blundered, but

I did forget, I wanted to make one comment about the aversive versus nonaversive therapy that Mr. Mihet commented on.

The City of Tampa, I think the record will show, found that conversion therapy was just simply harmful and they wanted to prevent it. And nonaversive therapy is in itself harmful, ipso facto then obviously aversive therapy would be even more harmful. And while that may be self evident to Your Honor, I'm sure it is, I think I would be remiss by not making that comment.

THE COURT: Thank you, Mr. Williams.

And then Ms. Walbolt on behalf of Equality Florida.

MS. WALBOLT: Thank you, Your Honor. I want to start by thanking the court for allowing me to speak on behalf of Equality Florida in support of this ordinance. We appreciate your consideration of our filings and allowing us to speak today.

I want to start by addressing the extensive argument of plaintiff's counsel this morning with respect to the reports that the City relied on for the legislative findings that it made of the need for this ordinance to protect minor citizens in its community from harm, and to absolutely tell the

court that we stand by the statements in our brief with respect to those reports and the studies that they relied on.

Far from being inconclusive, the reports of every recognized national professional association that has addressed conversion therapy has consistently condemned it and prohibited their members from engaging in it as an ethical matter.

Counsel talked extensively about the American College of Physicians paper in 2015. I quote from that paper: "The college opposes the use of conversion, reorientation or reparative therapy for the treatment of LGBT persons."

Three years later the American Academy of Child and Adolescent Psychiatries issued a 2018 policy on conversion therapy which states that all such therapies "lack scientific credibility and clinical utility. Additionally, there is evidence that such interventions are harmful. As a result, conversion therapies should not be part of any behavioral health treatment of children and adolescents."

We cited -- that's at page 5 of our papers in opposition to the injunction. At page 7 we quoted extensively from a paper of a federal agency in

which they concluded that interventions aimed at changing sexual orientation and gender "can be harmful and should not be part of behavioral health treatments."

Every single court, Your Honor, that has looked at these studies has accepted them. Not a single one has questioned the validity of the actual findings and conclusions of those organizations. Including, I might emphasize, the Eleventh Circuit in the *Keaton* case. It was a 2011 case. I'm sure the court has or will read it. That's the case where they upheld the university's regulation that a student who was seeking a degree in counseling, mental health counseling, could be required to abide by the Code of Ethics of the National Mental Health Counseling Association that precluded conversion therapies. And the Eleventh Circuit noted that the regulation specifically addressed the viewpoint argument and rejected it and said the regulation is not aimed at suppressing the expression of opinions or viewpoints about conversion therapy, but to protect -- I'm now quoting -- "actual clients who might suffer actual harms from a counselor's actions."

Counsel repeatedly described these reports as

requiring -- saying that further research is required. But the fact is that none of these organizations hesitated to condemn this type of a therapy and to prohibit it as an ethical matter. And in fact, as we again cited in our papers, some actually stopped the additional research double line clinical researches because they found that that would be unethical because those studies would themselves create a harm.

So we are not dealing here, Your Honor, with a hypothetical harm -- words used by counsel earlier. The harm is very discrete and it's very severe. It can range from depression to rejection to suicide. And those are obviously substantial compelling interests that the City has in protecting its young people from.

Counsel spoke at length about a professor at Columbia who did 10 tests that he found to be successful in using this therapy to change sexual desires. That was a 2002 study. It was a study by one professor, admittedly from a great, great university, but it's not a study, much less a position policy paper, by a nationally recognized organization.

Your Honor, we were of the view, rightly or

wrongly, that the review of this ordinance should be based on the actual evidence that the City considered and so we've limited our papers to that evidence and we've described it at some length in our papers.

Counsel today said that this was the state of the research today, that it was still inconclusive and needed more. And I would, with respect, would disagree with that. And if the court wishes us to present studies that have been done more recently, we're prepared to do that and file them in support -- further support of the correctness of the legislative standing.

It is true that -- and counsel correctly said that these papers have noted that it's not established to a scientific -- to a medical certainty. But we're not here on a medical malpractice case; we're here on an issue of does the City of Tampa have a rational, reasonable basis to accept this professional consensus that there is a possibility -- a likelihood of harm. And I submit it does, it doesn't have to wait until it begins to see suicides from teenagers and children in this city.

And counsel laid great stress on the fact that

there had been no complaints in the City of Tampa, but the fact is there is a national consensus that this is harm to children, that there have been harm to children in other areas, and the City was perfectly within its rights to prohibit the use of that therapy on minors within the City limits.

Counsel also talked at length about the fact that this was voluntary therapy. And I suggest that if the issue were adults, that might be a fine argument, but we're dealing with minors who can be anywhere from 17 years on down. And the whole point of what this therapy tries to do is to tell these children that they're bad, that they're actually being sinful, that what they're doing is contrary to The Bible, and that they can and they should change it. And so when they can't do it, if they can't do it, then that creates its own set of harm.

And yet the children who are being taught this and told this by their parents, by family members, by their church members, are going to accept that, they're going to believe that, they're going to want to do what they're being told they should want to do.

And the American College of Physicians actually made that point in their paper. We cited

it at page 7 of our brief in opposition to preliminary injunction -- I beg your pardon, it's page 6. And they said that adolescents and children often "agree" to this type of therapy precisely out of fear of disapproval, loss of love, rejection, or outright abandonment by their family, and so that it is not truly voluntary when it's children.

I want to just briefly -- I will be brief because I know we're getting late in the day -- go back to where plaintiff's counsel started this morning. The very first statement that they made was that this ordinance precludes what the plaintiffs can say to these persons. And that's just simply incorrect and I think Mr. Williams made that clear.

The plaintiffs are perfectly free, they can take out billboards, they can have radio messages, they can go wherever they want, lecture on this therapy and its benefits and that it's not harmful, they can say whatever they want to say about it.

So first and number one, this isn't ***NIFLA*** because ***NIFLA*** was a state statute that said to these agencies, You will post this message, this notice on your premises. It was compelled speech and it was compelled speech as speech, not part of any kind of

a procedure. And the Supreme Court made that point very, very clear in its opinion that this prohibited speech was not part of any procedure.

All that this ordinance does is prohibit a procedure that involves speech. It involves speech to the extent that it's the speech that is designed and then used as a therapeutic procedure to change the sexual orientation of these minors. So it's a very different case, I submit, from the *NIFLA* situation. It's limited to minors. It's limited to the mental health therapy that's been discredited and condemned universally by every national association that has looked at it.

And we submit that *Keaton* is very instructive to this court because it recognized that when you're dealing with counseling, and particularly counseling here of children, even though it's talk therapy, it is still therapy. It is a procedure that a mental health therapist is presenting.

I want to make the same point again that Mr. Williams did because I think it's critical, that we're the exact opposite of the *Wollschlaeger* case because there it was nothing more than anecdotal evidence and the anecdotes were completely contrary to the recommendation of the national associations

that were involved there, the doctors.

We're exactly the opposite. We're consistent with what those organizations recognize and not relying just on anecdotal evidence.

***NIFLA* has a lot of talk about professional speech; there is no question about it. But the Supreme Court specifically says we don't have to reach that question because this compelled speech that's at issue in *NIFLA* doesn't even pass intermediate scrutiny, so we don't have to get into any of these other issues.**

I submit that the court knows how to abrogate decisions. It doesn't say it's abrogating *King* and *Pickup*, it doesn't say that the ordinances there are unconstitutional. And I suggest that the court would not have left that unsaid if it in fact was finding that those ordinances -- which are today still in place in the Third Circuit and in the Ninth Circuit -- were in fact constitutional.

So I end with where I began, that this ordinance doesn't require plaintiffs to say anything about this therapy, it doesn't prohibit this therapy for adults, it doesn't place any restrictions on them talking about the efficacy of the therapy, either to their patients or in public forums.

And there is no less restrictive way to avoid the harm to these young people than to prohibit the therapy itself. Informed consent is just unrealistic in the context of the peer pressure and the problems that these young people have, the family pressure they have. There can be no truly voluntary consent.

And there can't be an informed consent to something that has been universally found to be both a harmful and ineffective therapy, and anything short of prohibiting it from minors would not prevent the harm that all professional organizations have concluded exists.

The state has a lot of statutes -- I guess this country does -- that are named after children who get killed or commit suicide or have terrible things happen to them and then there is a rush to have legislation, and then rightly so, to fix the harm so it won't happen to other children.

The City of Tampa recognized that this was a harm, a harm that was recognized all across the country, and took steps to try protect its children from that harm. Thank you, Your Honor.

THE COURT: Thank you. Let me just organize my notes for a minute. I do have questions and it

seems to me that some of these will be questions to which I would imagine each of you wants to respond. Others maybe perhaps just one and then respond to what the other person had to say.

MR. MIHET: Your Honor?

THE COURT: Go ahead.

MR. MIHET: Would you be willing to give us just a very brief time to rebut some of the things that have been said? Not that long, but just there has been some things that I think we can rebut before we get into the Q and A.

THE COURT: If it's 3 o'clock now, how much time are you thinking? A few minutes or are you thinking --

MR. MIHET: I would say 20, 25 at the most.

THE COURT: Let's do this. Let me start asking some of my questions. I know there are counterpoints to everything that they said, just as they had counterpoints to you, to the extent that there are specific things that you want to weave in or perhaps they may be answered in the course or addressed in the course of answering my questions as well.

I would like to go ahead and start asking some of my questions and then perhaps take a brief break

and I'll look over and make sure I've covered everything I wanted to cover and that will give you all an opportunity as well to make sure that you've covered what you wanted to cover.

The good news is the one topic I wanted to address was Mr. Ruggiero and we did that by me interrupting Mr. Williams.

Let me turn to standing briefly. And a couple of points that I would like -- that I welcome thoughts and further argument on. First of all, with regard to Mr. Pickup, it was my understanding in the briefing that I guess he was sitting for the exam in August. Is that issue now moot, is he licensed, or what is the situation with Dr. Pickup?

MR. GANNAM: Your Honor, of course we're dealing with an evidentiary issue on Mr. Pickup. The allegation in the verified complaint is that he's seeking licensure in Florida, that he has rented space in Florida, that he's receiving inquiries from clients here in Florida.

I can represent to the court that his licensure has been delayed; he still only needs the one requirement which is to sit for the national test before he can complete his Florida licensure.

But I would also point out, Your Honor, and

I'm prepared to walk the court through the allegations showing that Mr. Pickup is not a newcomer to this kind of therapy. He's licensed in two other states --

THE COURT: There's a whole case named after him; I'm fully aware that he's not a newcomer.

MR. GANNAM: He's active in this field. So it's more than plausible that he is going to follow through and get the licensure that he's stated under verification that he intends to get. It's our information at this point he's been delayed until January.

THE COURT: And this isn't quite a standing -- well, this is a standing question. When I look at the ordinance, the ordinance specifically carves out unlicensed people. So then is there an argument here that Dr. Pickup, as an unlicensed person that practices those therapy, that he could be doing this within the City of Tampa?

MR. GANNAM: Well, I think it would destroy any chance of him getting a license in Florida were he to try to do it without a license, Your Honor, so I don't think that's an option. It may be true that he could provide therapy in Tampa without violating the ordinance because he's unlicensed, but he would

be breaking lots of other laws, I think, so I don't know what effect that has on his standing in this particular case.

MR. MIHET: But Your Honor, that's a good segue into an under inclusiveness argument which the Supreme Court addressed in ***NIFLA*** where it said that if you have a law that is wildly under-inclusive was the word that the Supreme Court used in ***NIFLA***, then you have failed to narrowly tailor that law.

And here, Your Honor, if conversion therapy -- so-called conversion therapy is evil and is tantamount to child abuse in every instance, even when it's voluntary and nonaversive and so on and so forth, then it makes no sense to exempt someone like Dr. Pickup and to say to Dr. Vazzo, who is licensed, Well, you can't do it, but all you need to do is send your client on over to Dr. Pickup, or to Mr. Cunningham, the leader of the other plaintiff in this case, and they can do exactly the same things that you can't do because you have a license. That makes no sense, that is not -- that does not serve any rational purpose, let alone a compelling interest, and for that reason this ordinance is wildly under-inclusive.

Along those same lines as well, you know, if

conversion therapy is child abuse, why would you exempt a member of the clergy; is it because you think that the state has a -- I mean the church has a First Amendment right to abuse children? Clearly that's not the case. We see a lot of prosecutions of members of the clergy for harming children.

If the City correct that this is a form of child abuse, then exempting members of the clergy makes this ordinance wildly under-inclusive. All of those other things, when we were told about all the things that the ordinance doesn't do, those are not redeeming qualities for purposes of constitutional analysis, those are fatal flaws that makes this ordinance under-inclusive.

THE COURT: Mr. Williams, or Ms. Walbolt, is there anything you want to say as to Pickup's standing and as to this issue that while it may be contrary to the licensure requirements that the Florida statute at least that aspect they've preempted to themselves, if not more, that there is potentially at least a loophole here where if Dr. Pickup didn't care about ever getting licensed in Florida, he could provide such therapy here within the City of Tampa and not be violating the ordinance?

MR. WILLIAMS: Only to, if I may, Your Honor, only to reflect on the basic requirements for standing which are injury in fact, which is concrete and particularized, as well as actual or imminent. Well, that hasn't been shown.

The fact that they say that -- Dr. Pickup I assume is a Ph.D. or medical, may not be able to get licensed -- I don't know that that's in the record, number one. I don't know that that is an impediment to have standing if one can pursue licensure in any event.

And then you have to show a causal connection and a favorable decision that would redress the injury. None of that I think is present here.

And you haven't mentioned third party standing. That's first party standing for Dr. Pickup. Third party standing involves other requirements that I'm happy to go into, but they aren't present either.

So I think from a standing point of view, Dr. Pickup on behalf of himself, first party standing, and all three of the plaintiffs from a third party standing, have failed to meet the requirements that the federal courts have set forth for years in terms of what it takes for standing,

and that's the flaw of their standing argument here.

I don't know that I need to develop that further because we go into perhaps a factually oriented discussion, but I haven't heard anything or seen anything in the record that satisfies those requirements. There are three for first party, there is three for third party.

THE COURT: And then there is the case law -- I believe it's the plaintiff's side, there is the two cases; one, a Supreme Court case, the *Village of Arlington Heights vs. Metropolitan Housing Development Corp*, that's at 429 U.S. 252. It was a 1977 United States Supreme Court case. And then there is also *Planned Parenthood v. Miller*, which is a 1991 Eleventh Circuit case, and that's at 934 F.2d 1462.

In both of those it indicated the court didn't consider whether other individual or corporate plaintiffs had standing because one plaintiff had standing. Part of that that's curious to me, sort of the basic principle that the court should only be deciding actual cases or controversies.

So what I'm grappling with on this issue is that if I don't do the plaintiff by plaintiff analysis, not just for their individual standing but

then also their third party standing, and I instead rely upon this precedent and say well okay, Vazzo has the strongest argument for his own standing and I'll take that and run with it, then under this precedent am I required to ignore the other plaintiffs' standing, or is that really more because it was the appellate court considering it and so at that point the appellate court is taking the position of, you know, there was enough here, the case has gone far along enough, therefore we're going to sort of ignore the standing issue because there is at least one party here with standing.

That's just -- to give you a preview of something I'm further researching, it seems to me in terms of the big picture principle of your taxpayer dollars going for me and others to resolve cases and controversies, is the position that is long -- and do these cases stand for the point that as long as one plaintiff has standing, it really doesn't matter if the others do.

MR. WILLIAMS: Candidly, Your Honor, I've run into that same conundrum myself in the past. The only common denominator that I can think of is self-serving and that is when standing was granted, the court ruled in my favor on the substantive

issues. With that, I'll probably just sit down.

THE COURT: Mr. Mihet, perhaps, or whoever wants to speak on this, perhaps this is something that you all have encountered more. I just found those cases to be curious because I would think that my task would be to individually analyze each standing.

I think Ms. Walbolt stood up faster than you, Mr. Gannam, so even though she's amicus and you're a party, I'm going to give Ms. Walbolt an opportunity to speak first.

MS. WALBOLT: Actually I didn't want to speak to the issue of standing, that's not my issue. I wanted to speak to the point that he so adroitly worked into his answer, as you invited him to do, very nicely, and just say that on the wildly under-inclusive I would urge the court to read the ***NIFLA*** analysis and I think you will see that it had nothing to do with anything that's relevant here. And that there is the harm from allowing licensed therapists to do this therapy is that it gives the stamp of legitimacy because they have been licensed by the State of Florida, so now they're doing a therapy that gives that a stamp of legitimacy that is not something that's present when it's an

unlicensed person.

MR. WILLIAMS: Your Honor, the only thing I would add is -- again I'm reaching back to memory that certainly could be flawed, but I believe at the trial level, the district court level, it is a plaintiff by plaintiff analysis.

THE COURT: Mr. Gannam, go ahead.

MR. GANNAM: Your Honor, in addition to the cases you mentioned, I would just commend to the court from our last brief at Document 114, part 4A2, where we also mention *Carey v. Population Services International*, a U.S. Supreme Court case, 431 U.S. 678. But also *In Re Florida Cement & Concrete Antitrust Litigation*, a Southern District of Florida case from 2011, a district court looking at this issue, it's 2011 Westlaw, 13174536, where they simply say it is settled law that as long as one plaintiff has standing, the court has subject matter jurisdiction over the case.

And because the standing issue is truly jurisdictional and that's why in some of these cases it's mentioned in a footnote or merely in passing that look, if we have jurisdiction over the case through the standing one plaintiff, there is really no purpose to be served in analyzing it closely for

other plaintiffs where it's maybe not as clear.

And I think that's what we have in this case. It's not only that Vazzo, for example, has a good argument for standing; his standing hasn't even been challenged by the defendant. And the same for the corporate defendant in this case that has not been challenged to bring the claims on its own behalf, it's only challenged to the extent it brought claims on behalf of third parties.

So Vazzo and the corporate plaintiff together, their standing hasn't been challenged. The court has jurisdiction over this case through their standing. To scrutinize Pickup then at this point, especially given his connectedness to this issue and the fact that he's got a track record of being a therapist in this field, it doesn't seem to serve any purpose for anyone here because the court has jurisdiction over the case.

MR. MIHET: And if I could just add one thing to that to answer Your Honor's specific question about whether there is a difference between a court of appeals looking at this or a district court looking at this, I would submit to you that there is no difference, there cannot be a difference, because standing is a jurisdictional question and as we all

know, federal courts at all levels have an unflinching obligation to police their own jurisdiction.

So if standing were to be looked at by individual plaintiff rather than by the controversy itself, then a Court of Appeals could not turn a blind eye to one appellant not having standing just because the others do; it would have to right that wrong.

Rather, Your Honor, I submit to you the way we read these cases is that standing and jurisdiction and Article III controversy is looked at at the case level. And what these appellate courts are saying to us is that if you have one plaintiff with undisputed jurisdiction, the way we have with Vazzo and with Soli Deo Gloria for its own claim, then that creates the requisite case or controversy for Article III purposes and it really is not a wise use of time to spend all this time arguing about one or two other plaintiffs. There is no jurisdictional bar to proceeding in the case on all of the plaintiffs' claims.

THE COURT: Let's talk briefly about the standard for a preliminary injunction. And when I look at the case law and I compare Eleventh Circuit

to other circuits, it's clear that the Eleventh Circuit has -- at least considers itself to have a very stringent -- or to I guess evaluate very stringently, I should say, because it's similar prongs in every circuit, but just the Eleventh Circuit the way it considers them, that it considers to evaluate them stringently. It also has published opinions saying that the movement has to satisfy all four prongs to obtain a preliminary injunction.

Looking at the more traditional view of irreparable injury, so setting aside the First Amendment aspect, I think we could all agree that the delay in this case is not -- if plaintiffs are making a column of their good facts and their bad facts for irreparable injury, the delay, the time in bringing this suit, the time in bringing a preliminary injunction motion, that all of those seem to stack up against an irreparable injury, again separating out the First Amendment nature of this.

Looking more closely though at the First Amendment issue and more specifically it was the sea gallon case -- let me glab that. Reed just flew across the floor. Okay, I'm looking at the Siegel case, that's the Eleventh Circuit case, 234 F.3d

1163. And I found this case helpful in terms of at least it seemed to me calling a spade a spade. I say that by meaning that it seems that there is a bit of inconsistency with how courts are analyzing these prongs and the weight that they're giving to these prongs, especially when there are Eleventh Circuit published decisions saying that the plaintiffs have to meet their burden on every single prong and that every single prong is important.

In Siegel, and I'm looking more specifically at 1178, and it says, "The only areas of constitutional jurisprudence where we have said that an ongoing violation may be presumed to cause irreparable injury involve the right of privacy" -- that doesn't apply here -- "and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether."

Now, as an initial matter, that seems to be bumping up the substantial likelihood to now an imminent likelihood test, which frankly imminent to me sound even harder than substantial. And then -- you've got to love all the adjectives -- and that pure speech will be chilled or prevented altogether.

How does Siegel and how does the way that the

Eleventh Circuit has treated First Amendment claims as part of the substantial likelihood or maybe even as Siegel says imminent likelihood, how should that affect my analysis in considering the irreparable harm part of the four-prong test?

Go ahead, Mr. Mihet.

MR. MIHET: Your Honor, several points to make there. Number one, on the question of what does the standard of substantial likelihood of success entail, we have the Eleventh Circuit in the case of *Shatel Corp vs. Mao Ta Lumber*, that's 697 F.2d 1352, pinpoint cite at 1354. The court tells us in that case that substantial likelihood does not add to the quantum of proof that is required for purposes of obtaining a preliminary injunction.

And so if I can just quote from the case, in that case the Eleventh Circuit says, "Defendant argues that a substantial likelihood is required in this circuit. But substantial means real, valuable, material or of substance," citing to Black's Law Dictionary. "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 or the word likelihood rather is synonymous with

probability."

So that's what the Eleventh Circuit says. Just because we have language that says you have to show a substantial likelihood of success doesn't mean that the standard increases from a mere probability of success -- so if this court finds today that the plaintiffs have shown that they are likely to succeed by a preponderance of the evidence, that is sufficient according to the Eleventh Circuit in *Shatel*.

There are numerous district courts in Florida that have cited *Shatel* for this proposition that there is not a higher standard for purposes of preliminary injunction. And I have a footnote that has maybe five or six cases. Rather than burden the court with it, I can --

THE COURT: But in terms of irreparable harm then, I know your position is that because there is a -- that if the court finds that there is a substantial likelihood of success on the merits of the First Amendment speech claim, that that itself is -- it's then axiomatic that that then is irreparable harm.

MR. MIHET: That's certainly our position and incidentally, Equality Florida agrees with us on

that point. If you look at their brief, they first go through the analysis and argue that because we waited eight months, we are not irreparably harmed. Then they go on and say yes, it's true in First Amendment cases irreparable injury is presumed from a First Amendment violation, but then they argue that we can't show irreparable injury because we cannot show a First Amendment violation.

If they're wrong about the latter -- which we think they are, we can show a First Amendment violation -- then I think there is no dispute at least between the amicus and us that the constitutional violation by itself is sine qua non irreparable injury.

We have the often cited *Elrod* case from the Supreme Court that says that the loss of First Amendment freedoms even for one day unquestionably constitutes irreparable injury. And that's what we have here. I submit to you that neither the defendants nor the amicas have cited a single First Amendment case where a delay of eight months or less was found to preclude a showing of irreparable harm.

All of the cases they cite in the context of delay to bringing suit, leading to a finding of no irreparable harm, are not First Amendment cases.

When you look at the First Amendment context, it is not unusual to see months, years, even decades that pass between an unconstitutional statute being adopted and a subsequent challenge that is brought. And that's just because of the basic recognition that the Siegel court says in the Eleventh Circuit that First Amendment is different and it's different because of the value that we as a free society place upon that.

Your Honor, I'd say eight months in the grand scheme of things is not a very long time. I mean, as you can tell from this case, my clients are not very popular politically, they didn't have law firms lining up to try to bring this case on their behalf. It took them a while to get here and these cases are complex and complicated. And I just don't that I there is any basis in the law to find that the passage of eight months precludes a finding of irreparable harm.

THE COURT: What about -- so let's set aside the timeframe, just ignore the timeframe for a moment. Because again looking back at *Siegel* it's talking about how you presume irreparable injury -- and again I'll read it. It gives the example of a right of privacy, which does not apply here, "And

certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether."

Now, here we're talking about a city ordinance, so to the extent that I agree -- if I agree with plaintiffs and decide that it is speech and not conduct, or not conduct with incidental speech, here is it really being prevented altogether? I mean, it is being prevented to the extent that it's the therapy within city limits. But it's not that Dr. Vazzo or Dr. Pickup or -- in my mind I call it New Hearts Outreach, I just find that easier to roll off the tongue than Soli Deo Gloria. Nothing against Latin, I took Latin for many years, but New Hearts Outreach seems to roll off the tongue a little faster.

With those entities and Dr. Vazzo or Dr. Pickup, once he gets licensed, I mean, they could serve the Tampa Bay community even not being in the City limits of Tampa. So under *Siegel* would that then be a presumed irreparable injury?

MR. MIHET: Absolutely it would be, Your Honor. The case law is very clear and we've cited it in our briefs. A town cannot say please take your First Amendment protected activity elsewhere.

The First Amendment reigns supreme even within the city limits of Tampa and Tampa cannot say take this protected speech outside of our city limits.

If Your Honor agrees with the plaintiffs that this ordinance is a restriction on speech rather than conduct, then I don't see any scenario where the court can say well, but just because you can practice it in California or in Tarpon Springs or somewhere else, then you cannot challenge the Tampa law. I don't think that's what the law is.

There is a lot of First Amendment cases in the pornography or obscenity context where some localities have said, you know, take this somewhere else, and the courts have said no. As a sovereign government, the City of Tampa is subject to the constitution of the United States, just like any other city or state is, and it is no answer to say that you can just go somewhere else.

With respect to -- and I don't know if the court is asking this or not, but we've heard a lot about these are all the other things that the ordinance doesn't prohibit and that the plaintiffs can do, they can take out billboards or ads or they can go do conferences.

You know, you can't save an ordinance by

saying that it doesn't prohibit speech that plaintiffs don't want to engage in. I mean, the undisputed testimony before this court in the verified complaint is that these plaintiffs want to engage in a particular type of speech, and there is no question that the ordinance bans that speech -- not imminently, not into the future, but today. It's been banning it for sometime already.

So I think if you find that this is in fact speech, which we would ask you to do, then everything else under *Siegel* falls into place in plaintiff's favor.

THE COURT: And again, I'm just walking through this. So if I found that there was a substantial likelihood of success on the merits on the First Amendment -- the two First Amendment claims, Count One and Count Two, then -- and I'm not saying in terms of if after merits the court were to determine that yes in fact there was a violation and then, you know, either it requires -- or completely says the ordinance is unconstitutional, or doesn't. I'm just talking about specifically for purposes of the preliminary injunction.

In terms of the irreparable injury, the case law you're saying says that even in considering the

irreparable injury for the short time, for the time that it would take for the entire case, that it shouldn't be that even in the short term that a First Amendment substantial likelihood -- an ordinance with a substantial likelihood of violating the First Amendment, that that shouldn't even be able to remain status quo under the irreparable injury part because even if you can go outside the city limits and do it.

MR. MIHET: Correct, because the loss of First Amendment freedoms even for one day within the City of Tampa unquestionably constitutes irreparable harm per the Supreme Court in *Elrod*.

And I will just again -- not quibble, let me take issue with the court's emphasis on substantial likelihood. We think that means more likely than not; mere probability of success is sufficient. We certainly think we've shown a substantial likelihood, but I want the court to apply the correct standard.

THE COURT: And then one last point or question. If the whole point of a preliminary injunction is to keep the matter as status quo and status quo right now is that the ordinance was on the books and remained on the books for months until

the lawsuit was filed and then now is still on the books while we're talking today, why would status quo not be leaving the ordinance in place? If the idea of preliminary injunction is to freeze time and freeze everything while the merits are being decided, then why doesn't that weigh in favor of leaving the ordinance in place pending the rest of the litigation? Even if I do find that there is an substantial likelihood of success?

MR. MIHET: In First Amendment cases the status quo antidoctrine says that the court should freeze things in place without the constitutional violation that is alleged and shown to take place.

So if the court concludes that the ordinance is likely to be shown to be unconstitutional, the status quo anti would require the court to return the parties to the situation that was in place before the likely unconstitutional ordinance was enacted. And we think the case law is clear on that, I've seen it cited many times; unfortunately, I don't have a case off the tip of my tongue for that proposition, but I know it has come up a lot in First Amendment cases.

THE COURT: One more question for you, Mr. Mihet, just because you're standing. With

regard to the injunctive relief that you're seeking, and I ask this because there was some discussion today about the aversive therapy versus nonaversive therapy and the way the ordinance was written and your client's position that it over-encompasses both therapy that your clients also would consider to be harmful and as well as the nonaversive therapy that your client practices.

To the extent that there was a manner -- and I guess I'm asking you if there is a manner -- if I did conclude that this is speech and that it did -- there is a lot of "ifs" embedded here -- but if it failed to satisfy strict scrutiny -- if I assume it's content based, if I assume it's viewpoint discriminatory and it fails to satisfy strict scrutiny if I decide it's strict scrutiny, or even intermediate scrutiny if I decide that, is there something less than --

MR. MIHET: A total ban on the total ban.

THE COURT: A total ban on the total ban, during the pendency of this case. I mean, keeping in mind I'm a mere magistrate judge that writes a report and recommendation and then the district judge decides and there is many appellate rights after that. What is the -- in terms of carving out

something less than, if I even got there.

MR. MIHET: Sure. Well, Your Honor, as we said in our main presentation, we think that the preemption issue requires invalidation of the whole thing.

But putting that issue aside -- I don't want to sound like I'm conceding the City's authority to enact this or part of this legislation. But putting that aside for the sake of argument, if this court were to fashion an injunction that would prohibit enforcement of this ordinance only with respect to nonaversive, voluntary, noncoercive therapy of the kind that my clients wish to provide, and in as a result of this limited injunction, or more limited injunction rather, my clients are able to begin to do that which they want to do the day that the injunction is entered, then my clients would not have much beef or standing to quibble with the parts of the ordinance that remain in place. As we've made it very clear, they have no interest in engaging in any of those other types of therapies and remedies that were thought of as the primary driver for this.

I would note for the record that there was no evidence that anyone was engaging in those kinds of

therapies in the City of Tampa. My clients don't know of anyone that engages in those kinds of therapies. So there may be some different arguments and reasons, whether it's preemption, whether it's lack of need or what not as to whether any parts of this ordinance can remain in place, but as far as my clients are concerned, you know, a more limited injunction that protects their right to do that which they want to do I think would be at least for immediate or temporary purposes satisfactory to them.

THE COURT: Okay. And I had Mr. Mihet on the hot seat for a little bit. Mr. Williams or Ms. Walbolt, was there anything you wanted to address for any of those questions?

MR. WILLIAMS: Yes, Your Honor. The ordinance itself protects -- on its face expressly protects pure speech. As I said and Ms. Walbolt I think reiterated and Mr. Mihet has kind of conceded in his remarks, if Dr. Pickup or Dr. Vazzo want to go out and put up a billboard to talk about SOCE, come see me about SOCE, I'll tell you about SOCE, any pure speech, that's pure speech. And the City was very careful not to prohibit/ban pure speech.

But conversion therapy is not that kind of

speech. Let me cite to I think a very important in *Locke v. Shore*, 634 F.3d 1185, the Eleventh Circuit in 2011 states -- held that a statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right of pure speech so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation. And that's exactly what this ordinance does. It prohibits communications that are inextricably involved in the communicative process of providing the therapy and nothing more. That's all it does. Everything else is expressly carved out from the ordinance itself. And I think that should answer the question right there.

Now, I can think of nothing more valuable, nothing more irreparable than to have a minor child who is immature take steps that would lead to temporary or permanent harm -- permanent harm meaning death. And for this court to determine that their right to free speech, which is not pure speech, is irreparable but the potential for irreparable harm to a child in this city, that's a comparison frankly that fails out of the box, in my opinion.

Very quickly, substantial likelihood of success obviously means more. I frankly don't have the case law in front of me, I apologize, but obviously means more than the simple greater weight of the evidence. When I started practicing law we used to take the BBs and take one BB and put it on the other side of the scales of justice and I win. That's not substantial likelihood. Substantial likelihood I think at this stage of this litigation is akin to clear and convincing. Approaching clear and convincing. Not just a BB tie that one percent makes the difference.

And last but not least, when we talk about harm, we cannot ignore the public's interest here. Is the public interest fashioned by getting rid of this ordinance until the merits are tried somewhere down the line in '19, as I recall, or is the public interest benefited by keeping this ordinance in place until those merits are litigated to the complete full extent that the rules of procedure and evidence allow?

Now, that correlates I think to the fact that they waited eight, nine months to file the lawsuit and then they really weren't -- there was nothing diligent, much less immediate about obtaining

injunctive relief that Mr. Mihet just described.

So to suggest that a preliminary injunction is absolutely necessary in this case to prevent First Amendment protection or to create First Amendment protection in the context of potential irreparable harm to children, in the context of in my opinion a substantial likelihood that they will not succeed on the merits, and because of the public interest that far outweighs Dr. Vazzo's or Dr. Pickup's presumed First Amendment issues, this is not even in my opinion a close call and I hope the court agrees with me.

MR. MIHET: May I just say one thing about the public interest aspect, Your Honor?

THE COURT: Go ahead, Mr. Mihet.

MR. MIHET: Like the irreparable harm aspect, the case law on the public interest aspect says quite clearly that the public has no interest in the upholding of ordinances that are likely to be found unconstitutional.

Here, Your Honor, we have a situation where admittedly we have had no complaints that were brought to the City requiring them to pass an ordinance -- certainly no complaints about nonaversive voluntary therapies, but we do have

plaintiffs that are being irreparably harmed each and every day. We think that balance -- if the court finds for the plaintiffs on the substantial likelihood of success element, then we think that the public interest also falls into line just like the irreparable injury element does.

I would note, Your Honor, the lack of enforceability mechanisms for the ordinance also factor into this analysis as well. We have an ordinance that is practically unenforceable, that cannot be enforced, that the City's enforcers don't know how to enforce. If the court were to enjoin an unenforceable ordinance tomorrow, then there would be no -- the sky would not fall over the children of Tampa, we're certain of that.

MR. WILLIAMS: Do you want further response? I'm happy to do that. I don't know that you reached the point of diminishing returns --

THE COURT: Feel free to respond. I guess -- the one concern that I have is to the extent -- if plaintiff got what they wanted and an injunction was granted on the whole ordinance, I mean, what then is there, either the state has put forth or that locally otherwise would prohibit a therapist from doing the aversive therapy or something else

dangerous in relation to the non talk therapy if we're -- assuming -- and again, if it's the talk therapy -- if it's the aversive therapy versus the nonaversive, and I completely appreciate that the defendants and Equality Florida's position is that both are harmful, I'm not saying at this point that I've made a conclusion or a finding on that. But even if plaintiffs got what they want and I recommended granting the injunction and then obviously it would be up to Judge Jung to either adopt or reject that, but what would exist, what's on the books either for the state or for the City that would then protect from these therapies that both plaintiffs and defendants seem to agree could be harmful from occurring?

MR. WILLIAMS: Nothing, Your Honor. Nothing, that's the point. And I do want to comment, I agree that the City of Tampa or any municipality doesn't have the right to further a patently unconstitutional statute. That's 101. This is hardly -- he's got the cart before the horse. This is hardly a patently unconstitutional ordinance. In fact, quite the opposite, quite the opposite in my opinion.

So going to the balance of interests, which

any court has to recognize in this setting, is it more important to protect the interests of children in the City of Tampa for a period of time while they have the merits discussed, or is it more important to not do that, given the length of time that they have taken even to get here in the first place. Again, I say it's not a difficult decision in my opinion in terms of the balance of interest.

And I think that the more compelling argument here is that the plaintiffs really have provided no palpable injury that they want to protect. It's a theoretical injury that is predicated on the fact that they claim this is pure speech. I won't reiterate my argument on that, but it is not. If it was, I probably wouldn't be standing here today. Thank you.

MS. WALBOLT: And I would just like, Your Honor, if I could, to re echo that. This is not a speech, a regulation of speech as speech. The ordinance carved out the speech as speech and said that's permissible. This is a regulation of a mental health therapy that happens to use speech to provide this therapy to the minors.

And I just must respond again to the argument that there have been no complaints by minors to the

City of Tampa about this kind of therapy. The City didn't need complaints by minors or their parents or anyone for that matter. They had empirical studies of national professional associations saying it's harmful, it is not beneficial, and that is the empirical evidence that they relied on. Thank you.

THE COURT: Thank you.

MR. GANNAM: Your Honor, I would like to address just what would be out there to regulate or to prohibit someone engaging in damaging counseling if this ordinance were to be enjoined. And this goes back to our preemption argument where under Chapter 491 Florida Statutes and under the Florida Administrative Code, there is a state board established to hear disciplinary cases against licensed counselors, including our plaintiff, Vazzo, for sure, and to the extent Pickup is licensed.

But if they make misrepresentations regarding the kind of therapy that they can provide and its benefits, that can subject them to discipline. If they don't meet the standards, the professional standards of their peers in the provision of this kind of therapy or the provision of the therapy for which they're licensed, they can be disciplined by the board. And a board consisting of at least six

licensed professionals out of the nine members can hear those claims and decide whether this literature and whether the positions of these various organizations have a bearing on the practice of the plaintiffs and others who may want to engage in this kind of therapy in Tampa.

That is the proper forum for these things to be decided. Especially when, you know, the word empirical is getting thrown around a lot. Up to 10 sources that were included in the recitals for this ordinance, most of them were not actually studies at all, they were simply positions based on or referring back to the studies that do exist.

And going back to the APA study, there is no empirical evidence that can draw a causal link between sexual orientation change efforts and harm. And the paper, in fairness, also says that you can't -- there is no empirical evidence to draw a causal link between sexual orientation change efforts and benefit.

But the report does say that there is at least as much anecdotal evidence of benefit as there is of harm, but they can't make any causal connections. It's not right to say there is empirical evidence of harm; there is not. There have been some empirical

studies that at most suggest there may be a risk of harm.

But anyone who has heard a drug commercial or had any kind of medical procedure and sees the stack of paperwork you have to sign before the hospital or the doctor will go through it, knows that every procedure, every drug, every medical treatment has some risk of harm, and we have to acknowledge that in order to get that treatment.

The question is can you quantify that there is more harm from this treatment than from others that are not prohibited. Is there more harm, is there some higher percentage, some higher likelihood of harm resulting from sexual orientation change efforts than there is from other types of mental health therapy. That cannot be answered and it is not answered by any of the studies, and therefore it's wrong to say that there is empirical evidence supporting this ordinance. It simply isn't true.

MR. MIHET: And Your Honor, if I could just add one thing. We think we've shown in the briefs and today that there are alternative checks and balances on counselors that would prohibit them from engaging in some of these horrendous practices that the City was allegedly concerned with.

But Your Honor, even if you were to find that there aren't, that is not a basis for saving this unconstitutional ordinance. The Supreme Court has said time and time again that the City of Tampa cannot burn the house to roast a pig.

Your Honor, if the City of Tampa has failed to narrowly tailor this ordinance by including protected speech with conduct that is unprotected, the remedy isn't to save the ordinance so that the ban on conduct can be saved. The remedy is to invalidate the ordinance for going too far and for violating the First Amendment, and then the City of Tampa is not left without a remedy.

My colleague, Mr. Williams, told us that this existing ordinance came to fruition in less than two and a half months. If this court tomorrow were to issue a total injunction as opposed to fashion a more limited injunction, I'm sure that the City of Tampa could take the court's guidance, find -- whatever the court finds, assuming that it's not the preemption issue, assuming it's the narrow tailoring defect that carries the day, the City of Tampa could I think beat its two-and-a-half month record by several weeks and could enact a constitutional ordinance that would not affect my client's rights

and that would protect its interest.

We know already that there are not conversionists waiting at the doors to begin the type of coercive aversive treatments in Tampa because we know there weren't any before the ordinance passed. And so I think that on this particular issue the lack of narrow tailoring dooms this ordinance, whether or not there are other alternatives already on the books.

And I do have on my list and I don't know if this is the appropriate time or not, but I did want to spend five minutes addressing the continuing argument on conduct that continues to reappear. May I say a few things about that now?

THE COURT: Let's do this. Let's take a brief break just so everyone can gather their thoughts. I think I am out of questions, but I want to look over my notes and then also talk to my very smart law clerk, to be completely honest, and make sure that I haven't missed any questions, and then come back out. That will give you all an opportunity to speak amongst yourselves and decide what additional items you think you need to raise in sort of a conclusion.

So it's 10 until 4. Let's at that time a break until 4:00 and then at 4:00 we'll come back.

And if I have any questions, I'll follow up with those. Otherwise I'll hear any closing remarks that anybody wants to make.

MR. MIHET: Thank you, Your Honor.

(Recess was taken from 3:49 until 4:00 p.m.)

THE COURT: The good news is I don't have any other questions. Another bit of good news, although I guess whether you consider it good news is up to you. I do think it's appropriate, particularly since I have injected some questions and perhaps even some issues, that both sides have now indicated that they wish they'd the case before me or the citation for me. To the extent that any -- either the parties or Equality Florida would like to do any additional briefing, sort of like substantial likelihood, additional briefing. So it does not need to be -- I have now prepared for this hearing twice. So most of the cases I've gotten to know very well because I prepared for this last summer and then when we took it off the calendar, I then prepared for it again this month.

So I don't need *Reed* and I don't need *Wollschlaeger*, I don't need any of those cases cited to me again or quoted to me. But to the extent that there is a unique issue or a unique case, something

that you think you would like the opportunity to bring to my attention, I will allow you to do that.

Looking at the calendar, today is the 15th, the date that comes to mind for me would be November 30th, December 3rd, to give you the time. I am mindful that next week is Thanksgiving week.

If you would like additional time -- the concern I have is the longer I give you, the further it then pushes off me issuing a report and recommendation. But if you would like more time, I'm willing to give you until December 7th. But November 30th, December 7th are the dates I'm looking at.

MR. WILLIAMS: Your Honor, December 3rd is fine with our side.

THE COURT: December 3rd? So Monday the 3rd you would want?

MR. WILLIAMS: Yes.

THE COURT: Mr. Mihet?

MR. MIHET: That's fine with the plaintiffs as well.

THE COURT: Okay. So I will give you until December 3rd. Again, and I'll limit it to a maximum of 10 pages. I don't expect that you're going to need 10 pages, I really don't. But to the extent

that you want the luxury of 10 pages so that you don't have to file a motion asking for more pages, I will say 10 pages.

This is only as to the City's motion to dismiss and the plaintiff's preliminary injunction motion. I intend to have my R&R out much faster than that on Mr. Ruggiero's motion to dismiss. So I guess if there is any other case law, I'll go ahead and say that the plaintiffs wish to file with that, you need to do it immediately is all I can say. If there is something based on any questions I asked for that case. Because I do intend to get that out hopefully before December 3rd or at least near or around that time.

Is there anything further -- I know Mr. Mihet, you had indicated there was more that you wanted to say and so I was going to give each party and also Equality Florida an opportunity to add anything you wanted to add.

MR. MIHET: We have a couple loose ends we want to tie up, but we'd be happy to let our colleagues go first in light of the fact that we're movants, unless the court wants us to go first.

THE COURT: Go ahead. I mean, if there is anything further, any last minute thing you want to

say after they finish, I'll let you do that as well. Plus you do have the 10 pages that you can address things in, too.

MR. GANNAM: Thank you, Your Honor. Just quickly I want to cover two points, one on standing and one on preemption. On the standing issue, the one issue I don't think we really got into today is the third party standing issue. On that, Your Honor, I would just simply commend to the court the section of our last brief at Docket 113, part 4A3. And that's where we talk about third party standing for our minor clients.

The *Planned Parenthood Association of Atlanta v. Miller* case, 934 F.2d 1462 at 1465, note 2, provides that the court permits a plaintiff who has suffered some concrete injury to assert their right to the third party because, one, the plaintiff and the third party have a close relationship, and two, the third party faces some obstacle to asserting his own rights. It's that prong of obstacle to asserting rights that the defendant has attacked in this case, Your Honor.

In our brief in the section part 4A3 that I pointed out to the court, we cite several cases for the proposition that when you're talking about

minors, dealing with mental and sexual health issues, they are obviously hindered because of the stigmatization or the chilling of them asserting their rights if they have to disclose that they're engaged in some kind of therapy along those lines. And just to quote one of them, this is actually a Tenth Circuit case from 1990. This is *AID for Women v. Foulston*, 441 F.3d 1101 at 1114.

MR. WILLIAMS: What's that again, Roger?

MR. GANNAM: 441 F.3d 1101 at 1114. Adolescents seeking health care related to sexuality or mental health care may be chilled from asserting their own rights by a desire to protect the very privacy of the care they seek from the publicity of a court suit.

What we think these authorities show is that it's self evident that minors are hindered in bringing a case like this. The very fact that Tampa passed an ordinance like this saying that this kind of therapy is wrong and bad, just would add to that stigmatization of minors to tell the world, hey, I'm getting that kind of therapy.

So we think that having alleged that we have minor clients, for example, paragraphs 100 through 102 and then 110 through 112 of the verified

complaint talked about how plaintiff Robert Vazzo sees minor clients in this area and currently has a minor client in this kind of therapy or who wants this kind of therapy that Vazzo can't give to him.

Plaintiff New Hearts Outreach, similarly paragraphs 126 and then 133 through 136 of the verified complaint, show how that ministry -- -they exist. One of their functions is to connect minors who want this kind of therapy with professionals who can give it. They're receiving inquiries, according to these verified allegation which are not refuted -- they're getting inquiries but they can't offer the referrals because of the ordinance.

So we think that we have satisfied by simply alleging that there are minor clients that the named plaintiffs are serving that want this therapy and can't get it, but that's sufficient for us to bring these claims on their behalf.

And a final point about the standing issue there, as well as anything else that may be caught up in the motion to dismiss, to the extent the court finds that it's a mere absence of sufficient allegations on one of these issues, we would just ask the court for the opportunity to amend.

A final point now about preemption. The

Classy Cycles **case we've cited in our brief, it's one of the few Florida cases that actually found that implied preemption exists. In that case it was about a county and a city ordinance that imposed certain safety apparel requirements for people who rent mopeds and scooters and motorcycles, as well as certain minimum insurance requirements for those rentals of motor scooters and mopeds and motorcycles.**

And what the court said in the *Classy Cycles* case was that there was some express preemption for some of the requirements, but also found implied preemption on the insurance issue, not because the State of Florida had specifically required insurance for all the same classes of motorcycles or motor scooters or motor bikes that the municipality and that the county had done, but because they had pervasively regulated in that area. In other words, they'd sort of covered the waterfront on the types of motor vehicles and the insurance requirements that the state thought was necessary. And because of that, the City and the county were not free to then come in with some additional specifics and make additional requirements.

That's the same problem that we have here with

the Tampa ordinance, Your Honor, is that the State of Florida has covered the waterfront on licensed health care professionals including not only medical doctors, osteopathic physicians, but specifically the kinds of counselors that our clients are, they have covered the waterfront on regulation and on discipline and education. There is simply no room left for municipalities like Tampa to impose additional specific requirements on one particular kind of therapy when the overall practice has been regulated pervasively by the state.

And that's all that we have, Your Honor.

THE COURT: Thank you, Mr. Gannam.

Mr. Williams or Ms. Walbolt?

MR. MIHET: Oh, I'm sorry, Your Honor, I had a few things. I think Mr. Gannam was talking about himself.

THE COURT: Go ahead.

MR. MIHET: Just a couple of quick hits that I made a note of here and then I'll end with an exhortation.

Mr. Williams said that federal courts should respect local legislatures. They do respect them, Your Honor, but when it comes to First Amendment rights, the case law we provided says that even

though there is deference and respect provided, cities, municipalities, local governments must back up any kind of restriction on protected speech with actual concrete evidence of harm. That is not nondifferential and that is not disrespectful to a local governing body to require that of them.

Mr. Williams said you just look at the ordinance itself. He spent a lot of time walking us through what the ordinance actually provides. The ordinance speaks for itself, but the city council cannot simply make assertions in the ordinance without the empirical evidence to back them up. They can't simply say that something is harmful; they actually have to have the evidence of harm.

Your Honor, there was some discussion that was made along the lines of children are precious and also I think Ms. Walbolt talked about the whole point of conversion therapy is that kids are bad.

You know, Your Honor, first of all, my clients would find it really offensive that they would be lumped into a category with people who would tell kids that they are bad. They have no interests in doing that. And these kinds of statements really betray a lack of knowledge from the City about what it is that my clients do and what they want to do.

They wholeheartedly believe that children are precious and they would never harm a child, Your Honor.

This notion that minors cannot assent to voluntary noncoersive, nonaversive therapy, the APA wholeheartedly disagrees with that and there is discussion in there on pages 71 through 74 about the fact that minors can be responsible for health care decisions, Your Honor. The Florida statutes -- there is a Florida statute that we've cited in our brief that gives minors over the age of 13 the ability to make some health care decisions on their own without even their parents or guardians being involved.

We know of course in the context of abortion that minors often are granted the leeway to make some important health care decisions on their own.

And of course we know from the ordinance that when it comes to transition counseling, counseling that assists a minor to transition from one gender to another, that's fully exempted from the coverage of this ordinance. So in that context the City would I think readily agree that minors are able to voluntarily assent to those kinds of procedures. It defies reason to argue then that somehow minors

cannot voluntarily assent to the kind of therapy that my clients wish to provide.

And you know, my clients -- if you were to ask them, I mean, they would tell you that the kind of counseling, speech-only talk therapy counseling that they provide could not possibly work with someone who does not actually want to be there and to be engaged in the kind of discussion that takes place.

You're not talking about hooking somebody up to a machine against their will and you're not talking about beating someone down verbally with these kinds of outrageous statements that kids are bad and destined to hell and all these other things.

Maybe somebody out there does that and if the City wanted to ban only those kinds of practices, the City certainly could have. That's not what the City did here.

In fact, on narrow tailoring Mr. Williams said that -- I think he said something to the effect of well, we didn't differentiate between aversive therapy and nonaversive therapy or coercive and voluntary because council found that it's all bad.

I wrote down, "Bingo." They can't find that it's all bad without actually considering those alternatives. And I spent a lot of time going

through deposition testimony where Mr. Maniscalco said for the court we never considered anything less than a total ban, we never looked at it, we never considered it. So that deprives Mr. Williams of the opportunity to now come and say well, it wouldn't have worked anyways.

With respect to viewpoint discrimination, Your Honor, we heard a lot about the *Keaton* case out of the Eleventh Circuit. And, you know, *Keaton* was a situation where a counseling student was being reprimanded and asked to go through a rehabilitation program because the counseling student was forcing -- I believe it was a she, forcing her viewpoints and her opinions on the clients in that case. And so the court said it is not viewpoint discriminatory to ban the imposition of the counselor's viewpoint on to the client.

There was no distinction, it wasn't like only certain viewpoints were banned from being imposed on the clients. All viewpoints were banned from being imposed by the counselor on the client because that's not what ethical counselors do. Ethical counselors do not seek to impose their values and their goals on the clients. Ethical counselors engage in client-centered, client-directed therapy

where the values and the goals of the clients reign supreme.

I submit to you that if *Keaton* dealt with a situation much like we have here where only certain viewpoints were banned from being imposed upon the clients, that the decision would have gone exactly the other way, Your Honor.

In our case we have an ordinance that doesn't ban the imposition of the counselor's viewpoint on the client. Ethical codes and ethical standards already do that. And the defendants have no evidence to rebut my client's sworn allegations in the complaint that they don't seek to do that.

What we have here is an ordinance that even prohibits the sharing of any banned viewpoints with the clients. And I spent a lot of time showing the court how the prohibition is only one way, it's not a two-way as it was in *Keaton*. Only certain viewpoints are banned by this ordinance and that's what makes this ordinance viewpoint discriminatory.

Just a couple of more things with respect to the standard of review and whether or not this ordinance is one that restricts speech or conduct.

Number one, we heard no explanation from Mr. Williams why it is that the City referred to

this as a regulation of professional speech before *NIFLA* came out. I don't know if that was an oversight or if there is no explanation, but we know what the City referred to this as and it properly, correctly referred to this as a prohibition on professional speech.

We heard nothing from the defendants with respect to *King* and how it is that they can rely so heavily on *King*, while at the same time going against its key and essential holding that SOCE counseling is speech and not conduct.

Your Honor, also I would say we heard some suggestion that *Wollschlaeger* provides a standard. I submit to you *Wollschlaeger*, the Eleventh Circuit obviously and obviously cannot overrule the Supreme Court in *NIFLA* and *Reed.* And if *NIFLA* and *Reed* stand for the proposition that all content-based restriction on speech are subjected to strict scrutiny, then we think that that is the law of the land.

Mr. Williams, both in his briefs and today argued that *NIFLA* and *Reed* are in opposite because they don't deal with conversion therapy bans, Your Honor. That's -- I don't think that's how precedent works. They don't have to deal with conversion

therapy. Clearly they dealt with protected speech and with government's attempts to regulate protected speech in matters that violated the constitution.

You know if we're only going to look at cases that dealt with conversion therapy, well we only have *Pickup* and *King*, and we would argue both of them have been abrogated, and so we would have nothing left to look at. Not even *Keaton* dealt with the precise issue that we have here. That's not a ground for distinguishing the Supreme Court's clear teaching in *NIFLA* and *Reed*.

Your Honor, I guess I'm still confused because I hear so much of this argument that we're not banning speech, we're banning a procedure. And after all this, I still don't know what is this procedure that we're talking about. If we're not talking about shock therapy, if we're not talking about, you know, putting leeches on somebody to have their blood sucked out or putting wrist bands on somebody, those are procedures, then what are we -- what is the procedure that they think is happening in my client's offices?

My clients say indisputably that it's just a conversation. They listen to the client talk and they talk back, and they don't engage in a

particular procedure. They simply talk, not even with a predetermined goal in mind on behalf of the counselor other than to assist the client with the client's goal so as to change. So there has been no evidence to rebut my client's clear testimony that they're engaged in speech, not in a procedure.

Your Honor, most importantly, in the briefs and today we've seen not even an effort by the defendants to justify the ordinance under the strict scrutiny standard. So if it turns out that they are incorrect on the standard, we think that they have done nothing to meet strict scrutiny; we think it's because they acknowledge that they cannot meet strict scrutiny on this record and in this case, and that requires the invalidation of the ordinance.

One thing really on the overwhelming research. Again, we heard the cherry picking argument. You know, I don't know how we could cherry pick all of those references that we brought before the court without ending with a full bushel of just disclaimer upon disclaimers that none of these studies draw the required correlation, causal correlation between the claim of harm and the banned practice.

And of course we heard no rebuttal whatsoever on the arguments that we brought with respect to

gender identity change efforts other than to say that Professor Bahlburg is not a national entity. We've heard of no coherent argument why it is that Tampa feels that it can ban what the University of Columbia clearly sanctions and allows.

Your Honor, I just want to end with a very quick personal anecdote. I don't typically do this, but I've been involved by my friend Mr. Williams and some of the anecdotes that he has said. You know, in the *NIFLA* case the Supreme Court in teaching us that we cannot allow governments to classify professional speech as conduct, the Supreme Court listed a number of dictatorial regimes that have attempted to or that have done exactly those same things. And it did that as a history lesson to us to show us what happens if we allow governments to classify the speech of professionals -- of medical professionals in the case of *NIFLA* -- as conduct for the purpose of regulating it, and the results are not pretty.

One of those regimes that the Supreme Court referred to was the dictatorial regime of Nicolae Ceausescu in communist Romania. I had the I'll call it privilege of growing up under that dictatorial regime with a parent that was involved in the field

of health care and so I got to observe all of those horrendous things that the ***NIFLA*** decision speaks of.

And Your Honor, we didn't have an independent judiciary that could protect the citizenry from that kind of governmental overreach. I'm so thankful that we do have an independent judiciary in this country, and my clients look at you as -- at this court as sort of the last stop between them and tyranny and they just plead with the court to restore their constitutional rights.

And with that, I just want to thank you for the patience you have shown us today. Thank you.

THE COURT: Thank you, Mr. Mihet.

Mr. Williams or Ms. Walbolt.

MR. WILLIAMS: We went through the ordinance, Your Honor, carefully because the ordinance I think answers a lot of the questions, and I commend a careful reading to Mr. Mihet, too.

I'm very familiar with Romania because I am a student of international relations for a long time. And I agree with Mr. Mihet that Romania didn't have a judiciary. But they didn't have a constitutional republic either and they didn't have elected officials that could make reasoned decisions based on empirical evidence. And had they had that, then

maybe that would be the difference. I'm glad he's here and not there.

Last, Your Honor, anything else that -- and I'm speaking for Ms. Walbolt as well -- we will put in our 10-page responses that Your Honor has invited.

My question is from a formatting point of view is Your Honor okay if we just make it an outline or abbreviated point by point as opposed to a pontification by lawyers?

THE COURT: Sure, you can do it however you want. If you want to just bullet point a series of cases that you think would be helpful; all I ask is that you double space it because it's amazing how a single spaced wall of text is not exactly pleasing on the eyes. So just double space it.

If you want to do it as a bullet point, if you want to do it as an outline, if you want to do it as a more traditional brief -- my only limitation is 10 pages, double spaced, and that it otherwise conforms to the Local Rules.

MR. WILLIAMS: Do you have any objection -- because I know Your Honor reads these cases and you don't need us lawyers to edify you on them -- with attaching any case that we cite and highlighting the

part that we think is important?

THE COURT: If you want to email those copies to my chambers, you can. I mean, I print them and highlight them myself, too, so it's not necessary. I'm pretty good when it comes to Westlaw. I don't do Lexus too much these days, but Westlaw I use. So if it's a case reported on Lexis only and not Westlaw -- I don't want to say that I necessarily prefer one or the other, it just so happens that I guess Westlaw is on my desktop.

So if it's a Lexis only case, then you're welcome -- that would be one that I would invite for you to provide for me, but otherwise it's not necessary.

MR. WILLIAMS: I'm not suggesting that we're going to be overly lengthy; we're going to be as pithy as we can. I wanted to make sure I had the right guidance.

THE COURT: And I'm giving you all 10 pages really because there is so much briefing in this. I had an English professor in college that said that most animals if you put them in front of a keyboard could pound out something that made sense in ten pages, but that it took a real art to draft something in two pages. So all of my papers that

year always had to be two pages and I found it much hard to write a two-page paper than it is to write a 10-page paper. So in a sense I was trying to make it a little easier on you all by giving you the length that would give you the luxury of adding more if you needed to. Because I think I'm still haunted by my semester of two-page papers personally.

MR. WILLIAMS: I'm reminded of that old adage, "If I had more time, I'd have written a shorter letter."

THE COURT: Exactly.

MR. WILLIAMS: Thank you, Your Honor, on behalf of the City, Mr. Ruggiero, I'm sure on behalf of Equality Florida for the time that you've allowed us today.

THE COURT: Mr. Mihet, are you standing up because you needed to say something? Go ahead.

MR. MIHET: Question on the format. Mr. Gannam and I spent a fair amount today reading from PowerPoint slides that had the transcripts and what not. If it's beneficial for the court or perhaps the court reporter for us to provide those slides either by filing them or by emailing them somewhere, we would be happy and pleased to do that, if they're helpful.

THE COURT: If you could file them, go ahead and file the PowerPoint. You could file it as -- if an extra copy today, we can file it as a court's exhibit. Really not just for the court reporter but also Judge Jung. I don't expect that -- I expect he will be ruling off the papers unless he has another hearing. So it may be beneficial for him to see.

I was following along on the actual transcripts each time and I was making notes of the pages of the actual transcripts. And I did note each time where those were in the record. But to the extent particularly for the court reporter to be able to take down any information that wasn't in the record.

MR. MIHET: We can convert them to PDF and file them as such in the docket.

THE COURT: Either way. Or if you're running into an issue with not having something to select on CM/ECF, you could just do it as a notice of filing.

MR. MIHET: Excellent.

THE COURT: Anything else to address for purposes of today?

MR. MIHET: Not from the plaintiffs.

THE COURT: So just to recap, December 3rd, 10 pages is the page length and deadline for any

supplemental briefing -- emphasis on supplemental. It does not need to be rehashing of anything that's already in front of me. I've carefully reviewed everything and will likely carefully review it many more times between now and a report and recommendation.

The only caveat is the 10 pages really is limited to the motion to dismiss on behalf of the City and the preliminary injunction motions that the plaintiffs filed. I say that because I don't want you to think that I'm waiting until December 3rd to issue an R&R on Mr. Ruggiero. I may very well be entering one before then.

If nothing else, then we are in recess and thank you for your professionalism and your time today.

(The proceedings adjourned at 4:30 p.m.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF HILLSBOROUGH)

I, Lynann Nicely, RMR, CRR, Official Court Reporter for the United States District Court, Middle District, Tampa Division,

DO HEREBY CERTIFY, that I was authorized to and did, through use of Computer Aided Transcription, report in machine shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages, numbered 1 through 220, inclusive, constitute a true and correct transcription of my machine shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Tampa, County of Hillsborough, State of Florida, November 23, 2018.

/s/ Lynann Nicely

Lynann Nicely, RPR, RMR, CRR, CRC
Official Court Reporter