UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:18-CV-80771-RLR

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,

vs.

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

Defendants.

_____/

FINDINGS OF FACTS AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AS TO DEFENDANT, CITY OF BOCA RATON

THIS CAUSE is before the Court upon the Motion for Preliminary Injunction (DE 8), filed by Plaintiffs, Robert W. Otto ("Otto") and Julie H. Hamilton ("Hamilton") (collectively, "Plaintiffs"). The Court has carefully reviewed Plaintiffs' Motion, Defendant, City of Boca Raton's ("City") Response in Opposition (DE 83), Plaintiffs' Reply (DE 95), and all pertinent portions of the record. In addition, the Court held an evidentiary hearing on October 18, 2018, and is otherwise fully advised in the premises. The Court now issues the following findings of fact and conclusions of law. For the reasons set forth below, Plaintiffs' Motion is **DENIED** and this matter is **DISMISSED** due to lack of subject matter jurisdiction.

I. INTRODUCTION

On October 10, 2017, the City passed Ordinance No. 5407 ("Ordinance"), which prohibits conversion therapy—treatment performed with the goal of changing an individual's

sexual orientation or gender identity—on minors within City limits. *See* City's Exhibit 1, Ordinance, 6:10-14. Defendant, Palm Beach County ("County") has passed a similar (albeit, not identical) ordinance. *See* DE 1-5.

Plaintiffs' Motion seeks an injunction prohibiting, *inter alia*, the City's enforcement of the Ordinance.[1] Plaintiffs seek the preliminary injunction based on alleged violations of the First Amended as well as Florida law. Specifically, Plaintiffs allege that the Ordinance violates their First Amendment rights because it: (1) discriminates on the basis of viewpoint; (2) discriminates on the basis of content; (3) is an unconstitutional prior restraint; and (4) is unconstitutionally vague. Plaintiffs also allege that the Ordinance violate the Florida law because it is preempted by state legislation.

II. FINDINGS OF FACT

1. On October 10, 2017, the City enacted the Ordinance, which prohibits the practice of conversion therapy on minors.[2] City's Exhibit 1.

2. The Ordinance defines conversion therapy as follows:

> Any counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.

Id. at 6:10-14.

3. The Ordinance's definition of conversion therapy does not include:

> [c]ounseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change sexual orientation or gender identity.

Id. at 6:14-19.

---

[1] The Motion also seeks to enjoin the County's enforcement of its related ordinance, Ordinance 2017-046, which the Court addresses in a separate order.

[2] "Conversion therapy" is also referred to as SOCE or "sexual orientation change efforts."

4. The Ordinance, moreover,

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

Id. 4:21-5:2

5. Clergy and other religious leaders, moreover, are exempt from the Ordinance and may provide guidance and counseling to minors, so long as it is not performed under the guise of licensed mental health therapy. *Id.* at 4:21-5:2; 6:26-7:3.

6. The Ordinance identifies the City's "compelling interest in protecting the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and questioning youth, and in protecting its minors against exposure to serious harms caused by sexual orientation and gender identity change efforts." *Id.* at 5:3-6.

7. The Ordinance also identifies numerous studies and position papers from mental health agencies and organizations, including the U.S. Department of Health and Human Services, which recognize the harm conversion therapy causing in minors, as well as adults. *Id.* at 1:15-4:14; 5:7-11. The following are examples of such studies and position papers' conclusions:

a. "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." City's Exhibit 2, "Homosexuality and Adolescence," *Pediatrics*, Am. Acad. of Pediatrics, 633 (1993).

b. "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 experience by the patient." City's Exhibit 3, Position Statement on Psychiatric

Treatment and Sexual Orientation, Am. Psychiatric Ass'n Official Actions, approved December 1998.

c. The American Psychological Association created a task force to conduct a "systematic review of peer-review journal literal on sexual orientation change efforts (SOCE) and concluded that efforts to change sexual orientation are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners and advocates." City's Exhibit 4, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, Am. Psychological Ass'n, Task Force on Appropriate Therapeutic Responses to Sexual Orientation, at v (2009).

d. "As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice." City's Exhibit 6, Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression, Am. Psychoanalytic Ass'n (June 2012).

e. "Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or, necessarily, and the possibility that they carry the risk of significant harm, such interventions are contraindicated," contrary to the claims of SOCE practitioners and advocates. City's Exhibit 7, "Practice Parameter on Gay, Lesbian or Bisexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents," J. Am. Acad. Child Adolesc. Psychiatry, V. 51, No. 1, 968 (2012).

f. "Services that purport to 'cure' people with non-heterosexual orientation lack medical justification and represent a serious threat to the health and well-being of affected people." City's Exhibit 8, Pan American Health Organization Position Statement (May 17, 2012).

g. "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 harm." City's Exhibit 9, "The School Counselor and LGBTQ Youth," Am. Sch. Counselor As'n (2016).

h. "Conversion therapy perpetuates outdated views of gender roles and identifies as well as the negative stereotype that being a sexual or gender minority or identifying as LGBTQ is an abnormal aspect of human development. Most importantly, it may put young people at risk of serious harm." City's Exhibit 10, "Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth," U.S. Dep't of Health and Human Services, Substance Abuse and Mental Health Services Administration, at 1 (2015).

8. Hamilton and Otto are both marriage and family therapists, licensed by the State of Florida. City's Exhibit 31, Otto Deposition, 9:10-20; City's Exhibit 32, Hamilton Deposition, 25:23 – 26:1.

9. Hamilton practices in Palm Beach Gardens and has not practiced in the City in at least the ten years. City's Exhibit 32, 39:22-24; 340:1-341:18.

10. Although Otto practices marriage and family therapy within the City, he admits that he does not practice "conversion therapy" as defined by the Ordinance. Specifically, he states as follows:

> A: I can't change any client. My clients come to me with issues of distress that they want to work on, and I will talk with them about those issues and above alleviating their stress. Or if they have a conflict between their sincerely held religious beliefs and some other aspect of their life, be that sexual or not, we'll talk about those incongruities and how to make sense of those and how to decrease their anxiety and discomfort that comes from that.
>
> * * *
>
> Q: So let's assume that you have a client expresses a desire to change his or her sexual orientation. Do you then undergo efforts in an attempt to, in fact, change the client's sexual orientation?
>
> A: I've already said I can't do that. 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. The doctor is not going to change you to do that. So, I cannot change a client to do that. You can ask that in lots of different ways, but the answer is always going to be "I cannot change a client."

City's Exhibit 31, 44:3-12; 44:25-45:13.

III. CONCLUSIONS OF LAW

Based on the findings of fact set forth above, the Court makes the following conclusions of law.

To obtain a preliminary injunction, Plaintiffs must establish that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may cause the City; and (4) if issued, the injunction would not be adverse to the public interest. *See Siegel v. LePore*, 234 F.2d 1163, 1176 (11th Cir. 2000) (citing *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). "In this Circuit, '[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishe[s] the "burden of persuasion" as to each of the four prerequisites.'" *Id.* (quoting *McDonald's*, 147 F.3d at 1306).

In addition to this four-part standard to obtain a preliminary injunction, Plaintiffs must also satisfy the basic requirements of Article III of the Constitution, including the jurisdictional

requirement of standing. "[S]tanding 'is perhaps the most important of the jurisdictional doctrines.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (alternation in original) (quoting *Allen v. Wright*, 468 U.S. 737 (1984)). "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ." *Warth v. Seldin*, 422 U.S. 490, 500, (1975). "Nonetheless, standing requirements 'are not mere pleading requirements but rather [are] an indispensable part of the plaintiff's case.'" *Church v. City of Huntsville*, 30 F.3d 1332, 1336 (11th Cir. 1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

For the reasons set forth herein, the Court finds Plaintiffs lack standing to pursue both a preliminary injunction and the claims in their Complaint. Even assuming, *arguendo*, Plaintiffs meet the basic jurisdictional requirements to pursue their claims, the Court also finds Plaintiffs have not met their burden of persuasion sufficient to merit the extraordinary preliminary injunction remedy.

A. Standing.

Plaintiffs raise claims and seek a preliminary injunction on behalf of both Hamilton and Otto, who are family therapists, as well as their minor patients. DE 1, DE 8. The City challenges Plaintiffs' standing to obtain relief in this matter, including a preliminary injunction.

To establish standing, Plaintiffs must show: (1) an injury-in-fact, which is concrete and particularized, as well as actual or imminent; (2) a causal connection between the alleged injury-in-fact and the conduct at issue; and (3) that a favorable decision would likely redress the injury-in-fact. *Lujan*, 504 U.S. at 560; *see also Natal Parks Conserv. Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003).

"Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate—as opposed to a

merely conjectural or hypothetical—threat of *future* injury." *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). "[A] prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past." *Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992). Though "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974), "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lyons*, 461 U.S. at 102 (alterations in original) (quoting *O'Shea*, 414 U.S. at 496).

1. Hamilton Lacks Standing to Challenge the City's Ordinance.

The Complaint and Motion challenge the validity of two separate ordinances, promulgated by two different governmental entities, banning conversion therapy for minors—(1) the Ordinance, applicable only within City-limits (City's Exhibit 1, 5:16-20) and (2) the County's ordinance (DE 1-5), applicable throughout the County, unless a municipality within the County has "adopted an ordinance in conflict." DE 1-5, 6:6-8. Unlike Otto's allegation that he maintains a counseling practice in the City (Compl., ¶ 125), Hamilton makes no such claim. Rather, she merely alleges that she practices therapy "in Palm Beach County." Compl., ¶ 140. The Court also notes that Hamilton's factual allegations regarding the cause of her alleged injuries address only the County's ordinance and not the City's Ordinance (Compl., ¶¶ 155-161).

The record evidence shows that Hamilton does not practice in the City of Boca Raton – or indeed anywhere outside of Palm Beach Gardens. City's Exhibit 32, 34:22-37:25. Although Hamilton states "there would be occasions" where she might "want to be able to provide psychotherapy services" elsewhere (City's Exhibit 32, 329:24-330:2), the threat of prosecution of Hamilton as a result of the City's Ordinance is, at most, speculative. These allegations are

insufficient to establish Hamilton's standing to assert claims, let alone to impose a preliminary injunction, against the City. *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1329 (11th Cir. 2000).

Moreover, to the extent Hamilton now seeks to manufacture standing by filing a declaration stating she has seen a client within the City since the filing of the Complaint, her efforts fail. *See* DE 96-1. It is well-settled that "Article III standing must be determined as of the time at which the plaintiff's complaint is filed." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.2d 1263, 1275 (11th Cir. 2003) (internal citations omitted) (emphasis added); *see also Moyer v. Walt Disney World, Co.*, 146 F. Supp. 2d 1249, 1253 (M.D. Fla. 200) ("The existence of standing is determined as of the date suit is filed."); *Resnick v. Magical Cruise Co., Ltd.*, 148 F. Supp. 2d 1298, 1301 (M.D. Fla. 2001) ("The determination of whether a plaintiff has standing to bring suit is made as of the date the lawsuit is commenced"). "Belated efforts to bolster standing are futile." *Moyer*, 146 F. Supp. 2d at 1253. Thus, Hamilton's Declaration, filed in support of Plaintiffs' Reply (DE 96-1), in which she states she has begun treating clients in the City since filing of this litigation, is insufficient to confer her standing. Hamilton lacked standing to obtain relief against the City at the time Plaintiffs filed the Complaint, and Hamilton's claims against the City must, therefore, be dismissed.

2. Otto Lacks Standing to Challenge the City's Ordinance.

The prohibition contained in the Ordinance is very narrow: it only prohibits a provider from "practic[ing] conversion therapy on any individual who is a minor." City's Exhibit 1, 8:5-7. "Conversion therapy" is defined as "treatment performed with the goal of changing an individual's sexual orientation or gender identity." *Id.* at 6:10-14. Otto makes it crystal clear in his deposition testimony that he does not, and has no desire to, practice "conversion therapy." *See* City's Exhibit 31, 44:3-12; 44:25-45:13. In fact, he admits such a change is not possible. *Id.* Because Otto neither practices nor intends to conversion therapy, as defined by the Ordinance, he

has suffered no injury-in-fact and, therefore, lacks standing to pursue a preliminary injunction and his claims against the City.

3. Plaintiffs Lack Third-Party Standing to Challenge the City's Ordinance.

Plaintiffs allege in Count II that the Ordinance violates their minor clients' right to receive information under the First Amendment. However, generally speaking, "[i]t is a well-established tenet of standing that 'a litigant cannot rest a claim to relief on the legal rights or interests of third parties.'" *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 (3d Cir. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Courts will only recognize third-party standing if three criteria are satisfied:

> the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.'

Harris v. Evans, 20 F.3d 1118, 1121 (11th Cir. 1994) (quoting *Powers*, 499 U.S. at 411) ("*Powers* factors").

Courts have rejected therapists' attempts to assert third-party standing when challenging conversion therapy bans for minors (as the Court should here) because, *inter alia*, the therapist could not meet the third standing factor demonstrating that the minor clients "fac[ed] obstacles that would prevent them from pursuing their own claims." *King v. Christie*, 981 F. Supp. 2d 296, 312 (D.N.J. 2013); *see also Doe ex rel. Doe v. Governor of New* Jersey, 783 F.3d 150 (3d Cir. 2015) (affirming dismissal of First Amendment complaint by minor children regarding conversion therapy ban for failure to state a claim); *Pickup, et al. v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (affirming in part dismissal of conversion therapy ban lawsuit brought by both therapist and minor children) *abrogated on other grounds by Nat'l Inst. of Family and Life Advoc. v. Becerra*, 138 S. Ct. 2361 (2018).

Here, Plaintiffs have not presented any evidence in support of their efforts to obtain third-party standing, particularly where the therapists themselves lack first-party standing to pursue claims against the City. *See* Compl., ¶¶ 178-182; 203-211. Accordingly, Plaintiffs have not met the *Powers* factors. Specifically, there exists no apparent hindrance to the minor clients' ability to seek their own judicial relief and, therefore, Plaintiff's cannot obtain a preliminary injunction or assert third-party standing on behalf of their minor clients.

B. Substantial Likelihood of Success on the Merits.

The Court finds the Ordinance is a regulation of professional conduct, as opposed to a regulation of professional speech as Plaintiffs allege. The United States Supreme Court recently reaffirmed the ability of governments to "regulate professional conduct, even if that conduct incidentally involves speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*") (citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)); *accord Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992). "While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it . . . ." *Id.* (citing *Sorell v. IME Health Inc.*, 564 U.S. 552, 567 (2011)); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *U.S. v. Stevens*, 559 U.S. 460, 468 (2010)). A law may regulate speech, for example, "'as part of the practice of medicine, subject to reasonable licensing and regulation by the state.'" *Id.* (emphasis in original) (quoting *Casey*, 505 U.S. at 884).

Here, unlike the California statute at issue in *NIFLA*—which improperly compelled speech that was not "tied to a [medical] procedure at all"—the Court finds that Ordinance is expressly tied to a specific procedure (psychological conversion therapy), and does not compel any speech at all. *NIFLA*, 138 S. Ct. at 2374 (emphasis added). is the Ordinance bans therapists

from performing a specific, dangerous, and ineffective mental health procedure on minors. To dissect permissible or impermissible professional practices based on whether they require the practitioner to utter spoken words would lead to absurd results. Perhaps recognizing this, the *NIFLA* court expressly reaffirmed that regulation of professional conduct is constitutionally permissible. 138 S.Ct. at 2372 (stating"[s]tates may regulate professional conduct, even though that conduct incidentally involves speech."). Therefore, the *NIFLA* Court's focus upon, and rejection of, "professional speech" as a separate First Amendment category is not applicable to the Ordinance, which does not ban "professional speech" (or any speech for that matter).[3]

Moreover, regulations of conduct, rather than speech, do not implicate the First Amendment in general, or "viewpoint discrimination" contentions in particular. The Ordinance "regulates only treatment, and nothing . . . requires us to analyze a regulation of treatment in terms of content and viewpoint discrimination." *Pickup*, 740 F.3d at 1231. States and local governments routinely (and constitutionally) regulate professional conduct, and more specifically, medical treatments.[4]

1. The Rational Basis Test Applies Because the Ordinance Regulations Professional Conduct.[5]

---

[3] The Ordinance bans a mental health procedure, conversion therapy for minors, expressly found to be valid, constitutional regulation of conduct in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated on other grounds*, *NIFLA, supra* ; *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013), *aff'd* 767 F.3d 216 (3rd Cir. 2014), *abrogated on other grounds*, *NIFLA, supra*; and *Doe v. Christie*, 33 F. Supp. 3d 518 (D.N.J. 2014), *aff'd sub nom*, *Doe ex rel. Doe v. Governor of N.J.*, 783 F.3d 150, 155 (3d Cir. 2015).

[4] *See Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider."); *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) ("[T]he decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health.").

[5] The Court notes Plaintiffs' Motion seeks a preliminary injunction solely based on their contention that strict scrutiny is the applicable standard of review. In other words, Plaintiffs do not content that the City's Ordinance fails rational basis or heightened scrutiny.

The rational basis test is used to determine the constitutionality of regulations of professional conduct. *Lange-Kessler v. Dep't of Educ. of the State of New York*, 109 F.2d 137 (2d Cir. 1997) (finding that regulation of the medical profession is afforded rational basis review). "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). Under this standard, a statute comes to the court bearing "a strong presumption of validity." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). A state is under no obligation to produce evidence supporting the rationality of the legislation and, indeed, the legislature need not even have actually been motivated by the rational reason presented to the court when it enacted the challenged law. *Beach Commc'ns,* 508 U.S. at 314–15; *Leib,* 558 F.3d at 1306. Rather, the challenger bears "the burden to negative every conceivable basis which might support [the law]." *Beach Commc'ns,* 508 U.S. at 315; *Williams,* 240 F.3d at 948. "Only in an exceptional circumstance will a statute not be rationally related to a legitimate government interest and be found unconstitutional under rational basis scrutiny." *Williams,* 240 F.3d at 948.

Here, the Court finds that the City has the power to regulate the particular conduct in question. Neither the Florida Constitution nor Florida statutes preempt the City's authority to legislate mental health treatments and the conduct of mental health professionals. *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."). The

City clearly has a legitimate—even compelling—interest in the health and safety of its minor residents, which Supreme Court has acknowledged. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.").

Second, the Court find that the Ordinance is rationally related to this government interest by banning conversion therapy for minors—a procedure which scores of medical and mental health organizations have found to be harmful—within the City.[6] *See* City's Exhibit 1, 1:11-5:20; 7:4-7; City's Exhibits 2-11.[7] The Court also recognizes that the Ordinance does not preclude Plaintiffs or any other mental health professional from voicing their sincerely held religious beliefs or candidly expressing their disdain for homosexuality. What it does preclude, however, is professional counseling with the goal of changing a minor's sexual orientation or gender identity. Ordinance, 6:10-19. Like the statute at issue in *Pickup*, the Ordinance "bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients. [The law] merely prohibits licensed mental health providers from engaging in SOCE with minors." *Pickup*, 740 F.3d at 1229.[8]

---

[6] In fact, intransient nature of homosexuality has even been judicially recognized by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (noting that "in more recent years [] psychiatrists and others recognize[] that sexual orientation is both a normal expression of human sexuality and immutable") (emphasis added).

[7] The Court also notes the several studies cited in the amicus briefs in opposition to Plaintiffs' preliminary injunction motion, filed by The Trevor Project (DE 90) and Equality Florida (DE 91). These studies note the distressing effects that conversion therapy has on minors, including increase suicide rates, substance of abuse, anxiety, and depression.

[8] *See also Casey*, 505 U.S. at 884 ("All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated [], but only as part of the practice of medicine, subject to reasonable licensing and regulation

Accordingly, the Court finds that Ordinance meets the rational basis test as rationally-related regulation of a mental health procedure for the health and safety of minors and that Plaintiffs have failed to show a likelihood of success on the merits on their viewpoint discrimination based on the evidence before the Court.

2. Plaintiffs Have Not Shown the Ordinance Discriminates on the Basis of Content.

The Motion's contention that the Ordinance constitutes a content-based speech restriction suffers the same fate as does its earlier contention that the Ordinance discriminates against speech on the basis of viewpoint: since the Ordinance regulates conduct, rather than speech, no First Amendment scrutiny at all is required, and the Ordinance is easily justified because it is supported by a rational basis.[9] *See* Section I(B)(1), *supra.*

3. The Ordinance Is Not Preempted by Florida Law.

The Motion alleges that the City's enactment of the Ordinance was *ultra vires* and in violation of Article VIII, § 2(b),[10] of the Florida Constitution and § 166.021, Florida Statutes.[11] Florida is a home rule state, and the Florida Constitution explicitly authorizes municipalities to "exercise any power for municipal purposes except as otherwise provided by Florida law." Fla.

---

by the State []. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here" (internal citations omitted).

[9] Plaintiffs' Motion also asserts the City's Ordinance is unconstitutionally vague, however, Plaintiffs' Reply fails to address this argument, which the Court deems abandoned. Even assuming, *arguendo*, Plaintiffs have not dropped their vagueness challenge, this claim nonetheless fails. Plaintiffs are individuals with specialized knowledge of the terms of art within their profession and clearly understand what the Ordinance prohibits. *See* Compl., ¶¶ 126, 142; *see U.S. v. Weitzenhoff*, 35 F.3d 1275, 1289 (9 Cir. 1993) (stating the standard for vagueness is lowered with respect to challenged phraseology indigenous to persons with specialized knowledge). Plaintiffs have, therefore, failed to demonstrate a likelihood of success on their vagueness challenged to merit a preliminary injunction of the City's Ordinance.

[10] Article VIII, § 2(b) authorizes municipal home rule, allowing municipalities to "exercise any power for municipal purposes except as otherwise provided by law." Art. VIII, § 2(b), Fla. Const.

[11] Section 166.021, Fla. Stat., recognizes that "the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except . . . [a]ny subject expressly prohibited by the constitution [and] . . . [a]ny subject expressly preempted to state or county government by the constitution or by general law." § 166.021, Fla. Stat.

Const. Art. 8 § 2(b). Plaintiffs have not met their burden on this argument, and the Court finds the Ordinance is neither expressly or impliedly preempted.

a. Express Preemption.

Plaintiffs have not shown that the City's Ordinance is expressly preempted. Express preemption requires a specific legislative statement that cannot be implied or inferred and must be accomplished by clear language stating an intended preemption. *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010); *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006). "[T]he legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act" except "[a]ny subject expressly prohibit by the constitution" or "[a]ny subject expressly preempted to state or county government by the constitution or by general law." § 166.021(3)(b)-(c), Fla. Stat.

Plaintiffs' Motion fails to cite any legislative action expressly preempting municipalities from enacting ordinances prohibiting conversion therapy for minors. To the extent Plaintiffs reply on § 491, Title XXXII, Fla. Stat., or Section 64B4-5.001, Fla. Admin. Code, as a source of "express" preemption, neither law expressly preempts regulation of mental health professionals by local government.[12] *See* Compl., ¶ 275; §§ 491.002-16, Fla. Stat.; § 64B4-5.001, Fla. Admin. Code.[13] Accordingly, Florida law does not expressly preempt the Ordinance.[14]

---

[12] The Complaint incorrectly refers to "Fla. Admin. Code. Ann r. 64B-5001," a rule that does not exist. Compl., ¶¶ 275-278. Rather, Section 64B4-5.001 provides the disciplinary guidelines for professionals licensed pursuant to § 491.002, Fla. Stat.

[13] Section 491 merely regulates the licensing scheme for mental health professionals, "establishing minimum qualifications for entering into and remaining in" this field, and Section 64B4-5.001 of Florida's Administrative Code codifies the disciplinary scheme for violations of Section 491. §§ 491.002-16, Fla. Stat.; § 64B4-5.001, Fla. Admin. Code.

[14] Moreover, Plaintiffs' passing reference to proposed legislation in the Florida Legislature is merely a red herring. Compl., ¶ 278. Whether the Legislature considered legislation relating to conversion therapy in the past is of no consequence here, nor is the Florida Legislature the sole regulator of mental health providers in Florida, based on the plain language Chapter 491, Title XXXII, Fla. Stat., as Plaintiffs incorrectly claim in Paragraph 278. Compl., ¶ 278.

b. Implied Preemption.

The Court finds that the City's Ordinance is not impliedly preempted by Florida law, specifically, Chapter 491, Florida Statutes, or Section 456.003, Florida Statutes. Implied preemption occurs when "the legislative scheme is so pervasive as to virtually 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." *D'Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017); *Browning*, 28 So. 3d at 886. In determining if implied preemption applies, the court must look 'to the provisions of the whole law, and to its object and policy.'" *Browning*, 28 So. 3d at 886 (quoting *State v. Harden*, 938 So. 2d 486, 489 (Fla. 2006)). Findings of implied preemption are generally "disfavored," and courts "must be careful and mindful in attempting to impute intent to the Legislature to preclude a local elected governing body from exercising its home rule powers." *D'Agastino*, 220 So. 3d at 421, 423; *see also Exile v. Miami-Dade Cty.*, 35 So. 3d 118, 119 (Fla. Dist. Ct. App. 2010) (noting the "severely restricted and strongly disfavored doctrine of implied preemption"); *Randolph v. Family Network on Disabilities of Fla., Inc.*, No. 4:11-cv-555-RS-WCS, 2012 WL 71719 (M.D. Fla. Jan. 10, 2012) (upholding ordinance prohibiting discrimination based on sexual orientation and finding no implied preemption). *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 (Fla. Dist. Ct. App. 2005) ("Florida courts are reluctant to conclude that a municipality is preempted from exercising its local powers in the absence of an express exemption, particularly in light of the ease with which the Florida Legislature can expressly preempt a local authority if intended.") (citations omitted).

The intent of Chapter 491 is merely to "establish[] minimum qualification for entering into and remaining in the respective [mental health] professions"—clearly a licensing regulation

detailing the requirements to obtain certain professional titles and specializations. § 491.002, Fla. Stat. The types of therapy that a professional licensed pursuant to Chapter 491 may offer to minors is not regulated; Chapter 491 merely enumerates the qualifications required to provide such therapies. The Court finds, therefore, that the regulation of conversion therapy for minors is clearly not an area impliedly preempted to the state.[15]

Plaintiffs also reply on Section 456.003, Fla. Stat., which outlines the legislative intent for Florida's professional regulation statutes, provides that the state may regulate professions for the preservation of health, safety, and welfare of the public when "[t]he public is not effectively protected by other means [such as] local ordinances." § 456.003(2)(b), Fla. Stat. Both the precedential case law and Florida's statutes shows that municipalities can and should regulate professions when appropriate, as the City has done in the Ordinance. Because neither the Florida Constitution nor general law addresses the mental health procedure of conversion therapy, there is no basis Plaintiffs' claim that Florida law impliedly preempts the Ordinance.

C. Irreparable Harm.

Plaintiffs have not carried their burden of establishing that they are likely to suffer irreparable harm in the absence of preliminary relief, particularly due to their lack of standing.[16] *See, supra*, Section III(A). Moreover, Plaintiffs are incapable of establishing irreparable harm because, *inter alia*, the Ordinance (1) does not prevent them from speaking to the public about SOCE; (2) does not prevent them from expressing their views to their patients; (3) does not

---

[15] To wit, the Supreme Court has recognized that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cty. v. Automated Med Labs Inc.*, 471 U.S. 707, 716 (1985) (emphasis in original); *see also Craig v. Boren*, 97 S. Ct. 451, 458 (1976) ("[T]he protection of public health and safety represents an important function of state and local governments.").

[16] Moreover, the claim for monetary damages, by its very nature, belies a claim of irreparable harm. *Ferrero v. Associated Materials, Inc,*, 923 F.2d 1441, 1449 (11th Cir. 1991).

prevent them from administering SOCE to their adult clients; and (4) does not prevent them from referring minor clients to religious leaders. *See* City's Exhibit 1, 4:21-5:2.

Finally, Plaintiffs' delay of approximately eight months before challenging the Ordinance dictates against a finding of irreparable harm. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months – though not necessarily fatal – militates against a finding of irreparable harm . . . . Indeed, the very idea of a *preliminary* injunction is premised on the need for speedy and urgent action to protest a plaintiff's rights before a case can be resolved on the merits") (emphasis in original); *see also Compulife Software, Inc. v. Newman*, No. 16-cv-81942-RLR, 2017 WL 2537357 (S.D. Fla. June 12, 2017) (finding a three-month delay in seeking a preliminary injunction demonstrated the lack of irreparable harm).

D. Balance of Hardships and Public Interest.

Because Plaintiffs have failed to establish their standing, likelihood of success on the merits, or irreparable injury, Plaintiffs are not entitled to preliminary injunctive relief. Thus, the Court need not consider whether the alleged, threatened injury to Plaintiffs outweighs whatever damages the proposed inunction may cause the City or whether the injunction would be adverse to the public interest. Nonetheless, the record is clear that the balance of hardships, and consideration of public interest, clearly outweigh any threatened injuries to Plaintiffs if the injunction is not issued. The Ordinance identifies numerous medical and mental health organizations that have found that SOCE poses a serious threat to health and well-being of the affected persons, and many such organizations have also concluded that there is a lack of credible evidence that such therapy is effective. *See* City's Exhibits 1-11. In contrast, the alleged infringement on Plaintiffs' purported rights is exceedingly narrow: on one activity (trying

to change a sexual orientation; while otherwise allowing the "expressi[on of] their views to patients"); in one forum (a counseling office); and with one particular client (a minor).

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Plaintiffs' Complaint (DE 1) is **DISMISSED** against Defendant, City of Boca Raton for lack of subject matter jurisdiction. Plaintiffs' Motion for Preliminary Injunction (DE 8) is **DENIED** as moot.

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this ___ day of October, 2018.

Copies furnished to:
Counsel of record

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE