

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:18-CV-80771-ROSENBERG/REINHART**

ROBERT W. OTTO, PH.D., LMFT,
individually ,and on behalf of his patients,
JULIE H. HAMILTON, PH.D., LMFT,
individually and on behalf of her patients,
Plaintiffs,

v.

CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA,
Defendants.

**DEFENDANT PALM BEACH COUNTY'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING
PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION [DE 8]**

I. FINDINGS OF FACT

A. The County's Ordinance Bans the Professional Practice of a Provider Seeking to Change a Minor's Sexual Orientation or Gender Identity.

1. On December 19, 2017, the County passed Ordinance 2017-046 ("Ordinance"). DE 1-5; DE 37-1, p. 100.¹ The Ordinance banned Providers from engaging in "conversion therapy," defined as "the practice of seeking to change an individual's sexual orientation or gender identity, including but not limited to efforts to change behaviors, gender identity, or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex," on a minor. DE 1-5, p. 13. "Conversion therapy," "does not include counseling that provides support and assistance to a person undergoing gender transition, or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and does not seek to change an individual's sexual orientation or gender identity." *Id.* at 13.

2. A "provider" is "any person who is licensed by the State of Florida to perform counseling pursuant to Chapters 456, 458, 459, 490 or 491 of the Florida Statutes ..." *Id.* at p. 13.

3. The Ordinance does not "prevent mental health providers from speaking to the public about [sexual orientation change efforts] SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders." *Id.* at 11. Furthermore, the Ordinance does not prevent "unlicensed providers, such as religious leaders, from administering SOCE to children or adults" or "minors from seeking SOCE from mental health providers in other political subdivisions" outside of Palm Beach County. *Id.*

4. The Ordinance does not ban advertisement. DE 1-5; *see also* DE 81, p. 149:16-18.

5. The City of Boca Raton's ban on conversion therapy conflicts with the County Ordinance in that the penalties are different. The City Ordinance provides that "[a]ny person that violates any provision of this article shall be subject to the civil penalty prescribed in section 1-16 [of the Boca Raton Code]. . . ." Section 1-16 of the Boca Raton Code provides for a fine "not

1. The City's Ordinance is being addressed by the City's submission.

exceeding \$500.00.” The County, in contrast, penalizes a first violation of the Ordinance with a fine of \$250.00 and a second violation with a fine of \$500.00. DE 1-5, 13:26-28.

B. The Sources Cited in the Ordinance Warn against the Harms of Conversion Therapy.

6. In the “whereas” clauses of the Ordinance, the County summarized the findings of several scientific and professional organizations. DE 1-5; DE 85-1. The County reasonably found that the research was “overwhelming” and “demonstrating that sexual orientation and gender identity change efforts can pose critical health risks to lesbian, gay, bisexual, transgender or questioning persons.” DE 1-5, p. 11. The County was reasonable to rely on the cited research.

7. In 1993, the American Academy of Pediatrics stated, “Therapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation.” DE 85-3, p. 3.

8. In 2009, an American Psychological Association (“APA”) task force reported that:

Although the recent studies do not provide valid causal evidence of the efficacy of SOCE or of its harm, some recent studies document that there are people who perceive that they have been harmed through SOCE (Beckstead & Morrow, 2004; Nicolosi et al., 2000; Schaeffer et al., 2000; Schroeder & Shidlo, 2001; Shidlo & Schroeder, 2002; G. Smith et al., 2004), just as other recent studies document that there are people who perceive that they have benefited from it (Beckstead & Morrow, 2004; Nicolosi et al., 2000; Pattison & Pattison, 1980; Schaeffer et al., 2000; Spitzer, 2003). Among those studies reporting on the perceptions of harm, the reported negative social and emotional consequences include self-reports of anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction. ... Many participants in studies by Beckstead and Morrow (2004) and Shidlo and Schroeder (2002) described experiencing first the positive effects and then experiencing or acknowledging the negative effects later.

Overall, the recent studies do not give an indication of the client characteristics that would lead to perceptions of harm or benefit. Although the nature of these studies precludes causal attributions for harm or benefit to SOCE, these studies underscore the diversity of and range in participants’ perceptions and evaluations of their SOCE experiences.

... However, studies from both periods indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts. The lack of rigorous research on the safety of SOCE represents a serious concern, as do studies that report perceptions of harm (cf. Lilienfeld, 2007).

DE 1-6, pp. 51; DE 85-5, pp. 50. The statements of the APA task force report were supported by citations to research and studies. *See id.*

9. The APA Council of Representatives adopted, “Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts,” which stated:

Although sound data on the safety of SOCE are extremely limited, some individuals reported being harmed by SOCE. Distress and depression were exacerbated. Belief in the hope of sexual orientation change followed by the failure of the treatment was identified as a significant cause of distress and negative self-image (Beckstead & Morrow, 2004; Shidlo & Schroeder, 2002).

Although there is insufficient evidence to support the use of psychological interventions to change sexual orientation, some individuals modified their sexual orientation identity (i.e., group membership and affiliation), behavior, and values (Nicolosi et al., 2000). They did so in a variety of ways and with varied and unpredictable outcomes, some of which were temporary (Beckstead & Morrow, 2004; Shidlo & Schroeder, 2002). Based on the available data, additional claims about the meaning of those outcomes are scientifically unsupported.

DE 85-6, p. 2.

10. The Pan American Health Organization denounced the practice, “‘Reparative’ or ‘conversion therapies’ have no medical indication and represent a severe threat to the health and human rights of the affected persons. They constitute unjustifiable practices that should be denounced and subject to adequate sanctions and penalties.” DE 85-10, p. 2.

11. The American Psychoanalytic Association also warned against conversion therapy for sexual orientation and gender identity:

Psychoanalytic technique does not encompass purposeful attempts to “convert,” “repair,” change or shift an individual’s sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes.

DE 85-7.

12. The American Psychiatric Association echoed these concerns: “The potential risks of “reparative therapy” are great and include depression, anxiety, and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient.” DE 85-4.

13. In 2015, the Department of Health and Human Services' Substance Abuse and Mental Health Services Administration ("SAMHSA") issued a report on efforts to change both sexual orientation and gender identity. DE 85-12. SAMHSA stated: "There have been no studies on the effects of conversion therapy on children, though adults' retrospective accounts of their experiences of conversion therapy during childhood or adolescence suggests that many were harmed (American Psychological Association, 2009). No new studies have been published that would change the conclusions reached in the APA Taskforce's 2009 review." *Id.* at 33.

C. The Sources Cited in the Ordinance Warn Against Changing Gender Identity.

14. The sources cited in the Ordinance also warned against the harms of seeking to change gender identity. *See* DE 85-12, p. 21; DE 85-8, p. 13.

15. Regarding efforts to change gender identity, SAMHSA also reported:

There is a lack of published research on efforts to change gender identity among children and adolescents; no existing research supports that mental health and behavioral interventions with children and adolescents alter gender identity.

It is clinically inappropriate for behavioral health professionals to have a prescriptive goal related to gender identity, gender expression, or sexual orientation for the ultimate developmental outcome of a child's or adolescent's gender identity or gender expression.

Mental health and behavioral interventions aimed at achieving a fixed outcome, such as gender conformity, including those aimed at changing gender identity or gender expression, are coercive, can be harmful, and should not be part of treatment.

DE 85-12, p. 21; *see also id.* at 34 (*citing* Zucker & Bradley, 1995; Byne, et al., 2012; Coleman, et al., 2012; Minter, 2012; Wallace & Russell, 2013; de Vries, Steensma, Doreleijers, & Cohen-Kettenis, 2011; Edwards-Leeper & Spack, 2012).

16. In 2012, the American Academy of Child and Adolescent Psychiatry discussed the harm of seeking to change a child's gender identity:

Similarly, the possible risk that children may be traumatized by disapproval of their gender discordance must be considered. Just as family rejection is associated with problems such as depression, suicidality, and substance abuse in gay youth, the proposed benefits of treatment to eliminate gender discordance in youth must be carefully weighed against such possible deleterious effects.

DE 85-8, p. 13.

D. The Sources Cited in the Ordinance State Special Concern for Minors.²

17. The sources cited in the Ordinance addressed specific concerns for minors:

18. The American Academy of Child and Adolescent Psychiatry specifically discussed the harm to minors:

Psychiatric efforts to alter sexual orientation through “reparative therapy” in adults have found little or no change in sexual orientation, while causing significant risk of harm to self-esteem. ...

There is no empirical evidence that adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness, and caring, which are important protective factors against suicidal ideation and attempts. ... Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial, or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated.

DE 85-8, pp. 11-12.

19. The American College of Physicians also stated:

Available research does not support the use of reparative therapy as an effective method in the treatment of LGBT persons. Evidence shows that the practice may actually cause emotional or physical harm to LGBT individuals, particularly adolescents or young persons. Research done at San Francisco State University on the effect of familial attitudes and acceptance found that LGBT youth who were rejected by their families because of their identity were more likely than their LGBT peers who were not rejected or only mildly rejected by their families to attempt suicide, report high levels of depression, use illegal drugs, or be at risk for HIV and sexually transmitted illnesses [.]

DE 85-13, p. 11.

20. In 2014, the American School Counselor Association stated, “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).” DE 85-11, p. 1.

21. The American Psychological Association task force reported that:

² Plaintiffs agree that self-rejection can be harmful to minors. DE 78-2, no. 25; DE 79-2, no. 26.

[They] found no empirical evidence that providing any type of therapy in childhood can alter adult same-sex orientation ... [and] the theories that such efforts are based on have not been corroborated by scientific evidence or evaluated for harm. Thus, [they] recommend that [licensed mental health providers] LMHP avoid such efforts and provide instead multicultural, client-centered, and affirmative treatments that are developmentally appropriate (Perrin, 2002)

... SOCE that focus on negative representations of homosexuality and lack a theoretical or evidence base provide no documented benefits and can pose serious harm through increasing sexual stigma and providing inaccurate information. ...

DE 1-6, pp. 88-89; DE 85-5, pp. 87-88. The task force also reported that: “Children and adolescents are often unable to anticipate the future consequences of a course of action and are emotionally and financially dependent on adults. Further, they are in the midst of developmental processes in which the ultimate outcome is unknown. Efforts to alter that developmental path may have unanticipated consequences[.]” DE 1-6, p. 86; DE 85-5, p. 87.

22. SAMHSA also advised that, “[i]nformed consent cannot be provided for an intervention that does not have a benefit to the client.” DE 85-12, 35.

23. The sources discussed above explain why a minor’s consent to conversion therapy may not be meaningful.

24. The warnings against conversion therapy were not limited to coercive, behavioral, or aversive techniques. Accordingly, the warnings against conversion therapy reasonably included the type of “talk therapy” performed by Plaintiffs on consenting minors.

E. The County’s Legislative Record Includes Evidence of the Harms of Conversion Therapy.

25. At the first reading of the County Ordinance, on December 5, 2017, mental health professionals spoke out against conversion therapy. A therapist informed the County that:

As a therapist, the first rule of thumb is to do no harm. Conversion therapy not only violates this ethic, but it implies that a therapist has the ability to change one’s sexual orientation. As great as we are, therapists are far and wide unable to pinpoint the therapeutic intervention which can make an individual change this part of who they are. ...

DE 36-1, pp. 49-50. A psychologist and certified sex therapist advised the County that:

Research has actually found that efforts and so-called therapies aimed at changing one’s gender, identity, or sexual orientation can result in a number for mental health issues for minors; including shame, guilty, depression. Decreased self-esteem, increased self-hatred, ... feelings of anger and betrayal, loss of friends, social

withdrawal, problems in sexual and emotional intimacy, high-risk behaviors, confusion, self-harm, substance abuse, and suicidal ideation.

Id. at 11-14.

26. The County learned from the president and founder of the Palm Beach County Human Rights Council that his organization had received two complaints about minors who were being subjected to conversion therapy. *Id.* at 65; DE 37-1, pp. 80-81.

27. The County received emails from individuals writing in support of the Ordinance, one of whom had “personally heard and been moved by the horrific stories of friends that have been subject to these cruel and inhumane methods,” DE 85-15, p. 3, and another whom stated that “[c]onversion therapy has been demonstrated in research to be ineffective and sometimes profoundly harmful to children who receive it,” County Exhibit 44 (PBC 002858-002871).

28. On December 19, 2017, the County heard from a local licensed clinical social worker and a family therapist who had been practicing for more than 30 years. DE 37-1, p. 15. He advised the County that he had “worked with youth and families [his] entire career” and that “conversion therapy” was “an extremely dangerous and unethical practice that does not work.” *Id.*

29. Local providers and members of the public gave the County reason to believe that “conversion therapy” was being practiced on minors in its jurisdiction. *See* DE 36-1, 17:23—18:2; DE 37-1, 8:23-25, 46:10-16, 47:13-17, 48:22—49:5.

F. Plaintiffs’ Professional Practices Are Not Expressive.

30. The record reflects that Plaintiffs’ professional practices are not expressive:

31. Plaintiffs are licensed marriage and family therapists. VC, ¶ 34.

32. In their professional practice, Plaintiffs engage in “talk therapy,” a “form of treatment.” DE 79-2, no. 34, 36; DE 78-2, no. 33, 35; DE 78-1, no. 23; DE 79-1, no. 23.

33. Plaintiffs’ clients seek help with discomfort, distress and life challenges. DE 81, p. 22:12-21. The purpose of Plaintiffs’ therapy is to help their clients. *See* DE 81, p. 37:16-23; DE 77, p. 54:16-20.

34. The purpose of therapy is not for Plaintiffs to express their personal views. *See* DE 77, pp. 34:6-17, 222:14-23, 224:7-8; DE 81, pp. 24:2-3, 105:7-10. “Self-disclosure” of a therapist’s beliefs or opinions is limited. *See* DE 77, p. 29:25 – 30:13. A therapist may only self-disclose if it is helpful to a client or the therapist needs to state a conflict of interest. *Id.*

35. Plaintiffs' practices are client-focused and client-directed: the client sets the therapeutic goals, DE 77, p. 66:10-12; DE 81, p. 44:14-14; DE 78-2, no. 36-37; DE 79-2, no. 37-38, the client's values control, DE 77, p. 89:6-8, the client tells Plaintiffs what brings them in and how they think Plaintiffs can help. DE 81, p. 57:22-23; DE 77, p. 100:9-10.

36. Therapy is provided in the context of a relationship that is formalized by an intake process and consent form. DE 81, pp. 97:14-98:14; DE 77, pp. 55:3-57:5.

37. The therapy Plaintiffs provide can only legally be done with a license. *Id.* at 72:21-73:4; DE 81, p. 23:8-9. Therapists must study and learn the principles and methods of therapy to "have conversations that are effective and healing" DE 77, pp. 71:15-17, 72:6-11, 72:21-73:21, 234:22-235:2; DE 81, pp. 22:22-25:19, 37:8-38:3. This training distinguishes the words of a friend from the healing practices of a therapist. *See id.*

38. Hamilton's "methods and principles" are the "power of listening, empathizing, the importance of being nonjudgmental, not shaming clients, creating a safe space where they can open up and share their heart as well as understand themselves." DE 77, p 71:18-23; *see also id.* at 105:2-106:6, 107:15-108:5; DE 78-1, nos. 7, 9.

39. During therapy, Hamilton does not introduce her own ideas or advice or suggestions, but uses what the client brings to the table. DE 77, pp. 157:2-158:3, 165:15-166:8.

40. Similarly, Otto also does not give advice; he talks about pros and cons for the client to weigh, DE 81, p. 74:23-75:21, asks his clients how they make sense of their own feelings, DE 81, p. 72:5-18, and lets them decide what they should do with what they bring to the table. DE 81, p. 155:15-156:20.

G. Plaintiffs Know What Conversion Therapy Is.

41. Neither Otto nor Hamilton learned sexual orientation change efforts in their course work at Nova Southeastern University. DE 81, pp. 186:17-187:4; DE 77, p. 15:12-18.

42. Plaintiffs abide by the code of ethics issued by the American Association for Marriage and Family Therapy ("AAMFT"). VC, § 89; DE 77, p. 237:2-7.

43. The AAMFT webpage, states "positions on couples and families," including:
From time to time AAMFT receives questions about a practice known as reparative or conversion therapy, which is aimed at changing a person's sexual orientation. As stated in previous AAMFT policy, the association does not consider homosexuality a disorder that requires treatment, and as such, we see no basis for

such therapy. AAMFT expects its members to practice based on the best research and clinical evidence available.

DE 86-1, p. 3.

44. Plaintiffs admit that “it would be unethical to perform” “‘aversive therapy techniques’ used in conversion therapy, such as inducing nausea, vomiting or paralysis; providing electronic shocks; or snapping a rubber band around a patient’s wrist when the patient becomes aroused to same-sex erotic images or thoughts.” DE 78-2, no. 19; DE 79-2, no. 20.

45. The continuing learning education accrediting body for the Florida board that licenses marriage and family therapists revoked certification for credits from one of Hamilton’s presentations that the board said was about “conversion therapy.” DE 77, p. 267:18-269:8.

46. Plaintiffs admit they cannot change their clients’ sexual orientation. *Id.* at 134:19 (“I can’t change your attractions”); DE 81, p.44:3 (“I can’t change any client.”).

47. Otto does not practice “conversion therapy” DE 81, p. 176:8-23 (“I don’t practice conversion therapy.”); *see also* DE 79-2, nos. 37-38. He does not attempt and in fact cannot change a client’s sexual orientation. DE 81, pp. 43:19-25, 44:1-20, 45:5-12 (“That’s like trying to say you go to the doctor and here, ‘I’d like to be nine feet tall. Would you try to change me?’ That’s impossible.”). He has never dealt with gender identity issues. *Id.* at 151:19-20.

48. Hamilton testified that it was her goal to offer therapy that would seek to change a female child’s gender identity from male to female. DE 77, pp. 94:25-95:9. Hamilton, who considers “sexual orientation” and “sexual attractions” to be synonymous, *id.* at 141:10-142:1, has also offered therapy “hoping to reduce attractions, if at all possible.” *Id.* at 137:10-138:18.

49. Because of the Ordinance, Hamilton declined to see two minor children whose parents expressed interest in changing the gender identity of the children. *Id.* at 206:15-208:7.

50. Both Plaintiffs know what “conversion therapy” is and what it means to “seek to change” a minor’s sexual orientation or gender identity. *See, e.g.*, DE 81, p. 43:19-25, 44:1-20, 45:5-12, 176:8-23; DE 77, pp. 94:25-95:9, 137:10-138:18, 141:10-142:1.

II. CONCLUSIONS OF LAW

“Where a plaintiff seeks to enjoin the enforcement of a legislative enactment, the relief ‘must be granted reluctantly and only upon a clear showing that the injunction before trial is

definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts.” *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314, 1331 (S.D. Fla. 2006) (citation omitted). Because Plaintiffs fail to show a likelihood of success on the merits, they are not entitled to preliminary injunctive relief. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). Thus, the Court does not analyze the other requirements for preliminary injunctive relief.³

A. Lack of Standing

1. Otto does not have standing to challenge a ban of a practice he does not conduct.

Otto maintains a counseling practice in the City of Boca Raton. DE 1, ¶125. There is a conflict between the County and City Ordinance in terms of penalties. Per the County’s Ordinance, it does not apply in the City, and thus does not apply to Otto. Additionally, the Ordinance does not apply to Otto because he does not practice conversion therapy. DE 81, 176:8-23; DE 79-2, nos. 37-38. Accordingly, Otto fails to show that he would succeed on the merits.⁴

2. Plaintiffs’ clients have not been shown to be hindered in their ability to bring their own claims.

One may not ordinarily claim standing to assert the rights of a third party. *Singleton v. Wuff*, 428 US 106, 114 (1976). A third party claim requires that 1) the plaintiff must in fact be injured; 2) there is a close relation to the third party; and 3) there must exist a genuine hindrance to the third party’s ability to bring his own claim. *Singleton*, 428 US at 116. “Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply.” *Id.* Certainly, the Supreme Court has allowed third party patient-claims in certain situations that have involved the subject matter of abortions and contraception. *See id.* (stating a hindrance to pregnant women in bringing a claim related to abortion due to the limited timeframe with a pregnancy); *Doe v. Bolton*, 410 U.S. 179 (1973). But, neither the Supreme Court nor the

³ The Court also concludes that Plaintiffs fail to establish imminent irreparable harm. “A preliminary injunction requires showing ‘imminent’ irreparable harm” *Wreal, LLC v. Amazon.com*, 840 F.3d 1244, 1248 (11th Cir. 2016) (internal citations omitted). Plaintiffs’ five month delay in filing suit after the enactment of the County’s Ordinance contradicts Plaintiffs’ assertion of “imminent” irreparable harm. Additionally, Plaintiffs’ alleged harm consisting of mainly monetary lost is not special or unique to be deemed irreparable. DE 8, p.19; DE 81, 85:24-25; 86:1-6; DE 1, ¶¶ 157-157; DE 77, 57:15-58, 262:3-9.

⁴ Otto likewise cannot show that the Ordinance will cause him irreparable harm.

Eleventh Circuit has adopted a general bright line rule that all doctors can bring a third-party claim on behalf of all clients or patients. The courts still apply the third-party standing analysis in doctor-patient situations. *E.g.*, *Planned Parenthood Ass'n v. Miller*, 934 F.2d 1462 (11th Cir. 1991); *Planned Parenthood SE, Inc. v. Bentley*, 951 F. Supp. 2d 1280 (M.D. Ala. 2013).

Applying that analysis here, the Court finds no evidentiary basis to conclude that Plaintiffs' clients are hindered in their ability to advance their own interests where they could proceed under pseudonyms. *See King v. Gov. of N.J.*, 767 F.3d 216, 244 (3d Cir. 2014) *cert. denied*, 135 S. Ct. 2048 (2015) *abrogated on other grounds*, *Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (“*NIFLA*”). Minors claiming to be affected by laws banning conversion therapy in other jurisdictions have filed suit in both *Doe ex rel. Doe v. Governor of New Jersey*, 783 F. 3d 150 (3d Cir. 2015) and *Pickup, et. al. v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Accordingly, Plaintiffs have failed to establish a hindrance to their clients from bringing their own claims.

B. Substantial Likelihood of Success on the Merits⁵

1. Conversion therapy is not expression protected by the First Amendment, but a type of professional conduct the government may reasonably regulate.

First before the Court is whether “conversion therapy” is expression falling within the protection of the First Amendment, *i.e.*, “speech.” Plaintiffs bear this initial burden of showing that the activity they wish to engage in is expressive. *E.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5, (1984). If that burden is met, the burden shifts to the government to justify any restriction on the expression. *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1280 (S.D. Fla. 2012) (citation omitted). Plaintiffs failed to carry their initial burden.

As a threshold matter, Plaintiffs' facial challenges to the Ordinance failed when they admitted that the Ordinance also bans “aversive therapy that takes place through conduct.” DE 95, p. 15. By further admitting that “aversive therapy” is unethical, Plaintiffs agree that the County

⁵ As Plaintiffs only argued the merits of their own First Amendment free speech claims and their Florida-law-preemption argument, the merits of the other claims asserted in their Verified Complaint, including their free exercise claims and the claims of their minor clients, are not relevant here. *See Cont'l Tech. Servs., Inc. v. Rockwell Int'l Corp.*, 927 F.2d 1198, 1199 (11th Cir. 1991) (“An argument not made is waived[.]”).

acted rationally in banning it. Thus, Plaintiffs failed to show that “no set of circumstances exist under which the [Ordinance] would be valid.” See *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329 (11th Cir. 2001) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Accordingly, this Court analyzes the Ordinance only as applied to Plaintiffs and their practices.

Plaintiffs practice marriage and family therapy, which is defined as:

the use of scientific and applied marriage and family theories, methods, and procedures for the purpose of describing, evaluating, and modifying marital, family, and individual behavior, within the context of marital and family systems, including the context of marital formation and dissolution, and is based on marriage and family systems theory, marriage and family development, human development, normal and abnormal behavior, psychopathology, human sexuality, psychotherapeutic and marriage and family therapy theories and techniques.

§ 491.003(8), Fla. Stat. (2018). The use of these methods, techniques, and modalities is restricted to therapists appropriately trained in their use. § 491.003(8)(b). Plaintiffs’ practices may not discriminate, VC, ¶ 91, must meet minimum standards of performance, *id.* at ¶ 86, and must not cause harm, *id.* “Talk therapy” is not exempted from any of these regulations. Plaintiffs take no issue with their “talk therapy” practice being so regulated. *Id.* at ¶¶ 84-94.

Nor does the law. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (“A statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.”) (citations omitted); see also *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (“Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”) (emphasis added) (discussing restriction of one method of performing an abortion); cf. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”); *Wilson v. State Bar*,

132 F.3d 1422, 1429 (11th Cir. 1998) (finding that the State Bar rules prohibiting disbarred attorneys from having contact with clients about legal matters “govern occupational conduct, and not a substantial amount of protected speech”).

The United States Supreme Court recently reaffirmed the authority of governments to “regulate professional conduct, even though that conduct incidentally involves speech.” *NIFLA*, 138 S. Ct. 2361 (citing *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 884 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.)). Here, the Ordinance regulates professional conduct.⁶ *See Pickup v. Brown*, 740 F.3d 1208, 1225-31 (9th Cir. 2014) *cert. denied*, 134 S. Ct. 2871 (2014) *abrogated on other grounds NIFLA*, 138 S. Ct. 2361 (criticizing the analysis of “professional speech” not “professional conduct”).

Analyzing California’s ban on sexual orientation change efforts (“SOCE”), the Ninth Circuit held that the ban was a valid regulation of “professional conduct.” *Pickup*, 740 F.3d at 1225-1231. In so holding, the court reasoned that “the key component of psychoanalysis was the treatment of emotional suffering and depression, *not* speech.” *Id.* at 1226 (emphasis original,

⁶ Plaintiffs’ argument that this conclusion is precluded by *Wollschlaeger v. Governor*, 848 F.3d 1293 (11th Cir. 2017) is not persuasive for two reasons. First, the *Wollschlaeger* Court’s comment about “professional conduct” and *Pickup* was dicta. *Id.* (“In any event, *Pickup* is distinguishable on its facts and does not speak to the issues before us.”); *see United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (“As our cases frequently have observed, dicta is defined as those portions of an opinion that are not ‘not necessary to deciding the case then before us.’”) (citations omitted). Second, the facts and resulting relevant analysis in *Wollschlaeger* are distinguishable. In *Wollschlaeger*, the court found the case *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) more persuasive and analogous. 848 F.3d at 1309. In *Conant*, the government was not permitted to restrict a physician’s communications about marijuana, but was permitted to prosecute a physician who unlawfully prescribed marijuana. 309 F.3d at 635. Finding communication to be at issue, the *Wollschlaeger* Court held that Florida’s restrictions on physician’s ability to inquire, keep records, and harass patients on the topic of gun ownership were unconstitutional content and viewpoint-based restrictions on the physician’s speech. 848 F.3d at 1307-10. The court then upheld the anti-discrimination provision, construing it to narrowly apply to “non-expressive, conduct such as failing to return messages, charging more for the same services, declining reasonable appointment times, not providing test results on a timely basis, or delaying treatment.” *Id.* at 1317. Notably, more than half of these examples of “non-expressive” conduct implicate the written or spoken word: returning messages, declining appointments, and providing test results. Yet, *Wollschlaeger* read the anti-discrimination provision to only regulate treatment or conduct of the professionals and thus found no constitutional violation. *See id.*

citation omitted). The *Pickup* Court noted that “[m]ost, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment.” *Id.* at 1229. Otherwise, “any prohibition of a particular medical treatment would raise First Amendment concerns” and that would “restrict unduly the states’ power to regulate licensed professionals and would be inconsistent with the principle” that regulating conduct does not abridge free speech “merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Id.* (citing *Giboney*, 336 U.S. at 502 (1949)). The fact that the “treatment may be performed through speech alone” did not alter the conclusion that the therapy is “*treatment ... not speech.*” *Id.* at 1230-31 (emphasis original). The *Pickup* Court found that California’s SOCE ban regulated “therapeutic treatment,” which was not “symbolic” or “expressive speech” and that the ban did not restrain the plaintiffs from “communicating a message,” “imparting information or disseminating opinions.” *Id.* at 1229-30. Because the ban “regulates a professional practice that is not inherently expressive, it does not implicate the First Amendment.” *Id.*

Mindful of the Eleventh Circuit’s dicta in *Wollschlaeger v. Governor*, 848 F.3d 1293, 1309 (11th Cir. 2017), this Court closely examined whether Plaintiffs’ practices consisted of constitutionally protected speech. The words at issue are spoken in the context of the Plaintiffs’ licensed practice of marriage and family therapy, which is the use of theories, methods, and procedures, to therapeutically help clients in an environment that is formalized by consent forms and an intake process. Plaintiffs’ words neither express the Plaintiffs’ personal views, ideas, or theories, nor give advice. Accordingly, these words, as used by Plaintiffs in their specific practices, are not sufficiently imbued with the elements of communication and expression and are not “speech.” *See Pickup*, 740 F.3d at 1230. The fact that Plaintiffs perform therapy through the mode of “talk” does not convert their therapy into expressive or symbolic speech. *Id.* at 1229-30. Whatever expression Plaintiffs accomplish through their client-directed therapy is merely incidental to the treatment they provide. *See id.*, at 1231.

The Ordinance does not ban communication about conversion therapy. DE 1-5. The Ordinance does not ban inquiries like the law in *Wollschlaeger v. Governor*, 848 F.3d 1293 (11th Cir. 2017). The Ordinance does not ban recommendations for treatment like the law in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Nor does the Ordinance compel a governmental message,

which is “not tied to a procedure at all,” like the law in *NIFLA*, 138 S. Ct. 2361 (2018). *See id.* Here, what is banned *is* the procedure. Like the consent requirement in *Casey*, 505 U. S. 833 (1992), the words of Plaintiffs are only implicated as part of the practice of therapy.

The Court finds the cases relied upon by Plaintiffs distinguishable. Unlike the restrictions on legal challenges in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), the ban on conversion therapy does not restrict speech that is necessary for the proper functioning of any system akin to an independent judiciary. The ban only restricts words that are bound up in the practice of private conversion therapy, which is not part of any larger governmental or free-press system. Furthermore, unlike the solicitation restrictions in *NAACP v. Button*, 371 U.S. 415 (1963), the Ordinance does not hinder political association or the vindication of constitutional rights. The Ordinance is unlike the “material support” prohibition in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), which prohibited the plaintiffs from “communicating a message” through teaching, training, or advocating on behalf of terrorist organizations. Here, Plaintiffs are free to associate, advertise, and advocate as they please. Plaintiffs’ input in political processes and the marketplace of ideas remains untouched; only their therapeutic practices on minors are restricted.

Because the Ordinance regulates “a professional practice that is not inherently expressive, [it does] not implicate the First Amendment.” *Pickup*, 740 F.3d at 1230. Accordingly, the Ordinance receives the “deferential review” afforded “other regulations of the practice of medicine.” *Id.* at 1231; *see also Casey*, 505 U. S. 833 (1992). “The rational basis test asks (1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government’s objective and the means it has chosen to achieve it.” *Leib v. Hillsborough Cty. Pub. Transp. Comm’n*, 558 F.3d 1301, 1306 (11th Cir. 2009). It is Plaintiffs’ “burden to negative every conceivable basis which might support [the law].” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993). Plaintiffs fail to meet this burden.

On the face of the Ordinance, the County asserted a “compelling interest in protecting the physical and psychological well-being of minors ... and in protecting its minors against exposure to serious harms caused by sexual orientation and gender identity change efforts.” DE 1-5, p. 5. This interest is not only legitimate, it is compelling. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (the state has a “compelling interest in protecting the physical and psychological well-being of minors”); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (“It is

evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”) (citation omitted).

Florida Constitution Article VIII, §1(g) gives charter counties, such as Palm Beach County, all powers of local self-government not inconsistent with general law. Palm Beach County’s authority to enact ordinances is derived directly from the Florida Constitution or the State of Florida. Therefore, the County, as a political subdivision of the State, has the police power and authority to regulate in the interest of health and safety. *See Hillsborough Cty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985) (“[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.”); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons . . . is unquestionably at the core of the State’s police power,” which extends to “state and local governments.”); *Lambert v. Yellowley*, 272 U.S. 581, 587 (1926) (“There is no right to practice medicine which is not subordinate to the police power.”); DE 35-1, § 3 (The County’s charter authorizes it to adopt ordinances to protect the health, safety, and general welfare of its residents).

There is no clear language showing that the Florida legislature intended to preempt local regulation of professional conduct by those licensed pursuant to the chapters cited in the Ordinance. *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). Nor does this Court see a basis to impute such an intent when implied preemption is “severely restricted and strongly disfavored” *Exile v. Miami-Dade County*, 35 So. 3d 118, 119 (Fla. 3d DCA 2010); *see also D’Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017). In section 456.003(2)(b), Florida Statutes, the State acknowledged that local ordinances may also regulate professionals to protect the health, safety, and welfare of the public. Accordingly, Plaintiffs’ preemption claims do not warrant the issuance of a preliminary injunction.

The Ordinance is rationally related to the County’s interest in protecting minors from conversion therapy. Plaintiffs are thus not likely to succeed on their First Amendment claims, and are not entitled to a preliminary injunction.

2. Even if conversion therapy were protected speech, the Ordinance satisfies heightened and strict scrutiny.

- a. The content and viewpoint-neutral Ordinance withstands heightened scrutiny.

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (emphasis added). The Ordinance bans a practice regardless of the content of the words implicated by the practices or the provider’s ideological basis for the practice. Compare *Virginia v. Black*, 538 U.S. 343 (2003) (ban on cross burning with the intent to intimidate was content-neutral because it did “not single out for opprobrium only that speech directed toward ‘one of the specified disfavored topics’”) with *R. A. V. v. St. Paul*, 505 U.S. 377 (1992) (ban on cross burning with intent to intimidate “on the basis of race, color, creed, religion or gender” found to be content-based) (emphasis added) and *Wollschlaeger*, 848 F.3d at 1307 (ban on discrimination and harassment based on gun ownership or possession found to be content based) (emphasis added). The Ordinance bans a practice – no matter the basis of the practice. Content is not regulated; thus, the Ordinance is content neutral. *See Pickup*, 740 F.3d at 1231 (9th Cir. 2014).⁷

The Ordinance is also viewpoint neutral. *See id.* at 1231; *see also King v.*, 767 F.3d at 237 (“The prohibition of this method of communicating a particular viewpoint, however, is not the type of viewpoint discrimination with which the First Amendment is concerned.”). The Ordinance does not discriminate based on the direction of the intended change. A provider is equally prohibited from seeking to change a heterosexual minor into a non-heterosexual as they are from seeking to change a non-heterosexual minor into a heterosexual. The Ordinance is not viewpoint-based for excluding from the definition of “conversion therapy” practices that support a minor who is undergoing gender transition. This exclusion is consistent with the definition of “conversion therapy.” The Ordinance does not discriminate based on the viewpoint of the provider but prohibits all providers from specified practices. *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 875 (11th

⁷ Alternatively, the Court concludes that the Ordinance discriminates “in a way that does not trigger strict scrutiny” because the basis of the content discrimination “is the very reason the entire class of speech at issue is proscribable.” *See King v. Gov. of N.J.*, 767 F.3d 216, 236 (3d Cir. 2014); *see also R. A. V.*, 505 U.S. at 388 (1992) (“When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”). As *Reed* did not address this principle of content-based discrimination, this Court does not read *Reed* as abrogating it. *Cf. Flanigan's Enters. v. City of Sandy Springs*, 703 F. App'x 929, 935 (11th Cir. 2017) (“But significantly, the majority opinion in *Reed* did not address the secondary-effects doctrine. For this reason alone, we cannot read *Reed* as abrogating either the Supreme Court's or this Circuit's secondary-effects precedents.”).

Cir. 2011) (remediation plan that required a student to comply with a universally applicable code of ethics prohibiting her from imposing her religious values on patients, including those regarding homosexuality, was viewpoint neutral).

As a content and viewpoint-neutral regulation, the Ordinance, if it implicates the First Amendment at all, is entitled to intermediate scrutiny.⁸ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). Just like the New Jersey conversion therapy ban was “sufficiently tailored to survive intermediate scrutiny,” the County Ordinance, which is nearly identical to the New Jersey ban and similarly cites the professional statements and opinions, also withstands such scrutiny. See *King*, 767 F.3d at 239-240. Plaintiffs are thus not likely to succeed on the merits of their First Amendment Claims even if the Ordinance restricted speech.

b. The County’s Ordinance would withstand strict scrutiny.

Plaintiffs urge the Court to apply strict scrutiny. While the Court’s previous conclusions elucidate why strict scrutiny does not apply, the Court also concludes that the County has met its burden of showing a likelihood of success under strict scrutiny. Strict scrutiny requires the County to prove that the Ordinance “furthers a compelling interest and is narrowly tailored to achieve that interest.” See *Reed*, 135 S. Ct. at 2231 (citation omitted).

As discussed, *supra*, the County’s interest is compelling. The harms are not imagined. The sources cited in the Ordinance unanimously conclude that rigorous research on the safety and effectiveness of seeking to change sexual orientation is deficient, but that there is evidence that conversion therapy can cause harm, including depression, self-harm, self-hatred, suicidal ideation, and substance abuse. None of the organizations identified a basis for distinguishing between those likely to experience harm and those likely to perceive a benefit. Plaintiffs’ critique of the APA report does not strip the County of its authority to protect its citizens from the risk of harm. See *Collins v. Texas*, 223 U.S. 288, 297-98 (1912) (recognizing the “right of the State to adopt a policy

⁸ Furthermore, because the Ordinance involves after-the-fact enforcement, they are not prior restraints. *E.g. Horton v. City of St. Augustine*, 272 F.3d 1318, 1332 (11th Cir. 2001) (“Horton’s challenge does not qualify under the specialized exception for ‘prior restraints on speech’ because it does not involve a permitting or licensing scheme or other prior review but instead an after-the-fact enforcement.”) (citation omitted).

even upon medical matters concerning which there is difference of opinion and dispute”). Neither the County nor the Court were presented with an adequate basis for concluding that any conversion therapy on a minor, voluntary or otherwise, is safe and effective. *Cf Ferguson v. JONAH*, 2015 N.J. Super. Unpub. LEXIS 236, *31 (excluding expert opinions about the effectiveness of SOCE).

Conversion therapy actually existed in the County. A Palm Beach County resident urged the County to enact the ban in light of his friends’ horrific experiences. The County received information from the Palm Beach County Human Rights Council that two local minors were being forced to undergo conversion therapy. Local providers spoke to the County about the harms of conversion therapy; other local providers gave the County reason to believe conversion therapy was being practiced in its jurisdiction. The County need not wait for a minor to publicly confess to it that the minor had agreed to try to change their sexual orientation through therapy only to experience self-hatred and suicidal ideation after the therapy failed. *See King*, 767 F.3d at 239 (3d Cir. 2014) (“[A] state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm.”). The small number of reports of harm from minors makes sense in light of the retrospective reports and delayed perceptions of harm noted by the sources cited by the Ordinance. *See* DE 85-12, p. 33; DE 1-6, pp. 51; DE 85-5, pp. 50. The County’s compelling interest is in preventing harm before it occurs.

To address this compelling interest, the Ordinance is narrowly tailored to prohibit only the **practice**, as opposed to any discussion or recommendation, of **conversion therapy**, which is condemned by numerous professional organizations as contraindicated, harmful, and ineffective, on **minors**, “whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely,”⁹ by **licensed providers**, who would be the only ones legally able to apply principles and methods in their efforts to change a minor.

The fact that Hamilton declined to provide therapy to a minor that would seek to change a minor’s gender identity because of the County’s Ordinance proves the effectiveness of the Ordinance. Plaintiffs identified no different methods of achieving the County’s goals that other jurisdictions have found effective. Accordingly, the Court finds the “alternative measures” analysis in *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014), inapposite.

⁹ *See Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990).

No other regulation actually prohibits providers in the County from subjecting minors to the risk of the harms associated with seeking to change a minor's sexual orientation or gender identity. *See* DE 77, p. 95:22-23; DE 36-1, p. 15:12-21. The blanket and general prohibitions against discrimination and "harming minors" have not been interpreted by Plaintiffs as banning them from exposing minors to the risk of conversion therapy. Nor has the requirement that Plaintiffs "meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance" caused Plaintiffs to heed the judgments of prevailing professional organizations that conclude conversion therapy is contraindicated. Thus, no other regulation can effectively prevent the harms associated with conversion therapy. Moreover, informed consent, which cannot be provided for a therapy that is not effective, does not adequately prevent the harms associated with conversion therapy when there is no safeguard to ensure that only those who are likely to benefit from conversion therapy will consent to it. *See King v. Gov. of N.J.*, 767 F.3d 216, 240 (3d Cir. 2014). Accordingly, the County's Ordinance would likely withstand strict scrutiny, and Plaintiffs would not be entitled to a preliminary injunction.

3. The Ordinance Is Not Unconstitutionally Vague.

The Ordinance provides Plaintiffs with a reasonable opportunity to understand what is prohibited. Hamilton knows what it means to seek to change sexual orientation or gender identity. Otto also knows: he gives clients an "informed consent form [that] outlines the nature of SOCE counseling, explains the controversial nature of SOCE counseling, ... and informs the client of the potential benefits and risks associated with SOCE counseling." VC, ¶ 128; DE 81-6.

Here, as in *King*, the banned conduct is sufficiently clear to pass constitutional muster where the therapy is a discrete practice within the profession, has been the target of public statements by professional organizations, and is familiar to Plaintiffs. 767 F.3d at 240-41. Accordingly, the Ordinance is not void for vagueness. *See id.*; *see also Pickup v. Brown*, 740 F.3d 1208, 1233-34 (9th Cir. 2014) ("SB 1172 is not void for vagueness."). Plaintiffs are not entitled to a preliminary injunction on this claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 15, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the authorized CM/ECF filers.

/s/ Rachel Fahey
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