

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

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

Plaintiffs,

vs.

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

Defendants.

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

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

I. INTRODUCTION

On October 10, 2017, the City passed Ordinance No. 5407 (“Ordinance”), which prohibits conversion therapy—a discredited type of mental health treatment performed with the goal of

changing an individual's sexual orientation or gender identity—on minors within City limits. *See* DE 128-1 (Ordinance), p. 6:10-14. Defendant, Palm Beach County (“County”) has passed a similar (albeit, not identical) ordinance. *See* DE 121-1 (County’s Ordinance).

The Motion seeks an injunction prohibiting, *inter alia*, the City’s enforcement of the Ordinance.¹ Plaintiffs seek the preliminary injunction based on alleged violations of the First Amendment as well as Florida law. Specifically, Plaintiffs allege that the Ordinance violates their First Amendment rights because it: (1) bans speech on the basis of content and viewpoint; and (2) is unconstitutionally vague. Plaintiffs also allege that the Ordinance violates Florida law because it is preempted by state legislation.

II. FINDINGS OF FACT

A. The City’s Ordinance.

1. On October 10, 2017, the City enacted the Ordinance, which prohibits the practice of conversion therapy on minors.² DE 128-1 (Ordinance).

2. The Ordinance defines conversion therapy as follows:

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

Id. at p. 6:10-14.

3. The Ordinance does not restrict, in any way, conduct or speech outside of a formal therapy session:

[The Ordinance] does not intend to prevent mental health providers from speaking to the public about SOCE.

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

² “Conversion therapy” is also referred to as SOCE or “sexual orientation change efforts.”

4. Moreover, the Ordinance only prohibits treatment with the goal of changing an individual's sexual orientation or gender identity. Thus, even within a therapy session, the Ordinance does not prevent licensed therapists from "expressing their views to patients; recommending SOCE to patients ... or referring minors to unlicensed counselors, such as religious leaders." *Id.* at pp. 4:21–5:2.

B. Evidence of Conversion Therapy's Harm.

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

6. The following are examples of studies and position papers' conclusions regarding the harms of conversion therapy (including therapy relating to both same-sex attractions and gender identity on both minors and adults), relied upon by the City in enacting the Ordinance:

a. According to the American Academy of Pediatrics, "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." DE 128-2, (Am. Acad. of Pediatrics), p. 633.

b. "The potential risks of 'reparative therapy' are great and include depression, anxiety, and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experience by the patient." DE 128-3 (Am. Psychiatric Ass'n Official Action).

c. The American Psychological Association ("APA") created a task force to conduct a "systematic review of peer-review journal literature on sexual orientation

change efforts (SOCE) and concluded that efforts to change sexual orientation are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners and advocates.” DE 128-4 (APA Task Force Report), at v.

d. The APA Task Force found,

[S]ome recent studies document that there are people who perceive that they have been harmed though SOCE Among those studies reporting on the perceptions of harm, the reported negative social and emotional consequences include self-reports of anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family. Loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction.

Id. at p. 42.

e. “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.” *Id.* at p. 77.

f. Plaintiffs claim that inconclusive studies inure to their benefit. However, the task force concluded,

[T]here is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE. However, studies from both periods indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts. The lack of rigorous research on the safety of SOCE represents a serious concern, as do studies that report perceptions of harm.

Id. at v.

g. The American Psychological Association Council of Representatives has adopted a policy statement against SOCE, which noted that “[d]istress and depression were exacerbated” in individuals subjected to such therapy. DE 128-5 (APA Policy Statement).

h. The Pan American Health Organization, an office of the World Health Organization, has stated, “‘Reparative’ or ‘conversion therapies’ have no medical indication and represent a sever threat to the health and human rights of the affected persons. They constitute unjustifiable practices that should be denounced and subject to adequate sanctions and penalties.” DE 121-19 (2012 Pan American Health Organization Position Statement), p. 2.

i. “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,” according to the American Psychoanalytic Association. DE 128-6 (Am. Psychoanalytic Ass’n Position Statement).

j. The American Academy of Child & Adolescent Psychiatry’s Practice Parameter states, “Just as family rejection is associated with problems such as depression, suicidality, and substance abuse in gay youth, the proposed benefits of treatment to eliminate gender discordance in youth must be carefully weighed against such possible deleterious effects.” DE 128-7 (Practice Parameter, Am. Acad. Child & Adolescent Psychiatry), p. 969.

k. “Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or, necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated,” contrary to the claims of SOCE practitioners and advocates. *Id.* at p. 968.

l. According to the American School Counselor Association, “School counselors recognize the profound harm intrinsic to therapies alleging to change an individual’s sexual orientation or gender identity and advocate to protect LGBTQ students from this harm.” DE 128-9 (Am. Sch. Counselor Ass’n Position Statement), p. 37.

m. The report prepared by U.S. Dep’t of Health and Human Services, Substance Abuse and Mental Health Services Administration found as follows: “Conversion therapy perpetuates outdated views of gender roles and identifies as well as the negative stereotype that being a sexual or gender minority or identifying as LGBTQ is an abnormal aspect of human development. Most importantly, it may put young people at risk of serious harm.” DE 128-10 (SAMHSA Report), p. 1.

7. At the Hearing, Plaintiffs challenged the quality of the above-cited authorities, describing them as “no evidence at all.” DE 129 (Hearing Transcript), p. 48:9-13. The Court disagrees. Far from mere anecdotal remarks or individual opinions, the authorities relied upon by the City in adopting the Ordinance are primarily official position statements of major medical and mental health organizations. The City properly found that the research about the dangers of conversion therapy, particularly for minors, was “overwhelming.” DE 128-1, p. 11.

8. Plaintiffs contend that the Ordinance is not “narrowly tailored” because it bans conduct that has not been shown to be harmful. The Court rejects this contention. For instance,

Plaintiffs contend that the authorities relied upon by the City have only found that “aversive” SOCE causes harm.³ However, the referenced authorities did not limit their recommendations against conversion therapy to only coercive, behavioral, or aversive techniques. *See, e.g.*, DE 128-6 (Am. Psychoanalytic Ass’n Position Statement) (“Psychoanalytic technique does not encompass purposeful attempts to ‘covert,’ ‘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 internalized attitudes”); DE 128-10 (SAMHSA Report) at p. 1 (“[C]onversion therapy – efforts to change an individual’s sexual orientation, gender identity, or gender expression – is a practice that is not supported by credible evidence and has been disavowed by behavioral experts and associations.... Most importantly, it may put young people at risk of serious harm.”). Accordingly, the authorities relied upon for the Ordinance warn against conversion therapy, including the type of “talk therapy” performed by Plaintiffs on minors.

9. Similarly, the Court rejects Plaintiffs’ contention that the relied upon authorities only address “involuntary” talk therapy. *See, e.g.*, DE 128-4 (APA Task Force Report) at p. 79 (“Finally, we were asked to report on the appropriate application of affirmative therapeutic interventions for children and adolescents who present a desire to change their sexual orientation or their behavioral expression of their sexual orientation, or both, or whose guardian expresses a desire for the minor to change. We recommend that [Licensed Mental Health Professionals]

³ There are two different conversion therapy techniques—aversive and non-aversive. DE 128-4 (APA Task Force Study) p. 22. Aversive techniques, which Plaintiffs admit are unethical (DE 121-26; DE 121-30) (Plaintiffs’ Responses to Requests for Admissions, Request No. 19) involve “inducing nausea, vomiting, or paralysis; paralysis; providing electronic shocks, or having the individual snap an elastic band around the wrist.” DE 128-4 (APA Task Force Study), p. 22. Non-aversive techniques, on the other hand, employ mental health counseling techniques. DE 121-26, 121-30 (Plaintiffs’ Responses to Requests for Admissions, Request Nos. 33-34).

provide multiculturally competent and client-centered therapies to children, adolescents, and their families rather than SOCE”).

10. Plaintiffs additionally contend that the Ordinance is under-inclusive because it only applies to licensed therapy “providers,” and not to, for instance, members of the clergy who provide religious counseling. However, the authorities relied upon by the Ordinance specifically address the harms of change “therapy,” which, axiomatically, is a service provided by a therapist. *See, e.g.*, DE 128-2 through 128-10. Indeed, the authorities are comprised of mental health care organizations, who recommend against SOCE performed by its constituent mental health care providers.

11. Additionally, the studies relied upon by Plaintiffs to support their claims that conversion therapy is safe for minors are misplaced. DE 126-30 (Guidelines for Psychological Practice); DE 126-31 (Columbia University Study).

12. Specifically, in the Columbia University Gender Identity Disorder Study, the “therapeutic” technique did not involve performing conversion therapy directly on minors. Rather, “[t]o minimize the child’s stigmatization, only the parents come to treatment sessions.” DE 126-31 (Columbia University Study), p. 360. The Study recognizes that the child may be stigmatized “When gender and sex issues are discussed.” *Id.* at p. 368.

13. Plaintiffs’ cited Guidelines for Psychological Practice acknowledges that one approach to gender-questioning youth encourages “an affirmation and acceptance of children’s expressed gender identity,” and the practice of “interventions aimed at trying to change gender identity and expression to become more congruent with sex assigned at birth” has been deemed unethical by the World Professional Association for Transgender Health Standards of Care. DE 126-30, at p. 842.

C. Plaintiffs' Practice of Conversion Therapy

i. Therapy as Conduct

14. Hamilton and Otto are both marriage and family therapists, licensed by the State of Florida. DE 128-31 (Otto Deposition) p. 9:10-20; DE 128-32 (Hamilton Deposition), pp. 25:23–26:1.

15. Plaintiffs practice their profession verbally. Speech is the only tool that Plaintiffs use in their therapy sessions. DE 1, Complaint, ¶ 74.

16. Both Hamilton and Otto also admit they do not practice aversive techniques. DE 121-26, DE 121-30 (Plaintiffs' Responses to Requests for Admissions, Request Nos. 19, 33-34).

17. Moreover, Plaintiffs admit that had the Ordinance only banned aversion techniques, and not also non-aversive practices, of conversion therapy, that they would not have filed suit. DE 129 (Hearing Transcript), p. 12:18-19.

ii. Plaintiffs' Standing

18. Hamilton practices in Palm Beach Gardens and has not practiced in the City in at least the ten years. DE 128-32 (Hamilton Deposition), p. 39:22-24; pp. 340:1–341:18.⁴

19. Although Otto practices marriage and family therapy within the City, he admits that he does not practice “conversion therapy” as defined by the Ordinance. DE 128-31 (Otto Deposition) p. 176:8-23 (“I don’t practice conversion therapy.”). He describes his practice as follows:

A: I can’t change any client. My clients come to me with issues of distress that they want to work on, and I will talk with them about those issues and about alleviating their stress. Or if they have a conflict between their sincerely held religious beliefs and some other aspect of their life, be that sexual or not, we’ll talk

⁴ The Court notes that Hamilton claims she started to practice mental and family therapy within the City since the filing of this lawsuit. DE 96-1. However, as discussed in Section II.B, *infra*, her activity post-filing is irrelevant to the question of standing.

about those incongruities and how to make sense of those and how to decrease their anxiety and discomfort that comes from that.

* * *

Q: So let's assume that you have a client expresses a desire to change his or her sexual orientation. Do you then undergo efforts in an attempt to, in fact, change the client's sexual orientation?

A: I've already said I can't do that. That's like trying to say you go to the doctor and here, "I'd like to be nine feet tall. Would you try to change me?" That's impossible. The doctor is not going to change you to do that. So, I cannot change a client to do that. You can ask that in lots of different ways, but the answer is always going to be "I cannot change a client."

DE 128-31 (Otto Deposition), p. 44:3-12; pp. 44:25-45:13.

20. Counseling minors seeking help with unwanted same-sex attractions or gender identity issues is an insignificant part of Plaintiffs' practice. For example, in the year prior to the passage of the Ordinance, Hamilton treated only five minors regarding unwanted sexual or gender problems out of forty-four total clients. DE 128-30 (Hamilton's Supplemental Answer to Interrogatory No. 18). In the past nine years, Otto has only seen four minors seeking help with unwanted same-sex attractions. DE 128-28 (Otto's Supplemental Answer to Interrogatory 22).

iii. Plaintiffs' Purported Informed Consent

21. Both Plaintiffs abide by the code of ethics issued by the American Association for Marriage and Family Therapy ("AAMFT"). DE 1 (Complaint), ¶ 89; DE 128-32 (Hamilton Deposition) p. 237:2-7.

22. Pursuant to the American Association for the Marriage and Family Therapy's Code of Ethics, counselors must obtain informed consent from their clients and, if the individual is legally incapable of giving informed consent, therapists must obtain informed permission from a legally authorized person. DE 128-24 (AAMFT Code of Ethics, § 1.2).

23. Additionally, the informed consent requires the therapist to adequately inform the client of significant information concerning treatment processes and procedures and “of potential risks and benefits of treatments for which generally recognized standards do not yet exist.” *Id.*

24. Regarding the efficacy of SOCE, Hamilton’s Consent-to-Treat Form only includes a warning that there is “no guarantee that by pursuing psychotherapy the client will be happier, and no particular treatment can be guaranteed to be effective.” DE 128-21 (Hamilton Consent-to-Treat Form). Hamilton does not, however, advise her minor clients that “none of the existing research supports the premise that mental or behavioral health interventions can alter gender identity or sexual orientation.” DE 128-10 (SAMHSA Report) at p. 1.

25. With regard to the potential dangers of SOCE, Hamilton’s Consent-to-Treat form only advises generally that “[s]ometimes the psychotherapeutic process can bring up uncomfortable feelings such as anxiety, sadness, anger and so on; please be aware that this is a normal response to talking about unresolved life experiences.” DE 128-21. Hamilton does not, however, advise her minor clients that the practice of “‘conversion therapy’ represent[s] ‘a serious threat to the health and well-being – even the lives – of effected people.’” DE 128-8.

26. Otto provides even less “informed consent.” With regard to the efficacy of SOCE, Otto advises his minor clients that “some people believe that such counseling is unlikely to assist you. As noted above, your therapist disagrees with such conclusions” DE 128-22 (Otto’s Informed Consent for Counseling Regarding Unwanted Same-Sex Attractions and Behaviors”).

27. With regard to the potential dangers from SOCE, Otto advises his minor clients only that “the therapeutic process can evoke stressful feelings or emotions that are difficult to deal with during the process.” *Id.*

iv. *Plaintiffs' Understanding of the Ordinance*

28. Both Plaintiffs know what “conversion therapy” is and what it means to “seek to change” a minor’s sexual orientation or gender identity. *See, e.g.*, DE 128-31 (Otto Deposition), p. 43:19-25; p. 44:1-20; p. 45:5-12; p. 176:8-23; DE 128-32 (Hamilton Deposition), pp. 94:25-95:9; pp. 137:10-138:18; pp. 141:10-142:1.

29. Plaintiffs also concede that the Ordinance applies equally to conversion therapy seeking to change a minor’s sexuality from homosexual to heterosexual and vice versa, as well as therapy with the goal of changing a minor’s gender identity from one’s sex assignment to the opposite sex and those seeking to change back to their sex-aligned gender identity. DE 129 (Hearing Transcript), p. 28:6-25.

III. CONCLUSIONS OF LAW

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

A. **Standard to Obtain a Preliminary Injunction.**

To obtain a preliminary injunction, Plaintiffs must establish that: (1) they have a substantial likelihood of success on the merits; (2) substantial irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may cause the City; and (4) if issued, the injunction would not be adverse to the public interest. *Tally-Ho, Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1022, 1026 (11th Cir. 1989) (noting the plaintiff must demonstrate a substantial likelihood of success on the merits of its trademark infringement claim by establishing the four elements of infringement). At least one Eleventh Circuit opinion has found that a substantial likelihood of success was established because the plaintiff was “highly likely to prevail after a full trial on the merits.” *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) (emphasis added). “The burden of persuasion in all of the four

requirements is at all times upon the plaintiff.” *U.S. v. Jefferson Cty.*, 720 F.3d 1511, 1520 (11th Cir. 1983) (quoting *Canal Auth. V. Callaway*, 489 F.3d 567, 573 (5th Cir. 1974). “In this Circuit, ‘[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishe[s] the “burden of persuasion” as to each of the four prerequisites.’” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (quoting *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). In this context, “the issuance of a preliminary injunction will turn solely on whether th[e] ordinance violates the First Amendment.” *Gannett Satellite Info. Network, Inc. v. Twp. of Pennsauken*, 709 F. Supp. 530, 535 (D.N.J. 1989).

In addition to this four-part standard to obtain a preliminary injunction, Plaintiffs must also satisfy the basic requirements of Article III of the Constitution, including the jurisdictional requirement of standing. *Fla. Ass’n of Medical Equip. Dealers v. Apfel*, 194 F.3d 1227, 1229 (11th Cir. 1999) (affirming the denial of plaintiff’s preliminary injunction motion for lack of standing); “[S]tanding ‘is perhaps the most important of the jurisdictional doctrines.’” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (alteration in original) (quoting *Allen v. Wright*, 468 U.S. 737 (1984)). “[S]tanding in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal” *Warth v. Seldin*, 422 U.S. 490, 500, (1975). “Nonetheless, standing requirements ‘are not mere pleading requirements but rather [are] an indispensable part of the plaintiff’s case.’” *Church v. City of Huntsville*, 30 F.3d 1332, 1336 (11th Cir. 1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

For the reasons set forth herein, the Court finds Plaintiffs lack standing to pursue both a preliminary injunction and the claims in their Complaint. Even assuming, *arguendo*, Plaintiffs meet the basic jurisdictional requirements to pursue their claims, the Court also finds Plaintiffs

have not sufficiently met their burden of persuasion to merit the extraordinary remedy of a preliminary injunction.

B. Standing.

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

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

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

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

The Complaint and Motion challenge the validity of two separate ordinances, promulgated by two different governmental entities, banning conversion therapy for minors—(1) the Ordinance, applicable only within City-limits (DE 128-1, p. 5:16-20) and (2) the County's ordinance (DE 121-1), applicable throughout the County, unless a municipality within the County has “adopted an ordinance in conflict.” DE 128-1, p. 6:6-8. Unlike Otto's allegation that he maintains a counseling practice in the City (DE 1, Complaint, ¶ 125), Hamilton makes no such claim. Rather, she merely alleges that she practices therapy “in Palm Beach County.” DE 1 (Complaint), ¶ 140. The Court also notes that Hamilton's factual allegations regarding the cause of her alleged injuries address only the County's ordinance and not the City's Ordinance DE 1, (Complaint), ¶¶ 155-161.

The record evidence shows that Hamilton does not practice in the City of Boca Raton – or indeed anywhere outside of Palm Beach Gardens. DE 128-32 (Hamilton Deposition), pp. 34:22–37:25. Although Hamilton states “there would be occasions” where she might “want to be able to provide psychotherapy services” elsewhere (*id.*, at pp. 329:24–330:2), the threat of prosecution of Hamilton as a result of the City's Ordinance is, at best, speculative. However, “speculative or imaginary threats will not confer standing.” *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1329 (11th Cir. 2000) (citations omitted). These allegations are insufficient to establish Hamilton's standing to assert claims, let alone to impose a preliminary injunction, against the City.

Moreover, to the extent Hamilton now seeks to manufacture standing by filing a declaration stating she has seen a client within the City since the filing of the Complaint, her efforts fail. *See* DE 96-1. It is well-settled that “Article III standing must be determined as of the time at which the plaintiff's complaint is filed.” *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.2d 1263, 1275 (11th Cir. 2003) (internal citations omitted) (emphasis added); *see also Moyer v.*

Walt Disney World, Co., 146 F. Supp. 2d 1249, 1253 (M.D. Fla. 200) (“The existence of standing is determined as of the date suit is filed.”); *Resnick v. Magical Cruise Co., Ltd.*, 148 F. Supp. 2d 1298, 1301 (M.D. Fla. 2001) (“The determination of whether a plaintiff has standing to bring suit is made as of the date the lawsuit is commenced”). “Belated efforts to bolster standing are futile.” *Moyer*, 146 F. Supp. 2d at 1253. Thus, Hamilton’s Declaration, filed in support of Plaintiffs’ Reply to the Preliminary Injunction Motion (DE 96-1), in which she states she has begun treating clients in the City since filing of this litigation, is insufficient to confer her standing. Hamilton lacked standing to obtain relief against the City at the time Plaintiffs filed the Complaint, and Hamilton’s claims against the City must, therefore, be dismissed.

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

The prohibition contained in the Ordinance is very narrow: it only prohibits a provider from “practic[ing] conversion therapy on any individual who is a minor.” DE 128-1 (Ordinance), p. 8:5-7. “Conversion therapy” is defined as “treatment performed with the goal of changing an individual’s sexual orientation or gender identity.” *Id.* at p. 6:10-14. Otto makes it crystal clear in his deposition testimony that he does not, and has no desire to, practice “conversion therapy.” *See* DE 128-31 (Otto Deposition), p. 44:3-12; pp. 44:25–45:13. In fact, he admits such a change is not possible. *Id.* Because Otto neither practices nor intends to practice conversion therapy, as defined by the Ordinance, he has suffered no injury-in-fact and, therefore, lacks standing to pursue a preliminary injunction and his claims against the City.

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

Plaintiffs allege in Count II that the Ordinance violates their minor clients’ right to receive information under the First Amendment. However, generally speaking, “[i]t is a well-established tenet of standing that ‘a litigant cannot rest a claim to relief on the legal rights or interests of third parties.’” *Pennsylvania Psychiatric Soc’y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288

(3d Cir. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Courts will only recognize third-party standing if three criteria are satisfied:

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

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

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

Here, Plaintiffs have not presented any evidence in support of their efforts to obtain third-party standing, particularly where the therapists themselves lack first-party standing to pursue claims against the City. *See* DE 1, Compl., ¶¶ 178-182; 203-211. Accordingly, Plaintiffs have not met the *Powers* factors. Specifically, there exists no apparent hindrance to the minor clients’ ability to seek their own judicial relief and, therefore, Plaintiffs cannot obtain a preliminary injunction or assert third-party standing on behalf of their minor clients.

C. Substantial Likelihood of Success on the Merits.

Aside from Plaintiffs' lack of standing, the Court nevertheless addresses the substantive arguments in the Motion for the benefit of the record. Plaintiffs argue that the enforcement of the Ordinance should be enjoined because (1) it is an *ultra vires* act, preempted by Florida law and (2) it violates the First Amendment. DE 8. Plaintiffs have failed to carry their burden traveling under either theory.

1. The Ordinance Is Not Preempted by Florida Law.

The Motion alleges that the City's enactment of the Ordinance was *ultra vires* and in violation of Article VIII, § 2(b),⁵ of the Florida Constitution and § 166.021, Florida Statutes.⁶ At the outset, if the Ordinance were preempted, it would not be within the City's power to regulate Plaintiffs' conduct, thus, ending the Court's inquiry. However, the Court finds Plaintiffs have failed to show a substantial likelihood of success on the merits that the Ordinance is either expressly or impliedly preempted, nor have they met their burden as it relates to the other three preliminary injunction factors.⁷

a. Express Preemption.

Florida is a home rule state, and the Florida Constitution explicitly authorizes municipalities to "exercise any power for municipal purposes except as otherwise provided by

⁵ Article VIII, § 2(b) authorizes municipal home rule, allowing municipalities to "exercise any power for municipal purposes except as otherwise provided by law." Art. VIII, § 2(b), Fla. Const.

⁶ Section 166.021, Fla. Stat., recognizes that "the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except . . . [a]ny subject expressly prohibited by the constitution [and] . . . [a]ny subject expressly preempted to state or county government by the constitution or by general law." § 166.021, Fla. Stat.

⁷ Unlike in the First Amendment context, irreparable injury may not be presumed. *Siegel*, 234 F.3d at 1178 (noting irreparable injury may be presumed in First Amendment claims). Thus, "[a] showing of irreparable injury is the sine qua non of injunctive relief." *Id.* (internal citations omitted). In fact, Plaintiffs wholly fail to address the questions of irreparable injury, the balance of harms, and public interest, based on the preemption claim.

Florida law.” Fla. Const. Art. 8 § 2(b). Express preemption requires a specific legislative statement that cannot be implied or inferred and must be accomplished by clear language stating an intended preemption. *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010); *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006). “[T]he legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act” except “[a]ny subject expressly prohibited by the constitution” or “[a]ny subject expressly preempted to state or county government by the constitution or by general law.” § 166.021(3)(b)-(c), Fla. Stat.

Plaintiffs have not shown that the Ordinance is expressly preempted. The Motion fails to cite any legislative action expressly preempting municipalities from enacting ordinances prohibiting conversion therapy for minors. DE 8. To the extent Plaintiffs rely on § 491, Title XXXII, Fla. Stat., or Section 64B4-5.001, Fla. Admin. Code, as a source of “express” preemption, neither law expressly preempts regulation of mental health professionals by local government. *See* DE 8; §§ 491.002-16, Fla. Stat.; § 64B4-5.001, Fla. Admin. Code.⁸ Accordingly, Florida law does not expressly preempt the Ordinance.

b. Implied Preemption.

The Court finds that the City’s Ordinance is not impliedly preempted by Florida law, specifically, Chapter 491 or Section 456.003 of the Florida Statutes. Implied preemption occurs when “the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.” *D’Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017);

⁸ Section 491 merely establishes a licensing scheme for mental health professionals, “establishing minimum qualifications for entering into and remaining in” this field, and Section 64B4-5.001 of Florida’s Administrative Code codifies the disciplinary scheme for violations of Section 491. §§ 491.002-16, Fla. Stat.; § 64B4-5.001, Fla. Admin. Code.

Browning, 28 So. 3d at 886. “Courts should be reluctant to ‘preclude a local elected governing body from exercising its local power’ by finding preemption by implication ‘in the absence of an explicit legislative directive.’” *Shands Teaching Hosp. v. Mercury Ins. Co.*, 97 So. 3d 204, 211 (Fla. Dist. Ct. App. 2012) (quoting *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 (Fla. Dist. Ct. App. 2005)). In determining if implied preemption applies, the court must look ‘to the provisions of the whole law, and to its object and policy.’” *Browning*, 28 So. 3d at 886 (quoting *State v. Harden*, 938 So. 2d 486, 489 (Fla. 2006)). Findings of implied preemption are “severely and strongly disfavored,” *Exile v. Miami-Dade Cty.*, 35 So. 3d 118, 119 (Fla. Dist. Ct. App. 2010), and courts “must be careful and mindful in attempting to impute intent to the Legislature to preclude a local elected governing body from exercising its home rule powers.” *D’Agastino*, 220 So. 3d at 421, 423; *Randolph v. Family Network on Disabilities of Fla., Inc.*, No. 4:11-cv-555-RS-WCS, 2012 WL 71719 (N.D. Fla. Jan. 10, 2012) (upholding ordinance prohibiting discrimination based on sexual orientation and finding no implied preemption with Florida statute); *Phantom of Clearwater, Inc.*, 894 So. 2d at 1019 (“Florida courts are reluctant to conclude that a municipality is preempted from exercising its local powers in the absence of an express exemption, particularly in light of the ease with which the Florida Legislature can expressly preempt a local authority if intended.”) (citations omitted). “The test is not whether the Legislature has expressly authorized municipal power, but whether such power has been expressly prohibited.” *D’Agastino*, 220 So. 3d at 429 (Fla. 2017) (Parient, J., concurring) (internal quotations and citations omitted). “Thus, implied preemption should be found only ‘if the senior legislative body’s scheme of regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme.’” *Shands Teaching Hosp.*, 97 So. 3d

at 211 (quoting *Tribune Co. V. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984) (additional citations omitted)).

No such conflict exists here. First, a review of Chapter 491 shows that the Florida legislature has not enacted pervasive legislation of mental health professionals. The intent of Chapter 491 is threefold: (1) to make communications between the public and counselors privileged; (2) to protect the public from preventing persons not qualified to practice counseling; and (3) to “establish[] minimum qualification for entering into and remaining in the respective [mental health] professions.” § 491.002, Fla. Stat. The types of therapy that a professional licensed pursuant to Chapter 491 may offer to minors are not regulated; Chapter 491 merely enumerates the qualifications required to provide mental health counseling, including certain subspecialties.⁹ Like the challenged law in *Phantom of Clearwater, Inc. v. Pinellas Cty.*, Chapter 491 is a “relatively short chapter.” 894 So. 2d at 1019 (holding a county’s regulation of fireworks sales was not preempted by the state statute regulating the sale and use of fireworks). “It does not compare in length or substance to the uniform traffic laws or the statutory regulation of telecommunications,” for example. *Id.*

Plaintiffs also cite Section 456.003, Fla. Stat., as grounds for implied preemption. Section 456.003 outlines the legislative intent for Florida’s professional regulation statutes and provides that the state may regulate professions for the preservation of health, safety, and welfare of the public when “[t]he public is not effectively protected by other means [such as] local ordinances.” § 456.003(2)(b), Fla. Stat. Thus, Section 456.003 shows that municipalities can and should regulate professions as a part of their police powers when necessary for the public’s well-being, as

⁹ For example, Section 491.0143 (“Practice of sex therapy”) states, “Only a person licensed by this chapter who meets the qualifications set by the board may hold herself or himself out as a sex therapist.”

the City has done in the Ordinance.¹⁰ If the statute recognizes and “reserves spheres of regulation to junior legislative bodies,” a local ordinance within that sphere is neither expressly nor impliedly preempted. *Hillsborough Cty. v. Fla. Restaurant Ass’n, Inc.*, 603 So. 2d 587, 591 (Fla. Dist. Ct. App. 1992) (“[T]he legislative scheme must be so pervasive that it completely occupies the field, thereby requiring a finding that an ordinance which attempts to intrude upon that field is null and void.”).

Plaintiffs’ reliance on *D’Agastino v. City of Miami*, 220 So. 3d 410 (Fla. 2017), is misplaced. The *D’Agastino* court held that a local regulation empowering a civilian investigative panel to subpoena police officers accused of misconduct was preempted by the Police Officers’ Bill of Rights (“PBR”). *Id.* at 422-427. In so doing, however, the Florida Supreme Court expressly affirmed *Miami-Dade Cty. v. Dade Cty. Police Benevolent Ass’n*, 154 So. 3d 373 (Fla. Dist. Ct. App. 2014), holding local regulation of non-disciplinary investigations by the Office of Inspector General involving police officers is not preempted by the procedures in the PBR. *Id.* at 427. The Florida Supreme Court also noted that, despite the preemption of the civil investigative panel’s subpoena powers, police officers remain “subject to the disciplinary investigations conducted by their own internal affairs department and the CJSTC.” *Id.*

This observation is equally applicable to Plaintiffs’ implied preemption argument. For example, the fact that Chapter 491 contains a disciplinary section does not render the City’s Ordinance preempted. § 491.009, Fla. Stat. In fact, this section expressly contemplates that authorities separate and apart from the disciplinary board will regulate the conduct of counselors:

¹⁰ To wit, the Supreme Court has recognized that “the regulation of health and safety matters is primarily, and historically, a matter of local concern.” *Hillsborough Cty. v. Automated Med Labs Inc.*, 471 U.S. 707, 716 (1985) (emphasis in original); *see also Craig v. Boren*, 97 S. Ct. 451, 458 (1976) (“[T]he protection of public health and safety represents an important function of state and local governments.”).

being convicted of a crime or entering a nolo contendere plea to a crime “which directly relates to the practice of his or her profession or ability to practice his or her profession” is grounds for denial of the counselor’s license or other disciplinary action. *Id.*

Moreover, the Florida legislature requires practitioners of numerous professions—from midwifery to pest control, attorneys to interior design—to obtain a license from the state and subjects such professionals to potential disciplinary actions. *See, e.g.*, § 467.006, 482.071, 454.021, 481.2131, Fla. Stat. Police officers, including those in *D’Agastino* and *Dade Police Benevolent Ass’n*, are also members of a profession subject to qualifications and certifications by the Florida legislature, as are mental health counselors. *See* §§ 943.13, 943.1395, Fla. Stat. Like Chapter 491 and the City’s Ordinance, however, the state’s requirement that police officers obtain certain qualifications does not preempt a local government’s ability to ban certain law enforcement techniques or regulate the actions of their police officers. *D’Agastino*, 220 So. 3d at 427; *see also Lake Hamilton Lakeshore Owners Ass’n v. Neidlinger*, 182 So. 3d 738, (Fla. Dist. Ct. App. 2015) (finding association’s nuisance claims against airboat company were not impliedly preempted by the Florida Fish and Wildlife Conservation Commission’s regulation of boating activities); *Hillsborough Cty. v. Fla. Restaurant Ass’n, Inc.*, 603 So. 2d 587 (Fla. Dist. Ct. App. 1992) (holding state statute regulating the service and sale of alcoholic beverages did not preempt county’s ordinance requiring display of health warnings about alcoholic beverages).

Finally, Plaintiffs’ concession that they would not have challenged the City’s Ordinance if it had only banned aversive, as opposed to non-aversive, conversion therapy techniques undermines their preemption claim. *See* DE 129 (Hearing Transcript), p. 12:18-19. It is a recognition that local regulation of conversion therapy techniques is not preempted. Because neither the Florida Constitution nor general law pervasively regulates the mental health profession,

the Court finds that the regulation of conversion therapy for minors is clearly not an area impliedly preempted to the state.

2. The Ordinance Is a Constitutional Exercise of the City’s Police Power to Regulate Professional Conduct.

Statutes and ordinances are presumed to be constitutional, and all reasonable doubts regarding the statute or ordinance must be resolved in favor of constitutionality. *State v. Hanna*, 901 So. 2d 201, 204 (Fla. Dist. Ct. App. 2005); *see also State v. Kinner*, 398 So.2d 1360 (Fla. 1981); *Gammon v. Cobb*, 335 So. 2d 261 (Fla. 1976)). Moreover, the Florida Constitution gives municipalities broad “governmental, corporate, and proprietary powers . . . to exercise any power for municipal purposes.” Art. VIII, § 2(b), Fla. Const. “In defining the scope of a “municipal purpose,” Florida courts have long held that “[i]t is the duty of public authorities in municipalities to protect the safety, the health and the general welfare of the citizens.” *Quiles v. City of Boynton Beach*, 802 So. 2d 397, 398 (Fla. Dist. Ct. App. 2001); *see also Hillsborough Cty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985) (“[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.”); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons . . . is unquestionably at the core of the State’s police power,” which extends to “state and local governments.”). And, “when no fundamental right is implicated, the challenged statute passes constitutional muster as long as the legislature had a rational basis for its enactment.” *Mitchell v. Clayton*, 995 F.2d 772, 776 (7th Cir. 1993) (citing *Maguire v. Thompson*, 957 F.2d 374, 376 (7th Cir.), *cert. denied*, 506 U.S. 822 (1992)).

The Court finds the Ordinance is a regulation of professional conduct, as opposed to a regulation of professional speech as Plaintiffs allege. Jurisprudence has long recognized the government’s power to regulate professions. *See, e.g., Oshins v. York*, 150 Fla. 690, 672 (Fla. 1942) (en banc) (finding the “law has been settled that the regulation of the practice of dentistry is

subject to the police power”). Accordingly, no fundamental right is at issue, and the Court views the Ordinance through the lens of the City’s valid exercise of its police power.

The Ordinance prohibits the practice of a certain type of treatment, namely, conversion therapy, on a class of persons whom the City has a compelling interest in protecting, minors.¹¹ See *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (acknowledging the state has a “compelling interest in protecting the physical and psychological well-being of minors”); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). Access to any particular treatment, moreover, is not a fundamental right. See *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) (“[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider.”); *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) (“[T]he decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health.”).

Plaintiffs argue that because they perform non-aversive conversion therapy using speech techniques, their professional conduct is beyond the reach of regulation. This argument ignores the legal precedent. The United States Supreme Court recently reaffirmed the ability of governments to “regulate professional conduct, even if that conduct incidentally involves speech.” *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (“*NIFLA*”) (citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)); accord *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992). “While drawing the line between speech and conduct can be difficult, this Court’s precedents have long drawn it” *Id.* (citing *Sorell v.*

¹¹ The Court also notes that the Ordinance bans both aversive and non-aversive techniques of conversion therapy on minors.

IME Health Inc., 564 U.S. 552, 567 (2011)); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *U.S. v. Stevens*, 559 U.S. 460, 468 (2010)).

Thus, while it may be generally true that determining whether words constitute conduct “is a dubious constitutional enterprise,” *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293, 1309 (11th Cir. 2017)¹², sometimes speech *is* conduct and, even if determining when words are conduct “can be difficult,” resolution of the Motion requires this Court to make the determination. And if making the determination is ever “not difficult,” this is the case. Plaintiffs argue, and this Court has found, that *everything* that happens in a therapy session is verbal.¹³ Thus, unless a therapy session involves *no* conduct, then speech therapy *is* the conduct. *Wollschlaeger* recognizes as much. Commenting on the *Pickup* decision upholding a SOCE ban, the court noted that “[i]mportantly, the law in *Pickup*, like the law in *Locke [v. Shore]*, 634 F.3d 1185 (11th Cir. 2011)] did not restrict what the practitioner could say or recommend to a patient or client. *Wollschlaeger*, 848 F.3d at 1309. The *Wollschlaeger* Court’s express reaffirmation of *Locke* is especially significant. In that case, the Eleventh Circuit found that the Florida legislature’s requirement that interior designers obtain a license did not infringe on First Amendment expression. Rather, the license requirement was a permissible professional regulation, even though “expression” was incidentally affected. “A statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the

¹² *Wollschlaeger* itself is, of course, distinguishable from the matter at hand. In that case, the court examined whether physicians’ inquiries about patients’ gun ownership or possession was protected First Amendment speech. These inquiries, notably, were not the actual medical procedure or practice performed by the physicians, but rather ancillary questions, unlike here, where the conduct at issue is the actual course of care.

¹³ Of course, merely because marriage and family therapy is administered verbally does not mean then the counselor is not engaged in scientific conduct. Hamilton and Otto have PhDs in their chosen scientific field. They, and all others engaged in the “practice of marriage and family therapy” employ “scientific . . . theories, methods, and procedures for the purpose of describing, evaluating, and modifying . . . individual behavior.” Section 491.003(8), Fla. Stat. It is this conduct that the Ordinance regulates.

incidental effect of observing an otherwise legitimate regulation.” *Id.* at 1191 (quoting *Accountant’s Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988); *see also Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456–57 (1978); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1430 (11th Cir. 1998) (recognizing, in dicta, that regulations that “govern occupational conduct” with only an “incidental effect” on speech withstand First Amendment scrutiny); *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1386 (7th Cir. 1992)).

“It should be no surprise then, that the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not.” *Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 901 F.3d 235, 1241 (11th Cir. 2018); *see also Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.*, 547 U.S. 47, 66 (2006) (“FAIR”) (explaining that, to merit First Amendment protection, conduct must be “inherently expressive”). A law may regulate speech, for example, “as part of the practice of medicine, subject to reasonable licensing and regulation by the state.” *Id.* (emphasis in original) (quoting *Casey*, 505 U.S. at 884); *see also Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164, 1173 (11th Cir. 2018) (“Of course, not all laws implicating the First Amendment are unconstitutional.”). “[A] law regulating conduct that merely alters incentives rather than restricts the ingredients necessary for speech does not regulate conduct that is ‘inherently expressive’—a necessary trait of an impermissible conduct-based regulation.” *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 878, 878 (9th Cir. 2018) (citing *Pickup*, 740 F.3d at 1225; *FAIR*, 547 U.S. at 66).

As Justice White noted in *Lowe v. S.E.C.*,

One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in light of the client’s individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulatable transaction called a contract, the professional’s speech is incidental to the conduct of the profession.

* * *

Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation cease to function as legitimate regulation of professional practice with only incidental impact on speech.

472 U.S. 181, 232 (1985) (White, J., concurring).

Here, the Ordinance does not prevent Plaintiffs from engaging in what are undoubtedly free speech activities:

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

DE 128-1 (Ordinance), pp. 4:21–5:2.

Unlike the California statute at issue in *NIFLA*—which improperly compelled speech that was not “ tied to a [medical] procedure at all ”—the Court finds that the Ordinance is expressly tied to a specific procedure (psychological conversion therapy). *NIFLA*, 138 S. Ct. at 2374 (emphasis added). Indeed, the Ordinance directly regulates the procedure itself with surgical precision: using psychological procedures to convert sexuality or gender identity is the *only* thing prohibited.

This case is similarly distinguishable from *Conant v. Walters*, which struck down a federal policy that threatened doctors with revocation of their DEA prescription authority if they recommended the medicinal use of marijuana to their patients on First Amendment grounds. 309 F.3d 629, 637-639 (9th Cir. 2002). However, *Conant* plaintiffs did not even challenge the policy’s prohibition against the act of prescribing or administering marijuana. *Id.* at 634 (noting the lower court and parties agreed that a doctor may be validly prohibited from performing treatments that violate federal law). Here, like the unchallenged provisions at issue in *Conant*, the Ordinance

bans the improper treatment, rather than speech recommending treatment. *See* DE 128-1 (Ordinance).

a. Courts recognize the use of police power to regulate professional conduct.

To constitutionally distinguish regulations of professional practices based on whether the practice involves the utterance of words would lead to absurd results. Perhaps recognizing this, the *NIFLA* court expressly reaffirmed that regulation of professional conduct (even verbal conduct) is constitutionally permissible. 138 S.Ct. at 2372 (stating “[s]tates may regulate professional conduct, even though that conduct incidentally involves speech.”). Specifically, the *NIFLA* Court recognized that “[l]ongstanding torts for professional malpractice ‘fall within the traditional purview of state regulation of professional conduct.’” 138 S.Ct. at 2373 (emphasis supplied). And preventing professional malpractice is exactly what the Ordinance does. Surely, governments can (and do) prohibit surgeons from performing surgeries that both harm and provide no medical benefit to their patients. Therapists do not have a First Amendment right to commit malpractice merely because they practice their profession with words, rather than with a scalpel. Therefore, the *NIFLA* Court’s focus upon, and rejection of, “professional speech” as a separate First Amendment category is not applicable to the Ordinance, which does not ban “professional speech” (or any speech for that matter).¹⁴ And regulations of conduct, rather than speech, do not implicate the First Amendment in general, or “viewpoint discrimination” contentions in particular. *See Pickup*, 740 F.3d at 1231.

¹⁴ The Ordinance bans a mental health procedure, conversion therapy for minors, expressly found to be valid, constitutional regulation of conduct in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013), *aff’d* 767 F.3d 216 (3rd Cir. 2014); and *Doe v. Christie*, 33 F. Supp. 3d 518 (D.N.J. 2014), *aff’d sub nom, Doe ex rel. Doe v. Governor of N.J.*, 783 F.3d 150, 155 (3d Cir. 2015).

Analyzing California’s ban on sexual orientation change efforts (“SOCE”), the Ninth Circuit held that the ban was a valid regulation of “professional conduct.”¹⁵ *Pickup*, 740 F.3d at 1225-1231. The court reasoned that “the key component of psychoanalysis was the treatment of emotional suffering and depression, *not* speech.” *Id.* at 1226 (emphasis original, citation omitted). The *Pickup* Court noted that “[m]ost, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment.” *Id.* at 1229. Otherwise, “any prohibition of a particular medical treatment would raise First Amendment concerns” and that would “restrict unduly the states’ power to regulate licensed professionals and would be inconsistent with the principle” that regulating conduct does not abridge free speech “merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Id.* (citing *Giboney*, 336 U.S. at 502 (1949)). The fact that the “treatment may be performed through speech alone” did not alter the conclusion that the therapy is “*treatment . . . not speech.*” *Id.* at 1230-31 (emphasis original). The *Pickup* Court found that California’s SOCE ban regulated “therapeutic treatment,” which was not “symbolic” or “expressive speech” and that the ban did not restrain the plaintiffs from “communicating a message,” “imparting information or disseminating opinions.” *Id.* at 1229-30; *see also Ft. Lauderdale Food Not Bombs*, 901 F.3d 235, 1241 (11th Cir. 2018) (noting “[c]ontext separates the physical activity of walking from the expressive conduct associated with a picket line or a parade”). Thus, nothing in *NIFLA*, contrary to Plaintiffs’ argument, disturbs or calls into question the holding in *Pickup*.

¹⁵ Notably, the Ninth Circuit denied the appellants’ motion to recall the mandate upholding the SOCE ban, following *NIFLA*. *See Pickup v. Brown, et al.*, No. 12-17681, Dkt. 155 (9th Cir. Nov. 6, 2018). Accordingly, the Ninth Circuit’s reasoning that California’s ban on conversion therapy for minors regulated professional conduct remains persuasive law.

In *Hines v. Alldredge*, a veterinarian who provided veterinary advice to pet owners via email and telephone calls raised a First Amendment challenge to a law that required him to physically examine an animal before treating it. 783 F.3d 197 (5th Cir. 2015). The Fifth Circuit upheld the regulation, recognizing that the examination requirement “does not offend the First Amendment,” even though the rule “may have some impact on the veterinarian’s speech.” 783 F.3d at 201. “The idea that content-neutral regulation of the professional-client relationship does not violate the First Amendment has deep roots, and has been embraced by many circuits.” *Id.* at 202 (citations omitted).

Here, notably, Plaintiffs admit that the Florida Legislature and the AAMFT Code of Ethics require that Plaintiffs meet minimum standards of performance and to not cause harm to their patients. DE 1 (Complaint), ¶ 86; § 491.003(8), Fla. Stat.; DE 128-24 (AAMFT Code of Ethics). Thus, even though Plaintiffs describe their entire practice as “talk therapy” when engaged with clients (whether or not they are performing conversion therapy), they do not claim that other professional standards and regulations are violations of their First Amendment rights. “There is a difference, for First Amendment purposes, between regulating professionals’ speech to the public at large versus their direct, personalized speech with clients.” *Locke*, 634 F.3d at 1191 (citing *Lowe*, 472 U.S. at 232; *Bowman*, 860 F.2d at 604-05). The license requirement in *Locke* was permissible because it “regulates solely the latter,” as does the City’s Ordinance.

Plaintiffs are free to recommend conversion therapy to their minor patients; they are free to publically speak about conversion therapy; free to perform conversion therapy on adults; and they are even free to express their personal views on conversion therapy or same-sex attractions to patients, including minors. DE 128-1 (Ordinance), p. 4:21 – p. 5:2. What the Ordinance bans therapists from performing is the specific, dangerous, and ineffective mental health procedure on

minors¹⁶ within practice of their profession. As mental health counselors, Plaintiffs are not entitled to greater First Amendment rights when practicing their trade than other professions, simply because Plaintiffs' medical treatments involve words, as opposed to, for example, a scalpel or a pill. *Locke*, 634 F.3d at 1191.

Because the ban “regulates a professional practice that is not inherently expressive, it does not implicate the First Amendment.” *Pickup*, 740 F.3d at 1220-30; *see also Gonzalez v. Carhart*, 550 U.S. 124, 158 (2007) (“Where it has rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulation the medical profession in order to promote respect for life, including life of the unborn.”) (emphasis added). Accordingly, the Court finds Plaintiffs have failed to meet their burden showing that the City's Ordinance is a regulation of a fundamental right, as opposed to professional conduct.

3. The Ordinance Withstands the Rational Basis Test as a Permissible Exercise of the City's Police Power.¹⁷

Courts apply the rational basis test to determine the constitutionality of regulations of professional conduct as an exercise of a government's police power. *Lange-Kessler v. Dep't of Educ. of the State of New York*, 109 F.2d 137 (2d Cir. 1997) (finding that regulation of the medical profession is afforded rational basis review); *Mitchell*, 995 F.2d at 776 (“[W]hen no fundamental right is implicated, the challenged statute passes constitutional muster as long as the legislature had a rational basis for its enactment.”). “The rational basis test asks (1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a

¹⁶ See DE 128-2 through DE 128-11, cited herein, discussing the harms of conversion therapy.

¹⁷ The Court notes Plaintiffs' Motion seeks a preliminary injunction solely based on their contention that strict scrutiny is the applicable standard of review. In other words, Plaintiffs do not content that the City's Ordinance fails rational basis or heightened scrutiny.

rational relationship between the government's objective and the means it has chosen to achieve it." *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009). Under this standard, a statute comes to the court bearing "a strong presumption of validity." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). A state is under no obligation to produce evidence supporting the rationality of the legislation and, indeed, the legislature need not even have actually been motivated by the rational reason presented to the court when it enacted the challenged law. *Beach Commc'ns*, 508 U.S. at 314–15; *Leib*, 558 F.3d at 1306. Rather, the challenger bears "the burden to negative every conceivable basis which might support [the law]." *Beach Commc'ns*, 508 U.S. at 315; *Williams*, 240 F.3d at 948. "Only in an exceptional circumstance will a statute not be rationally related to a legitimate government interest and be found unconstitutional under rational basis scrutiny." *Williams*, 240 F.3d at 948.

Having found that the City has the power to regulate professional conduct at issue (see, *supra*, Sections 1 and 2(a)), the Court turns to whether there is a rational relationship between the government's objective and the means it has chosen to achieve it." *Leib*, 558 F.3d at 1306. It is Plaintiffs' "burden to negative every conceivable basis which might support [the law]." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Plaintiffs fail to meet this burden.

On the face of the Ordinance, the City asserted a "compelling interest in protecting the physical and psychological well-being of minors ... and in protecting its minors against exposure to serious harms caused by sexual orientation and gender identity change efforts." DE 128-1, p. 5. This interest is not only legitimate, it is compelling. See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (the state has a "compelling interest in protecting the physical and psychological well-being of minors"); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is

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

Additionally, the City’s Ordinance cites ten different position papers and studies in which accredited, professional organizations within Plaintiffs’ field have acknowledged the harms associated with conversion therapy on minors. *See, supra*, Section I; DE 128-1 – 128-11. Plaintiffs argue that most of these sources are position papers, not peer-reviewed studies, and are thus insufficient evidence of harm is not well-taken. By Plaintiffs’ standards, the City would be required to conduct “empirical research” to demonstrate the “self-reports of anger, anxiety, confusion, depression, grief, guilt, hopelessness, [and] deteriorated relationships with family” as a result of conversion therapy. *See* DE 128-4 (APA Task Force Report, p. 42). The Supreme Court has found that evidence of harm, specifically in the context of harm to children, does not require “a multiyear controlled study in which some children are intentionally exposed to [harm] and others are shielded from [harm].” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) (finding the “government’s interest in the ‘well-being of its youth’ . . . justified the regulation of otherwise protected expression.”) Because “[t]here are some propositions for which scant empirical evidence can be marshaled,” *id.*, the Court finds that Ordinance meets the rational basis test as rationally-related regulation of a mental health procedure for the health and safety of minors.

4. Alternatively, Even if the Court Classifies the Ordinance as a Regulation of Speech, It Is a Constitutional Regulation of Speech.

Plaintiffs allege that the Ordinance, when viewed as a regulation of speech, is unconstitutional as a content-based, viewpoint-based, or an unconstitutionally vague First Amendment restriction. The Court finds Plaintiffs have failed to demonstrate a likelihood of success on these First Amendment claims sufficient to merit a preliminary injunction, for the reasons set forth more fully below.

a. *The Ordinance is content-neutral.*

“As a general rule, laws that by their nature distinguish favored speech from disfavored speech on the basis of the ideas or view expressed are content based.” *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”). By contract, a content-neutral ordinance “places no restrictions on . . . either a particular viewpoint or any subject matter that may be discussed.” *Hill v. Colorado*, 530 U.S. 703, 723 (2000). “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward v. Rock Against Racism*, 491 U.S. 781, (1989).

Based on a plain reading of the Ordinance and Plaintiffs’ own concessions, the Ordinance is clearly content-neutral. The ordinance prohibits a certain type of conversion therapy on minors, whether that therapy involves aversive or non-aversive techniques. Plaintiffs concede that a ban on aversive therapy techniques would not be challenged. DE 129 (Hearing Transcript, p. 12:18-19. They also admit that the Ordinance applies equally to conversion therapy on minors seeking to change from both homosexuality to heterosexuality and vice versa, as well as therapy with the goal of changing a minor’s gender identity from that assigned at birth to the opposite sex and to minors with the goal of changing to their sex-aligned gender identity. DE 129 (Hearing Transcript), p. 28:6-15. In other words, the Ordinance applies to all change, whatever the goal of such change may be. *Id.*

The Ordinance also does not preclude the following:

[c]ounseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person’s coping, social support, and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or

unsafe sexual practices, as long as such counseling does not seek to change sexual orientation or gender identity.

DE 128-1 (Ordinance), p. 6:14-19. Thus, the Ordinance bans a practice regardless of the content of the words involved in the practices or the provider's ideological basis for those practices. Compare *Virginia v. Black*, 538 U.S. 343 (2003) (ban on cross burning with the intent to intimidate was content-neutral because it did "not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics'") with, *R. A. V. v. St. Paul*, 505 U.S. 377 (1992) (ban on cross burning with intent to intimidate "on the basis of race, color, creed, religion or gender" found to be content-based) (emphasis added) and *Wollschlaeger*, 848 F.3d at 1307 (ban on discrimination and harassment based on gun ownership or possession found to be content based) (emphasis added). Because the Ordinance bans a practice – no matter the basis of the practice – content is not regulated; thus, the Ordinance is content neutral. See *Pickup*, 740 F.3d at 1231 (9th Cir. 2014).

b. The Ordinance is also viewpoint-neutral.

"Viewpoint discrimination is a subset of content discrimination A viewpoint-based law goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express." *McKay v. Federspiel*, No. 14-CV-10252, 2014 WL 7013574, at *10 (E.D. Mich. Dec. 11, 2014), aff'd, 823 F.3d 862 (6th Cir. 2016) (quoting 1 *Smolla & Nimmer on Freedom of Speech* § 3:9 (citing *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176, (1976)); see also *King v.*, 767 F.3d at 237 ("The prohibition of this method of communicating a particular viewpoint, however, is not the type of viewpoint discrimination with which the First Amendment is concerned.")).

The Ordinance does not discriminate based on the direction of the intended change. As noted, *supra*, Plaintiffs admit that a provider is equally prohibited from seeking to change a

heterosexual minor into a non-heterosexual as they are from seeking to change a non-heterosexual minor into a heterosexual. DE 129 (Hearing Transcript), p. 28:6-25. The Ordinance is not viewpoint-based for excluding from the definition of “conversion therapy” practices that support a minor who is undergoing gender transition. This exclusion is consistent with the definition of “conversion therapy.” The Ordinance does not discriminate based on the viewpoint of the provider but prohibits all providers from specified practices. *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 875 (11th Cir. 2011) (remediation plan that required a student to comply with a universally applicable code of ethics prohibiting her from imposing her religious values on patients, including those regarding homosexuality, was viewpoint neutral).

c. *Even if this Court were to apply higher standards of scrutiny, the Ordinance survives review.*

Although the Court views the Ordinance as both content and viewpoint neutral, even if the Court were to find the Ordinance burdened speech on the basis of protected expression, the Ordinance survives both heightened and strict standards of scrutiny.

“The First Amendment requires heightened scrutiny whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566, 131 S. Ct. 2653, 2664 (2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (explaining that “‘content-neutral’ speech regulations” are “those that are *justified* without reference to the content of the regulated speech” (internal quotation marks omitted))).

Under heightened scrutiny, the City “must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (citing *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–481 (1989); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.*

Y., 447 U.S. 557, 566 (1980). There must be a “fit between the legislature’s ends and the means chosen to accomplish those ends.” *Id.* (citing *Fox*, 492 U.S. at 480). “As in other contexts, these standards ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.” *Id.*

Plaintiffs, on the other hand, urge the Court to apply strict scrutiny. Strict scrutiny requires the County to prove that the Ordinance “furthers a compelling interest and is narrowly tailored to achieve that interest.” *See Reed*, 135 S. Ct. at 2231 (citation omitted).

It is well-settled and the City has demonstrated that the City has a substantial, even compelling, interest in the well-being of its minor residents. On the face of the Ordinance, the City asserted a “compelling interest in protecting the physical and psychological well-being of minors . . . and in protecting its minors against exposure to serious harms caused by sexual orientation and gender identity change efforts.” DE 128-1 (Ordinance) p. 5. In fact, as noted, *supra*, this interest is not only legitimate, it is compelling. *See Sable Commc’ns of Cal., Inc.*, 492 U.S. at 126 (the state has a “compelling interest in protecting the physical and psychological well-being of minors”); *Ferber*, 458 U.S. at 756-57 (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”) (citation omitted).

The City’s compelling interest is in preventing harm to minors before it occurs. The sources cited in the Ordinance unanimously conclude that rigorous research on the safety and effectiveness of seeking to change sexual orientation is deficient, but that there is evidence that conversion therapy can cause harm, including depression, self-harm, self-hatred, suicidal ideation, and substance abuse. *See generally* DE 128-2 through DE 128-11 (Professional studies and position papers). To the extent Plaintiffs quarrel with the empirical nature of the cited position

papers and studies, courts “have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and ‘simple common sense.’” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Florida Bar v. Went For It, Inc.* 628 (citations and internal quotation marks omitted). “We do not, however, require that ‘empirical data come. . . . accompanied by a surfeit background information’” *Id.*; see also *Fox Telev. Stations, Inc.*, 566 U.S. (noting certain recognized harms will necessarily be lacking empirical support). Notably, the Third Circuit has acknowledge that the same studies and position papers relied upon by the City in passing the Ordinance showed “substantial” evidence of the serious health risks accompanying conversion therapy. *King*, 767 F.3d at 238. “Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject.” *Id.*

None of the organizations identified a basis for distinguishing between those likely to experience harm and those likely to perceive a benefit. Plaintiffs’ critique of the APA report does not strip the City of its authority to protect its citizens from the risk of harm. See *Collins v. Texas*, 223 U.S. 288, 297-98 (1912) (recognizing the “right of the State to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute”). Additionally, the City nor the Court were presented with an adequate basis for concluding that any conversion therapy on a minor, voluntary or otherwise, is safe and effective. Cf. *Ferguson v. JONAH*, No. HUDL547312, 2015 WL 609436, at *10 (N.J. Super. L. Feb. 05, 2015) (excluding expert opinions about the effectiveness of SOCE). Moreover, the City need not wait for a minor to publicly confess to it that the minor had agreed to try to change their sexual orientation through therapy only to

experience self-hatred and suicidal ideation after the therapy failed. *See King*, 767 F.3d at 239 (3d Cir. 2014) (“[A] state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm.”). The small number of reports of harm from minors makes sense in light of the retrospective reports and delayed perceptions of harm noted by the sources cited by the Ordinance. *See* DE 128-10 (SAMHSA Study), p. 33; DE 128-4 (APA Task Force Report), pp. 50-51.

To address this compelling interest, the Ordinance is narrowly tailored to prohibit only the practice, as opposed to any discussion or recommendation, of conversion therapy, which is condemned by numerous professional organizations as contraindicated, harmful, and ineffective, on minors, “whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely,” by licensed providers, who would be the only ones legally able to apply principles and methods in their efforts to change a minor. *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990). Notably, Plaintiffs identified no different methods of achieving the County’s goals that other jurisdictions have found effective. *See, e.g., King v. Gov. of N.J.*, 767 F.3d 216, 240 (3d Cir. 2014); *Pickup, et al. v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Accordingly, the Court finds the “alternative measures” analysis relied on by Plaintiffs in *McCullen v. Coakley*, inapposite. 134 S. Ct. 2518, 2539 (2014),

No other regulation actually prohibits providers in the City from subjecting minors to the risk of the harms associated with seeking to change a minor’s sexual orientation or gender identity. *See* DE 128-32 (Hamilton Transcript), p. 95:22-23. The blanket and general prohibitions against discrimination and “harming minors” have not been interpreted by Plaintiffs as banning them from exposing minors to the risk of conversion therapy. Nor has the requirement that Plaintiffs “meet the minimum standards of performance in professional activities when measured against generally

prevailing peer performance” caused Plaintiffs to heed the judgments of prevailing professional organizations that conclude conversion therapy is contraindicated. *See King*, 767 F.2d at 238 (citing the APA and other studies, also relied on by the City’s Ordinance, as substantial evidence of SOCE’s harm to minors). Thus, no other regulation can effectively prevent the harms associated with conversion therapy. Moreover, informed consent, which cannot be provided for a therapy that is not effective, does not adequately prevent the harms associated with conversion therapy when there is no safeguard to ensure that only those who are likely to benefit from conversion therapy will consent to it. *See id.* at 240. Accordingly, the City’s Ordinance would likely withstand strict scrutiny, and Plaintiffs would not be entitled to a preliminary injunction.

5. The Ordinance Is Not Unconstitutionally Vague.¹⁸

Plaintiffs claim the City’s Ordinance is unconstitutionally vague because they require mental health professionals “to guess at their meaning and differ as to their application.” DE 8, p. 17. “The Constitution does not require perfect clarity in the language of statutes and ordinances. ‘All . . . due process . . . requires is fair notice . . . sufficient to enable persons of ordinary intelligence to avoid conduct which the law forbids.’ *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164, 1176 (11th Cir. 2018) (quoting *High Ol’Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982)). “To succeed on a claim that an ordinance is void for vagueness, ‘the complainant must demonstrate that the law is impermissibly vague in all of its applications.’” *Stardust*, 899 F.3d at 1176 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982)). The standard for vagueness, moreover, is lowered with

¹⁸ The record is unclear whether Plaintiffs continue to pursue their vagueness challenge. Although raised in their Motion (DE 8), Plaintiffs do not address the vagueness question in the supporting Reply (DE 95), nor did Plaintiffs address this challenge at the October 18, 2018, hearing (*see generally*, DE 129 (Hearing Transcript)). Nonetheless, the Court addresses their challenge in abundance of caution.

respect to challenged phraseology indigenous to persons with specialized knowledge. *U.S. v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993).

Based on Plaintiffs' own arguments and admissions, as well as the plain text of the Ordinance, the Court finds that that Ordinance provides Plaintiffs with a reasonable opportunity to understand what is prohibited. First, the Ordinance clearly defines "conversion therapy." *See* DE 128-1 (Ordinance), p. 6:10-14.¹⁹ Second, the Ordinance has explicit exceptions, detailing what it does not prevent:

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

Id. at pp. 4:21–5:2. Third, both Hamilton know what it means to seek to change sexual orientation or gender identity. *See, e.g.*, DE 128-31 (Otto Deposition), p. 43:19-25; p. 44:1-20; p. 45:5-12; p. 176:8-23; DE 128-32 (Hamilton Deposition), pp. 94:25-95:9; pp. 137:10-138:18; pp. 141:10-142:1. Otto also knows: he gives clients an "informed consent form [that] outlines the nature of SOCE counseling, explains the controversial nature of SOCE counseling, ... and informs the client of the potential benefits and risks associated with SOCE counseling." DE 1 (Complaint), ¶ 128; DE 128-31 (Otto Deposition).

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

¹⁹ Any counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.

“Besides, in order for a First Amendment vagueness challenge to prevail, “the alleged vagueness must pose a real and substantial threat to protected expression such that a substantial amount of legitimate speech will be chilled.” *Petersen v. Fla. Bar*, 720 F. Supp. 2d 1351, 1368 (M.D. Fla. 2010) (holding Florida Bar’s board certification rules would not “chill a substantial amount of legitimate speech”) (quoting *McEntee v. Merit Systems Protection Bd.*, 404 F.3d 1320, 1333 (Fed. Cir. 2005)). Plaintiffs are not entitled to a preliminary injunction on this claim.

D. Irreparable Harm.

“Significantly, even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.” *Siegel*, 234 F.3d at 1176 (additional citations omitted). Plaintiffs have not carried their burden of establishing that they are likely to suffer irreparable harm in the absence of preliminary relief, particularly due to their lack of standing.²⁰ *See, supra*, Section III(A). Moreover, Plaintiffs are incapable of establishing irreparable harm because, *inter alia*, the Ordinance (1) does not prevent them from speaking to the public about SOCE; (2) does not prevent them from expressing their views to their patients; (3) does not prevent them from administering SOCE to their adult clients; and (4) does not prevent them from referring minor clients to religious leaders. *See* DE 128-1 (Ordinance), pp. 4:21–5:2. Plaintiffs also wholly fail to address irreparable harm in the context of their preemption argument.

Finally, Plaintiffs’ delay of approximately eight months before challenging the Ordinance dictates against a finding of irreparable harm. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (“A delay in seeking a preliminary injunction of even only a few months –

²⁰ Moreover, the claim for monetary damages, by its very nature, belies a claim of irreparable harm. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991).

though not necessarily fatal – militates against a finding of irreparable harm Indeed, the very idea of a *preliminary* injunction is premised on the need for speedy and urgent action to protect a plaintiff’s rights before a case can be resolved on the merits”) (emphasis in original); *see also Compulife Software, Inc. v. Newman*, No. 16-cv-81942-RLR, 2017 WL 2537357 (S.D. Fla. June 12, 2017) (finding a three-month delay in seeking a preliminary injunction demonstrated the lack of irreparable harm).

E. Balance of Hardships and Public Interest.

Because Plaintiffs have failed to establish their standing, likelihood of success on the merits, or irreparable injury, Plaintiffs are not entitled to preliminary injunctive relief. Thus, the Court need not consider whether the alleged, threatened injury to Plaintiffs outweighs whatever damages the proposed injunction may cause the City or whether the injunction would be adverse to the public interest. Plaintiffs again fail to address either the balance of hardships or the public interest regarding preemption. Nonetheless, the record is clear that the balance of hardships, and consideration of public interest, clearly outweigh any threatened injuries to Plaintiffs if the injunction is not issued. The Ordinance identifies numerous medical and mental health organizations that have found that SOCE poses a serious threat to health and well-being of the affected persons, and many such organizations have also concluded that there is a lack of credible evidence that such therapy is effective. *See* DE 128-1 – DE 128-11 (Ordinance and supporting studies). In contrast, the alleged infringement on Plaintiffs’ purported rights is exceedingly narrow: on one activity (trying to change a sexual orientation; while otherwise allowing the “expressi[on of] their views to patients”); in one forum (a counseling office); and with one particular client (a minor).

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IV. CONCLUSION

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

DONE AND ORDERED in Chambers, West Palm Beach, Florida, this ____ day of November, 2018.

Copies furnished to:
Counsel of record

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE