UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 18-CV-80771-ROSENBERG

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 COUNTY of PALM BEACH, FLORIDA,

Defendants.

West Palm Beach, FL
October 18, 2018

PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Official Court Reporter:	Pauline A. Stipes Fort Pierce/West Palm Beach 772-467-2337 Official Federal Reporter HON. ROBIN L. ROSENBERG

THE COURT: Good morning, you may be seated. Okay, good morning, everyone.

We are here in the matter of Robert W. Otto, Ph.D., LMFT, individually and on behalf of his patients, and Julie H. Hamilton, Ph.D., LMFT, individually and on behalf of her patients, versus the City of Boca Raton, Florida and the County of Palm Beach, Florida, and the case number is 18-CV-80771.

We are here today for a hearing on Plaintiff's motion for preliminary injunction. The filings related to the preliminary injunction motion include the motion itself at Docket Entry 8, Boca Raton's response to the motion for preliminary injunction, Docket Entry 83, Palm Beach County's response at Docket Entry 85, the Plaintiff's reply to the responses on the preliminary injunction motion, Docket Entry 95.

The Court has received and reviewed the Amicus Brief from The Trevor Project at Docket Entry 90, and the Amicus Brief from Equality Florida Institute at Docket Entry 91, and the Amicus brief from Alliance. At the Plaintiff's request, Plaintiff submitted proposed findings of fact and conclusions of law pre-hearing, and I will be asking for those following the hearing as well. That is something we want to take up at a date that everyone agrees is acceptable to submit post hearing findings of fact and conclusions of law.

The Court has received Boca Raton's findings of fact

and conclusions of law, Palm Beach County's findings of fact and conclusions of law, the exhibit list from Boca Raton and Palm Beach County.

There are other things not being taken up today, notably, Boca Raton's motion to dismiss at Docket Entry 34, Palm Beach County's motion to dismiss, Docket Entry 39, the Plaintiffs' consolidated response at Docket Entry 62, and the Defendant's replies on the motion to dismiss, Boca Raton's reply, Docket Entry 84, and Palm Beach County's reply, Docket Entry 82. And there is the Plaintiff's verified Complaint, Docket Entry 1, with the exhibits.

So, with that background of why we are here today, let's see who is here today.

If we could have appearances by counsel and anyone at counsels' table.

MR. MIHET: Good morning, Horatio Mihet on behalf of the Plaintiffs, and with me is Roger Gannam, and seated at the table themselves are Dr. Robert Otto and Dr. Julie Hamilton.

THE COURT: Good morning.

MS. FAHEY: On behalf of Palm Beach County, Rachel Fahey, with Kim Phan, and seated at the table supporting us with our exhibits is our paralegal, Melanie Cullen.

MR. ABBOTT: Good morning, Dan Abbott and Anne Flanigan for the City of Boca Raton.

THE COURT: Good morning, everyone.

With the exhibit lists, I know you submitted them, shall I rely upon those or did you bring extra copies? If not, I have them. They are on the appropriate AO Form, so I thank you for that, and I think they were submitted at Docket Entry 105 and 106, but presumably --

MR. MIHET: And 104, your Honor.

THE COURT: And 104. Is that the Plaintiffs' 104?

MR. GANNAM: Plaintiffs' are 105, your Honor.

THE COURT: What I have right here, maybe somebody has an extra -- no, I have it, I have 104, 105, and 106.

So, I suppose, just so I am clear whose is whose, you said the Plaintiffs' is --

MR. MIHET: 105. The city's is 104.

THE COURT: The city's is 104.

MR. MIHET: And the County's is 106.

THE COURT: All right. And you have all of your exhibits premarked?

MR. MIHET: Yes, your Honor.

THE COURT: Okay.

MR. MIHET: We have them on the thumb drive if the Court would like those now or later.

THE COURT: Does everyone have them on the thumb drive?

Let's talk about what makes sense in terms of an orderly presentation. I assume, because the technology is

already set up, PowerPoints ready to go, you have certain agendas on how you want to present. I have an agenda as well, I am sure they can be compatible agendas.

Let me hear first from counsel how you envisioned making your presentation, and maybe you conferred with Defense. And in addition to explaining the manner of making your presentation, have you accounted for what amount of time you think it will take to make your presentation?

It is my understanding nobody is seeking -- I won't say it is not an evidentiary hearing, I suppose it is in the sense that presumably there will be exhibits admitted, but I haven't understood there to be witnesses being called to testify, correct me if I am wrong, but rather more an emphasis on legal argument.

From the Plaintiff?

MR. MIHET: Yes, your Honor. We have foregone the option to bring forth live evidence for the Court this morning, however, we do need and intend to walk the Court through the relevant parts of the voluminous record the parties have established during the PI discovery phase of this case.

With the Court's indulgence, my colleague, Mr. Gannam, and I would take approximately two hours to walk the Court through the Plaintiff's case for a preliminary injunction, that is the evidence and the law, and we propose to do that first this morning and have a brief time for rebuttal at the end of

the day after our colleagues have an opportunity to state their cases.

We have attempted, and believe succeeded, to streamline the proceeding and save a lot of the Court's time. I think the Court initially reserved two days for the hearing.

THE COURT: Well, that was just to be nice, letting you know there was an overflow day. I fully anticipate, and it sounds like you agree, this should be done in a day.

MR. MIHET: We certainly do, only to say it would take some time for us to walk through the record, but we will be efficient and speedy.

THE COURT: You believe two hours is what you need for your presentation?

MR. MIHET: Approximately.

THE COURT: That would encompass perhaps questions I may have, so you will weave in those answers as part of your presentation.

MR. MIHET: Yes, your Honor.

We'll certainly answer any questions the Court may have, but we do have a PowerPoint. In my mind I have an idea how I want the proceeding to go, but your Honor is in charge.

THE COURT: As I am sure it is very compatible, we all know what the key issues are, although I know there are nuances, but there are key legal issues that comprise the nature of this case and, of course, there are the facts that

the Court must ensure it understands.

And from the Defense, first from the county.

MS. FAHEY: The county similarly has a lengthy presentation, I imagine the same time, 90 minutes to two hours to get through that presentation. Ms. Phan and I will be splitting that presentation.

THE COURT: From the city.

MS. ABEL: Good morning. We do not have a PowerPoint presentation, we had planned to answer any questions the Court has and plan to rebut the presentations before us. Whatever time allocations work for the Court, we will work with them.

THE COURT: Is there anybody here on behalf of the entities that filed the Amicus Brief, the three Amicus Briefs? Maybe state your appearance for the record at a minimum.

MS. DUNLAP: Erin Dunlap and Jennifer Yasko. We just wanted to submit the briefs, we will not make any presentation.

THE COURT: Okay, I did receive them. Thank you for that.

Well, let's see, I have gone over a lot of what I wanted to say initially. As I indicated, I do have an outline of topics I want to make sure we cover. I have no doubt that in two hours the two sides indicated they want you have covered the topics, maybe not answer the questions I may have. I may jump in when you get to a topic that I want to talk about and let it flow that way so you can proceed with the PowerPoint

presentations rather than start off with a series of questions I have.

I do think that each counsel should come to the podium when you give your presentation, and I understand we are working on technology issues with Defense. Hopefully when Ricardo gets here we can resolve that. You have a couple of hours to work that out if the Plaintiff is going to go first, which the Plaintiff will.

And, let's see, I think that that is it. Given you have your presentations, I am not going to jump in yet with my series of questions. Don't be surprised when you get to topics, or I see you haven't gotten to a topic that I want you to address, I might politely interrupt and let you know what I would like to hear more about in the course of your presentation.

So, with that, let's turn it over to the Plaintiff.

Now, you said two hours, I am going to put a clock on.

Do you want any kind of a notice of how your time is? Kind of like a real trial and examination or closing argument or opening statement.

MR. MIHET: Your Honor, if I had known the Court would clock us, I would have said two hours and 15 minutes.

THE COURT: The clocking means I will let you know. I will not tell you that you need to sit down, it becomes a way of managing and controlling the day.

MR. MIHET: My goal is to go about 90 or a hundred minutes myself and allow my colleague 20 or 30 minutes to cover a couple of distinct topics for the Court.

THE COURT: All right. Why don't I maybe give you a warning at 60, so you know when an hour has gone by, and you will know where you stand.

MR. MIHET: Thank you.

THE COURT: I will let you come to the podium. I won't start the clock until you are there, and making sure your technology works, and tell me when you are ready.

Now, when I am looking down at my computer and iPad, don't think I am not listening, I take notes and do research and do a lot of things here. If my eyes are not always looking at you, please know it is not that I am not paying attention.

You may proceed.

MR. MIHET: May it please the Court.

We are here this morning because the City of Boca Raton and County of Palm Beach have figuratively invaded the offices of Dr. Hamilton and Dr. Otto and banned what they are saying to their Defendants -- clients who have sought them out and gone there voluntarily and want to hear what the doctors have to say to them.

The Government and Defendants lack the constitutionally required impelling interest for their profound intrusion on Plaintiff's speech, and they have failed to

narrowly tailor it through outright bans. Because they cannot prove the ordinance is strict scrutiny, we would ask the Court to enjoin these ordinances and liberty to provide the counseling that Plaintiffs wish to provide and the kind that the ordinances ban.

THE COURT: You are going to start with the factual context rather than the law?

MR. MIHET: Correct. The law bans all SOCE related behaviors and expressions. Be that as it may, it is critical for the Court to understand at the outset there are in fact two fundamental differences and distinctions among the types of sexual orientation and gender identity change efforts which the Government and the Defendants never even considered before they enacted their bans.

What we have first, your Honor, is aversive and non-aversive change efforts.

Aversive therapy is conduct based therapy where aversive or negative stimuli or stimulus is paired with undesirable behavior in an attempt to reduce or eliminate that behavior.

Now, the APA, American Psychological Association, in its 2009 task force report on appropriate therapeutic responses to sexual orientation -- and we are going to hear a lot about the APA report today. I will refer to it as the APA report, it is Exhibit 14 out of the County's exhibits, your Honor.

On page 22, the APA report provides some examples of aversive therapy referring back to the 1960's. The APA says on page 22, "Behavior therapists tried a variety of aversion treatments such as inducing nausea, vomiting, or paralysis; providing electric shocks, or having the individual snap an elastic band around the wrist."

Your Honor, those are aversive techniques.

On the other hand, we have non-aversive therapy, which is talk therapy, which is carried out entirely and exclusively through speech. Clients talk, therapists listen and empathize and ask questions, and they talk the clients through whatever goals the clients have set for themselves.

The evidence in this case is undisputed that Dr. Otto and Dr. Hamilton do not provide aversive therapy, do not wish to provide aversive therapy, and do not know of anyone who provides aversive therapy in the entire world, let alone Palm Beach County.

If the Defendants had banned only aversive therapy, your Honor, we wouldn't be here this morning.

The second fundamental distinction the ordinances ignore is between voluntary and forced or coerced therapy.

The APA report on page 71 talks about involuntary and coercive treatments in which minors are or might be forced to undergo treatment against their will. Page 71, especially in the footnotes, APA provides definitions of what involuntary and

coercive treatments are.

The APA contrasts this with voluntary counseling where a patients seeks, requests, and willingly receives the therapy, and the APA encourages counselors and therapists to respect and observe the autonomy of the clients, even minor clients, to direct their own counseling. That is pages 74 through 77 of the APA report.

Once again, in this case, the evidence is undisputed that Dr. Hamilton and Dr. Otto only provide voluntary therapy which their clients seek, request, and willingly receive. They would never force any therapy, including SOCE therapy, on any patient who does not wish to be engaged and participate voluntarily in the process.

If the Plaintiffs banned only involuntary coerced therapy where parents or somebody else forces minors to undergo therapy against their will, we wouldn't be here this morning, your Honor.

Now, since we know and we are clear about what Plaintiffs do not want to do, what is it that they do want to do, but are prohibited from doing by the ordinance?

We look at the verified Complaint. I point out that for purposes of the preliminary injunction, the city has admitted all of the factual allegations in the verified Complaint, we know that from footnote 5 in the city's opposition, Docket Entry 3. The county has not admitted the

facts, but have not introduced any evidence to controvert the facts. Paragraphs 71 through 82, and 1.2 through 161 lists out what it is that Plaintiffs want to provide.

They want to provide only non-aversive talk therapy exclusively through speech. They want to provide counseling to minor clients who seek, request, and voluntarily assent to talking with the Plaintiffs. They don't impose their own pre-conceived goals and desires on any client. They conduct only client centered, client directed counseling, and only seek to assist their clients with the client's own goals that they set for themselves.

Now, for some clients those goals do include wishing to change unwanted same-sex attractions or gender identity confusion, or to conform their behavior through a true concept of themselves or moral and religious convictions.

Now, with respect to the ordinances, as already indicated, they do not draw any distinction between voluntary or coerced counseling or between aversive and non-aversive therapy. They indiscriminately impose a total ban on all sexual orientation and gender attached counseling. More importantly, whose goal it is to discuss sex change or gender identity.

SOCE is the short term that is used in the critical language. It is illegal if the intent to change is on the part of the counselor, the Plaintiffs, but -- and this is

critical -- it is also illegal if the intent to change is on the part of the client, the patient, and the counselor is merely seeking to assist and facilitate with the client's own goal to change.

In the black letter of the two ordinances they talk about the goal to change and do not differentiate whose goal it is, but we also know that because we asked the Defendants at their 30(b)(6) depositions. They designated someone to tell us how the Defendants themselves interpret and apply these ordinances, and we asked them about this.

I want to show the Court, this is from the city's 30(b)(6) deposition. The city's 30(b)(6) deposition, this is starting at page 157, line ten, and going through 158, 13.

"Question: Whose intent does the code enforcement officer have to look at; the minor's, or the therapist's or both?"

THE COURT: Let me stop you. From a procedural standpoint, you're showing experts from the deposition. Has the deposition been filed or are you intending to file the deposition as evidence?

MR. MIHET: It has been filed, all depositions and deposition exhibits are in the docket.

THE COURT: You contemplate that would be part of the record as part of the preliminary injunction?

MR. MIHET: Yes.

THE COURT: Does the Government have the same understanding?

MS. FAHEY: Yes.

MR. ABBOTT: We do.

THE COURT: All right.

MR. MIHET: "Answer: I think it's a ban on therapists. It's not governing the youth. It's governing the therapist's activities.

"Question: Okay. So if a minor shows up and the minor has the intent of changing their sexual orientation or gender identity, but the therapist engages in counseling, practice or treatment, and the therapist doesn't share that intent, then that would not be a violation of the ordinance?

"Answer: I think it would. I think that if the therapist treats -- if the practice is gender identity conversion or sexual orientation conversion, whether or not it's prompted by the parents, by the therapists, by the child themselves, that is banned by the ordinance.

"Question: Okay.

"Answer" That's my understanding.

"Question: Okay. And just so we are clear then, if the minor wishes to receive this type of counseling and the therapist wishes to provide the minor with that the minor -- I am sorry -- provide the minor with that which the minor seeks, which is to assist the minor with the minor's goals, if those

goals are to change sexual orientation or gender identity, then that would be prohibited by the ordinance?

"Answer: That's my understanding, yes."

That is the city's testimony. I would like to show the County's similar testimony. This is from the Hvizd deposition, page 268, line 14, going to page 269, line five.

THE COURT: What name?

MR. MIHET: Hvizd, H-V-I-Z-D. This is the county's representative on the topic of how the county interprets and applies the ordinance.

THE COURT: The page and line?

MR. MIHET: 268, line 14 to 269, line 25.

"Question: What about an adolescent who was born female, but has been identifying as a male for a time? If that minor seeks therapeutic help in changing gender identity behaviors and expressions back to match her biological body, would the ordinance prohibit a therapist from providing talk therapy to assist with that identity change?

"Answer: If the practice seeks to change the individual's gender identity, that would be conversion therapy, and that would be prohibited."

Moving on to page 269.

"Question: If the adolescent's intent is to change the gender identity back to female and the therapist assists the adolescent with that goal, that would be prohibited

by the ordinance?

"Answer: Yes. If the practice does seek to change the adolescent's gender identity, that is within the definition of conversion therapy."

Question, line 12: "And it doesn't matter who seeks to change the gender identity if -- whether it is the child or the therapist, correct?

"Answer: I don't know that I would say it doesn't matter.

"Question: Well, if the child seeks to change the gender identity or sexual orientation, for that matter, and the therapist engages in talk therapy to assist with that goal, that would be a violation of the ordinance?

"Answer: I think the question would then -- yes, that would be a violation of the ordinance."

Your Honor, the Defendants, especially the city, seek to make much of the fact that Dr. Otto has testified that he, himself, cannot change anyone and that he, himself, doesn't try to change someone, so they conclude disingenuously that he is not affected by the ordinance.

However, both Dr. Otto and Dr. Hamilton have clearly testified in the verified complaint and at their depositions that they want to help their clients with the clients' own goals, and sometimes those goals include changing gender identity or sexual orientation or change related behaviors or

expressions.

Quite clearly by the letter of the ordinances themselves and the testimony of the Defendants' witnesses as to how they interpret the ordinances they ban change counseling even when intended and initiated by the clients themselves and assisted by the Plaintiffs.

Now, a few words on the relative burdens in this case, burdens of proof.

In our briefs and in the proposed order at paragraph 72, we show that a pair of Supreme Court cases, Gonzalez and Ashcroft, dictate that the burden of proof at the preliminary injunction stage tracks the burden of proof at trial, and so, it is the Government Defendants, not Plaintiffs, who bear the burden today of proving compelling interests and narrow tailoring, among other First Amendment elements, because it is the Government Defendants who bear those burdens at trial.

So, your Honor, this is critical, it isn't Plaintiff's burden to demonstrate that voluntary SOCE counseling is effective, and not their burden to demonstrate that SOCE counseling is not harmful. Instead, it is the Defendants who bear the burden to prove that actual, not conjectural or hypothetical, harm is caused by voluntary SOCE counseling.

THE COURT: Let me inject, then, as long as we are talking about burdens of proof, this is related to the topic, not squarely on the issues you have addressed, which is the

Governmental interest and the way the Governmental action is tailored or arguably, in your point of view, not tailored.

There is a standard of the Plaintiff having to prove four prongs, one of which is substantial likelihood of success on the merits. It is well established that a party seeking a preliminary injunction must first establish a substantial likelihood of success on the merits. However, from the briefing, the Court did not discern any direct arguments regarding the meaning of the standard "substantial likelihood of success on the merits."

Maybe we take this for granted because we see the language used in preliminary injunctions, but that is one of the four prongs, an important prong, and one that the Plaintiff, the movant, bears the burden of establishing.

So, the Court is interested in learning in this case now the parties' understanding of this standard.

From the Court's own research, the Eleventh Circuit has stated that "in our opinion the word substantial does not add to the quantum of proof required to show a likelihood of success sees on the merits and the word likelihood is synonymous with probability. Citing to Shatel Corporation versus Mao Ta Lumber and Yacht Corporation, 697 F.2d 1352, at 1355, Footnote 2, Eleventh Circuit, 1983.

The Court concluded in that case that even though the District Court had not included the word "substantial" in its

conclusions of law, such an omission, even if an error, was harmless.

Based on this Eleventh Circuit precedent, what level of likelihood or proof does the Court need to find to grant or deny preliminary injunction? Put another way, can the Plaintiff analogize this standard to another legal standard, such as preponderance of the evidence or clear and convincing? On the spectrum of legal certainty, where does "substantial likelihood" fall?

MR. MIHET: I would be in agreement with the case you read from. Substantial does not add to the quantum of proof for the Plaintiff to succeed at the preliminary injunction stage. If the burden at trial is preponderance of evidence, which it is, the same burden would apply at the preliminary injunction stage, particularly in a First Amendment context, I am in agreement with the standard the Court read, preponderance of the evidence, more likely than not.

I would emphasize that even though the Plaintiffs have the burden of proving likelihood of ultimate success on the merits, within that analysis, where the Court has to engage on the First Amendment inquiries, it is the Defendants who bear the burden of showing compelling interests and narrow tailoring.

The burden shifts back and forth. I hope the two Supreme Court cases make that clear to the Court.

Now, in our briefs and proposed order, paragraphs 73 to 75, we pointed to five Supreme Court cases, Janus, Turner Broadcasting, Edenfield, Landmark and Sable Communications, and one Eleventh Circuit case, Mason, which together established that the Defendants must discharge their burden with concrete evidence or studies that demonstrate that the seek to ban causes the purported harms they fear.

They need to establish much more than hypothetical conjecture that there might be some harm relationship between the banned speech and the feared harm.

In other words, because this is a First Amendment case and we are dealing with a restriction on speech, the Defendants cannot discharge their burden by pleading for legislative deference or claiming that SOCE is harmful, or stating that other organizations have found or concluded that SOCE is harmful.

Instead, what the cases teach is the Defendants must bring forth concrete evidence or studies that demonstrate that voluntary non-aversive SOCE counseling, the counseling that they banned these Plaintiffs from doing, causes sufficiently great harm to justify their complete and outright ban.

Now, before we show the Court how Defendants have utterly failed to meet their burden of proof on compelling interest and narrow tailoring, I want to spend a few minutes on the Defendants' attempt to avoid strict scrutiny or any

scrutiny by arguing the only thing the ordinance is prohibiting is professional conduct, not speech.

To dispose of the Defendant's principal argument, this is their principal defense, your Honor, their ordinances regulate professional conduct and are therefore not subject to scrutiny, the Court need look no further than the Defendant's own authority, King versus New Jersey.

King involved a SOCE ban that is virtually identical to the ones before this Court, and Defendants, as your Honor has seen in their briefs, are quite fond of King. They cited it as their principal justification in their ordinances, and they rely on it and also use it as the chief legal authority in this case, and yet King spends a great deal of time picking apart and eviscerating the Defendants' argument that the ordinances ban only conduct.

I have a few excerpts from King. This one is from page 224.

"The parties agree that modern day SOCE therapy, and that practiced by Plaintiffs in this case, is talk therapy that is administered wholly through verbal communication." That is true in King, and that is true here, your Honor.

Going back in, "Though verbal communication is the quintessential form of speech as that term is commonly understood, Defendants argue that these particular communications are conduct and not speech for purposes of the

First Amendment because they are merely the tool employed by therapists to administer treatment. Thus, the question we confront is whether verbal communications become conduct when they are used as a vehicle for mental health treatment."

If that argument sounds familiar, it is the exact same argument that the Defendants are bringing to this Court today.

The Third Circuit said, this is page 224 and 225, "We hold that these communications are speech for purposes of the First Amendment. Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized the verbal or written communications as conduct based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in Holder versus Humanitarian Law Project."

Also on page 225, the Third Circuit says, "Given the Supreme Court had no difficulty characterizing legal counseling as speech, we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are conduct.

The SOCE counseling they were looking at in King is virtually the same as what we have here.

And then pages 228 and 229, the Third Circuit provides conclusions: "To classify some communications as speech and others as conduct is to engage in nothing more than a labeling game." They go on and say, "Simply put, speech is speech, and

it must be analyzed as such for the purpose of the First Amendment."

And then they say, "We conclude that the verbal communications that occur during SOCE counseling are not conduct, but rather speech for purposes of the First Amendment.

Your Honor, I spent some time here only because King is their case, your Honor, they rely on it so heavily, and yet king --

THE COURT: The outcome ultimately was favorable to their position, so maybe their reliance upon that is perhaps in part -- mainly on the outcome, but I recognize that the argument that has been put forth by the Defendants in part relating to conduct versus speech has been addressed by King. I am familiar with King and I am further reminded of the principle.

MR. MIHET: That leaves the Defendant with no authority to support their contention. They have Pickup, and the Eleventh Circuit in Wollschlaeger avowed that Pickup -- I will get to that.

Now, before I get into what King got wrong or veered off the path, the thing they got right is to conclude that the SOCE ban there, and therefore here with the nearly identical ordinances, discriminates on the basis of content. That is on page 236 of the King opinion.

The Third Circuit says, "We agree with Plaintiffs that

A3371" -- that was the SOCE ban -- "discriminates on the basis of content. They don't even say it was a close call. They say, "We have little doubt in this conclusion." They say the law there, as here, bans what Plaintiffs want to say based on the content of what it is that they are saying.

THE COURT: So, let me pick up there. There was one line of questioning I had. It relates to a determination that this Court will need to make presumably, whether the ordinances at issue are viewpoint neutral or not.

It is my understanding that the Plaintiff is arguing that the ordinances are viewpoint discriminatory.

MR. MIHET: Yep.

THE COURT: But the Court wants clarity about precisely what aspects of the law are not viewpoint neutral.

If we take the Boca Raton ordinance for starters -- let me pull that up -- and we go to Section 9-105, definitions, in the very first sentence, quoting definitions, "Conversion therapy or reparative therapy means, interchangeably, any counseling, practice, or treatment performed with the goal of changing an individual's sexual orientation or gender identity.

Is there anything in that first sentence that you are arguing on behalf of your clients is viewpoint discriminatory.

MR. MIHET: Yes, your Honor.

THE COURT: What is that?

MR. MIHET: The whole lot.

THE COURT: I will have the same question -- well, we will go on to the second part, but I would like to start with that section.

MR. MIHET: Sure. If I can explain, when a client walks into the Plaintiff's office and wishes to pursue a change, let's say for example gender identity, an adolescent female has been identifying as a male for some time and wishes to change back to her female identity to match her biological body, we know from the literature this happens all the time, she comes in for assistance with this process from the Plaintiffs.

This ordinance which you just read allows only one viewpoint to be shared with this client, and that is change is not desirable, that there is nothing improper or wrong with the current state of affairs, and the client should not seek the change.

That viewpoint is sanctioned and allowed by the ordinance, however --

THE COURT: The fact that it applies to anyone, it could be any person who -- whether one identifies in both or either gender and wants to consider identifying --

MR. MIHET: Sure --

THE COURT: -- as any gender. How is it specifically viewpoint discriminatory towards persons when there is no delineation as to a particular type of person who is affected

by this sentence?

MR. MIHET: The prohibition is not on the person, but the message, the viewpoint, that is, the viewpoint that change is not desirable and not possible, that is not allowable.

THE COURT: Just change in general, that is the discrimination, that anyone who seeks change at all, any type of change?

MR. MIHET: Change of gender identity or sexual orientation in this case or related expression.

If somebody seeks those changes, the only viewpoint they are allowed to present is that those changes are not necessary, they are not achievable, they are not good, and they ought to continue and persist in the state they are in. They should not pursue change.

The viewpoint that is banned is that change is possible, it is not certain, but may be achieved, and that the client, if that client wishes to pursue change, then the client should be allowed and permitted to pursue change.

So, what the makes the viewpoint discriminatory is not that it prohibits equally change in either direction, from heterosexual to homosexual, that is not discriminatory; what is discriminatory is the viewpoint that they share is one that affirms the current state of affairs and disaffirms or disavows any kind of change, your Honor.

So, Defendants' own principal authority concludes --

THE COURT: Let me make sure that you covered -- so, it seems like you just acknowledged that the law would apply equally to changes to homosexual behavior as well as changes to heterosexual behavior. You acknowledge that and concede that. That is not what your argument is as to viewpoint discriminatory, just the notion of change; is that right?

MR. MIHET: Your Honor, actually what the definition goes on to say is that counselors can affirm change and can affirm somebody who is seeking to change their gender identity or going through, for example, you know, hormone therapy or surgical interventions, those kinds of things the ordinances say can be affirmed and assisted and helped, but the opposite is not true.

If the therapist believes surgical intervention is not the right course of action, not in the patient's interest, they are not permitted to provide that viewpoint.

And so, I don't think I would quite agree with the Court's proposition that the ordinances are completely neutral in terms of the directional change. I do think --

THE COURT: No. It was a question. I haven't stated a position, it was a question. I thought -- I haven't gotten to the second part of that, the ordinance, but the first part in that one sentence, I understood you to say that even though that -- that even though it does apply equally in the first sentence to changes to homosexual behavior as well as changes

to heterosexual behavior, the fact that a therapist can engage in change therapy, therapy seeking the goal of change, whether it is the parent or the child, the therapist, that makes that viewpoint discriminatory.

MR. MIHET: Sure, that is a viewpoint and that is banned by the ordinance.

THE COURT: In addition, are you saying -- so, the second part of the sentence is "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."

That is all part of the first sentence, so, is it still the same position?

MR. MIHET: Your Honor, it says toward individuals of the same gender or sex, that would indicate it only goes one way.

THE COURT: It says "including, but not limited to." I am just asking you. I want to understand your position as to whether the first sentence is discriminatory or not, and if it is discriminatory, why. That is what I want to know.

MR. MIHET: It is discriminatory because now we add this clause here, because it goes one way in what it specifies what is prohibited.

THE COURT: In the including language, including but

not limited to?

MR. MIHET: Yes.

THE COURT: The second sentence goes on to say, "Conversion therapy does not include counseling that provides support and assistance to a person undergoing gender transition or counseling that provides support and assistance to a person undergoing gender transition," and goes on from there.

MR. MIHET: Yes.

THE COURT: So, what is your position, then, with respect to this exclusion; how does that fit into the gender discriminatory analysis from your perspective?

MR. MIHET: It is an exemption that says only one viewpoint is permitted, the one that affirms the change, and the opposite viewpoint, one that would seek, perhaps, to provide other alternatives, is not permitted in that case.

THE COURT: Okay. So you have then pointed to two different things within the first sentence, just the notion of viewpoint discriminatory because it relates to change, and now a second proposition or argument, which is viewpoint discriminatory because -- not allowing change, but allowing support and assistance.

MR. MIHET: Yes, allowing affirmation of the change process when that change is to change gender identity from a biological sense to another identity.

THE COURT: Do you see the exclusion in any way

distinguishable from the first sentence in the ordinance based on the verbs used in the section? For example, the ordinance prohibits therapy seeking to change some aspect of the minor's identity, while the law allows support and assistance if the child is already in the process of changing some part of their identity through gender transition. Do you see any --

MR. MIHET: Based on the county and city, they do not differentiate whose intent it is to change. I don't see a difference, your Honor.

THE COURT: Okay. One more question to followup on the discussion of the viewpoint.

In your filings, you rely on the Supreme Court precedent from Sorrell, 564 U.S. 552, 2011.

Can you walk me through exactly how that case is analogous to this case? And are there any other cases you rely on for the proposition that a viewpoint discriminatory regulation would automatically be unconstitutional?

I have taken a leap now. First of all, the analogy that you draw to Sorrel as to the viewpoint discrimination in the message, in the content of the ordinance; and secondarily, any other cases you rely upon, because you have made the point that if this is a viewpoint discriminatory regulation it is automatically unconstitutional.

MR. MIHET: I don't think we were citing Sorrel for a factual scenario, but once the conclusion concludes that it is

discriminatory, there is no next step, it is an automatic invalidation. That comes from Sorrel and other cases. We are not aware of a single case out there that espoused that a viewpoint discriminatory ordinance is redeemable or salvageable.

THE COURT: Is there any case you cited to that you think is the strongest case you have that you are relying upon for -- since you are not relying upon Sorrel for a factual analogy, just for the legal principle, is there any factually analogous case whereby you draw upon that case to argue other than just -- I guess right now it would seem the plain meaning of the ordinance, coupled with the deposition testimony, that this language in this ordinance is viewpoint discriminatory? I know you draw upon King.

MR. MIHET: Not in the contention of the ordinance that we have here, but in a general sense, when you have an ordinance that allows one viewpoint, but not the other, that is the definition of viewpoint discrimination.

So, I am thinking of Lamb's Chapel, a lot of Supreme Court cases that basically say the Government cannot decide whose viewpoint ought to be able to prevail in the marketplace. In a free marketplace of ideas, the free flow of exchange, the Government has no interest in regulating viewpoints.

While the Government may dictate particular subject matter at times, or at a reasonable time, place, and manner,

restrictions, when it comes to viewpoint, the Government has no interest and no business deciding which viewpoints are permissible and which are not.

THE COURT: Okay.

MR. MIHET: So, your Honor, getting back to content discrimination and King, you know, a finding of content discrimination also yields -- or triggers, rather, strict scrutiny, and that is where King veered off course.

It was in its next conclusion, even though King found that the SOCE ordinance regulated speech and did so based on its content, King concluded that because it was the speech of professionals, it did not have to apply strict scrutiny.

The Supreme Court has corrected this aspect of King twice, first in the Reed case, where the Supreme Court held unequivocally that all content based restrictions must survive strict scrutiny without exception, and then recently, at the end of this last term in June, in the NIFLA case where the Supreme Court called out King and Pickup by name and abrogated them, holding that there is no such thing as lesser strict -- lesser First Amendment scrutiny for content base restrictions on the speech of professionals.

In NIFLA, we have -- on page 2371, the Supreme Court kind of sets out what happened in King and Pickup. It says, "Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that

the notice regulates professional speech.

That is what the Defendants are asking you to do here as well.

Then it says, "Some Courts of Appeals have recognized professional speech as a separate category of speech that is subject to different rules," citing specifically King and Pickup, and going through the rationale of the Courts citing to them.

The tag line comes on the same page where the Supreme Court says, "But this Court has not recognized professional speech as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals.

THE COURT: Now, let me ask you a little bit about this. Let me walk through it. The issue we talked about was viewpoint discrimination, and now we are talking about content and whether something is content neutral or not.

Can I assume the argument you made about why the ordinances are viewpoint discriminatory are the same arguments you would make as to why they are content based?

MR. MIHET: Yes, your Honor.

As the Third Circuit said in King, it is not even a close call, because what they may say to their clients depends on the content.

THE COURT: Assuming the Court finds the ordinances are not content neutral, is it your position that strict

scrutiny is automatically included?

MR. MIHET: Absolutely.

THE COURT: Actually, this is the Ninth Circuit, let me walk through the different cases. What is your response to the Ninth Circuit's statement that "The First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it? That is Pickup versus Brown, 740 F.3d 1208, Ninth Circuit, 2014.

MR. MIHET: I can't say it any better than the Supreme Court majority said it on pages 2371 and 72, where they say in the same breath, after saying what the Ninth Circuit did in Pickup and the Tenth Circuit did in King, in the same breath it says, "but this Court" -- the Supreme Court -- "has not recognized professional speech as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals."

Pickup and King are no longer good law following NIFLA.

THE COURT: What about Justice Breyer's opinion in Reed versus Town of Gilbert that "there are a plethora of widely accepted forms of content regulation, such as in securities regulations or the HIV status exception to patient confidentiality?" That is Reed, 135 Supreme Court 2218, at 2235. Justice Breyer concurring, and Judge Tjoflat raised

similar issues in his dissent in Wollschlaeger.

MR. MIHET: There is a reason why Justice Breyer was writing a concurring opinion, the majority disagreed and said, once you conclude the restriction is content based, there is no review, you go to strict scrutiny in every instance. Justice Breyer had a different view, the same way Justice Tjoflat was in dissent in his view.

The finding of content based regulational discrimination must be strict scrutiny.

THE COURT: Is there not some lower standard that would be appropriate in the doctor/patient or child/caregiver context?

MR. MIHET: No, there isn't, and let me show you why.

The Defendants articulate that even after NIFLA, it is still possible to regulate professional conduct with something other than strict scrutiny.

On page 2372 of NIFLA, this is the operative language where they seek refuge, where they hang their hat. "This Court's precedents do not recognize such a traditional for a category called professional speech. This Court has afforded less protection for professional speech in two circumstances, neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their commercial

speech."

That is not what we have here. I don't think they are contending we have commercial speech. We don't have the first scenario.

"Second" -- the Supreme Court says -- "under our precedents, states may regulate professional conduct even though that conduct incidentally involves speech."

So, to answer your Honor's question, this is the argument that the Defendants make, yes, it is true that professional conduct may be regulated with something other than strict scrutiny, but professional speech cannot.

In the NIFLA case, the Supreme Court said, if you have conduct that only incidentally involves speech, then you don't need strict scrutiny. The example is Planned Parenthood versus Casey where abortion was the professional conduct, and there was a First Amendment challenge to some disclosures that accompanied the conduct of performing an abortion, and the Court said, look, we are looking at a regulation of abortion conduct with an incidental effect on speech, the informed concept or disclosure, and they said something less than strict scrutiny was appropriate.

So, in analogizing this case, your Honor, if the Defendants' ban had aversive techniques only, shock therapy, where you have someone hooking up a patient to a machine, and in the process saying I am now hooking you up to a machine, how

do you feel, I am administering shots, how do you feel, there is speech involved there, but clearly there is conduct, which is the electroshock therapy.

That, under NIFLA, could be regulated with something other than strict scrutiny even though it may incidentally involve some speech.

THE COURT: The conversion therapy definition in the ordinances doesn't -- correct me if I am wrong -- prohibit speech by the therapist to the patient about the therapist's view on conversion therapy. In fact, is my understanding correct that the therapist can actually speak not only to the patient about his or her views on conversion therapy, but can speak to the patient's parents, can speak publicly, can refer the patient to a non-licensed person to actually receive therapy, but what the therapist is not allowed to do is to engage in the counseling practice or treatment?

Now, understanding that speech may go along with counseling practice and treatment, is my understanding correct the ordinance doesn't prohibit, doesn't prohibit a therapist from speaking his or her views on conversion therapy? Yes or no, am I correct or not?

MR. MIHET: The answer is, your Honor, I don't know. That is the vagueness problem of the ordinance because the only thing that happens is speech back and forth. We don't know at what point does a counselor discussing his or her views about

something become therapy that is prohibited.

THE COURT: Let's assume for a moment, putting the vagueness argument aside, that it is clear that in this definition the therapist can express his or her views, cannot engage in therapy, that is counseling practice or treatment, but can express his or her views to the patient, to the parent, to the public, publish, locally, nationally, and can refer to someone not prohibited under the ordinance.

What do you say about the content aspect of it at that point?

MR. MIHET: Public speaking is not relevant, we are concerned with what happens in the office between the doctor and the therapist.

I am having a hard time conceptualizing that. It simply is not clear. My clients don't know, and I have asked them. They don't know. When they are responding to questions from a client that is seeking to change, and the client says, well, what do you think about this, doc, they don't know at that point is what I am about to say next going to be therapy or is it going to be only my opinion?

They don't know that. How is the code enforcer with the high school diploma going to know that as well?

THE COURT: I appreciate that. Let's put that vagueness aspect aside for a moment and assume for argument's sake and clarity's sake that it does not prohibit a licensed

therapist, the Plaintiffs in this case, from when the patient says what do you think doc, and the doc says, well, this is what I think, but doesn't go any further in terms of engaging in counseling practice or treatment, and is permitted to do all the other things I have just said, how does the Court look at that analysis? Is it conduct, is it speech --

MR. MIHET: It is clearly all speech, whether the doctor is sharing a personal opinion or whether it is engaged in speech with the client. There is no --

THE COURT: If the doctor is allowed to make the speech is what I am saying, yes, that is speech.

If the therapist is allowed to engage in speech, allowed to give his or her viewpoint on the therapy, but not allowed to engage in counseling practice or treatment.

MR. MIHET: That is content discrimination. It is the counseling, your Honor, that also takes place in speech. The counseling is not conduct, we know that from King and we know that from NIFLA.

The counseling here, it is indisputable, takes place exclusively through speech. There is not some modality where they are engaged in conduct simply because they are discussing one particular thing versus a personal opinion.

THE COURT: Okay. That hypothetical -- maybe it is not a hypothetical, but that line of questioning wouldn't make a difference in your analysis because you would nevertheless

look at counseling, even if you put viewpoints aside, that the counseling involves speech, and therefore it is speech, not conduct, and automatically subject to strict scrutiny, and that is your position.

MR. MIHET: Absolutely, your Honor, there is no part of their therapy that takes place other than speech.

Speech is the only thing, not like in NIFLA, where you have some conduct with an incidental impact on speech, here we have speech, we don't have conduct through which the speech is incidental. In the Wollschlaeger case the Eleventh Circuit en banc said when you are dealing with a doctor speaking to a patient, trying to argue that is merely incidental to speech, it is like trying to argue that walking or running is incidental to ambulation, it simply doesn't work, it is speech.

THE COURT: Let's talk about scrutinize. We have been talking about strict scrutiny. Let's talk about intermediate scrutiny. Why should the speech inherent to conversion therapy not be subject to some kind of diminished scrutiny, such as the standard articulated in Ocheesee Creamery, LLC versus Putnam, 851 F.3d 1228, Eleventh Circuit, 2017, which was cited by the Defendants for the proposition that intermediate scrutiny applies to content based restrictions of commercial and lesser protected forms of speech? Could the following categories not apply here?

MR. MIHET: No. First of all, we don't have

commercial speech here, this is not speech that proposes a commercial transaction.

THE COURT: Is the speech not made for economic gain?

MR. MIHET: Not necessarily. The ordinance banned speech whether it is paid or not. Commercial speech is speech which solicits, seeks a commercial transaction.

By the time the patient is talking to Dr. Otto or Dr. Hamilton, the transaction is no longer being proposed, they are there for actual speech. That is no longer commercial at that point, whether or not money is changing hands.

THE COURT: What do you rely upon for whether it is or is not commercial speech? Is there a particular case you think most strongly supports your position that in no way, shape, or form is this to be viewed in the lens of commercial speech?

MR. MIHET: Yes, the Supreme Court in NIFLA talked about the -- the name escapes me. One second.

THE COURT: That is okay, when you get that, you can bring that to my attention. We are coming up on 60 minutes, I want to give you that notice.

I also wanted to ask you, the Court does understand that the Supreme Court struck down the Ninth Circuit's reliance on professional speech as a category in NIFLA, but did not the Supreme Court leave open the door that a separate category of speech might be appropriate in another case? Do you agree with that? If so, why, or why is this not that case?

MR. MIHET: The Supreme Court said the state may regulate professional conduct which may merely have an incidental effect on speech.

It did not say that states, or municipalities in this case, can reclassify conduct -- rather speech as conduct to avoid constitutional scrutiny. If the Court concludes this is speech, which is what King says, then the Court has no room, under NIFLA, to apply anything other than strict scrutiny if in fact a content-based restriction is found to exist.

THE COURT: What about time/place/manner restrictions?

MR. MIHET: Content based restriction is not a time, place or manner.

In this case, the ordinances don't say you can engage in conversion therapy or SOCE counseling after 6:00 o'clock p.m. and only in a particular place, it is a total and complete ban county wide. There is no place in the county where these Plaintiffs can go at any time to conduct this First Amendment protected activity.

THE COURT: Well, looking at it in a different lens, would one not be able to look at it as a time/place/manner restriction insofar as this type of therapy can't take place with a child until he or she reaches the age of 18? So, kind of when manner, it can't take place if a child is less than 18 years by this type of person, a licensed therapist, but it can take place by other people who don't fall within the

restriction, maybe a clergy member or other persons, and it can take place in a different place, that is, not in the confines of a therapy session at the offices of the Plaintiffs.

Why is that not akin to time/place/manner?

MR. MIHET: Number one, you can can't have a content-based restriction that is also a time/place/manner. Two, if it were a time/place/manner it would be unreasonable for a number of reasons.

When somebody at the age of 13, your Honor, is dealing with a confusion or a crisis of identity where they want to return back to an identity that matches with their biological body, for example, the literature tells us -- I hope to get to it today. The American Psychological Association, which the Defendants themselves respect, says it is imperative to allow them to do that at the time they are experiencing it. Telling someone at 13 they must wait until they're 18 for the kind of help these doctors are able and willing to provide is not reasonable in this instance, your Honor.

And then again, with respect to clergy, sending them to an unlicensed therapist or clergy, that makes this ordinance wildly uninclusive. If SOCE counseling is so abusive and so harmful, your Honor, then why not exclude religious clergy from it? Why allow them to engage in what they deem to be child abuse, you know? If it is as harmful as they claim it is, they should have enacted a total and complete ban. They say,

well -- and they recognize in their communications most of the complaints they got dealt with religious-based counseling which they say we can't touch.

Well, the state can punish members of the clergy if they abuse children, that is not a new proposition. We see it in the media right now in various different subject, that makes this ordinance wildly inconclusive, which it fails a narrow tailoring, your Honor.

THE COURT: I am going to get to those prongs. Regardless of whether the Court applies strict or intermediate -- and I know there is some argument the Defense will make that why even a rational basis review is called upon. Let's talk about strict or immediate scrutiny.

The Court will need to make findings -- you began your presentation with that in the context of it being the Government's burden. I don't think anyone disagrees with that.

In Wollschlaeger the Court stated "heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." The Court went on, "The question is whether the data relied upon by the legislature is sufficient to demonstrate harms that are real and not merely conjectural such that the regulations will in fact alleviate these harms in a direct and material way." Wollschlaeger, 848 F.3d 1312, citing Turner Broad Systems, Inc. versus F.C.C., 512 U.S. 622, 1994.

In light of the case law, what is the Plaintiff's position on the following:

Who defines the Governmental interest and who gets to decide what scientific literature to depend on? What legal standard are you relying upon with respect to that?

MR. MIHET: Thank you, your Honor. The Defendants would have this Court completely defer to their legislative judgment, but the case law we have identified are the five Supreme Court cases, Turner, Landmark, Edenfield, Sable Communication and Janus. They all say that in the First Amendment context Defendants don't get to define for themselves what the First Amendment requires or permits.

This Court's obligation is to review the evidence that the Defendants put forward and to determine whether it is sufficiently concrete, sufficiently firm to allow the kind of ban that they make. Have they drawn a sufficient causal connection between the practice they ban, in this case voluntary SOCE counseling, the non-aversive kind, and the harms that they fear? We believe the answer is clearly no.

But that is a question for this Court, and not a question for the County Commission or the City Council in this case.

THE COURT: So, following up on that, exactly what quantum of proof do Plaintiffs assert the Government would need to pass these ordinances? If the evidence presented was not

enough, what would be enough?

As a hypothetical, if the county and the city were instead presented with evidence from the same number of studies as we have here that a new prescription medicine was harmful, how many studies would the county and city need? Must they wait for scientific unanimity? What more did the city or county need to present here to make their case for a compelling or important Governmental interest?

MR. MIHET: Sure, your Honor, I have a plan to go through what evidence they have, and what I will show the Court is that they have no evidence. What the APA has said, there are no studies, you can make no correlation, no causation, you can make no claim that SOCE causes harm.

So, the answer is going to depend, your Honor, but it certainly has to be, it has to be more than no evidence, which is what they have here.

THE COURT: Okay.

MR. MIHET: Before I get to the actual studies, your Honor, and I am moving into the compelling interest part. What I want to quickly show the Court is that on the subject of compelling interest the Defendants, they cannot demonstrate a compelling need to ban voluntary SOCE counseling that minors seek to request or willingly receive.

They never had -- actually, when Judge husbanding, the chief architect and proponent of the ordinances, when he first

approached the Defendant to enact the SOCE ban he asked for a ban on aversive involuntary therapy. I direct the Court's attention to Plaintiffs' Exhibit 6 which is being displayed right now.

This is the memorandum that he is sending in June 2016 to the county to ask them to enact a S on C event, some 18 months before the ban was enacted.

THE COURT: Are you seeking to admit this or are you presuming it is already in the record?

MR. MIHET: We are seeking to admit this.

THE COURT: This is Plaintiffs' 6, any objection?

MS. FAHEY: No, your Honor.

THE COURT: Admitted without objection.

(Whereupon Plaintiff's Exhibit 6 was marked for evidence.)

MR. MIHET: Here Judge Hoch says to the county "conversion therapy, also known as reparative therapy, is counseling based on the erroneous assumption gay, lesbian, bisexual and transgender identities are mental disorders that can be cured through aversion treatment."

That is what he was after, your Honor, aversive treatment.

On page two of this memorandum he says "the Palm Beach County Human Rights Council recognizes that the practice of conversion therapy, which is most often forced upon minors by their parents or guardians, is extremely harmful."

He was asking for a ban on aversive therapy that is forced upon the minors, your Honor. That is what they could have banned. That is not what they ban, your Honor.

Second, the Defendants never received any complaints of any harms resulting to anyone in their jurisdiction from voluntary non-aversive SOCE counseling.

The city readily admits it received no complaints SOCE caused harm at all, much less the voluntary non-aversive kind, and the city made no effort whatsoever to determine whether anyone was harmed.

We have the Woika deposition, W-O-I-K-A. This is the cities 30(b)(6) designee on compelling interest questions. Page 16, starting with line 21, going to 17, line four.

"Question: Prior to enacting the ordinance, had the City of Boca Raton ever received complaints that one of its citizens had been or was being harmed by conversion therapy?

"Answer: No.

"Question: Prior to enacting the ban, had the City of Boca Raton attempted to determine whether any of its citizens had been or were being harmed by conversion therapy?

"Answer: No, not to my knowledge."

Now, the county defendant on its behalf claims that unlike the city it did at least attempt to investigate whether anyone in the county had been harmed by SOCE counseling, but it wasn't able to find any evidence of harm on its own.

We have Ms. Hvizd's deposition, page 31, she was in charge of drafting the ordinance for the county, and she testified she undertook an investigation, but found no evidence of any SOCE harm within the entire county of Palm Beach. This is page 31, line 13 of the files deposition.

"Question: You found no one within Palm Beach County that was being harmed by conversion therapy?

"Answer: No."

Now, despite the county's failure to find any evidence of SOCE harm, the county claims it was provided with such evidence by two individuals, Judge Hoch, and one other citizen, Nick Sofoul.

Your Honor, with respect to Judge Hoch, at the December 19, 2017 Commission meeting where the ordinance received the final vote of approval, he testified, and this is on exhibit -- this is Exhibit 3, Plaintiff's Exhibit 3, a transcript of that County Commission hearing, your Honor.

On page 80, Judge Hoch tells the County Commissioners he had heard from two mothers, who heard from their two gay children, who heard from their two gay friends that the friends had been forced to undergo conversion therapy against their will.

You see that at line ten he says, "We received complaints from mothers of gay people because their friends, the gay children's friends who also identified as gay, were

being subjected to conversion therapy."

On line 15 he makes it clear the conversion therapy is the forced kind. He says, "There is nothing we can do about that unless you act today. So these kids are still being forced to go to the therapists who are telling them that God does not love them."

Your Honor, that is consistent with what Judge Hoch told the Commission a year and a half earlier, that he was looking to ban aversive forced therapy. Now he says there are two kids who heard from others, who heard from others they were harmed by forced therapy.

Hoch, Judge Hoch, had never mentioned, by the way, these two individuals in the year and a half before. At the County Commission meeting in December of 2017 was the first time that he had mentioned them, and by the time we get to this point the ordinances had been drafted long ago.

It is disingenuous for the county to posit that they used these two allegedly harmed individuals as a rationale since they had already drafted the ordinance prior to this point without even knowing about them.

But even if we grant them that, they base the ordinance on the two individuals, what we have here is a complaint about forced therapy. They could have banned forced therapy. That is not what they banned, that is not the only thing they banned.

With respect to the other person, Nick Sofoul, Plaintiff's Exhibit 4, your Honor --

THE COURT: Now, you are not moving these exhibits in?

MR. MIHET: Your Honor, for ease, could we move the exhibits in at the end?

THE COURT: As long as you all agree to all of them so I don't have to consider any argument while we are talking about the exhibit. You have 41 exhibits on your exhibit list. Are you intending to have all 41 admitted into evidence?

MR. MIHET: I may not move them all in today, but -- yes, your Honor.

THE COURT: Are you confident there is going to be agreement on all exhibits?

MS. FAHEY: The county is prepared to stipulate and I believe the counsel for the city as well, so long as all exhibits are considered for this hearing only, we can stipulate to the admissibility.

THE COURT: The city as well?

MR. ABBOTT: Yes, your Honor.

THE COURT: So I am clear, every exhibit on the Plaintiffs, city's and county's exhibit lists at Docket Entries 104, 105, 106, all parties are stipulating for preliminary injunction only they are admitted.

MR. MIHET: Sure. We may have argument on authenticity.

THE COURT: Admissibility.

MR. MIHET: Yes.

MS. FAHEY: Yes.

MS. ABEL: Yes.

THE COURT: We have all the exhibits on the thumb drive. I will make a note they have all been admitted without objection.

(Whereupon all exhibits were marked for evidence.)

MR. MIHET: With respect to Mr. Sofoul, on Plaintiff's Exhibit 4 we have the -- an email that he sent to the County Commissioners at 10:16 p.m. the night before the final vote. This is 44 minutes shy of the literal 11th hour, your Honor. There is no evidence that the County Commission ever saw or considered this email as a group before they voted upon the ordinance the very next morning.

However -- and also the ordinance, by this point, had long been drafted, so the argument that they based it on what Mr. Sofoul was saying is also, I think, disingenuous.

But even if they could claim they did base the ordinance on what Mr. Sofoul was telling them, it still doesn't help here because Mr. Sofoul also, like Mr. Hoch, is describing aversive forced therapy.

He talks about how he had been moved by the horrific stories of friends that had been subject to these cruel and inhumane methods. What kind of cruel and inhumane methods? He

attaches an article in his email, Plaintiff's Exhibit 5, and this article talks about an individual by the name of Samuel Britton, and on page two of this article, Mr. Britton recounts how he was forced to go through some rather horrific aversive techniques, techniques that my clients have never engaged in, have no business engaging in, have no interest engaging in.

Once again, if the Defendants wish to ban this kind of therapy that Mr. Sofoul was complaining about, they could have done that. That is not what they did.

So, at the end of the day, with respect to the complaints, your Honor, there was no need in Boca Raton or in Palm Beach County to ban non-aversive voluntary therapy.

There were no complaints about it, they were able to find no instances of harm, and what the Supreme Court said in Turner is that a regulation may be perfectly reasonable and appropriate in the face of a given problem, but may be highly capricious if that problem doesn't exist.

What we have here is the classic solution in search of a problem, a problem that did not exist in Palm Beach County or the City of Boca Raton, but a problem the Defendants decided to solve anyways through an outright ban. That is the very antithesis of compelling interest.

Now, moving on, the overwhelming research that the Defendants put forth, overwhelming research, that term was provided to the Defendants by the proponent of the ordinance,

Judge Hoch. The Defendants didn't do any of their own research, they merely accepted what Judge Hoch gave them. And as we have shown in our briefs, and in the proposed orders, and as we will quickly recapitulate today, not a single one of the ten sources cited by the Defendants contains any study showing any SOCE counseling, let alone the non-aversive voluntary kind my clients wish to provide, actually causes any harm.

What the Defendants posit are either studies that find claims of harm to be inconclusive or ideological opinion statements bereft of any backup evidence of harm.

Looking specifically at the gender identity change efforts, your Honor, as a separate and distinct category from sexual orientation change efforts, so we are clear, the ordinance includes gender identity along with sexual orientation efforts as part of this ban, and at their depositions the Defendants' representatives confirm that the Defendants interpret the ordinances to prohibit a counselor from helping a boy who shows interest in typical girl activities and not in boy activities. They prohibit counselors from helping the boy be comfortable with his biological body and be confident as a boy.

They also say the ordinance prohibits counselors from assisting an adolescent girl identifying as a boy for some time, but wishes to change back to her biological body identity, to her biological body. We have seen that testimony,

I will not read it for the Court again. For the city it is at Woika, 171, line 16, through 172, eight.

And also 172, 11 to 173, eight, that is where the city confirms its ordinance bans this kind of gender identity change efforts. And with respect to the county it is Hvizd, 268, line 14 to 269, line nine, and also 260, line 11 to 261, line eight.

There is no dispute that they prohibit these kinds of gender identity counseling.

Here is the problem with these prohibitions: They are not supported by Defendant's so-called overwhelming evidence; instead, they are refuted.

We have the APA report, this is County Exhibit 14, this is the primary document, the magnum opus, if you will, on change counseling. And all of the other evidence that they cite, all of the other nine, either cite and rely heavily on this document or don't cite or rely on any other document or study.

So, this document actually specifically excludes gender identity change efforts. On page nine we see the APA says they never even looked at gender identity because somebody else was looking at that issue.

So, if the APA doesn't draw any conclusions about gender identity in this document, neither can Defendants and neither can the other nine folks that cite to this.

Now, the APA did address the subject of gender

identity change efforts in another publication that came out in 2015. This is Plaintiff's Exhibit 30, it is guidelines for psychological practice with transgender and gender nonconforming people. This is referred to as TGNC, transgender and gender nonconforming.

What we see in this document is the exact opposite of overwhelming research. For example, page 835, this is an introduction here. On page 835, they tell us we cannot conflate gender identity with sexual orientation, cannot be conflated the way the Defendants lumped them here.

On page 842 we see the APA actually recognizes the absence of research on gender identity change in children, which is quite different from overwhelming research.

What they say on page 842 is, "Due to the evidence that not all children persist in a TGNC identity into adolescence or adulthood, and because no approach to working with TGNC children has been adequately, empirically validated, consensus does not exist regarding best practice with prepubertal children."

Your Honor, consensus does not exist, that is the exact opposite of overwhelming research.

There are two distinct approaches to treating prepubertal children that have confusion. In the second approach, children are encouraged to embrace their given bodies and to align with their gender roles, boys are encouraged to do

boy things, and girls are encouraged to be girls and do girl things.

What the APA says, quote, "It is hoped that future research will offer improved guidance in this area of practice."

Your Honor, they are hoping and calling for more research, but the Defendant thinks there is overwhelming research, it is bad and we are going to ban it.

Now, most noteworthy in this report, on page 843, this is what the APA says with respect to adolescents who have adopted a gender identity different from their biological body and wish to turn back. They say, "Emphasizing to parents the importance of allowing their child the freedom to return to a gender identity that aligns with sex assigned at birth or another gender identity at any point cannot be over stated, particularly given the research suggests that not all young gender nonconforming children will ultimately express a gender identity different from that assigned at birth."

What the APA is saying is that people do change back to the gender that is assigned at birth, and you have to allow that change when the minor seeks to do it at 13 or 14, you can't make them wait until 18.

What the Defendants have done here, they banned these Plaintiffs from assisting with this kind of gender identity change even though the APA, the organization they tout and

trust, tells them it is imperative to allow the freedom for that kind of change.

Other things the Defendant cites also confirm lack of empirical research on the outcome of gender identity change.

THE COURT: Let me stop you for a moment.

We have been going for an hour and 27 minutes, an hour and a half -- we have been going since 9:00, we have been going for two hours. Pauline has been working for two hours, but in terms of your argument, an hour and a half.

How are you doing on time? It sounds like you are focusing on the prong of the Government interest --

MR. MIHET: I am going through studies, yes.

THE COURT: Government interest and speaking about how the ordinance is or is not substantially related or narrowly tailored. What additional time do you envision for that area?

MR. MIHET: Those are the only two areas I have left. It is going slower than I anticipated. I might need another 20, 25 minutes myself before I turn things back over to my colleague. I apologize.

THE COURT: You are turning things over to your colleague for what?

MR. MIHET: Unenforceability of the ordinance with respect to having the code enforcers going out and policing what licensed therapists can or cannot do, which ties into the preemption argument.

THE COURT: How long does your colleague anticipate?

MR. MIHET: 25 minutes.

THE COURT: It sounds like you need an hour, and your colleague 20 minutes, that is an hour and 20 minutes. If we come back at 11:15, let us see if we can conclude by 12:30ish, a little after 12:30, the Plaintiff's presentation, and then we'll break for lunch.

MR. MIHET: Thank you, your Honor.

THE COURT: We will be in recess for 15 minutes. You can leave all of your things here and we will be back in 15 minutes, at 11:15.

(Thereupon, a short recess was taken.)

THE COURT: All right. You may be seated.

You may come back to the podium and we'll resume.

MR. MIHET: Thank you, your Honor.

We were talking about the state of the research, particularly with respect to gender identity, and then I'll talk about the sexual orientation change research.

We were talking about another document that is cited by the ordinances as overwhelming research, this is County's Exhibit 7, and it is a report by the American Academy of Child and Adolescent Psychiatry, or AACAP.

Now, in this particular study, what AACAP says on page 968, with respect to children they say, "Different clinical approaches have been advocated for childhood gender

discordance. Proposed goals of treatment include reducing the desire to be the other sex" -- that is banned by the ordinances here and other things. They say there have been no randomized controlled trials of any treatment.

On page 969, AACAP says, "Recent treatment strategies based upon uncontrolled case studies have been described that focus on parent guidance and peer group interaction. One seeks to hasten desistence of gender discordance in boys through eclectic interventions such as behavioral and milieu techniques, parent guidance and school consultation aimed at encouraging positive relationships with the father and male peers, gender-typical skills, and increased maternal support for male role taking and independence." Footnote 100. I will come back.

Basically, they are talking about therapy that says boys will be boys, and not gender identity, something that is banned here.

What they say in the last sentence, "Desistence of gender discordance has been described in both treatment approaches, as it is in untreated children."

Later on page 969, the same page, what AACAP says, "Given the lack of empirical evidence from randomized controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, and longitudinal evidence that gender discordance

persists in only a small minority of untreated cases arising in childhood, further research is needed on predictors of persistence and desistence of childhood gender discordance as well as the long-term risks and benefits of intervention before any treatment to eliminate gender discordance can be endorsed." They stop there and I add, or banned.

Further research is needed. What AACAP says, that is the opposite of we have overwhelming research saying one modality is harmful and must be banned. They don't get anywhere close to that, they say we need more research.

I pointed to footnote 100. That cites to the work of Dr. Bahlburg, a professor at Colombia University. His study is Exhibit 31. I would note, I hope I don't sound facetious, but Columbia University is not a forum university of quackery, and Professor Bahlburg is lauded for the work he does in studying transgender issues. He is certainly no quack either.

In this particular study, Plaintiff's Exhibit 31, he describes the great success that he has had in helping young boys desist from a female gender identity and become comfortable with their biological male bodies by doing the very same things that Defendants have banned here, talk therapy with the boys and with their parents and increasing male influences and male expressions so the boys become comfortable with being boys.

He talks about, on page 372 of his study, how he has

had a 91 percent success rate in one study that employs techniques expressly sanctioned by AACAP in the previous report that we looked at.

Your Honor, it is a good thing that Professor Bahlburg works in New York City and not Boca Raton or Palm Beach County. If he were in Boca the code enforcers would shut him down. This is a mind boggling aspect of the ordinance that my colleague will get into. But if a code enforcer with a GED or high school diploma can come in and look at what Dr. Bahlburg does, he could ban him and we'd have a real enforcement problem here.

Not to get ahead of ourselves, I will move on to the overwhelming research with respect to sexual orientation. Let me wrap this one on gender identity and say the Defendants have mischaracterized the extent of the research. When APA and AACAP concluded that not sufficient research existed and called for additional research on treatment and modalities, Defendants took that and concluded that the research was, quote, "overwhelming" and banned the very practices that these organizations said might have promise, but needed further studies.

Your Honor, this is reason alone to invalidate -- or enjoin, rather, the ordinances at this point.

Now, moving back to the APA report, the magnum opus cited by virtually all the other studies, here, your Honor, the

American Psychological Association makes it clear that it cannot and does not draw any conclusions with respect to harm, claims of harm from any type of SOCE, let alone voluntary non-aversive SOCE counseling.

Page 42 of the report "we conclude that there is a derth of scientifically sound research on the safety of SOCE." A derth of research is quite the opposite of overwhelming research, your Honor.

On the same page, "Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm."

There is no indication of occurrence or frequency of harm, they say, because no study to date of adequate scientific rigor has been explicitly designed to do so.

And they say, "We cannot conclude how likely it is that harm will occur from SOCE." We can't say it is a hundred percent or zero percent or one percent more likely that someone who undergoes SOCE counseling is going to suffer any harm from it.

What they say on page 42 is that "the nature of these studies precludes" -- that means does not allow, prohibits -- "causal attributions for harm or benefit to SOCE."

What that means is, if somebody reports anecdotal

harm, depression, or whatever else Defendants posit, when you hear that being posited, what the APA is telling you with this statement is that we cannot tell whether that alleged harm resulted from an actual SOCE treatment or whether it resulted from an infinite possibility of other factors. Maybe somebody walked under a ladder or stepped in front of a black cat, who knows what else. We cannot tell, according to the APA, whenever we have a report of harm because there is no causation or correlation.

Now, what they say on page nine on of this report is, "We concluded that research on SOCE has not answered basic questions of whether it is safe or effective and for whom."

They talked about the future research and what it should look at and address. That is the opposite of we have overwhelming research, we don't need any more, we must ban this right now because it is harmful. That is the farthest thing from what the APA says in this report.

The Defendants have accused us of cherry picking one or two quotes from the APA report. The truth is, the report is riddled with these kind of disclaimers upon disclaimers about you cannot draw conclusions about benefits or harm. It is not my clients' duty to prove the benefits or efficacy, it is the Defendants' burden to prove the harm which the APA says they cannot at this time.

So we are clear about cherry picking, in paragraph 12

in the proposed findings of fact and conclusions of law we put together a few of the disclaimers, not all, just a few. They are there for the Court, I will not recapitulate them here.

Needless to say, it is the Defendant who is cherry picking anecdotal so-called evidence of harm which the APA says cannot be contributed to SOCE -- caused by SOCE. No doubt they will attempt to do that again today, they will cherry pick some instances in the report when they say somebody reported some kind of harm.

The Court has to remember no attribution or causal relationship can be drawn from that harm and SOCE.

So, essentially what the APA report has concluded, there is no evidence of benefit or harm from SOCE because of the lack of empirical research, they say we need more research on this.

What the Defendants have done is accept the first premise of the APA, they say there is no evidence of benefits, and at the same time reject the second report from the APA, which is to say we have no evidence of harm. They can't have it both ways, if the evidence of benefits is not credible, the same has to be true for the evidence of harm.

Instead of the APA's recommendation for further research to be done, they declare an end to the research and debate, and they have banned one particular kind of counseling.

Now, according to the Supreme Court in NIFLA, that is

not science, your Honor, that is totalitarianism.

Now, one interesting aspect of the APA report, on page 41, they note that the isolated reports of harm which they cannot attribute to SOCE, they were coming from aversive techniques.

Page 41, we have the report where they say, "Early research" -- on the bottom of the page here -- "on efforts to change sexual orientation focused heavily on interventions that include aversion techniques. Many of these studies did not set out to investigate harm. Nonetheless, these studies provide some suggestion that a harm can occur from aversive efforts to change sexual orientation."

Once again the Defendants didn't ban aversive techniques, they banned non-aversive techniques as well.

With respect to my clients, Dr. Hamilton and Dr. Otto's clients, this is what the APA says on page 73 of the same report. "We found no empirical all research on adolescents who request SOCE."

No research is the exact opposite of overwhelming research.

Now, the APA contains a resolution in Appendix A, they make some recommendations based on the documents we have been through, and the Defendants cite the resolution as a separate item in their ten-item list, perhaps to make it seem like there is more. It is part of the same document, Appendix A to the

APA report. It appears separately in the ordinance and in County's Exhibit 15.

I submit to the Court that you can look long and hard through the list of things that are in this resolution from the APA, and you are not going to find anything about the APA recommending that SOCE counseling be banned, legally banned. They simply don't do that, and that is to be expected. They can't call for research on one hand and on the other hand suggest it ought to be banned, as the Defendants have done here. Nowhere in this resolution do we have that.

Now, since the APA itself could not conclude that SOCE counseling causes harm, it necessarily must follow that none of the other nine position papers that cite -- that the Defendants cite in their ordinance and in turn cite to the APA report, they can't draw that conclusion either. Right?

Well, maybe that is not the case. Look at County's Exhibit 20. This is the Professional School Counselor and LGBTQ Youth document by the American School Counselor Association. This is one of the ten items in Defendants' overwhelming research and here is what they say in the bottom paragraph of this document.

They say about halfway through the paragraph "Professional school counselors do not support efforts by licensed mental health professionals to change a student's sexual orientation or gender as these practices have been

proven, proven ineffective and harmful."

What do they cite? The APA report from 2009, the same report that says we cannot make any claims with respect to causation or harm. Now we have a document that the Defendants rely on for overwhelming research that basically entirely accedes to what the APA says. No.

Moreover, it appears the folks here didn't read the disclaimer we showed the Court where the APA said we are not looking at gender changing efforts, because they include that into their sweeping statement where they say the APA proved harm from for both SOCE and identity change. We have an ideological echo chamber wholly detached from the APA report.

I have two more of these. County's Exhibit 19, this is the Pan American Health Organization paper, and it also cites to the APA report on page two of this document, the organization PAHO for short.

The American Psychological Association conducted a review of 83 cases, and they say -- moving on for purposes of time -- they say, "not only was it impossible to demonstrate changes in subjects' sexual orientation, in addition the study found that the intention to change sexual orientation was linked to" -- and a whole list of maladies.

The APA found no such thing, the APA said you could not draw any linkage, any causation, attribution between isolated claims of harm and SOCE.

What PAHO says in the bottom paragraph, "As an aggravating factor, conversion therapies have to be considered threats to the right to personal autonomy and to personal integrity. There are several testimonies from adolescents who have been subject to reparative interventions against their will, many times at the families' initiative."

The problem they are getting at is with coerced therapies, not therapies that my clients wish to engage in and their clients wish to receive.

Last one, your Honor, the 2012 position statement by the American Psychoanalytic Association, another one of the Defendants ten items in their overwhelming research. What these folks say in the first paragraph, they affirm "the right of all people to their sexual orientation, gender identity and gender expression without interference or coercive interventions attempting to change sexual orientation, gender identity or gender expression."

My clients don't seek to coercively intervene or intervene or interfere with any of their clients' identities, they simply wish to provide the help that their clients seek and want and request.

Your Honor, this happens again and again and again. We do not have evidence driven study based conclusions of harm. We have an ideological echo chamber that is directed primarily at coercive, or maybe exclusively at coercive interventions,

the kind that we do not have at issue in this case.

So, I could take the time to go through the other ones, I don't think it is necessary, your Honor, because the Defendants have certainly gone through all of these studies that they posit for the Court and we asked them at their deposition what the state of their overwhelming research was.

Let me conclude this section by showing the Court what the Defendants have told us, these are their witnesses designated on the state of the research. First for the city we have Mr. Woika, his deposition starting with page 26, line 13 to 28, line five.

I ask him "Okay. How much more likely is an LGBT minor who undergoes sexual orientation or gender identity change efforts to experience depression versus an LGBT minor who does not undergo those kinds of efforts?

"Answer: I don't think I can give you a good answer on that.

"Question: Okay, the city --

"Answer: I don't know.

"Question: The city doesn't know?"

Time out. He was the city's designee on this topic.

"Answer: No.

"Question: The city doesn't know whether it's five percent more likely, one percent more likely, or zero point zero one percent more likely?

"Answer: That's correct.

"Question: How much more likely is an LGBT minor who undergoes sexual orientation or gender identity change efforts to experience feelings of fear or loneliness versus an LGBT minor who does not undergone those kind of efforts?

"Answer: I don't know, and the city does not know.

"Question: And if I ask you the same question for rejection, the answer would be the same? The city doesn't know?

"Answer: That is correct."

Moving on to page 27 -- still on page 27, line 12.

"Question: And if I ask you the same question with respect to feelings of anger, the answer would be the same? The city doesn't know?

"Answer: That's correct.

"Question: If I ask you the same question as to suicidal thoughts, your answer would be the same? The city doesn't know?

"Answer: That's correct."

Line 20, "Question: And is it fair to say the reason the city doesn't know this is because no study has ever found a causal connection between sexual orientation or gender identity change efforts and any harm?

"Answer: The reports and information that was attached to this ordinance" --

Time out, these are the list of ten items.

-- "ones that was relied upon for the ordinance, did not have any of those. Whether one exists or not, I don't think we have done any independent review of the literature or studies.

"Question: And so --

"Answer: So we did not know of any."

They cannot point to a single one that there is a causal relationship between a claim of harm and SOCE counseling, let alone voluntary SOCE counseling.

We asked the County's expert, Dr. Ginsburg, a list of similar questions, and at the end of those, in the interest of time, page 40 of Dr. Ginsburg's deposition, line 11:

"Question: Well, as you sit here today, are you able to identify a single empirical study since 2009, since the APA report, based upon a causal attribution could be made between SOCE and harm?

"Answer: I can cite at least -- I could cite a study that shows a lack of efficacy of conversion therapy.

"Question: That's great, but that is not my question.

"Answer: Then no."

Your Honor, that is the state of the research, and you asked me earlier in my presentation today how much research, what is the threshold? Those questions perhaps are still being debated by the Courts, but one answer is certain, it has to be

something more than no research.

It has to be something more when bodies out there say we need more research on this, we don't have enough to draw a correlation between harm and SOCE, we need more research. Counties and Governments can't say we have all we need, this is bad, this is real bad, we are going to outlaw it. That cannot be the standard here.

In the Edenfield case the Supreme Court dealt with a similar situation where the proponent of the ban pointed to the report of the trade association, AICPA. There was a speech restriction there, and they pointed to this report, and that report there, like the APA report here, said the organization, quote, "was unaware of the existence of any empirical data supporting the authorities of harm that had been advanced by the Government."

And the Supreme Court said, well, their own studies, their own proof says there is not enough proof out there, so, therefore, they found that the city had not -- or the Government, rather, had not met its burden in that particular case.

THE COURT: So, the only Circuit Courts that have considered this issue, the Third in King and the Ninth in Pickup, found that the Government's interests were sufficient, in other words?

MR. MIHET: They did so on the irrational basis on

Pickup and lower scrutiny --

THE COURT: Intermediate for King.

MR. MIHET: Intermediate for King. No one found it on a compelling interest. Your Honor, I don't know the level that the particular Courts delved into the studies as this Court has a chance to do today.

What I can tell the Court without any doubt, NIFLA dethroned King and dropped off Pickup, if you pardon the pun. The Court can start with a clean slate.

THE COURT: NIFLA didn't reference King or Pickup?

MR. MIHET: It did.

THE COURT: In terms of abrogating, there is no such language that would suggest those cases and everything they stand for -- was there a petition for cert and it was denied? King and Pickup have not been overturned. NIFLA has spoken to issues that have come up in King and Pickup but --

MR. MIHET: I believe there is no reasonable way to read NIFLA other than an abrogation of King and Pickup. The Court says this is what King and Pickup do, they go through the entire rationale of why professional speech is viewed with lesser scrutiny, and the Court says we have never done that, we have never sanctioned that.

THE COURT: You are saying on a particular issue as relates to professional speech?

MR. MIHET: Yes, just to show the Court for what it is

worth -- one second here. Just for what it is worth, if NIFLA did not abrogate King and Pickup, our friends at WestLaw --

THE COURT: I understand WestLaw indicated that, but that is not binding.

MR. MIHET: I do not suggest that.

THE COURT: I am aware of that.

MR. MIHET: That is the overwhelming research analysis. Now I am going to go into the last section, which is narrow tailoring, your Honor.

Under strict scrutiny, Defendants are required to demonstrate that the ordinances here are the least restrictive means available, goods versus vary I, and worth versus woke -- to say narrow tailoring the Defendants must show they seriously undertook to address the problem with less intrusive tools available to them.

That comes out of the McCullen case in the Supreme Court, 2014.

We show cases where they say basically they have to look at other alternatives and seriously consider them. If they reject them, they have to have a good reason for rejecting them.

THE COURT: Let me ask you, are you arguing that at the time that the regulation was passed, the county and the city had to consider narrow tailoring, that is fully explore all other means to protect minors from conversion therapy,

and/or is it enough for the Court to find today that there are no alternative means?

Where do you point the Court to evaluating no alternative means?

MR. MIHET: McCullen stands for the proposition the Defendants had to consider it in the first instance, and if they did not consider it, which I will show you they most certainly did not, that is reason enough for the Court to invalidate or enjoin the ordinance.

The Court should not accept after the fact excuses as to why certain alternatives might not work because the Defendants had a constitutional duty under McCullen to consider them under passage.

If they come to you now with clever excuses, those are excuses crafted by counsel for purposes of litigation, they are not alternatives that were seriously considered by the Defendants as McCullen quite clearly says they have a constitutional duty to do.

So, here, your Honor, the Defendants failed to meet their burden on narrow tailoring by a wide margin. If Judge Hoch asked the Defendants -- or did ask the Defendants to ban aversive therapy coerced upon minors, then Defendants could have banned aversive therapy being forced on minors while still allowing the Plaintiffs to conduct their non-aversive therapy.

If others are being harmed by forced therapy, the

Defendants could have banned forced therapy and allowing requested therapy.

They have no evidence showing less strict alternatives would have worked. That is one reason to grant the preliminary injunction, and the other one, which is more important, they have no evidence that they even considered such less constrictive alternatives at all, much less seriously considered them as their Constitution requires them to do.

The evidence we have shows us that they never considered this at all.

The city -- there were three City Council meetings on the subject of this ordinance, combined they did not exceed four minutes and 50 seconds in length worth of discussion. The only substantive discussion was the enforcement that my colleague will address, they didn't know how they were going to enforce this ordinance. They had no other alternatives.

Then we have Mr. Woika's deposition, page 29, line nine to page 30, line 24. That starts further down from what I have here for the Court, almost to the bottom of the page.

Question, line nine: "Did the City Council ever consider anything other than a blanket prohibition or a total ban on sexual orientation change efforts or gender identity change efforts?

"Answer: Are you referring to a ban on certain practices or -- as opposed to a total ban? Is that the

question.

Yes.

It goes on, line 16 of page 29:

"Answer: I think the Council had really the option of passing the ordinance, which is a total ban. And the only other alternative they considered was no ban.

"Question: Okay. So the answer to my question is no, the city has never considered anything other than a total ban?

"Answer: That's correct.

"Question: Now, you said -- so, just to be clear, then, the city never considered, for example, banning only aversive therapy as opposed to non-aversive therapy?"

Answer, page 30, line one: "Correct.

"Question: The city never considered banning only forced involuntary therapy while allowing therapy that a minor seeks out and voluntarily assents to?

"Answer: That is correct.

"Question: Now, you said in your earlier response that the city's only option was to enact the ban that is proposed or reject it entirely. Did I understand that correctly?

"Answer: That wasn't their only, but that was the decision that the Council was -- was deliberating in the October 2017 meeting.

"Question: Okay. Now, the Council could have

requested information on whether or not a ban that was short of a total ban would still address the perceived problem, correct?

"Answer: They could have, yes.

"Question: The Council could have requested information, for example, on whether or not prohibiting only aversive or forced therapy would still address the asserted harms of conversion therapy?

"Answer: They could have.

"Question: But they never made that request, correct?

"Answer: That's correct. They did not."

Your Honor, the city may try to come today and have a whole list of reasons why banning only forced therapy, banning aversive therapy would not meet the city's asserted interest. What they cannot get away from, your Honor, they never even considered that before they voted to enact this total ban.

McCullen says that alone is a constitutional violation that should trigger the enjoinment of this ordinance.

No consideration is very different, the exact opposite of serious the consideration required by McCullen.

Your Honor, so we don't leave the county out, let's look at what the county told us with respect to its efforts.

We have Exhibit 21, Plaintiffs Exhibit 21. This is an email that Dr. Hamilton wrote to attorney Hvizd for the city who was drafting this ordinance, and you see at the bottom of this exhibit is her email, and she is pleading with Ms. Hvizd

to limit the definition of conversion therapy to add such things as coercive counseling against the individual's will.

She specifically proposed a narrowing or narrower alternative for the county to consider, your Honor. There is no evidence that this was ever considered, much less seriously considered by the County Commission.

In fact, we've asked Ms. Hvizd -- Attorney Hvizd whether this even made it to the County Commissioners and she was not able to tell us whether they looked at it as a whole.

Also, your Honor, and for the record, I won't take the time to walk through that testimony, that is Hvizd's deposition, page 273, line two to page 279 line 23.

We also know that the County Commission received public comment during the Commission hearings asking it to consider alternatives such as banning shock therapy or banning aversive techniques. Ms. Hvizd testified about that on page 39, line 20 of her deposition. Again, the county has no evidence to show this Court that that was actually seriously considered by the county as an alternative for a total ban.

So, your Honor, for these reasons, the city and county never considered anything other than a total ban. They have no evidence that a total ban would address their concerns, and for that reason they badly flunk the narrow tailoring test.

We talked about the fact that these ordinances are wildly under inclusive. I will not belabor that point, that is

also relevant to the narrow tailoring analysis.

If we are talking about child abuse, your Honor, it doesn't matter whether it is done by a licensed therapist or clergy or any other adult, child abuse is child abuse, and the fact that they only banned it from licensed therapists, your Honor, goes to show they made no effort here to draw some reasonable lines.

And, your Honor, with respect to one thing we talked about earlier, which is the viewpoint discrimination, the Court asked me a question, you know, does the fact that they can recommend this to -- recommend their clients to go elsewhere for this kind of counseling, does that affect the analysis, number one, it is wildly under inclusive.

But number two, your Honor, when recommending this to a client -- imagine the situation where a client comes in and says, look, I would like to change back to being a girl the way I was born, can you help me with that? What would it look like if Dr. Hamilton says, you know what, I really want to help you, but I can't, it would be illegal for me to do it? I can't do it, but somebody else can. You could go to another doctor down the road and they could help you.

The fact that she has to deny a service because it is illegal for her to do it diminishes her viewpoint. Nobody in their right mind would say if you can't do it, I will go somewhere else. The fact that she has to refer somebody else

out under these auspices, under the threat of the full weight of the Government here, is, I think, a profound intrusion on her viewpoint and on her rights.

The Court has been very patient on the issue. If you have no questions, I will turn it over to my colleague at this point.

THE COURT: Thank you.

MR. GANNAM: Good afternoon, your Honor. I am going to deal with two specific issues related to enforcement of the ordinances which is an additional part of the narrow tailoring analysis and the tailoring issue.

Let me begin with enforcement. These ordinances -- the ordinances cannot as a practical matter be enforced to remedy any purported harms Defendants claim to have in view. Defendants' code officials, whose only education requirements are high school diploma or the equivalent, are objectively ill-equipped to investigate and make determinations about appropriate mental health therapeutic practices, as are the special masters who would be required to rule on the violations.

We think this is a flawed practice that would never satisfy narrow tailoring. This inability to enforce ordinances through existing code officials is admitted by the city's and county's senior officials in their unfiltered preordinance correspondence. This correspondence I am about to get into

points several times to the preemption problem that I will point out along the way.

Let me begin with the slide before the Court now. This is a September 7th email. Here, your Honor, we have a September 7th email --

THE COURT: On the screen, it is showing Plaintiff's 16.

MR. GANNAM: That is correct, this is a portion of it for purposes of the slide.

This is an email from the County Attorney Nieman, Denise Marie Nieman, to the Commissioners prior to enactment of the ordinance. I quote the email, I will explain the text of it.

In this email Attorney Nieman expressed reservations about tailoring the ordinance, namely conversion therapies, and it covers the inability of the county to enforce the ordinance against licensed therapists in any event.

"While we still have legal concerns including, but not limited to, preemption -- excuse me -- implied preemption, the Florida Patients Bill of Rights, conflicting Federal Court opinions, and parental rights, there were some arguments that advanced to a point where we were able to move from a definite no to a maybe." I will explain that later.

The second paragraph: "In addition to the legal issues" -- so we are moving into factual and practical issues.

"In addition to the legal issues, after researching the history of conversion therapy, I felt it important to bring to your attention some general observations, as well as practical concerns. Most of the universal complaints seem to be about religious organizations that the ordinance would not legally be able to address."

Here is the critical part. "Further, all of the six therapists who have been identified to us as practicing conversion therapy in PBC are located in the incorporated areas of the county, which I suppose is a plus because one of the main concerns is enforcement. It's difficult to imagine how a County Code Enforcement Officer would be able to issue a citation for a violation. How would an officer determine if a violation occurred?"

Let me move down to the next slide, which is Plaintiff's Exhibit 25. Here we have, prior to the enactment of the city's ordinance, Deputy City Manager George Brown who was the direct supervisor --

THE COURT: Is this the same exhibit?

MR. GANNAM: No, 25. This is a different author, this is Deputy City Manager George Brown of Boca Raton writing to City Attorney Diana Frieser about enforcement. The text says: "While I find so-called conversion therapy inherently wrong and totally abhorrent" -- he is not in favor of our clients' viewpoint here -- "a local ordinance banning such practice

would be extremely difficult, if not impossible, to enforce. Proving a violation would necessarily require public disclosure by a patient or credible witness that the treatment had been administered in violation of the ordinance. The city has not adopted ordinances limiting or regulating professions otherwise regulated by the state."

Here again is a preview of the preemption problem as well as noted by the Deputy City Manager. Moving down to the last sentence for time sake: "To me this is not an area of local governance." Once again a preemption issue.

Here the critical part is that he says it is difficult, if not impossible, to enforce. He was the head of Code Enforcement at the time of this email according to the deposition testimony.

I would also point out, your Honor, all these exhibits I am covering in this section are explained in our proposed findings of fact with the deposition cites as well. I will point out if I get into something already not laid out in the proposed findings of fact.

THE COURT: While you are doing that, I know it is unrelated to what you are talking about, before you stood up, there was mention of the McCullen case. Could you give me the site of that case? There have been a lot of submissions, so I don't forget to ask you -- and I don't mean to interrupt the discussion you are now having.

MR. MIHET: Your Honor, let me provide that during our rebuttal time.

THE COURT: That will be fine. You may proceed.

MR. GANNAM: The next exhibit is Exhibit 26, another email from George Brown, Deputy City Manager for Boca Raton. He reaches out to several colleagues who are his counterparts in municipalities in Palm Beach County.

In this email he poses to them "Colleagues, each of your cities has adopted a conversion therapy prohibition ordinance according to the forms we have been provided. Have any of you established specific enforcement procedures? What methods of investigation are utilized to determine if a violation has occurred? Have any cases been prosecuted? Please let me know when you have time. Thanks, George."

This is not as critical that he asks the question, but the responses are. I will get into those. The first response came from the Boynton Beach City Manager, Lori LaVerriere, my best guess how to pronounce the name. This is Exhibit 26, a different part of the email chain.

Her response is at the bottom -- right in the middle of the exhibit, but lower than Mr. Brown's further response. It says, "Are you contemplating procedures, enforcement? Moving up to Mr. Brown's statement: "I have recommended we adopt a resolution stating our position against it, rather than an ordinance making it an offense, because we would not want to

get between a family and its child based on a complaint from the child or a third party. We are in the early stages of considering the matter. I consider it more or less unenforceable ordinance and a matter that is not something our local Government should take up."

As a practical matter, the head of Code Enforcement says we can't enforce it and states as to a policy issue, this is something our Government should not take up.

So, there is no evidence in the record that either Deputy City Manager Brown's recommendation that a resolution would be passed instead of an ordinance or his concern an ordinance would be unenforceable would be communicated to the City Council before enactment, before they voted on it.

The fact that enforcement procedures raised by the attorney were disregarded, if they were even aware of them, is revealed in the subsequent exchange between LaVerriere and Brown. Moving to the next slide, this is LaVerriere's response to Mr. Browns' statement that they should do a resolution instead of an ordinance, and that it is unenforceable. Mid point of the slide she says, "Agreed. Electives received a lot of pressure from Rand Hoch." Above that, "As are ours."

This may explain why even if the City Council was aware of the concerns of enforcement and preemption, they went ahead and voted anyways. Either way, it is an absence, as my colleague pointed out, of any narrow tailoring or practical

enforcement.

THE COURT: I am sorry, what case or cases do you rely upon to consider the arguments you are making about enforcement difficulties fitting into the prong of the narrow tailoring?

MR. GANNAM: That is a good question. We didn't find a case that specifically addresses this inability to enforce the argument as a problem for narrow tailoring. An ordinance that cannot been enforced will do nothing to justify the ordinance in the first place.

THE COURT: In your research, have you found an example where something was struck down on constitutional grounds because, in whole or in part, there were enforcement difficulties?

What have you uncovered in that?

MR. GANNAM: I don't have anything for the Court at this point. I can't say it is not out there. We make the argument as a matter of reason and logic. If it cannot be enforced, it does nothing to advance the Government interest that is asserted to justify the ordinance in the first place.

Moving on to the next exhibit, which is Plaintiff's Exhibit 26, a new slide, this is where the Village Manager of the Village of Wellington, Paul Schofield, joins in on the conversation, and his agreement for the point being made.

He said, "Good morning, George, I would prefer to discuss that ordinance in person. Having said that, we do not

have a specific enforcement mechanism and I don't have any clear idea how we could train either Code Enforcement staff or law enforcement staff to actually enforce it. If we receive a complaint we will deal with it individually, and most likely refer it to one of the state governing bodies. The M.D.'s, D.O.'s and clinicians all have their own state boards."

Again, inability to even conceive how enforcement could be done by this village manager and the policy that leads into our preemption argument, at the state level there are existing boards to enforce regulations of licensed professionals.

Now, again, there is no evidence in the record that any of these dire enforcement concerns from all of the other city managers who Mr. Brown polled were ever considered by the City Council, but at the final meeting when this ordinance was voted into law by the City of Boca Raton, Council member Rodgers expressed his own doubts which he raised with the Council and city staff at the final meeting prompting responses from the City Manager and City Attorney.

For the record, this transcription we have on this slide comes from the deposition of Assistant City Manager Paul Woika where the video is played and transcribed by the Court Reporter.

We have Mr. Rodgers right before the vote: "Madam Chair?

Mayor Hayne recognizes Mr. Rodgers.

THE COURT: What exhibit are we looking at?

MR. GANNAM: This is from the Woika depo, page 61, lines five to 21.

"Mr. Rodgers: Madam Chair?

"Mayor Hayne: Mr. Rodgers.

"Mr. Rodgers: Question for our City Manager. How -- and I've looked through this and I have some concerns of language licensed practice versus unlicensed. How would we enforce this? Would this be like a code violation, that we'd bring it forward or --

"City Manager: It would be. I am not sure how we would enforce it, but it would be in the code related area.

"Mr. Rodgers: Any other thoughts from the attorney?

"Mayor Hayne: Ms. Frieser?

"Ms. Frieser: That was a -- it's a Code Enforcement process. I concede that it's -- there may be difficulties in actual practical enforcement issue. But it is a Code Enforcement process."

It is clear enough from the transcript the complete inability of the City Manager and City Attorney to answer Mr. Rodgers' question which is: How do we enforce this? The most they come up with is it is a Code Enforcement process.

I want to show the Court a few seconds of that meeting, how they respond in real time, how they answer this

question.

THE COURT: What exhibit does that come from?

MR. GANNAM: 24, a video file, and on a USB drive we gave to the Court Exhibit 24 media, part three of three, the third of the three City Council meetings where this ordinance even came up.

(Thereupon, the video was played.)

MR. GANNAM: I will advance it to minute four, second 44, or second 45. The actual discussion is at 48. I will give you a lead-in to see what is going on.

(Thereupon, the video was played.)

MR. GANNAM: That is it, your Honor. It is clear from the written transcription of the City Manager and attorney how are we going to enforce it. The body language and how they answered the question, they have no clue how it is going to be enforced and they went ahead and passed the ordinance anyways.

It is true by this point, given the correspondence by Deputy Manager Brown and the City Attorney herself, at this meeting the City Manager and City Attorney knew of the enforcement concerns and did not raise those as part of the process.

All this evidence -- all of this is evidence, I submit, compelling evidence that the ordinances cannot be enforced as a factual manner. Cities and counties are objectively unqualified and ill equipped to enforce regulations

of licensed mental health professionals in how they perform therapy and counseling.

The only required education for Code Enforcement officials is a high school diploma or equivalent. There is no city or county board of professional standards or even a single Code Enforcement official with a professional license that would be given the responsibility of enforcing the negotiations like the Plaintiffs.

We have an inability expressed, admitted by the city and county officials themselves, that this cannot be enforced.

I want to point to testimony. This is from the 30(b)(6) representative, Paul Woika, page 163, line 17 through page 165, line 18.

THE COURT: You want to get to preemption. Is this the last part of enforcement?

MR. GANNAM: It is.

THE COURT: How much time do you need for preemption?

MR. GANNAM: I will do it in ten minutes.

THE COURT: Okay, finish up with the enforcement issue and I'll have you go on to preemption.

MR. GANNAM: Thank you, your Honor.

So, here we have the first part of the testimony from Mr. Woika, and this is a hypothetical posed.

"Question: So you have a ten year old prepubertal child --

"Answer: Uh-huh.

"Question: -- and he was born as a boy, and he presents to Dr. Otto and says, you know, that he is really interested in girls, wants to play with dolls, wants to hang out with friends that are girls, wants to dress up as a girl, wants to do things that girls want to do, and he has no interest in things that boys want to do and is experiencing distress as a result of the fact that he wants to do all these things that girls want to do and yet, you know, he has a male anatomy. When he shows up" --

Here Mr. Woika interrupts and he says:

"Answer: So, to me -- and clearly I'm not a clinician in any event. But what you just explain to me sounds like someone who is identifying with -- as a female. But again, I am not the best person to make that call. Perhaps someone, you know, who's a therapist could do so."

Here the 30(b)(6) designee on interpretation of the statute says you need a therapist to know what we are talking about. Here is a change in gender identity or something else going on. As he continues with his answer he says:

"Answer: And if that were the case and the goal of Dr. Otto -- I think was your example of this case -- tried to change the gender identity to a male, then, yes, that would be a violation of this ordinance."

He gives the answer in the hypothetical, it would be a

violation, but the admission right before his answer that is critical here is that I am not able to do this. He has more education and has a professional engineering license. Code officials don't have any of these things, yet they are going to be asked to make a determination whether a child is experiencing confusion or distress about wanting to be or trying to be a gender different than what the child is born as. Even recognizing that child is identifying as the other gender and intending to change, or whether something else is going on, the city officials have no competency, no fault on them. I doubt any Code Enforcement official signed up to police professional therapists. There is no way for the city to adequately enforce this.

THE COURT: Let's move to preemption.

MR. GANNAM: The Defendants' lawyers were correct then to say preemption was a problem, and there is nothing that has changed legally to remove the preemption, therefore Defendants' ordinances are ultra vires and unenforceable .

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

I will start with the second prong. All the communications we looked at from the various city officials saying we can't enforce this, and cities and counties don't

enforce these things, and there are state level boards to enforce regulations against professionals, all of this is evidence for the strong policies saying this is a job for the state and not cities and counties.

The fact that they don't and can't enforce this is a strong policy against it and they have been willing to concede that area to the state.

Now let's look at what the Sarasota Alliance case said, what the standard requires. That is the other prong of preemption.

The proper inquiry according to Sarasota Alliance is whether the state has preempted a particular subject area. This is important because the relative subject area is health professionals, not as subset of regulation on sexual orientation or gender identity counseling, or even a subset of regulation of SOCE counseling or so-called conversion therapy.

If the rule were otherwise, a municipality would be empowered to enact any regulation they want and say there is not a specific regulation or specific law on the books at the state level right now. They haven't implied or preempted it. We have to look at the field.

The state regulatory scheme, which covers all licensed medical and mental health professionals, we think is pervasive, and it is evidence the state intent to be the sole regulator of these licensed professionals in the state.

In our briefing and proposed conclusions of law we cite numerous authorities for the proposition we think is undisputable that the regulation for mental health professionals has always been a matter of state concern.

The Defendants' contention that it is a local concern is simply incorrect as a matter of history and matter of law and matter of logic. There may be a case or two and maybe a Federal case saying this is a local concern. That is the difference between a Federal and state regulation, not local and state regulation, which we have here. The absence of any regulation of mental health professions and professionals specifically by either Defendant, especially when viewed in light of their compelling interests, confirms both the strong public policy favoring regulation by the state alone, and the Defendants have submitted to the state's "will be the sole regulator" of mental health and similarly situated professionals.

The Defendants' own lawyers make the argument better than we can.

We are going to Plaintiffs Exhibit 9, this is 16 months prior to the enactment of the county ordinance. Neiman states that the State of Florida had preempted the entire field of therapy regulation.

"Hi Rand, Greetings from Detroit's airport. It's fascinating how great lawyers can look at the exact same

language and make completely different opposite conclusions.

"I appreciate that you know much more about the subject than we do, but as you can tell based on our convo yesterday, I made myself very familiar with the issue. On a very basic level, how can we say that CT" -- conversion therapy -- "is a local issue? The entire field of therapy regulation is conducted at the state level."

If I can jump down to the last paragraph to save time, "I truly appreciate your openness and willingness to exchange information and understand where we're coming from. Yesterday's conversation suggested just that. Maybe your team has something at the ready. This is a classic non-localized issue in my view."

Now moving on to Plaintiff's Exhibit 11, which is another email, this time from Assistant County Attorney Hvizd who endorsed County Attorney Nieman's preemption provision.

"Hello Rand, In followup to your email of Friday, I offer the following synopsis of legal research conducted on the question of whether a county may enact a conversion therapy ban. The dual considerations a local Government must address when determining whether it is able to enact legislation in a particular area are preemption and conflict. The Florida Legislature's scheme of licensing and regulating businesses and professions is pervasive, evidencing an intent that this area be preserved to the Legislature."

As i said, the county's attorneys are making the argument better than we could.

Continuing, "Neither county nor municipal Governments license counselors, and there is no support in the law for a conclusion that regulating counselors is a local issue as addressed in Browning. To the contrary, every indication is that regulation of businesses and professions, including counselors, is a state issue."

Skipping down to the last line in the last paragraph, "The county plays no part in regulating counselors."

And then County Attorney Nieman adopts Hvizd's analysis without reservation, same Exhibit 11, a subsequent response, "Thanks, Helene! Rand, that sums it up."

Then we have another email, this is Plaintiff's Exhibit 13.

"Good morning, Rand." I will skip to the part that is relevant, third paragraph: "As for the other, cities have shared with is" -- I assume with us -- "their concerns about implied preemption and other areas that we have discussed with you. It's not just a county issue. What I said is that cities are willing to take greater risks with ordinances, they're smaller, know their constituents in a different more hometown way, sign off on things we wouldn't, etc. We can discuss further on the phone if you wish, but there's a whole different dynamic at play. Panhandling is a great example. Lots of

cities did what we told the BCC they couldn't.

"We'll keep it in still researching mode, but know that nothing will change just because more cities enact ordinances, unless one is tested and upheld on issues of concern to us. It would also be helpful to see how they're enforcing the ordinances and the results of their efforts. Any info you cam gather along these lines would be helpful."

In the next exhibit, Plaintiff's 14, Attorney Nieman repeated the point emphatically in the email to Judge Hoch. In this email she says, "Let me know when you want it to go" -- referring to her legal opinion -- "keeping in mind that nothing that happens with cities holds much persuasive value unless the Court rules on the exact issues I'm concerned about."

And then we have another email, August 2017, in which Judge Hoch asks Nieman to proceed with issuing a legal opinion. Here we have this interesting dynamic where we have the Palm Beach County Human Rights Council sort of directing the Palm Beach County's Attorney's Office to release the opinion.

It says, "On behalf of the Board of Directors of PBCHRC, I want to thank you for delaying moving forward with the direction received from the County Commissioners last summer regarding providing information concerning our request that the Commissioners enact a countywide ordinance to ban conversion therapy for minors by licensed professionals."

The next paragraph: "Over the past year, conversion

therapy bans have been enacted in" other Florida municipalities, and talks about laws across the nation.

In the concluding paragraph: "At this time PBCHRC would like you to move forward with providing your office's opinion concerning enacting a countrywide ordinance to ban conversion therapy for minors by licensed professionals. As we have discussed, your staff's legal opinions may well not be in agreement with that of PBCHRC and the twelve municipal attorneys in Florida who have addressed these matters, but be that as it may, we would like to move forward at this time."

Then we go to Exhibit 16. In the same email it says -- sorry, I went to the wrong slide.

All right. Here we have the second paragraph, this is Nieman to Judge Hoch, "We strongly believe that this area should be regulated by the state since it is the state who licenses and otherwise governs therapists."

Last paragraph, "While we still have legal concerns including, but not limited to, implied preemption" -- and goes on from there.

I was corrected by my colleague, this is the email Attorney Nieman sent to the County Commissioners following the email directive from Judge Hoch. "We strongly believe that this area should be regulated by the state since it is the state who licenses and otherwise governs therapists."

So, now, looking at all of this correspondence between

the County Attorney, Judge Hoch, and the Commissioners, despite the county's steadfast opinion the field of therapist regulation is preempted to the state, and repeated admonitions that the passage of ordinances by other cities would not change that opinion, the only thing that changed legally between her last admonition to Judge Hoch on April 12, 2017, and then on September 7, 2017, was the passage of ordinances in other cities as pointed out by Judge Hoch in his email.

The one condition Nieman had imposed, show me some change in the law, show me where one of the ordinances have been upheld in addressing our concerns, only a change in the political calculus can account for the change of position, apparently prompted by Judge Hoch's August 28th email thanking the County Attorney for waiting on the PBCHRC Council and stating they would like the County Attorney to go ahead with her legal opinion.

Finally, we have the city also expressing the same issue. This is Plaintiff's Exhibit 23, it is an excerpt of an email with Diana Frieser, the attorney who referred her opinion to the Boca Council.

It says, "It is worth noting that although regulation of health professions occurs through licensure at the state level, there is no express statutory preemption regarding the state's regulation of licensed health professions, nor any case law finding an implied preemption. However, given the

extensive regulation of health professions by the state, it is possible a Court may in the future find the regulatory field has been impliedly preempted to the state, thereby prohibiting local regulation."

Both the city and county attorneys recognize the preemptive issue and were concerned about it early on, and for good reason.

The counties have no board of professionals like Florida Statute 49.011 creates to license or regulate therapists working in their jurisdictions. Florida Statute 49.004, the Board of Clinical Social Work and Health Colleges was created to be nine members, six of the members must be licensed professionals in the respective fields.

As soon as the city or county would undertake to create a board to regulate professionals such as these ordinances purport to do there would be no question they would be stepping into the state's territory and stepping into a field preempted by the state. They haven't done that. Even if they did do it, it would add to the preemption argument, certainly wouldn't take away from it. We rely on the briefing and conclusions of law for the rest.

I would make one final point. The Plaintiffs argue Florida Statute 456.003, Subsection 2-B, indicates that the state gives permission for the local government to legislate in the field in creating these various professional boards to

regulate these professionals, the state is giving permission to enact ordinances in this field. We say, looking at the entire statute, that is not a reasonable reading of the statute.

Subsection 2-B says, starting at the beginning of Subsection 2, the legislature further believes that such professions shall be regulated only for the preservation of health, safety, and welfare of the public under the police powers of the state. Such professions shall be regulated when, part B, the public is not effectively protected by other means, including, but not limited to, other state statutes, local ordinances, or Federal legislation.

This is not permission for other counties to regulate in this field. We are entering into this field because no other regulation exists. This Court should find there is no room for counties and cities to regulate licensed professionals as they have in the ordinances and to find preemption.

Thank you, your Honor.

THE COURT: Thank you. All right. That concludes the Plaintiff's presentation?

MR. MIHET: Yes, your Honor. We ask the Court for brief rebuttal time at the end of the day.

THE COURT: Okay. Let's see if we can do that. That was a total of two hours and 45 minutes.

We will take a lunch break and we will come back at 1:30, and then we will be ready to have the County Defendant

present.

MS. FAHEY: Yes, your Honor.

THE COURT: And the courtroom doors are locked over the lunch hour. Feel free to leave things in here, they will be safe. If you need anything, take them with you.

We will see you back at 1:30.

(Thereupon, a short recess was taken.)

THE COURT: All right. Defense may come forward. Did you want me to give you any type of notice of timing?

MS. FAHEY: Yes, your Honor, it would be helpful to have a cue at 60 minutes.

THE COURT: All right. You may proceed.

Maybe I will begin by asking, I started off my questioning of Plaintiff's counsel concerning the substantial likelihood of success and cited an Eleventh Circuit case. Was there anything you disagree with or did you want to add anything to that?

MS. FAHEY: We did, your Honor, do a little bit of research on the issue and found an unreported case, Barnes versus Burger King, 1994 U.S. District, Lexis 21005. The Court case for that is 94-889-CIV, and in that case the Court held -- I believe it was the Southern District, your Honor -- that the standard of substantial likelihood requires more than a mere probability or preponderance of the evidence.

THE COURT: 1994, more recent than the Eleventh

Circuit I cited to, which was the Shatel case.

I will look at that. I use WestLaw, not Lexis. What was the case name?

MS. FAHEY: Barnes, B-A-R-N-E-S, versus Burger King.

THE COURT: All right. Do you want to proceed according to how you have it mapped out? And I will jump in with questions that I have when they fit into your road map.

MS. FAHEY: Yes, please.

The county would like to note for purposes of the preliminary injunction hearing we are here for today it is constrained by the matters raised by the preliminary motion itself, Docket Entry 8. It is not expanded to all claims brought in the verified complaint, Docket Entry 1. The complaint raises free exercise claims and some Florida Statute claims that were not briefed and not raised as a basis for the preliminary injunction motion.

THE COURT: The Plaintiff concedes that?

MR. MIHET: Correct, of course.

THE COURT: It is fair to say that all of the exhibits you have stipulated to for admissibility relate to only those claims as far as -- that are part of the motion for preliminary injunction. I am not going to come across exhibits, because there are many of them, that are unrelated; is that correct?

MS. FAHEY: That is correct. There are portions of the depositions and interrogatories that might be more

expansive than limited to free speech. As a preliminary place to start, I want to advise the Court the primary reason we are here is the freedom of speech claim.

The county's response is that the county's ban on conversion therapy is constitutional. National organizations noted a problem with conversion therapy, the county consumed that information, made its findings about it, and then received public comment on a proposed ordinance to ban conversion therapy, and then the county received information showing conversion therapy was a local issue as well.

The county had the authority to do something about the issue that it was advised about and so it did.

Plaintiffs' professional practices are not expressive. And so, in the context of the fact that the county's position is this is commercial -- pardon me, this is professional conduct, it is important, we believe, for the Court to look at what occurs in the Plaintiff's professional practices.

Next the county will discuss the fact that the county regulates professional conduct and the county will address the argument that even if it did regulate speech, the ordinance would survive the scrutiny.

THE COURT: Are you starting off strong with this is what Pickup did, but King didn't, and didn't NIFLA do away with that notion that it is conduct?

MS. FAHEY: Your Honor, yes, we are starting off

strong that conversion therapy is in fact professional conduct. No, we do not believe that NIFLA did away with the professional conduct. It is a subject I will talk about in detail later.

THE COURT: No, I will let you go through -- we have the slides right here.

It would follow you would start off with the first position, which is that it is conduct and it would be a rational basis review, but you have alternative arguments as well.

MS. FAHEY: The county argues and believes the appropriate standard of review is that professional conduct rational basis review. If the Court finds speech is implicated and the First Amendment comes into play, the county's argument is that the review is intermediate scrutiny. If you disagree with all of the others, the county believes it meets the legislative record.

THE COURT: Let me ask you this: If the Court were to find that it was viewpoint discriminatory, does it necessarily and automatically have to find the ordinance unconstitutional, or is there a place to go with this kind of case in a viewpoint based speech?

MS. FAHEY: Yes, your Honor, the course -- the county does not agree it is viewpoint discriminatory.

THE COURT: I am just asking a question. If the Court were to conclude that, is it automatic as a matter of law that

it becomes unconstitutional or not, and maybe or not, because of the particular nature of this matter?

MS. FAHEY: No, and here is why. R. A. V. versus St. Paul, 505 U.S. 377, 1992, in that case the Court said when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is prescribable, no significant danger or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

That analysis is repeated in the King case, and the county argues that that basis for exempting a certain type of content or viewpoint base discrimination has not been overruled by R. A. V. in the Eleventh Circuit. I believe an unpublished opinion in the county's submission for its proposed findings of fact and conclusions of law, the county cited an Eleventh Circuit case where it discussed the fact that Reed did not do away with a separate analysis of content discrimination, and because Reed did not address that, they did not read Reed as abrogating that in any way.

So, I did not see that Reed addressed the type of content discrimination that R. A. V. did, so we submit it has not been abrogated either.

THE COURT: Okay. And I guess -- and then you will

flesh it out, but if the Court were to find that maybe it is not viewpoint based or viewpoint discriminatory, but it is content based, must the Court subject it to a heightened scrutiny, or would you been arguing that again because of the nature of the speech involved here, it would fall into some other category that wouldn't normally have it be subjected to heighten scrutiny when it is content based?

MS. FAHEY: We believe the type of activity that conversion therapy is determines the next step the Court takes. We believe the first threshold question is, is conversion therapy professional conduct or is it speech.

THE COURT: Can it be both?

MS. FAHEY: Can it be both? I do not know that it can be both.

THE COURT: It can't be a conduct, a procedure, a practice, but it includes speech?

MS. FAHEY: Let me clarify my statement, your Honor, to say when I refer to speech, I refer to it as though it had a capital S, the First Amendment protected speech. Certainly there are words implicated in the process of providing the type of talk therapy that the Plaintiffs describe. However, it does not mean those words are imbued with the sufficient communicative and expressive qualities that would make it qualify for First Amendment protected speech.

I do have a portion of the presentation that I would

like to take you through.

THE COURT: Okay.

MS. FAHEY: To conclude the discussion, your Honor, where content base must be applied --

THE COURT: Must be strict scrutiny.

MS. FAHEY: I would turn to the same argument with R. A. V. and King, when NIFLA discussed Reed, it says, as a general matter, content based speech restrictions, etc., citing to Reed, and so to Wollschlaeger. It said generally, and so I do not agree that the law precludes a finding where you could have something that is content based and it also receives a lesser scrutiny.

THE COURT: As I recall NIFLA, from the very beginning of the opinion, which I don't have in front of me, it sort of carved out maybe two potential exceptions; one was in commercial and one had to do with sort of the Planned Parenthood versus Casey scenario.

Would you say this case is more like commercial or more like whatever the words that NIFLA used in terms of that it sort of, you know, had an impact on speech, but drew upon the Casey case, the Supreme Court case Planned Parenthood versus Casey?

MS. FAHEY: The second portion, under our precedents states may regulate professional conduct even though that conduct incidentally involves speech, and it did cite to

Ohralik and Casey as well.

The county's position is this is more like professional conduct and the county does argue it is conduct. The county has not affirmatively argued it is commercial speech, however, we are aware the Southern District interprets commercial speech more broadly than merely a statement that proposes a commercial transaction, and so we would not foreclose a finding by stating that it certainly wasn't commercial speech.

THE COURT: But you rely more on the second?

MS. FAHEY: Yes, your Honor.

THE COURT: That is speech incidental to the medical procedure.

MS. FAHEY: Professional conduct and speech incidental to professional conduct.

THE COURT: This has to do with notice given if a patient or client was going to be receiving a abortion.

MS. FAHEY: Yes, informed consent, specific compelled speech were the facts of Casey.

THE COURT: If we analogize this case to Casey, would the procedure be the counseling and the therapy?

MS. FAHEY: Yes.

THE COURT: But there is no informed consent requirement in this case, and there --

MS. FAHEY: Sorry to interrupt. We do disagree. Both

Plaintiffs have advised the county and the city that the Code of Ethics, AMFT, which is Exhibit 34, on page three of Exhibit 34, Section 1.2 requires informed consent. There should be no ethical practice of marriage and family therapy whereby there is no informed consent.

As I read the AMFT, I don't have it committed to memory, I recall there needs to be permission by somebody who is illegally incapable, which would be a minor who does not fall into the exemption, where a person under 18 is illegally able to consent.

THE COURT: That is not here, as it was in Casey.

MS. FAHEY: Correct. It has been suggested in one of the documents, I don't recall at this time, that perhaps the county should have only required an informed consent script for certain people before giving this type of therapy. And so, that is the greatest extent to which the -- sorry, not the greatest extent, that is how the -- an informed consent analysis has really been discussed in this case.

NIFLA talks about the fact that the notice requirements in NIFLA, those notice requirements were completely untied to any procedure that the patients walking into the facility may or may not be receiving there.

Here, the county's position is what is banned is the procedure. A licensed provider, defined by both the ordinances as certain individuals licensed under these statutes, is not

allowed to discuss the change of the sexual identity of a minor. It is the practice that is -- it is the procedure that -- so, to answer your question, we aren't talking about the informed consent, but we are not that far removed from the procedure.

Informed consent is conversation about the procedure. Here the county and city have banned the actual procedure.

THE COURT: You are not banning anything leading up to the procedure. It is my understanding, under the ordinance, the therapist could engage in a conversation with the patient about his or her views on conversion therapy, the therapist could do anything and everything short of beginning the procedure, the therapy, counseling, the actual -- we will call it the procedure, but using the words of the ordinance, counseling and therapy.

MS. FAHEY: Neither the county nor city prohibit them from expressing any views to a person, including a minor patient, or recommending conversion therapy to any person, including a minor, that is correct.

The county has taken no position whether it is appropriate to discuss your personal views in the context of providing therapy, however, the county has not entered into deciding that or not. If the words are part of a professional practice and is the therapeutic treatment of that individual, that is what is being regulated.

If the words are I personally believe this, I think this, I recommend that, to analogize it to the Conant case from the Ninth Circuit, in that case what was banned was any recommendation or discussion of the medical use of marijuana.

Certainly the Government was prohibited -- was allowed to prohibit doctors from prescribing marijuana, but they were not constrained from discussing the general proposition, this is a medicine I believe that could assist you in your situation, I would recommend it, I can't write a prescription.

THE COURT: I know I am taking you off script, you are doing fine. I will let you get back to your script.

Jumping ahead, doesn't that arguably undercut, possibly, the Government's interest, whether it having to be a compelling interest or an important interest depending on which scrutiny the Court applies, insofar as by allowing the therapist to even recommend the therapy and speak well of the therapy, maybe even encourage the patient to get the therapy, even going so far as telling the patient where to go, just not here, but the basis of the ordinance is that the therapy is harmful?

How do you reconcile that?

MS. FAHEY: The county has an interest in there being a marketplace of ideas and free expression of the marketplace of ideas. We have not, and cannot constitutionally constrain the Plaintiffs from their First Amendment rights to make those

recommendations, to speak to audiences about it, to tell individuals about it.

The Government is not going to enter into that type of regulation. We don't believe it undercuts our substantial governmental interest in protecting the minors of Palm Beach County from the practices of conversion therapy which have been found to be harmful.

In Palm Beach County, under the ordinance, you may not treat a minor -- you may not give him the treatment of conversion therapy. That is the law as it stands and we believe that is protecting minors from receiving that treatment.

THE COURT: So it was an effort by the county to balance, in the county's view, Plaintiffs obviously disagree, constitutional freedom of speech with protecting children from the therapy unless it was framed that way.

MS. FAHEY: Yes, your Honor, otherwise, I would expect we would hear the argument that the county had the opportunity to ban the therapy and not allowing people to discuss the therapy, like the Government did in Conant where they were trying to ban the prescription of marijuana, and whether that would be appropriate or helpful to anybody, that wasn't allowed.

If we had done that, we would hear the arguments that the less restrictive means of achieving our interest of

actually preventing this practice from being provided by licensed practitioners should have been achieved through actually banning it alone and not discussion of it.

THE COURT: I will ask you a couple more questions and let you move on. Because I began with the Plaintiff on the whole viewpoint -- whether it is neutral viewpoint based, it seems the Plaintiff I understood to make a couple of arguments why it is viewpoint based or viewpoint discriminatory.

I will use the Boca ordinance, conversion therapy, within the first sentence the Plaintiff seems to argue it is viewpoint based because it is not allowing regardless of which way the therapy is seeking to change someone's orientation or behavior, but it is this notion of change. So, there is this idea that the ordinance has expressed a view -- in its ordinance the county or city expressed a view that counseling regarding change -- even though I know you say counseling is conduct, not speech -- but counseling regarding change, that's a viewpoint based regulation.

And then secondly, the Plaintiffs argue that the second sentence that goes into conversion therapy does not include a person undergoing gender transition, and that is not prohibited, and the second sentence, that, too, suggests that it is viewpoint based.

How do you address that?

MS. FAHEY: The county's position is it is not

viewpoint based. It does not matter the viewpoint that the provider or potential patient brings to the table in their desire to seek to change sexual orientation or gender identity, does not matter which direction they are moving in, does not matter whether the basis is I believe this is the most sound practice in my field, does not matter if it is based on Christianity or Judaism, does not matter if it is based on the societal views of a particular community.

The county heard information at the public hearing, and I don't recall at the moment whether it was the first or the second hearing, but we had one speaker advise that there were specific communities that he was referencing of people in those communities -- nationalities he was referring to. I don't want to misstate him, I can provide this supplementally to the Court. Those communities thought it might be more desirable or appropriate to discuss orientation. If it was, for example, homosexual orientation, the county is not identifying whether a person desires that change or provide that change.

That is why that first sentence we are talking about, seek to change minors' sexual orientation or gender identity, that is not viewpoint based.

Then we go to the section of what is excluded and we discuss specifically supporting a minor's efforts to undergo gender transition. That is not at all inconsistent with what

is banning conversion therapy.

In a situation contemplated with the gender transition situation, you have a minor -- I believe Mr. Mihet gave the example of someone undergoing surgery or physically taking hormones to make their gender -- their physical gender presentation match their gender identity. This is not a person with a discordance of I believe I am a boy, will you please help me identify as a girl.

This exception isn't a conception, it is clarifying. If you have a boy who already decided I believe I am a girl, I am going to express my gender as a girl, and I am identifying as a girl, a person undergoing that transition can be supported by therapy, and so it is not the provider who is trying to change that child.

That child has already decided to undergo a change and is undergoing a change and the provider is supporting and counseling that minor.

THE COURT: What if the child already decided that he doesn't want to identify anymore as a girl, or she doesn't want to identify any more as a boy and comes in, and falls under one, the first sentence, because that person is not, at least at that stage, contemplating transition, but just to use that same analogy, why is that different then?

MS. FAHEY: I don't know that it is different.

If you have a child, no matter what the anatomical

sex, and they inform the provider that their gender identity is X, and that provider is not attempting to change X to be Y, Z or the number 3, then it is not conversion therapy.

If you have a minor saying I am X and the provider is performing a practice that seeks to change X to Y, Z or the number 3, we then have conversion therapy.

It is contemplated in the gender transition significant you have a child coming in saying I am anatomically a number 3, I would like to be X. Anatomically and physically those are my gender expressions I am working on, I am undergoing that transition, I identify as X no matter what anatomically I am, the therapist has not been asked to change the child from 3 to X. I know it is strange going from numbers to letters.

It is different because it is not therapists seeking to change the minor. The county has not prohibited or banned any minor from experiencing change in their gender identity, sexual orientation, sexual orientation identity, sexual behaviors. They may change, sexual orientation or gender may not be changed by a provider. That is what is specifically banned.

That is why the second sentence involving gender transition, it is not an exemption, it is not an exception, it is a clarification of what is not included in the definition.

THE COURT: Lastly, I know I keep saying that, much

was said about aversive and non-aversive and coercive and non-coercive. Could you speak to that?

The Plaintiff left the impression had an ordinance been drafted that included, and maybe it was at one point, that if it involved coercive and aversive and nonvoluntary, maybe that wouldn't be challenged or wouldn't even be eligible or subject to be challenged constitutionally.

How do you address that whole discussion?

MS. FAHEY: We first address it to say we believe that argument concedes the fact that that ordinance is not facially constitutional. Because the ordinance is aversive and non-aversive, aversive is conduct and subject to rational basis review, we believe the record supports and upholds review.

What we would discuss is that the aversive techniques certainly were something that were studied, they were more common and mostly studied in the beginning of this type of research, less common in modern day research, but that does not mean that the evidence that the county considered didn't span the gamut. The county received information that discussed conversion therapy, not conversion therapy solely through behavior techniques or aversive techniques, the harming beyond just those types of techniques.

THE COURT: Aversive techniques?

MS. FAHEY: Yes.

THE COURT: You will point that out when you get to

the type of evidence that the Government relied upon, I know it is quite voluminous. There are specific references to the harm of non-aversive and non-coercive therapy.

MS. FAHEY: On the topic of coercive, I would add therapy should not be coercive. Informed consent is required, it should be required by someone who is legally able to give it, and as we understand the Code of Ethics, AMFT 34, permission should be given by the person receiving this therapy.

Coercive techniques are already taken care of, and that is why -- that is why the strict scrutiny argument that Plaintiffs are arguing -- the county doesn't fail for that reason, because the county could have -- sorry, let me start over.

I think it would be a more persuasive argument hypothetically if the county had only banned coercive therapy, that there would be an argument under strict scrutiny that laws already took care of preventing that harm because there are already laws requiring that to be informed consent and permission from the person receiving it.

The county is banning the practice entirely, whether that child says that they want it because they, in their own self, actually want it, or whether they feel pressure from the household that they are living in, or whether they feel pressure from their friends to want it, any religious pressure,

any societal pressure. There could be any reason a minor might actually express a desire to want therapy.

As I will show you in the -- I believe it is the APA report, your Honor, there have been no factors discovered about what types of therapy cause harm and what types of therapies are going to lead to a benefit.

Because we don't know the identifying factors of what about this person makes the therapy beneficial, we don't know.

So, it could be very well the person who wants that therapy ends up in the harmed camp. It could be very well a person who feels societal pressure ends up expressing at the end of the day they perceived a benefit initially. So, the benefits that it was wanted is not something the research reports as a basis for distinguishing between who may have this therapy and who may not.

THE COURT: Okay.

MS. FAHEY: All right. I will -- nothing further from the Court?

THE COURT: Nothing further.

MS. FAHEY: I will proceed with the county's' slides.

This is the whereas clause that Mr. Mihet was citing from the county. The county did find the overwhelming research demonstrating that sexual orientation and gender identity change efforts can pose critical health risks to lesbian, gay, bisexual, transgender or questioning persons.

I divided my presentation into four categories. First, warned against attempting to change sexual orientation; second, attempting to change gender identity, and we'll look at ones especially concerned with minors; and finally, the recommended affirmative approaches when dealing with these types of patients.

The first chronologically is 1993 American Academy of Pediatrics, this is County's Exhibit 12.

Your Honor, for the purpose of time, I plan to read only small excerpts from each one.

"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." This was not limited to aversive techniques and not limited to coerced therapy.

Secondly, from the American Psychiatric Association, 1998, County's Exhibit 13. "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."

That is the excerpt I wanted to share with your Honor about that. Note the terms "reparative therapy" and "conversion therapy" are used interchangeably in the city's ordinance and in the literature we find that as well,

conversion therapy and reparative therapy are used interchangeably.

County Exhibit 14, 2009 APA Task Force report, this is Docket Entry 85, this has been filed a couple of times as attachments to the complaint as well as the deposition.

Earlier Mr. Mihet showed the studies, and this is the second page of recent studies.

It stated, "Although the recent studies do not provide valid causal evidence of the efficacy of SOCE" -- I will say SOCE when I come across it, that stands for sexual orientation change efforts -- "or of its harm, some recent studies document that there are people who perceive that they have been harmed through SOCE."

Just as in other studies, there are people who believe they have benefited from it, and it cites studies as well. "Among those studies reporting on the perceptions of harm, the reported negative social 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."

This is a continuation where, as I called out for your Honor, "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."

From this we see there is no evidence for anyone to distinguish whether an individual is likely after receiving conversion therapy to perceive harm or perceive benefit.

Further troubling, the APA report discusses the fact that often people report first perceiving a benefit and later receiving -- perceiving that they have been harmed.

This would -- this would further substantiate the county's basis for seeking to prevent therapy in the first instance rather than, like an allergy test, seeing if the patient quickly reacts negatively and ceasing at that point. It is possible they could first believe they have benefited and later down the road perceive they have been harmed.

THE COURT: So, taking that into account and considering, regardless what level of scrutiny, intermediate or strict, narrowly tailored or substantially related, do you know of any other cases that have relied upon data or information for the important governmental interest or compelling governmental interest where the means are narrowly tailored or substantially related when some of the documentation suggests that it is inconclusive as to whether in this instance it is

harm or benefit?

So it is kind of like we don't want to take a chance, we have some indication that it is harmful, we are still studying it, we don't know whether there are benefits or harm. It sounds like the county wants to be very maybe proactive and careful so as not to let the possibility of harm continue or begin, but some of the very documentation the county relies upon shows we don't really know, it could be beneficial, it could be harmful.

Where would the Court look to draw upon constitutional analysis that would find that that meets narrowly tailored or substantially related in that kind of an instance?

MS. FAHEY: To answer the Court's question, both Pickup and King find that, and both of them acknowledge that the APA task force was relied upon in substantiating those Government's enactment of their SOCE stance, and as you know, Pickup was the rationally related and King was the heightened scrutiny.

Secondly, I would not agree -- I would not agree that it is simply a it could be helpful, it could be harmful analysis, because you have to layer on to that analysis the fact that the research over and over again says we find no evidentiary basis for the effectiveness, that it is effective in actually achieving what it sets out to do.

So there is this therapy that nobody can identify what

specific practices would lead to a change or a perception of harm. So, I believe this next slide addresses that a little bit.

It states in the summary, this is from page 50 of Docket Entry 85-5: "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."

So we have no evidence supporting that it is safe or it is effective, so we don't see that there would be a rational basis to conclude that it would be appropriate therapy to be provided in the first instance.

THE COURT: Well, if we were just talking about this ordinance in the context of therapy and if it were effective or not, put aside the type of therapy and put aside if there is any discussion of harm or benefit, but just a matter of qualitative effectiveness or lack thereof, wouldn't that be -- and then you balance that with First Amendment rights, assuming we get beyond for discussion purposes it is not necessarily conduct or conduct only, but it is speech, wouldn't you think the Government's interest in effectiveness is far less compelling, far less important than when the Government is talking about doing something to prevent harm? Isn't that a

completely different analysis? Or is effectiveness part of what the Court should be considering as well when it focuses on the Government's interest?

I suppose you are going to say, yes, the Court should consider that. Isn't the harm and effectiveness different when we consider what the Government's interests are when weighing it against First Amendment rights? If we are talking about it in a vacuum maybe not, but we are balancing alleged infringement upon a constitutional right, the First Amendment under the Constitution.

MS. FAHEY: I agree, your Honor, that the type of regulation that might flow from a concern about effectiveness would look different from the type of regulation that would flow from a concern about harm.

Here we have a concern about harm, and I was looking to see if I could find -- I can't recall at this moment whether it is the Wollschlaeger case or NIFLA that discuss the various interests proffered by the Government in those cases, however, I believe that one of those cases addresses whether the effective practice of medicine is a compelling interest, and I think that it answers the question that is a compelling interest.

However, it goes on to analyze whether it could be upheld under that interest, and so, part of your question was whether effectiveness could be a substantial or compelling

Governmental interest. I believe the answer to that question is yes.

However, I do acknowledge, depending on the interest that the Government used to enact whatever restriction we are discussing, that is the interest that would govern, whether it's narrowly tailored or sufficiently tailored, etc.

THE COURT: As long as we are talking about that, there was discussion when Plaintiff was arguing about when you have to make that determination of Governmental interest and whether you have narrowly tailored or substantially related your means of accomplishing your Governmental interest.

Do you concur with the Plaintiff that it must be at the time that the ordinance is drafted and implemented? Can you acquire information on an ongoing basis, and here argue today, for example things you may have learned since the drafting of the ordinance? Can the Court consider that in terms of the governmental interest or whether you explored alternative means or explored ways to ensure it was substantially related?

MS. FAHEY: I understand a couple different parts of that question --

THE COURT: It is timing, the timing issue.

MS. FAHEY: As to the timing issue, we do not agree with Plaintiffs' interpretation of McCullen, the citation --

THE COURT: We got it, thanks.

MS. FAHEY: McCullen stated the Commonwealth has not shown it seriously addressed the problem with less intrusive methods available to it nor did it show different methods that other jurisdictions found effective.

In McCullen, we believe it is distinguishable on its face, and here is why.

It is discussing other jurisdictions having found effective other means having to deal with the problem being presented to that Government, and also talking about the fact that Massachusetts, in this case, had other methods in its laws to constrain the type of harms it was already worried about.

It had the ability to, I believe, issue injunctions, for example, is one thing it could have done. However, it didn't have any record to show that it had tried in the past to use its other laws on the books which theoretically could have addressed the topic, but those laws were ineffective in achieving their means.

It is very different. I did not see McCullen as holding that at the time of this case the PBCC, on December 5, 2017 and December 19, 2017 has to state on the record all of the alternative records that it could have used potentially, or we find none. I don't see that it is constrained to having shown the ineffectiveness of the alternatives at the time of adopting the ordinance.

I think that is the burden that the county and the

city -- if the Court were to find strict scrutiny applied, that is the burden we would bear in this proceeding for the preliminary injunction stage and ultimately whenever our burden was given to us.

You did ask, your Honor, I believe, whether the interest could change. That is something I do believe that the case law addressed when the standard of rational basis applies it is any conceivable legitimate governmental interest whether expressed at the time or not. I do believe there would be a basis, however, if heightened or strict scrutiny were implied, that the Court would be constrained to look at the interest that is articulated.

That is a separate analysis, what is the interest, whether alternative means would have been just as effective in achieving the governmental interest.

THE COURT: Okay, thank you.

MS. FAHEY: We have now the APA Council representative's adoption of an appropriate affirmative response to sexual orientation. That is County Exhibit 15. This is reported by SOCE.

The Pan American Health Organization, Palm Beach County Exhibit 19, stated that "reparative or conversion therapies have no medical indication and represent a severe threat to the health and human rights of affected persons. They constitute unjustifiable practices that should be

denounced and subject to adequate sanctions and penalties.

Exhibit 16 is from the American Psychoanalytical Association. "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."

In 2015, the Substance Abuse and Mental Health Services Administration -- I will refer to this as SAMHSA. This is County's Exhibit 21.

It stated, "There is limited research on conversion therapy efforts among children and adolescents, however, none of the existing research supports the premise that mental or behavioral health interventions can alter gender identity or sexual orientation.

"Interventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation, including those aimed at changing gender identity, gender expression, and sexual orientation are coercive, can be harmful, and should not be part of the behavioral health treatment."

Here you see the SAMHSA report is not saying it is not harmful, it is saying it is coercive and it is harmful.

The sources cited by the county's ordinance addressed

efforts to change sexually identity. In that report, the SAMHSA reported a consensus on efforts to change gender identity, citing "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 professional to have a prescriptive goal related to gender identity, gender expression, or sexual orientation for the ultimate developmental outcome of the 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. Directing the child or adolescent to conform to any particular gender expression or identity, or directing parents and guardians to place pressure on the child or adolescent to conform to specific gender expressions and/or identities is inappropriate and reinforces harmful gender stereotypes.

This is Exhibit 16 we already looked at. I wanted to highlight that it also touched on gender identity.

The American Academy of Child and Adolescent Psychiatry's practice parameter on gay, lesbian or bisexual

sexual orientation, gender nonconformity, and gender discordance in children and adolescents says, "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 dele --

THE COURT: Deleterious.

MS. FAHEY: Thank you, your Honor. -- effects.

Mr. Mihet cited from this paper as well, and he pointed out further research is needed before gender discourse can be endorsed. He said it might as well say it is bad. The county disagrees with that.

There must be more research before it can be endorsed. There is no reason -- according to the research we looked at, there is no reason to provide this therapy, it has not been shown to be effective to -- if there is no sufficient basis for actually providing it, we call into question whether it should even be provided.

Then we add on to that there are negative possible outcomes that are serious, such as self hatred and suicidal ideation. And Ms. Hvizd, in her deposition, I have a citation later, she noted that when she did her independent research when assigned this case on behalf of the county to research the ordinance, one of the things she discovered was a person who had committed suicide after receiving SOCE therapy. It wasn't

brought up because Mr. Mihet was citing harm to local harm. But the harm of suicide is great and grave, and anecdotally it has been linked to conversion therapy.

And so that brings me back to what I was saying about this particular source, was that we do question why would we provide it when there is no basis to provide it and also it carries a grave risk of harm.

The next area that the sources go into are issues specifically related to minors, and so, we have County's Exhibit 20, the American School Counselor Association discussing that "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."

Mr. Mihet made much of the fact that they cite the report, and they do support the APA 2009 report. It is, nonetheless, very instructive for the county to understand how national organizations such as the American School Counselor Association is interpreting the research that is available.

We believe that the APA 2009 report is referring to the task force report and not necessarily the practice parameter, but the practice parameter does discuss the fact that it is associated with harm. And the practice parameter is Exhibit 15.

This is Exhibit 12, which we have looked at before.

The highlighted portion for your Honor is that "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."

From this same paper: "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 ideations and attempts.

"As bullies typically identify their targets on the basis of adult attitudes and cues, adult efforts to prevent homosexuality by discouraging gender variant traits in pre-homosexual children may risk fomenting bullying. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial, or necessary, and the possibility they carry the risk of significant harm, such interventions are contraindicated."

This is addressing harms relevant to children.

The American College of Pediatrics published Exhibit 22, and from this we see they explain "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."

Associated with increased rejection, we know rejection to a minor is more detrimental than acception of that minor. The Plaintiff admits that rejection is harmful to minors.

The APA task force report stated specifically with respect to children, "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. Licensed mental health providers should strive to be mindful of these issues, particularly as these concerns affect assent and consent to treatment and goals of treatment."

This is part of the explanation for why this therapy is specifically banned on minors. Minors are often unable to anticipate the future consequences of present decisions. They are emotionally and financially dependent on adults. We are in no disagreement that children look up to adults and can be influenced by them and what they want for the children, and the

effect on children is unknown. So, because of these consequences, we question particularly the assent and consent of minors in particular.

The SAMHSA report says, "Interventions that attempt to change sexual orientation, gender identity, gender expression, or any other form of conversion therapy are also inappropriate and may cause harm. Informed consent cannot be provided for an intervention that does not have a benefit to the client."

The SAMHSA report was addressing conversion therapy and affirming LGBT abuse, which is the subject of the report.

This is an excerpt from Plaintiff's Exhibit 31.

On the topic of Plaintiff's Exhibit 31, this was a study that the county was not -- the county did not review or cite as the basis of its ordinance. It is something that we also received when we were exchanging exhibit lists, and so, this is relatively new to this case. However, it is also irrelevant to this case because this particular study deals with therapy provided to parents. In this particular study, the therapist did not meet with the child.

It states, "To minimize the child's stigmatism only the parents come to the treatment sessions. The boy himself is not included because of the inefficiency of office treatment at this age and in order to minimize stigmatization that may be associated with visits to a mental health facility, especially when gender and sex issues are discussed. This treatment

protocol is not at all suitable for children of pubertal age and older when management of GID through the parents is inappropriate.

This is an approach where the therapist met with the parents and the parents altered their conduct by organizing more play dates with friends of the same sex, having more time with the same sex parents of the child, that sort of actions that were taken by the parent.

The ordinance issued here today prevents therapy for a minor. The therapy cannot be provided to a minor.

We believe the Plaintiffs understood this because in the depositions Dr. Hamilton advised us that she had two clients, potential clients, where the -- she felt comfortable meeting with the parents to discuss with the parents the issues the parents had. However, because of the issues raised in the conversation about the therapy and her understanding of what they wanted to do, she would not meet with the child.

And so, we submit that this study does not have anything to do with what is being banned here.

We also want to draw the Court's attention to Plaintiff's Exhibit 30. This is similarly something that was provided to the county during the exchange of exhibit lists.

Here are some excerpts from this.

Mr. Mihet threw your attention, your Honor, to page 843, where it is emphasized to parents the importance of

allowing gender identity to return. That is not highlighted on the screen at this time. I also don't have a slide for that. But I want to remind your Honor that that statement emphasized to parents. The ordinances regulate providers in their practice of conversion therapy. It does not prohibit parents from allowing their children to express a different gender identity or return to a previously held gender identity.

This paper does say -- Mr. Mihet cited a portion where it talked about there are two approaches, here are the two approaches. "One approach encourages an affirmation and acception of children's expressed gender identity. In the second approach, children are encouraged to embrace their given bodies and to align with their assigned gender roles."

Discussing that second approach still, the APA noted that "when addressing psychological interventions for children and adolescents, the World Professional Association for Transgender Health Standards of Care identify interventions aimed at trying to change gender identity and expression to become more congruent with sex assigned at birth as unethical. It is hoped that future research will offer improved guidance in this area of practice.

"Nonetheless, there is greater consensus that treatment approaches for adolescents affirm an adolescent's gender identity. Because gender nonconformity may be transient for younger children in particular, the psychologist's role may

be to help support children and their families through the process of exploration and self identification."

We will see the county's ordinance does not ban a therapist from exploration or self identification. The ordinance bans the Plaintiffs from attempting to seek to change that minor's sexual identity.

It goes on, "For adolescents who exhibit a long history of gender nonconformity, psychologists may inform parents that the adolescent's self-affirmed gender identity is most likely stable."

THE COURT: It is just over an hour, an hour and nine minutes.

MS. FAHEY: I will, your Honor, go quickly through the slides with respect to the facts that affirmative therapy is the recommended therapy from the APA.

"The affirmative approach is supportive of clients' identity development without an a priori treatment goal."

That is what the county is doing, you may not have a goal to change sexual orientation or gender identity.

The APA addresses the account that providing SOCE increases self determination. The APA was not persuaded by this argument as it encourages LMHP to provide treatment that has not provided evidence of efficacy, has the potential to be harmful, and delegates important professional decisions that should be based on qualified expertise and training, such as

diagnosis and type of therapy. Rather, therapy that increases the client's ability to cope, understand, acknowledge and integrate sexual orientation concerns into a self-chosen life is the measured approach."

That is exactly what the county's ordinance explains what conversion therapy is not. Conversion therapy is not and does not include providing acceptance, support, understanding of a person, identity exploration and development. That is specifically clarified for anyone in doubt about whether the approaches that were recommended by the APA are allowed. They absolutely are allowed.

The only thing you may not do is engage in a practice seeking to change that minor.

I have gone through the portion that we wanted to highlight for your Honor today with respect to the written papers and the research that the county reviewed.

Next I want to show your Honor a few of the bases for concluding that conversion therapy was a local issue.

The county has filed in the record as document 36-1, a transcript recording of the first PBCC agenda where the PBCC considered first reading this ordinance.

(Thereupon, the video was played.)

MS. FAHEY: This slide is some highlights from Dr. Needle's statement where she highlighted for the Commissioners that she was commending them to send a message to our community

and protect the children and adolescents and youth in our community.

(Thereupon, the video was played.)

MS. FAHEY: From Ms. Bessette the County Commissioners learned in her field, mental health field, it is important for the therapist not to be imposing on the client the therapist's political, personal, or religious views.

(Thereupon, the video was played.)

MS. FAHEY: That is an excerpt from -- this can be found at Docket Entry 36-1, it is also Exhibit 2, this transcript. It was suggested during the Plaintiff's remarks that Mr. Hoch never mentioned these two reports of harm at any time to the county prior to this ordinance coming up for first reading.

The record does not reflect that that in fact is true. Certainly the record reflects there were no emails wherein Mr. Hoch referenced those two minors, however, discovery did not encompass all conversations between Mr. Hoch and individual board members, nor should it be permitted to, but we cannot conclude that he never mentioned these other minors.

We also can proffer that Mr. Hoch did mention these other minors to Ms. Hvizd in the discussion of this ordinance in a face-to-face meeting. So, there was no record to produce in discovery, however, that is not in the record for your Honor. I make that proffer to state the record doesn't reflect

that he said that to the commission as a whole body at any time prior to December 5th. That is true. But the fact that it was never mentioned before this date, we cannot conclude that in the record before the Court today.

At the second meeting, Mr. Hoch put -- added some more information to the statement that he made.

(Video played.)

MS. FAHEY: Sorry, I will play that for your Honor.

(Video played.)

MS. FAHEY: On the topic of Mr. Hoch, I want to touch upon briefly the notion was made that Mr. Hoch only requested that aversive techniques be banned and referring to the memo that he attached to an email. When he first emailed the Board of County Commissioners in June 2016, it was not noted, however, that Mr. Hoch -- what was contained in the proposed -- the language of the proposed ordinance. The deposition of Ms. Hvizd reflects that Mr. Hoch also provided a draft proposed from another entity. I believe the City of Miami beach drafted an ordinance at that point. He shared the ordinance with the county, that ordinance was not limited to aversive techniques.

We object to the indication because we were provided with much information, including the resources -- the sources that we have gone through at length looking at the studies, and so we would disagree that the request was to ban specifically

and only aversive techniques.

In the interest of time, I will summarize that the second meeting included a statement from a licensed clinical social worker where he asked the county to protect the minors in Palm Beach County from a practice that was dangerous and unethical. His name is Andres Torres, and I would commend his statement to the Court for your consideration.

Dr. Needle was at the second meeting and she was asked, what is your view as to the prevalence of this among practitioners? She said, "I think that if it is happening at all, that's too much, and it is happening. So you can Google, you can try to find a therapist that does it."

These statements, and additionally the statement of Dr. Hamilton who came to the -- to both meetings, and in the second meeting she asked the board what to do with her current clients if the ban was passed, implying that her current practice would be encompassed by the ordinance.

So, from -- at least from these two statements, and the county submits that the record as a whole reflects that conversion therapy is something that the county absolutely could conclude and have a reasonable basis to conclude was happening in Palm Beach County, and we had multiple people come and ask the county to protect the youth in our community, to protect the youth from the harm of conversion therapy.

Exhibit 6 is the Nick Sofoul email. We looked at the

Nick Sofoul email at length already. The county wants to add its argument that Mr. Sofoul did not state that his friends were subjected to only coercive or only aversive therapy techniques. Yes, he provided a link to an article, however, the county disagrees that that article limits the statements that he was making against the type of therapy which was being considered by the county, and that was conversion therapy on children.

The county also received Exhibit 44, an email from Mr. Curt Carlson, and he sent the same email to all of the Commissioners where he also asked that the Commissioners protect the minors from this type of practice and procedure.

Returning just briefly, your Honor, to Exhibit 6, that is the Nick Sofoul email, there was a suggestion that there is no basis to conclude necessarily that all of the PBCC considered Mr. Sofoul's email.

We do have Exhibit 43, which is an email from Mayor Hayne responding in thanks to Nick Sofoul, a very brief message, however, we do submit that to the Court to show that the email was in fact received. We do not have conclusive proof that every one of the Commissioners read it, nor should we conclude that they shouldn't consider this information that was provided to them prior to their vote.

In light of the issue that has been addressed nationally by various medical professional organizations with

urgency and solidarity, the county decided to -- after hearing the fact that this national issue was in fact an area of local concern as well, the county addressed the issue by passing the ordinance, 2017-46, stating it shall be unlawful for any provider to engage in conversion therapy on any minor regardless of whether the provider receives monetary compensation in exchange for such services.

And I am going to --

THE COURT: Do you want to address the preemption and enforcement issues? You probably are going to get to that at some point, but the Plaintiff ended with that.

MS. FAHEY: Preemption is an argument that my colleague, Ms. Phan, has prepared.

THE COURT: Is she doing enforcement also?

MS. FAHEY: I can handle enforcement.

THE COURT: Where does the Court fit enforcement into the legal analysis first and foremost, if at all? And if it does, how do the Defendants respond to the presentation the Plaintiff made, including relying upon internal memos of the Government and deposition testimony as well by the Defendants themselves?

MS. FAHEY: First, how to address the enforcement issue.

The enforcement section of the reply brief is 23 to 26. There are no legal citations for that argument, we did not

see that argument as negating any narrow tailoring on behalf of the county. If we look at McCullen that the Plaintiffs cited, McCullen says that the Government must demonstrate that alternative measures would fail to achieve the Government's interest, not simply that the chosen route is easier.

I do not see a basis in the law for a conclusion that enforcement is difficult as a basis for finding that there is somehow no narrow tailoring.

What the burden is, is to show that a less restrictive alternative method, that method would not as effectively achieve the interest of the county as the method the county has chosen. So, for instance, if we just take informed consent, the burden is not to show that the county's Code Enforcement officers can, in fact, go enforce the ordinance as it is written, period.

The burden is to show that the informed consent alternative is not as effective as the ban that doesn't involve informed consent. That is the analysis that we are asked to undertake, not how practically effective is the Government going to be in enforcing this ordinance.

I hear the practical concern. I expect there is some question if the ordinance has no effect, then what is the point, how could it achieve an interest? I understand that.

We respond with the fact that this ordinance has already had the effect that the county sought to achieve, and

that is the stopping of the practice of conversion therapy on minors.

We learned from the depositions of Plaintiffs that Dr. Hamilton -- we learned from her deposition that she interpreted the county's ordinance as applying to her, and she stopped a practice that came under the balance of what the ordinance banned, so the county's ordinance was effective in stopping the conversion therapy that it was seeking to stop.

There are -- there are methods of actually enforcing the ordinance. It is not a completely unenforceable ordinance. We concede it would be difficult, this type of regulation would be difficult to enforce. That doesn't make it unenforceable and doesn't make it -- doesn't mean the county hasn't achieved its methods by making it unlawful and creating a mechanism to actually follow through with the designation of this practice as being unlawful.

THE COURT: Okay.

MS. FAHEY: Since we are standing and not at the table, I am going to go past the section that Ms. Phan was going to cover and I am going to pick up -- I am going to pick up on the text of the conversion therapy ban.

I realized that I did not address your Honor's question about the internal memos, and Ms. Phan will be addressing that.

THE COURT: With respect to preemption?

MS. FAHEY: Yes.

As your Honor is aware, conversion therapy means the practice of seeking to change an individual's sexual orientation or gender identity and that was the practice that was banned.

Because we are here dealing with an as applied challenge to individuals who are licensed under Chapter 491 as licensed marriage and family therapists, we offer, your Honor, the term the practice of marriage and family therapy as defined by Florida Statute 491.003, 8, and in the interest of time, I will not read it to your Honor. However, I will note that it is 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. I said I was not going to read it, I will back away from that.

I did want to note that the definition of practice of marriage and family therapy as defined by Chapter 491 is applied or received, and that matches with the county's ordinance which bans this professional practice regardless of whether money is received.

I wanted to note for your Honor exempted from Chapter 491, the provisions of that chapter, which is a licensing statute for, among other things, licensed marriage and family

therapy. There is a exemption for rabbis, priests, ministers, or member of the clergy. They can use a Christian counselor, Christian clinical counselor, when the activities are within the ministerial duties and excepted are persons for or under the auspices of a sponsorship of an established and legally cognizable church, denomination, or sect.

This provision does not include members of the clergy who are acting in their roles of clergy as long as they do not hold themselves as operating pursuant to any of the licenses under Chapter 491.

I would like to look at the Plaintiff's practices.

Throughout this presentation, the point here is the Plaintiffs' practices are not expressive.

First a couple of general statements about the practice. Drs. Otto and Hamilton both acknowledge that talk therapy is a form of treatment, they do that in Request for Admissions at Docket Entry 78-2 and 79-2. They also both agree in their Request for Admissions that aversion therapy is unethical to perform, and that ties into the county's argument concerning a facial challenge.

They also acknowledge that the DSM, Diagnostic and Statistical Manual, of mental disorders does not include gay, lesbian and bisexual or transgender as a mental condition. They made that admission as to mental illness.

Dr. Hamilton provided us with the testimony that that

was the authority for diagnosing clients, and she wasn't aware of any other authorities that set out definitions of diagnosis than the DSM-I.

She was authorized to treat patients. She explained what she does is talk to them in therapy and help them with their problems. On the topic of disclosure, this is from Dr. Hamilton's deposition, and I don't have the citation on the slide. The previous citation for authorized to treat is page 54, lines seven through ten, and the next slide with respect to self disclosure, page 54, lines 16 through 20. That is wrong, sorry. Self disclosure, page 30, on the screen is lines one through 13.

Dr. Hamilton explained that self disclosing is permissible for the purpose of helping a client, but not permissible for the purpose of benefiting the therapist.

So, she may self disclose, not to make herself feel better or for the client to get her advice or comfort her in any way or meet any of her needs, but self disclosure for the needs of -- meeting the needs of the client and may be appropriate if it is necessary to advise if there is a conflict where the beliefs or opinions of the therapist could interfere with the treatment of the patient.

Next, from the discovery in this case we learned that the Plaintiffs' practices are formalized. In Dr. Otto's deposition, page 97, beginning at line 20, he was explaining

the difference between his professional practice and a conversation that he may have hypothetically with Mr. AB on the on a plane sitting next to him, and he explained that he sees sessions as something where a consent form was signed, he has a payment agreement signed in his office, though he does see clients outside of his office, he explained, but there are consent forms signed and payment agreements signed, and we work on goals together. There is a formal relationship.

Dr. Otto provided to us, Exhibit 33, his informed consent for counseling regarding unwanted same sex attractions and behaviors, and I would like to highlight that from that informed consent form. Dr. Otto advises that "your marriage and family therapist does not take a position on the goals or objectives you have with your counseling."

This I highlight for your Honor to reiterate that the practice of professional counseling is not supposed to be and is not, in fact, an expressive activity for the therapist.

Dr. Hamilton, on page 55 of her deposition, explained the intake process of how she has -- how she provides her therapy. There is first a phone call where they set up to meet or make their arrangements for when the appointment would be. And second, the individuals come into her office and she has an intake process and she has paperwork for them to sign.

She confirmed the paperwork that they have to sign includes Exhibit 32, which is the consent to treat and

financial agreement. And the county would highlight for the Court that included in this consent to treat and financial agreement paperwork the client signed is a hold harmless agreement where any claims for damages of any nature arising out of or allegedly due to therapy or services rendered, the client holds Dr. Hamilton harmless for, and she used the language "receive therapy and services." There is acknowledgment that this is a service that is provided to the clients.

Second, we also see acknowledgment of that, like the cases that acknowledge the professional conduct of professionals is subject to malpractice suits, and that is appropriate regardless of the First Amendment.

I will quickly go through some of the testimony from the Plaintiffs but, your Honor, I will try not to say after every slide -- the purpose of showing your Honor these slides and this testimony is to highlight for the Court that the practices engaged by Dr. Hamilton and Dr. Otto are not expressions by them.

Dr. Hamilton was asked: "Are there any methods or principles that you use in talk therapy?

"Answer: Yes." She uses the power of listening, empathizing, the importance of being nonjudgmental, not shaming go clients, creating a safe space where they can open up and share their heart as well as understand themselves better.

Dr. Otto told us that his practice is client driven, not Dr. Otto driven.

Dr. Hamilton let us know she develops therapy, she asks the family, what brought you here and what would you like to see happen. She also told us she goes with the values of the client.

She told us her personal beliefs do not get imposed on the client. She explicitly stated, I do not have conversations with minor clients telling them what I believe. My personal beliefs do not enter into the therapy session.

Dr. Otto said he is not in the therapy session to give advice. What he does is he talks about pros and cons for telling an individual -- pros and cons for a person taking a specific action, but he doesn't give advice which way that person should go. He provides an opportunity for the person to talk through their issues in a safe context where they are not judged, but he allows that person to make their own decision on what they -- on what they thought would be in their own best interest.

Dr. Hamilton let us know that she is more of a strength based therapist, and similar to Dr. Otto who does not give advice, she very typically doesn't tell clients you should not do that as much as she builds on what is going well for the client.

When she talks about the tools used in therapy, the

things that the client believes are going to be helpful to them. She asks them, what have you tried? What has worked for you in the past? What ideas do you have? What are your resources? What strengths do you have?

She explains there is a lot of research that shows what the clients bring to the table rather than introduce your own advice and your own suggestions, that if you elicit the client's ideas and their strengths and resources it is going to be a lot more effective because it is something they already own and belongs to them instead of to you.

Dr. Otto told us often times his clients are able to come to some resolution on what things they should change or what boundaries they think they should put up or what relationships they think they should modify.

Patients are directed in patient therapy, the ideas of the client control and dictate. The Plaintiffs are not communicating a message or expressing themselves or their own ideas, they are providing a space for their clients to talk through the issues that they have. They are also charged with the responsibility to treat those clients.

That is the responsibility and the purpose of the therapist in that relationship, it is treatment to help with the stress and distress that is being presented by the client who is coming to therapy to address that issue.

Quickly, I want to highlight that both Dr. Hamilton

and Dr. Otto acknowledge that they cannot change attractions, that is not within their power as therapists. Dr. Hamilton and Dr. Otto both stated that in their depositions.

And so, that brings your Honor to the topic of the county's regulation of any ordinance is a regulation of professional conduct.

Much of this has already been discussed in our preliminary conversation, I will quickly go through it. However, I ask your Honor, if I am skipping over any details you are interested in hearing, please let me know.

I want to start with NIFLA, the most recent Supreme Court case that touched on this issue because of what comes later. First, I want to point out the fact that NIFLA -- the facts before the Court in NIFLA involved a licensed notice that was compelled Governmental speech and not tied to a procedure at all. Every person that walked into that office had to be subjected to that compelled Governmental message.

That was language we previously read that NIFLA -- the Supreme Court specifically said, "under our precedents, states may regulate professional conduct even though that conduct incidentally involves speech."

Further in the opinion, the Supreme Court acknowledged that while drawing a line between speech and conduct can be difficult, the Court's precedents have long drawn it.

Now, NIFLA cited two cases, two of itself own cases,

for the proposition that professional conduct is something that receives a different standard of review. One of the case was Ohralik. The Court there stated, "Moreover, it 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" -- or carried out by language is what we have here -- "either spoken, written or printed."

The examples given by Ohralik were numerous, and they talked about the exchange of securities information, corporate proxy statements, exchange of price and production information among competitors, employers' threats of retaliation to employees, and the Court went on to say, "each of the examples illustrates the state does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."

The Court cited Casey, and the discussion is extremely brief, however it says, "to be sure, the First Amendment rights not to speak are implicated, but only as a part of the practice of medicine, subject to the reasonable licensing and regulation by the state."

Here we have the words coming out of the Plaintiffs' mouths not only related to the practice of mental health care that they provide, it is the mental health care they provide, it is the practice of medicine.

NIFLA did not abrogate Pickup on the topic of professional conduct. This was discussed by the Court, the Court went through that analysis and concluded, the Supreme Court has not recognized professional speech as a separate category requiring a different type, this is only professional speech.

The Ninth Circuit laid out here on one end we have public dialogue, and in the middle you have professional speech, and at the very end you have professional conduct, and here is a graph to represent where Pickup concluded each of those categories fell. The public dialogue got the most robust protection from the First Amendment, professional speech, however, it says was diminished, we come down to the intermediate level. Professional conduct it acknowledged, and as it finally held, was entitled to rational basis. Pickup's holding was that the SOCE ban regulated professional conduct and the appropriate analysis was rational basis.

NIFLA called into question the discussion of professional speech, but it did not touch or abrogate the holding of Pickup which was about professional conduct.

I know that I am very limited on time, your Honor, and so, I would like your guidance on whether you would like us to go specifically in depth into Pickup, or if we should move on to other cases that we believe are distinguishable such as Wollschlaeger and other cases.

THE COURT: You have gone an hour and 51 minutes. How much time had you contemplated you needed left to cover your material and then with co-counsel on preemption?

MS. FAHEY: I believe my co-counsel has at least 30 minutes of presentation --

THE COURT: On preemption?

MS. FAHEY: On preemption and other various topics.

MS. PHAN: I am going to go over preemption, standing, and also irreparable harm. That is what I was going to cover.

THE COURT: How much time did you need on your presentation?

MS. FAHEY: I can go through this in 20 minutes.

THE COURT: Okay. It is 3:30. We'll come back at quarter of 4:00, so 3:45. You think you need a total of 50 minutes left, 30 plus 20?

MS. FAHEY: The county had intended to go through the Pickup and Wollschlaeger cases and distinguish cases relied upon by the Plaintiffs.

THE COURT: I don't think you need to go through the cases. I would suggest that you skip those cases and just go right to the point you want to make, rather than go through the presentations about the facts and what the Court has held, and dicta, because I have them, and I have marked them up and I have read them.

Just make your point with the cases, that would be

most helpful. Maybe yours can be shortened as a result of that, and then we will see on the other issues of preemption, whether the full 30 minutes -- if we come back at 3:45, it would be my hope that we'll conclude within the hour, by 4:45. I think that would be ample. We have been going since nine o'clock.

Plaintiff talked about wanting rebuttal. If there is a point or two that can't go unmentioned, I think the Court has a good understanding and even better one after the presentations today. I am giving you an opportunity to give -- you the opportunity to do proposed finding of facts. You can't go outside the boundaries of what is argued and submitted in the briefing, it has to be confined to what is presented and the Court can consider it, but that is one last final opportunity for you to make that final presentation to the Court.

Let's take a 15-minute break and let's aim to conclude by 4:45, have that as a goal.

(Thereupon, a short recess was taken.)

THE COURT: Okay, you may be seated.

Okay, you may come to the podium and pick up where you left off.

MS. FAHEY: Yes, your Honor.

The remaining portion of my presentation was case analysis. We will rely on the written submissions to talk

about the distinguishing cases, and I conclude my portion of the presentation to say the county's argument is the appropriate standard of review is rational basis. This is professional speech.

The county alternatively argued if the intermediate scrutiny is applied, the same law there satisfied heightened scrutiny, and if this Court were to find that strict scrutiny applies, the county argues it -- interest has been found to be a compelling one as a matter of law. As for the protection of health and mental welfare of minors, that is a compelling interest, we have narrowly tailored that to ban only the practice of conversion therapy which is found to be harmful on minors who have diminished, diminished -- they are a vulnerable population where we have reason to believe they require extra protection and -- I am sorry, I am very sorry.

THE COURT: That is all right.

MS. FAHEY: The practice of conversion therapy on minors is narrowly tailored.

I could address any questions the Court has at this time.

THE COURT: You are not going to do a presentation?

MS. FAHEY: The City of Boca did want to make themselves available to answer any questions the Court has. I would alternatively mention that the City of Boca's ordinance is the same as the county's. The arguments I am making would

address them as well. We do not want to deprive their ability, and Ms. Phan will give her presentation on preemption. By any standard of review we pass constitutional scrutiny with a legislative record to show this is a harm that was actual and real, and not speculative.

THE COURT: Let me try to go to some of the questions on -- the legal questions I had for the Plaintiff.

We may have already covered it, let me check my notes. And I may have asked it in the very beginning of your presentation. It has been a long day. I apologize if I asked it.

The Plaintiffs argue that a finding, viewpoint discrimination would be dispositive. Do you agree? We have the case of Sorrell versus IMS, 564 U.S. 552, 2011. Quoting, "In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory."

If I didn't ask you, could you answer the question?

MS. FAHEY: We disagree it is dispositive, and we cited to the principle in R. A. V. about --

THE COURT: Okay, that is what you were talking about, R. A. V.

MS. FAHEY: And as I recall Sorrell's analysis, Sorrell still undertook to evaluate the Government interest that was being proffered, and so, I do not recall Sorrell to

have concluded that it was viewpoint discriminatory and therefore have concluded the analysis with that.

THE COURT: Okay. Let's see, there are more questions. I think you already answered them.

I know we talked about -- you made an argument that the definition of conversion therapy is facially viewpoint neutral, you than explained your reasons why. You explained how the exclusion is not really an exclusion in the second sentence, but you were saying it was a clarifying sentence.

Assuming facial neutrality as to the text of the definition, there is the whereas clause of the ordinance, as well as the Government's stated interest in the passing of these laws, is the prosecution of gay, lesbian, bisexual and transgender minors. I want to come back to how does the goal as well as the whereas clause, how does that fit into the Government's position that it is not viewpoint based, but viewpoint neutral?

MS. FAHEY: I don't have it up here with me, a copy of the ordinance.

I believe the county stated it was to protect the health, safety, and welfare of all minors, and certainly at times it is stated including gay, lesbian and -- I am going to find that --

THE COURT: It may be the last whereas clause on page -- looking at the city, maybe that is not fair to ask you

that.

Let me see if the county is the same. Whereas the Palm Beach County Board of Commissioners desires to prohibit within the -- the practice of sexual orientation or sexual identity change efforts on minors by licensed therapists only, including reparative and/or conversion therapy to be demonstrated to be harmful to the physical and psychological well-being of gay, lesbian, bisexual, transgender and questioning persons.

MS. FAHEY: Yes, if you go to the effects provision, the intent of the ordinance is to protect physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and questioning persons.

What I would offer as an explanation is that the whereas clause demonstrates that the sources that target conversion therapy as a practice that is harmful, those sources by and large deal with patients who are identifying and could be characterized as gay, lesbian, transgender, bisexual or questioning.

We have not seen a source that states that this type of therapy is being provided to heterosexual or normative identifying children to have them change to a different identity such as homosexual.

The statement where the therapists have been demonstrated to be harmful to the class of people, lesbian,

gay, bisexual, transgender and questioning persons, and I use class as a category of people, does not mean the county is not interested in protecting all of the minors, because over and over we see there is no scientific basis for concluding that a therapy can change sexual orientation or gender identity, and we can't find that it would change it in either direction and would be inappropriate to change it in either direction.

I believe that addresses the differences where we have demonstrated it is harmful to those type of people, but we want to protect all children including those that we --

THE COURT: Does it pertain to the law may functionally only apply to therapists like the Plaintiffs who practice homosexual to heterosexual therapy efforts? Following up, can the Defendants credibly say that the law will be enforced against therapists practicing heterosexual to homosexual conversion therapy?

MS. FAHEY: Yes, neither, a therapist who is attempting to change a minor child from homosexual to heterosexual, that professional practice would be unlawful under the ordinance.

THE COURT: So, I understand your position, you are not conceding that the ordinances are content based; is that correct?

MS. FAHEY: Yes.

THE COURT: If the Court nevertheless finds that it is

a content based restriction and does not fall into a special exception, would you agree the law would be subject to strict scrutiny?

MS. FAHEY: I agree that there is much law that finds that content based -- generally, the answer to that question is yes, and NIFLA says, under Reed, generally yes, content based equals strict scrutiny. Wollschlaeger says the same.

I do not believe there is any circumstance under which content based regulations -- I think I missed the part of your Honor's question, whether the determination has already been made that it is not professional conduct. If we are in the world of professional conduct, we do not reach the question of whether it is content based or not. If we are in the world of speech and it is content based, generally, yes, that would be -- that would be what would be applied.

However, the county disagrees that this is content based. The county is not prohibiting Dr. Hamilton -- the example at deposition, complimenting a costume and wearing a dress, that dress looks so pretty on you, specific content, specific words or messages, things like that. Content is not being proscribed, it is the practice of seeking to change.

So, it is entirely possible that a person could say that dress is so pretty and that comment have nothing to do with a practice seeking to change that child.

It is also possible that they are employing a

professional practice of therapy where that is a part of their design based upon their use of methods and theories which is the practice of marriage and therapy we learned from that definition. If they are using that in that context, then it would be regulated, but not because what she said, the dress was pretty, it is what she was doing, seeking to change the child's gender identity.

That conduct of seeking that with the child through the use of scientific method of conversion therapy is what is banned, not any specific content of the words used in therapy.

THE COURT: Okay. So, if we -- if you don't prevail on rational basis, you go to intermediate scrutiny and is it -- what would be triggering intermediate scrutiny, then? And we have touched on some of these issues. Is it the category of commercial speech, professional speech? Does time/place/manner -- although you did not mention that in any of your briefings, does that come into play or are you arguing for one of these categories or something else? If we get to and land on intermediate scrutiny, if that is where the Court goes, how does it get there?

MS. FAHEY: So, if the Court decides it is not applicable, we then analyze whether it is content based or not. Content and also -- content -- if the Court finds, yes, content, yes, viewpoint, we are definitely in the scrutiny situation.

However, if the Court finds it is not content based, and we believe it is not, it is not -- this conduct is not banned because of anything like the Supreme Court said in Reed, and that analysis is in the county's motion to dismiss and also in the proposed conclusions of law about content based.

We believe we are in intermediate scrutiny because it is not content based, and we know that the Court does -- in the Southern District of Florida does have a more liberal view of commercial speech. And as the county listened to the Court's a analysis of the reasonable time and place and manner restriction, the county has not thoroughly explored in its written submission the possibility that those apply, so we would not concede at this juncture they could not apply.

However, I think you see the King Court truly struggling with why it would be appropriate to apply any strict scrutiny to this type of ban, and they landed on professional speech, which NIFLA did not find to be something that they previously recognized.

NIFLA didn't foreclose the possibility of professional speech.

THE COURT: So, they found it was content based. The footnote found viewpoint based, but they didn't want to commit, neither court, the Ninth -- no, the Ninth went with rational, the Third didn't commit, and maybe Wollschlaeger didn't either. They met one and didn't have to reach the other, which isn't

always helpful to the District Courts. But in any event, that was my question to you, if this Court found it to be possibly viewpoint, possibly content based, are you relying upon, maybe like King, the professional speech to get to intermediate, at least?

MS. FAHEY: We would not concede that there is not a situation where -- reluctantly, we would argue every legal basis for -- sorry, reluctantly I would say, yes, professional speech, however, we do heed the Court's analysis in NIFLA about why it is they did not find professional speech regulated.

We would be very concerned with the result that this type of treatment, medical treatment of a child which is designed to do something to that child, is something that would receive strict scrutiny. And so, for that reason, we would be open to the time/place/manner analysis potentially applying and potentially, if this was something that the -- maybe perhaps this is the situation where professional speech would be something that the Supreme Court would analyze as being an appropriate use of that terminology and basis for lesser scrutiny.

I say that reluctantly because we believe that it is much more appropriate to find that it is professional conduct.

THE COURT: I guess, you know, it goes without saying with your rational basis analysis in the face of Wollschlaeger, particularly the statement by the Eleventh Circuit that "we do

not think it is appropriate to subject content based restrictions on speech by those engaged in a certain profession to mere rational basis review. If rationality were the standard, the Government could tell architects that they cannot propose buildings in the style of I. M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on."

Am I to take your response to be you don't look at it as a content based restriction, so what you are asking for is not in conflict with that case and that statement?

MS. FAHEY: Yes. In Wollschlaeger, we have the situation where the Plaintiff doctors were asking questions for the purpose of advising clients about safety risks to the minors in their home and so, there was no claim nor any evidence that routine questions to the patients were harmful or that it was contrary to practice to ask those questions.

So, we have a have different type of words coming out of professionals' mouth situation in Wollschlaeger that is not -- it is not the same as it is here.

Those were questions designed to make sure the doctor was giving the right type of advice and information to the patient.

These are words that are actually the treatment of the patient, so Wollschlaeger is in the situation of proposing a

building or proposing -- talking about this is a cheaper way to do this type of activity. It's discussion.

We don't have discussion here because both of the ordinances specifically state the Plaintiffs may discuss, recommend, express all they please, they may not engage in a practice on minors.

We have argued and state again that Wollschlaeger's discussion of Pickup is classic dicta as they distinguish it and don't find it particularly helpful to their holding, and they actually find and discuss the fact that Pickup had nothing to do with restricting providers from recommending SOCE, for expressing their views on SOCE. They found the case of Conant to be -- that is a case where the doctor could be prohibited from recommending marijuana as a useful treatment.

THE COURT: Sticking with Wollschlaeger, the Court found that the justifications for the act were insufficient because other privacy laws served the same function. Why don't other ethical and legal obligations on Plaintiffs effectively protect children from harmful medical treatments?

MS. FAHEY: As I understand it, there have been generally two worlds of other regulations that have been proffered for -- we are already -- the children are protected. You can't harm minors, that is an ethical code, and there are certainly other statutes that they may be in violation of if they actually harm minors. And then informed consent would be

something that we already have the concept of this is supposed to be something that that minor is at least assenting to.

So, first we start with the harm, you can't harm minors. The problem goes back to the allergy test situation.

This is not a situation where you can quickly discover whether the practice that is being employed on the child in the course of therapy is in fact resulting during that time in harm, or whether it is going to be a harm that is looked back on later.

A lot of the APA task force reports on harm, those were adults retrospectively looking back and realizing that the therapy that they received was harmful to them in the long term. That is why you can't harm a minor is not sufficient in preventing harms to minors from conversion therapy, because we don't know that the harm is going to be immediately appreciable sufficient to stop the harm before it actually occurs.

What we do know is what is likely to cause that harm is the conversion therapy, so the county has banned conversion therapy.

With respect to informed consent, with minors we have lots of different factors that go into whether their consent is truly voluntary. They are dependent on their guardians or parents. They have decreased faculties in their ability to appreciate the long-term consequences of today's decisions and they are developing children who are becoming who they are.

Those are some of the reasons. And I go back to the sources where I cited specific concerns about minors. Informed consent is not sufficient to address the county's interest in protecting minors given all those things, and the Court in King agreed with that analysis.

THE COURT: I know it was filed recently, but the Amicus brief states -- incapable of informed consent, minors over 13 years of age, their capacity to consent to mental health counseling, in reference to Florida Statute 394.4784, Subsection 2. If the state recognizes that minors are capable in one area of managing one area of health care, why are they not capable to manage in the other?

MS. FAHEY: That is a very limited exception to the rule that generally minors cannot consent.

That exception provides for limited therapy to a minor in crisis situations, and so that is when that exception to the consent rule applies.

There are other reasons why a state may acknowledge a basis for a minor to provide their informed consent. Pregnant minors have the ability to provide consent as to their pregnancy without their parents providing informed consent.

Minors' ability, one of the examples by the Amicus or Plaintiffs was the ability to consent in the criminal legal context.

It is a different situation in that situation. We

have -- first of all, we often have some sort of counselor, legal counsel who is advising the client in whether it is in their best interest to actually provide consent, and then we also have analyses that protect minors in the legal context to really go through all of the detailed factual circumstances to decide whether any consent provided for a search and seizure or for a confession were truly in fact voluntary.

That minor's age is very, very relevant when it comes to that Fourth Amendment analysis of whether their consent was voluntary as we would expect a 25 year old's consent to be.

THE COURT: The one I cited to, 394.4784, substance abuse treatment statute, 397.501, subsection 7-E-1, pregnancy related services, 73.65, aren't they all statutes where minors are entitled to give their consent to these services?

MS. FAHEY: It sounds as though these are areas where the state made a decision why the minors may have a reason why they need access to this help, the pregnancy intervention, substance abuse intervention and crisis intervention. There needs to be an exception for minors to timely access this help for substance abuse issues, if they have concerns about a pregnancy where they need to make a decision or a crisis situation, that is a 13 year old distinction.

THE COURT: All right. Before we turn to preemption, anything from the city either factually or legally that has not been addressed through the county that the city wants to bring

forward? Do you want to wait for the completion of the county that relates to preemption and a few other issues?

MR. ABBOTT: I can wait for the county's presentation, and looking at the clock, I'm not desperate to spend a bunch of time here. As the Court pointed out, the exhibits have been admitted, there are no witnesses being called, and given we will be able to put our position, in essence, in the proposed findings of facts and conclusions of law, I am not going to be prejudiced if I am not heard here today.

I do not want to leave this courtroom if you have questions that you want addressed. At this point, I need not ask you for an hour or two hours. I want you to know I am here and I want to answer any questions the Court may have.

THE COURT: The questions would be pretty much along the lines of what I asked of the county. Unless there was a different answer that you wanted to give -- if you want to think about that, I don't have any separate questions that I parceled out for the city versus the county. Maybe that was an oversight on my part. I saw the issues generally being similar relating to the two.

If you want to think about that, I will hear the final presentation by the county on the final issues, and I will let you come to the podium. At this point I have no specific questions for the city. I would merely want to make sure you have been heard, and if anything I have said or the county has

said doesn't accurately reflect your position factually or legally, make sure to let me know.

MR. ABBOTT: I will make a brief presentation after the county is done.

THE COURT: From the county on the final points.

MS. PHAN: As I mentioned, your Honor, I am going to go over the preemption and irreparable harm. Before I do that, I want to add something to Ms. Fahey's statement about the county's intention for enforcement.

It is not the Code Enforcement officers that are going to make the final determination, the County's intention is that the code officer will do the investigation when there is some sort of complaint of conversion therapy being performed and then there will be a hearing where a special magistrate would be the person to oversee the hearing and be making the determination based on the evidence presented by the investigator and violator.

THE COURT: Okay.

MS. PHAN: So, Courts have held that implied preemption is severely restricted and strongly disfavored. Exile v. Miami-Dade County 35 So.3d 118, Florida 3d DCA, 2010 and D'Agastino v. City of Miami, the citation is 220, So.3d 410, Florida, 2017. The Florida Supreme Court has stated that Courts must be careful and mindful in attempting to impute intent to the Legislature to preclude local Government from

exercising home rule powers.

Here is the Florida Constitution which gives the county the authority to self govern and this is where the county's power comes from.

In ordinance number 84-8, this is where the county adopted its charter and that is why Palm Beach County is a charter county.

In Palm Beach Charter Section 3.3, this is where the county states that the county may adopt ordinances to accomplish the purpose to protect the health, safety, and general welfare of all residents.

And here is the Palm Beach County ordinance. What I want to point out here is that the last sentence of the ordinance states that the county is exercising its police power for the benefit of the public health, safety, and welfare, and also the intent of the ordinance is to protect the physical and psychological well-being of minors.

Now, the Plaintiffs stated that historically, the health care regulation belongs to the state. The cases that they actually cite to support their position in their response to the county's' reply, I wanted to go over that because that is misleading in how they are misrepresenting the cases.

Dent versus West Virginia, 129 U.S. 114, 1898, that was based on if the state can require a doctor to get certificate from the State Board of Health, it had to do with

Fourth Amendment right to liberty problem, if the state can hinder his choice of occupation. So, it didn't have to do with whether the state versus local Government had the authority to regulation professions.

That is the same thing with another case the Plaintiffs cite, which is McNaughton v. Johnson, 242 U.S. 344, a 1917 case. There the same thing, California wanted to enact a law where they required a certificate in order to practice optometry, and the State Court there affirmed denial of the Plaintiff's injunction because again the state has the right to license and regulate professions.

We are not saying the state doesn't have to do that, we are saying the state doesn't have to regulate to prevent the county from doing that. I will state why.

Chapter 491 speaks to clinical counseling and psychotherapy services. The state is regulating licenses and continuing education, not regulating the scope of the practice.

Here 491.012, where they speak to violations, again, it is violations related to the licenses.

The next slide has to do with discipline, 491.009, the state is disciplining, but based on the license.

THE COURT: When there is discipline under the statute, what is the procedure for discipline? What body governs whether there is a violation; is it a panel of professionals within that field?

MS. PHAN: It is right there. I want to go over Subsection H in this. They say failing to perform any statutory or legal obligation placed upon a person licensed, registered, or certified under this chapter. I want to point out that the Legislature made a distinction between statutory or legal obligation, meaning that their legal obligation can come from somewhere else, some other source other than statutory.

In Section T it says violating a rule relating to the regulation of the profession or a lawful order of the department or the board previously entered in a disciplinary hearing.

So, in relation to their license, it is the board that disciplines them, but again, I want to point out --

THE COURT: Who is the board comprised of, professionals in the same field as the person who is alleged to have violated the statute?

MS. PHAN: I don't have the information on who the board is comprised of.

THE COURT: Bringing it back to the county, if there is an alleged violation of the ordinance, it dovetails to enforcement, and whether it is difficult to enforce or not, and I think the Defendants themselves have acknowledged the difficulty of enforcement.

Even getting beyond that, what body then determines

whether something constitutes conversion therapy? So they come upon a therapist whom they believe has violated the statute -- whom the county believes has violated the ordinance, and if it is shown to be a violation, there is a fine. Who makes the determination whether there is a violation; is it Code Enforcement persons?

MS. PHAN: Well --

THE COURT: Or professionals who know about the nature of the therapy and know whether it is conversion therapy or not? What level of understanding, education, and training do they have?

I am not sure this is related to the legal analysis, but I was curious about that.

MS. PHAN: At this point we are considering having a special magistrate. In regard to the qualifications, that hasn't been determined yet, that is still in the works, but we have a Youth Services Department where they deal with youths and they provide mental health services as well. We do have another branch that can help with that, we have professionals, psychologists, marriage and family therapists there that can help us in making a determination, whether it is to hire a special magistrate with special skills and seeing their qualifications, the county has resources in order to address this problem.

THE COURT: If it was a magistrate, it would be a

hearing. So someone makes a complaint, maybe the minor makes a complaint, I went to a therapist, the therapist was doing things I think fall within the definition of conversion therapy, I am complaining to you, the county. The county does what?

MS. PHAN: The county will do an investigation, the investigation talks to the minor, talks to the doctor, and makes his findings and brings it to the hearing, and the therapist or licensed professional can defend themselves however they want to, and the minor will be there. That is our intention, the minor will be there or the person complaining will be there to address the complaint that they have.

THE COURT: But you are not sure in front of whom that complaint -- who will hear that. You said maybe a magistrate. Is there not an enforcement in place right now if a complaint would come in tomorrow?

MS. PHAN: There is not a firm procedure in place yet, we are working with our Code Enforcement to have a procedure in place, but it is not -- there is not one that has been officially approved yet.

THE COURT: Okay.

MS. PHAN: So, I wanted to mention to your Honor that in the D'Agastino case, the Florida Supreme Court case, the Court did hold that the test for implied preemption requires the Court to look at the provisions of the law as a whole.

That is why I was pointing out this chapter, 491, if you look at it in the whole, they are just regulating licenses, they are not regulating specific areas of practices.

However, if you look at -- I mean, they do say practice of hypnosis, practice of juvenile sexual offender therapy, however, it is still with regard to the license and qualifications, not with regard to the actual treatment itself.

THE COURT: What practically is the analysis the Court has to undertake to determine whether licensing or -- whether regulating the therapy that is being prohibited under the ordinance has been preempted?

I know you say -- you cite to case law that says it generally shouldn't happen, that it is -- there is a narrow set of cases or instances. What is the road map? What does the Court need to find?

If I were looking at the screen, 491.0141, .0143, .0144, what would I need to see there under your interpretation of preemption that would tell the Court the State Court preempts this area that you have regulated?

MS. PHAN: Based on the statute if the Legislature intended to preempt by the laws they have enacted, and if it is pervasive. Here the laws they have enacted in regards to professional regulation all have to do with licenses. They have not gone into the specific treatment itself.

THE COURT: To become licensed, doesn't that interplay

with treatment?

MS. PHAN: That has to do with your education, CEU's, you are paying your dues and things like that.

But in regards to -- I speak to specific areas of treatment. They don't say that -- I mean, they don't say anything about conversion therapy, for instance.

THE COURT: Is that the inquiry, it stops there? I see juvenile sexual offender therapy and I see sex therapy and hypnosis. I don't see conversion therapy. That ends the inquiry or do I draw from the three statutes you have on the screen -- am I able to draw upon those to conclude certain things, such as the state has shown an interest in how these persons get licenses to practice juvenile sexual offender therapy, what their qualifications must be?

Is it both, one or the other? You are not suggesting that the inquiry ends just because I don't see conversion therapy there.

MS. PHAN: No, this is just an example of what the Legislature is actually regulating.

THE COURT: Who they give a license to based on the qualifications that person has. Once they are deemed qualified and given a license, they are on their own, the state doesn't have any involvement any more?

MS. PHAN: Not necessarily, of course, if there is misconduct of some sort.

THE COURT: If there is misconduct, one form of misconduct could be not exercising therapy properly or doing it in a way that is harmful or negligent.

MS. PHAN: Right.

THE COURT: Then the state would be involved in that.

MS. PHAN: Right, or if there is some sort of trickery going on. It does say that under the section where I listed with the disciplinary action -- I don't have the whole statute there, but from what I recall, it does give a list of things that they do discipline for, and things such as fraud, they discipline for things like that.

THE COURT: You are saying they don't get involved in the scope. Nowhere are they saying this is what sex therapy is, this is what juvenile therapy is, what the scope is, that is where you are drawing the distinction? There is not a statutory scheme that deals with the scope of the licensed therapist, therefore that provides an opening, coupled with the county to give it the power to administer laws, ordinances for the welfare of the community, is that the analysis?

MS. PHAN: Yes, your Honor. They don't talk about the very specific types of sexual therapy, they don't talk about the specific types of hypnoses, they don't talk about things like that. Yes, I am saying that it does leave open for the county to step in because Legislature hasn't stepped in to do that. So there are no inconsistencies with the county's

ordinance and with the law that currently exists.

THE COURT: If somebody went through conversion therapy and felt he or she was harmed, felt he or she had fraud acted upon him or her, was deceived in some way, under the statutory scheme, would the person -- the patient have an avenue of redress with the state?

MS. PHAN: I am not sure if they would, because the state hasn't said anything about conversion therapy being -- they haven't taken a position on conversion therapy.

Right now, we are just talking about the state, not any local bans, but the state hasn't taken a position. So, if a minor complains that he was being harmed by conversion therapy, I don't know if there is really any disciplinary action that could be taken on the therapist because there is nothing that the state says that the therapist can't do this.

THE COURT: Is every type of therapy -- is the statute exhaustive, is every type of therapy that exists within our state -- I guess it is not covered in the state statute because, as you are saying, conversion therapy is not there. But what about other areas of therapy that don't have their own provision in the state statute, such as 491, there is not an ordinance, but somebody feels that he or she has, under that discipline section, been violated, deceived, defrauded; there does the statutory scheme provide an avenue for redress for that instance? No ordinance, what does that person do?

MS. PHAN: What does that person --

THE COURT: If they felt they were misled, deceived, fraud acted upon them, harmed.

MS. PHAN: It would be a case-by-case basis. I am sure there are unhappy clients all the time making complaints to the board or to whatever authority they can, and I would say it would depend on a case-by-case basis.

I don't know specifically what situation you are referring to, other than if it is misconduct, what type of misconduct are we talking about in regards to, you know, inappropriate relations with the client, that would be an ethical violation, so it just depends.

That is my point, though, the Legislature leaves room open because they do discipline for if you have a statutory violation or you violate other legal obligations, so other legal obligations can come from Federal law, local law or from, I would say, their code of ethics, and also the board rules. The board has their own rules, too, that they have.

So, I don't think that the state intends for the only source or place of discipline is to come from the state because, otherwise, they wouldn't have added other obligations, they would say it is statutory.

THE COURT: What other ordinances are most similar to this one, not necessarily conversion therapy ordinances, which I know there are many cities, municipalities, county -- maybe

in the other counties, there are a list of other locations in Florida. Other than conversion therapy ordinances, are you aware of other ordinances in the State of Florida that seek to regulate therapy?

MS. PHAN: I haven't done an exhaustive study on other ordinances within the State of Florida to honestly tell the Court my opinion on that or what research I found on that.

I don't know what the other 67 counties have enacted that may regulate some sort of therapy other than conversion therapy.

THE COURT: I wouldn't expect you to know that other than if it surfaced in a case where the Court spoke to it as being preempted or not preempted.

Maybe I am asking it more from a legal standpoint, have you come across any cases where the Court has spoken and indicated that there is preemption and explained that it is because the state, let's say in the area of therapy, has already enacted statutes that govern qualifications, licensure?

MS. PHAN: Are you speaking just to therapy, though?

I do have case law where it speaks to preemption in -- such as the Florida Code of Ethics, that is the Sarasota case, the Court spoke to preemption there. Are you asking specifically with this?

THE COURT: Starting with that, that would be most analogous; if not, what case do you think is most analogous to

this case for the Court to look for guidance in support of your position?

MS. PHAN: There is a case that supports the County's position, they say that the county shall have all powers of local self government not inconsistent with general law.

The Court states that it generally serves no useful public policy to prohibit local Government from deciding local issues. Again, I stated that case for the proposition where Courts should be careful in imputing intent on behalf of the Legislature.

And I also want to point out, though, to the section that the Plaintiff has referenced and our interpretation of that, 456.0032(b) where there the legislature also seems to be contemplating that regulations can come from local ordinances.

So, we have the slide there, and so you can see there that the legislature says it is the intent of the legislature that persons desiring to engage in any -- hold on, I'm sorry.

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

The county means that the Legislature contemplates

there will be other regulations. If not, other local statutes or legislation that has the law or whatever it is that they need to preserve the health, safety, and welfare, the legislature can step in to fill that gap.

Here we are reading it that the legislature is saying there is a gap filler if there isn't already something in place that -- relevant to that subject matter that they are trying to regulate.

THE COURT: Why don't we give you a few more minutes.

You are at the time the Plaintiffs were, 2:46. You have one minute on them. I do want to leave the last few minutes for the city. I know I cut your presentation short for my questions.

MS. PHAN: I want to go over the emails that the Plaintiffs showed your Honor in regards to Ms. Nieman's and Ms. Hvizd's emails.

THE COURT: I remember them. Tell me what the argument is. Relating to what?

MS. PHAN: Preemption.

THE COURT: I remember those.

MS. PHAN: Ms. Hvizd's email -- well, actually Ms. Nieman's email where she says that it is fascinating how great lawyers can look at the exact same language and make completely opposite conclusions, there she is stating they are exchanging legal analyses, she hasn't made a determination at

that point. And so, the Plaintiffs are over reaching and mischaracterizing her email, there is the email --

THE COURT: But isn't it really -- it is a legal decision whether Ms. Nieman said one thing or another. Ultimately, I need to decide whether there is preemption. What would her thoughts have to do with this Court's analysis? It is a legal issue, correct?

MS. PHAN: Yes, exactly. I will move on from that.

In regards to the email, they say it becomes no to maybe, and they have labeled it no to maybe. The two September 2017 emails to Ms. Nieman didn't just come out from nowhere, it was not a political issue or anything.

This is in Exhibit 40, Defendant's Exhibit 40. Rand Hoch tells Ms. Hvizd he is going to have Trent Steele send a memo on preemption. On August 25th, this is Exhibit 41, Trent Steele sends a memo in regard to preemption. In Ms. Hvizd's testimony at page 192, lines one to 25, and 193, one through six, she says there was a change because the county recognized in Florida law -- and she was referring to Section 456.0032(b) -- the county does have authority or -- the county can actually regulate in this area.

It is based on the memo that she received from Mr. Trent Steele in regards to preemption and reading it herself, where I showed your Honor the Legislature does contemplate local ordinances when it comes to professional regulation and

preserving the health, safety, and welfare.

So, it wasn't, you know, A through Z. It was A, B, C, D, E that happened through that.

I will go to standing.

THE COURT: Well, Plaintiff didn't address standing.

Now standing has been raised, I know it was raised in the Motion to Dismiss. Is it raised in the Motion for Preliminary Injunction?

MS. PHAN: Not in the motion, but in our response to the motion.

THE COURT: Okay. Well, I have read what the parties have said. Primarily, I read what both parties have said with respect to the Motion to Dismiss. If you raised it also in your response -- I don't think -- if you want to say one minute on standing, that is fine. I don't want to get into a whole legal recitation on that now at this late hour.

I can rely upon the briefing. I am familiar with the different positions that the parties have taken with respect to standing.

MS. PHAN: Okay. Just really standing to Dr. Otto --

THE COURT: About being in the county or not being in the county?

MS. PHAN: Right. There is conflict with the county's ordinance in regard to personal test. The county's ordinance wouldn't apply to him, and in our ordinance there is a

conflict, ours isn't applicable. He wouldn't have standing on that.

And based on his testimony, Request for Admissions number 35, Otto denied that he wished to conduct therapy practices that seek to change sexual orientation. He wished to conduct therapeutic therapy to change a minor's sexual -- he said he did not practice conversion therapy. And standing on behalf of the clients --

THE COURT: You don't need to go over that, I am familiar with that body of law.

I think we'll turn it over to the city now.

MS. PHAN: Thank you, your Honor.

THE COURT: Thank you very much.

What does the city have to say? You have been patient and you have not asked for or will be getting the same amount of time, or else we would really be here into late hours.

MR. ABBOTT: Good afternoon, your Honor. I will not ask for a similar amount of time, thank you for the invitation.

The answer to the question are we in accordance with the County's presentation here today, it is yes.

Is it the Defendants' position the ordinance should be determined under the rational basis, the answer is yes.

Rational basis is a phrase that means different things in different contexts. It is the city's position the Plaintiffs are not engaging in protective speech at all.

Analysis for speech, rational basis, heightened scrutiny or strict scrutiny, none of that applies is our position.

Government's, when they act under police power, which is what we are doing here, we are stopping a dangerous practice, Governments can't do that willy-nilly. A Government can't enact a regulation that is arbitrary, and sometimes you see a Government regulation has to be fairly debatable, sometimes you see the phrase the Government regulation has to have a rational basis. They all mean the same thing, the standard is similar.

We agree the standard is rational basis, again, because everything the Government does under its police power has to have a rational basis, not because we are infringing on speech at all. That is not the sense we are using the phrase rational basis.

Our argument is, as most recently articulated under NIFLA, sometimes words are speech, I believe Ms. Fahey said speech with a capital S, protected expression, and sometimes they are conduct. NIFLA says "while drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it," and let me give you an analogy.

Let's say there is a medical doctor, the Plaintiffs are doctors, educated and called doctors, because they have the --

THE COURT: Speak slowly so we capture everything.

Otherwise it will be problematic.

MR. ABBOTT: All good points.

Let me draw this analogy, let's say there was a surgeon in Boca Raton or a surgeon in the United States or surgeons performing surgery without using anesthesia, or certain medical doctors that are starting to treat blood disorders with leeches; certainly we can pass an ordinance that says don't do that, we find that is dangerous, it causes harm and we are concerned you are going to do that here in Boca Raton.

We can do that under our police power, and if challenged, your Honor wouldn't evaluate that and say is there a sufficient restriction basis to restrict speech? Is it a rational basis or is it mid-level scrutiny or strict scrutiny.

Our contention in this case, it is just the same. We have found that psychologists are performing a practice that is causing danger, and we have enacted under our police powers a regulation that says stop doing that, you are doing something that is causing harm or that would cause harm.

THE COURT: Don't you agree, though, what makes this a little different and trickier is that the procedure is -- you know, does involve speech?

I know you are shaking your head no, but it is not -- it is not like whatever your two examples were of -- you said leeches, but it was something else.

MR. ABBOTT: Surgery without anesthesia.

THE COURT: I am not saying I don't agree or disagree with you, I am saying can't we acknowledge this is a little trickier than that in that the modality, the procedure, if you will, is therapy and therapy by -- and it is referred to as talk therapy, so that would suggest using words, which at least makes lawyers and judges think about speech.

We should be able to acknowledge that, whether you go so far as to argue strict scrutiny or viewpoint or it is just police power, but it is a little different.

MR. ABBOTT: And forgive me for being disagreeable, your Honor, no, that is something I cannot agree with. That is precisely why I used the analogy.

These doctors don't have superior First Amendment rights to these other doctors. Merely because some doctors apply their trade with a scalpel and another with their lips does not mean one is protected by the First Amendment and the other applying their trade is not. That is what the Courts mean.

And NIFLA says while it is sometimes hard to distinguish, sometimes words are speech protected under the First Amendment and some are conduct. Regulating the doctors with leeches and saying words is identical, neither of them are speech within the meaning of the First Amendment. The cases that NIFLA cites support that proposition.

In Planned Parenthood they were allowed to tell a doctor in Pennsylvania if somebody comes to you for an abortion you have to tell them about their baby and what support there might be for a baby. The reason the Court allowed that, not because it passed some level of scrutiny, not because there was a rational basis, or it passed heightened scrutiny or scrutiny, it is because it was not protected speech at all.

THE COURT: Didn't they use the word it was incidental? I don't think they said it was not speech at all.

MR. ABBOTT: I think that was the analysis. I don't think that case turns on how we regulate -- Government regulates speech. Ohralik is the United States Supreme Court case and in Ohio doctors don't solicit clients. Ohralik claimed they wanted to go to somebody's house and solicit a client, they want to knock on the door and speak and persuade and talk about the law and the case, and talk about theories, and the Court said that is not speech.

The reason that regulation was upheld was not because it passed a strict scrutiny or any lesser analysis; the reason it was allowed was because it wasn't deemed speech at all.

Here is a quote they give, and they cite Giboney versus Empire Storage & Ice, another case that the Supreme Court in NIFLA said these are the kind of cases that say we are not regulating speech at all.

It says, "Moreover, it 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."

So, the regulation of the ordinance regulates a profession, stop doing the profession in a wrong way which causes harm. The fact that these Plaintiffs practice their professions with words rather than a scalpel does not implicate the First Amendment at all.

I can flesh that out in my writing. I didn't want to leave here with the Court's thought that it is our intention that it is a rational speech analysis, that is not our position. They are not engaged in speech at all, and it is a regulation of conduct recognized by the Supreme Court.

The next thing I want to talk about is whether the ordinances are narrowly tailored. I will spare the Court the specific references to the authorities, I can bring them to the Court's attention in the proposed findings.

But let me tell the Court in advance, the reason why the ordinance bans both non-adversive and adversive psychological counseling is because both of them cause harm, and there is scientific support and we will reference the studies where the support is. The reason the ordinances banned voluntary and involuntary counseling of minors is because voluntary counseling of minors also causes harm.

The whole concept of being over inclusive is you accidentally caught somebody you didn't want to catch. It is my representation to the Court, and I will flesh this out in the filings, we didn't catch anything we didn't want to catch. Everything the Plaintiffs say, why do you regulate this, well, it is because that conduct also causes harm, and I will cite those particular provisions when we make our filings.

The reason that the ordinance is not under inclusive, for instance by not including religious counseling or by allowing the Plaintiffs to make recommendations in counseling, which by the way it does -- remember how narrow the ordinances are.

The only thing that is restricted is, don't use your therapeutic skills to try to change somebody's sexual orientation. The reason we allow those doctors to make those recommendations, or don't apply it to non-therapists, is the basis that the studies talk about, the damage caused by therapy. Therapy is delivered by therapists. We would have no basis to ban the sort of counseling one might get from one's religious leaders, or comfort. I might talk to my bartender who is a good listener, that is not the same thing, we can't ban that. That is not what the studies talk about, they talk about therapy delivered by therapists, and that is why there is the scope of the regulation.

The last thing -- I promise to be brief and it's the

last thing I have written notes on.

On the concept of preemption, I want to say a couple of things about this. First of all, the concept of preemption, the concept of the field preempt, what is the field? At most -- I don't agree with this -- actually, I might agree with this, I think there is preemption for the state licensing scheme for psychologists it would preempt the city to even act a differently sensing scheme. If the state says you can practice psychology with as PH ears T degree, but we say in Boca Raton you have to have a P. had did, I think that is preempted by the statute.

If the statute provides, as it does, circumstances under which a license may be revoked, then I think the City of Boca Raton would be preempted from attempting to revoke a license not provided for by the state.

This concept that a licensing scheme preempted all regulations is that what those folks do is simply not supported by the law.

Again, I don't need to spend a lot of time on this, but the most recent Supreme Court discussion on preemption, the D'Agastino versus City of Miami case, that is a case where there was a contention that a citizen review board that might impose discipline on employees is contrary to rights given by police officers in a police officer's Bill of Rights. I don't want to talk about that case and finding so much as to announce

the following: Police officers are licensed as well, not under the police officer's Bill of Rights. There is a licensing scheme comparable to licensing schemes for psychologists and hairdressers, it is in Chapter 943. Nobody is bold enough to contend that the licensing ordinances for police officers preempted the police officer.

Simply having a license is not enough to preempt the field. Everybody finds a statute that clearly regulates more than licenses. To even have a preemption claim, there is no Court that has ever found a simple licensing scheme to preempt licensing of an entire field.

Two more things. You remember when Mr. Mihet came up and said, you know, if the city would have just banned aversive talk -- aversive therapy, we wouldn't be here. Clearly they could have done that. If they had done that, we wouldn't be in your courtroom. What is that if not a admission that the city is allowed to regulate psychologists?

By his very admission, since we can adopt a local regulation, you can't punish a -- you can punish a psychologist that practices. I promised to sit down three times now.

The other thing I will say is, there is no showing on this record or anywhere else in this evidence as to the other elements of preliminary injunction as it pertains to this alleged preemption argument. The Plaintiffs have argued, and I am not going to deal with the arguments here, they said,

listen, if we have a substantial likelihood of success on the merits that the First Amendment was violated, that is damaging enough and we should get a preliminary injunction.

Clearly preemption is not a First Amendment concept, so on this record, if the Court were convinced there is preemption, there is no showing of irreparable injury, no showing that the threat of injury outweighs the damage to the city if an injunction were to issue, no showing an injunction would be adverse to the public interest, and we suggest no such showing is possible.

The Government interest is actual harm to children, and we are not talking about speech. The damage in preemption is they want to engage in a counseling session and make a buck for it. On this record, if I haven't persuaded you ultimately on preemption, certainly there is no reason to enter an injunction on that.

If you need me to answer any questions, I will do that.

THE COURT: It is late.

MR. MIHET: Your Honor, you have been very gracious with your time. Can we use ten minutes?

THE COURT: I promised, but I don't want to do it now. We will have a status conference following the hearing so we can talk about where you stand.

What does everyone's schedule look like for a

telephonic conference, unless you want to come over tomorrow around 2:00 o'clock so we can talk about where you are -- we could put it off for a couple of weeks, but I figure sooner rather than later.

I will be free in the morning as well. Do you want to do that?

MR. MIHET: One suggestion, any chance the Court would put it off until a ruling is made on the motion?

THE COURT: Well, that would mean you would be going along with everything -- if you want to keep adhering to the schedule in place.

MR. MIHET: The Court has stayed all other discovery. If I am incorrect about that, I wouldn't want deadlines to lapse. My understanding is that the Court put everything on hold to a subsequent revisiting until after the P. I.

THE COURT: Is that what the parties want?

MR. MIHET: We would want to do that. The Court's ruling would have significance as to where the case would go after that.

THE COURT: I had forgotten that everything had been stayed pending the hearing. You have done all of your discovery relative to the hearing in a preliminary injunction motion, everything has been stayed.

MR. MIHET: Okay.

THE COURT: I got too involved in substance.

Do the parties want that stay -- I am not guaranteeing -- it seems reasonable. It is late, I want to think about it. I want to know your point of view if that is what all the parties want.

Plaintiff wants that. What about the Defendants, do you need time to think about it or do you want that, too?

MS. FAHEY: The county agrees it would be prudent to reassess at a later point.

MR. ABBOTT: We agree also, your Honor.

THE COURT: All right. I will do an order to confirm that.

I am also going to do an order when your proposed findings of fact and conclusions of law will be done. We know Pauline indicated a week. Today is the 18th, on the 25th you will have a transcript. Did you confer over the break about a proposed date to get your proposed findings and conclusions in?

MR. MIHET: Three weeks from today, two weeks after the transcript is issued. November 9th is a Friday.

THE COURT: Does that work for everybody?

MS. FAHEY: Yes.

MR. ABBOTT: Yes, your Honor.

THE COURT: All right. That is agreeable. I will do an order and set it for the 9th of November. I say five o'clock so everybody simultaneously will submit it. It will be in Word format to the Court's email, and I think we have it

filed, too. In that order I will confirm the Court's view on the issue of staying, but it sounds reasonable. I see no reason why the Court wouldn't go along with it. I wanted to make sure I thought about everything.

MR. MIHET: Your Honor, I'm sorry, would the Court consider allowing the Plaintiffs a very short companion brief to go with our submission to address a couple of things I want to address that I don't have time for?

THE COURT: You will be able to do that in your proposed findings and conclusions, anything that is fair game. Everything raised in the record evidence and in the motions and response, reply, complaint, it is all fair game. I read everything and I have listened carefully. Just because you haven't had a chance to respond to certain points, you can absolutely be assured the Court is going to review it in your proposed findings and conclusions, as it will as it goes back and reads -- I am sure you covered it in your motion and reply.

Don't feel you haven't been heard on issues.

MR. MIHET: There were a couple of comments made about how we admitted and implied. I am not sure how we put those in a proposed finding of fact.

THE COURT: The Plaintiffs have not had --

MR. MIHET: We'll figure it out.

THE COURT: All right. That will conclude it for the day.

I want to thank everyone. You did a very nice job of being very thorough and very professional and very educational for the Court in trying to answer the Court's questions while staying on task with your presentations, which I know isn't always easy. I appreciate it. I will get the order out. Have a nice evening.

MR. MIHET: We have a hard copy of the exhibits.

THE COURT: That will be helpful, thank you.

(Thereupon, the hearing was concluded.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: October 23, 2018

/s/ Pauline A. Stipes, Official Federal Reporter

Signature of Court Reporter

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