

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

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,) Civil Action No. 9:18-cv-80771-RLR
)
Plaintiffs,)
)
v.)
)
CITY OF BOCA RATON, FLORIDA, and)
COUNTY OF PALM BEACH, FLORIDA,)
)
Defendants.)

**PLAINTIFFS’ NOTICE OF SUPPLEMENTAL AUTHORITY
IN SUPPORT OF PRELIMINARY INJUNCTION**

Plaintiffs respectfully bring to the Court’s attention two decisions issued today by the United States District Court for the Middle District of Florida, which bear directly upon, and provide persuasive authority on, numerous issues pending before this Court in connection with Plaintiffs’ Motion for Preliminary Injunction (and Defendants’ motions to dismiss). In *Vazzo et al. v. City of Tampa*, Case No. 8:17-cv-02896-WFJ-AAS, the Middle District is entertaining a constitutional and statutory challenge to Tampa’s ordinance banning SOCE counseling for minors, which is **virtually identical** to the Ordinances before this Court. Today, Magistrate Judge Amanda Arnold Sansone, issued two Reports and Recommendations:

First, in her Report and Recommendation on Tampa’s Motion to Dismiss (dkt. 148) (copy attached hereto as **Exhibit A**), Judge Sansone found that at least one of the therapist plaintiffs “has standing to maintain this suit individually **and on behalf of his minor clients**,” because he “has a close relationship with his minor client in Tampa [a]nd, given the sensitive nature of SOCE counseling—which the amended complaint describes in detail—the plaintiffs sufficiently demonstrate the Tampa minor’s privacy interest presents an obstacle to bringing claims on his or her own behalf.” (Ex. A at 9-10 (emphasis added)). The court also concluded that, because at least one plaintiff has standing, it need not scrutinize or entertain Tampa’s arguments as to the others. (*Id.*)

The court then concluded that plaintiffs' complaint, which is very similar to the Complaint before this Court, stated cognizable claims for: (1) violation of the counselor plaintiffs' First Amendment free speech rights (*id.* at 11-23); (2) violation of the minor plaintiffs' First Amendment right to receive information (*id.* at 23-24); (3) violation of the right to liberty of speech under the Florida Constitution (*id.* at 28-29); (4) implied (but not express) preemption under the Florida Constitution (*id.* at 29-33); and (5) violation of the Florida Religious Freedom Restoration Act (*id.* at 36-38). The court recommended that Tampa's motion to dismiss be denied as to these claims. (*Id.* at 38-39).

The court also concluded that a small part of plaintiffs' claims were not sufficiently pled or cognizable and should be dismissed, to wit: (1) plaintiffs' free exercise of religion claims under the federal and Florida constitutions (*id.* at 24-29); and (2) plaintiffs' claims for violation of the Florida Patient's Bill of Rights and Responsibilities. (*Id.* at 33-36).

Second, in her Report and Recommendation on plaintiffs' Motion for Preliminary Injunction (dkt. 149) (copy attached as **Exhibit B**), Judge Sansone concluded that Tampa's SOCE ordinance **is likely unconstitutional and should be enjoined** insofar as it bans voluntary, non-aversive, speech-only therapy. (Ex. B at 37-38). In arriving at this result, the Middle District reached a number of conclusions pertinent to the issues pending before this Court:

- (1) Several "factors weigh in favor of concluding the Florida Legislature intended to preempt the area of regulating mental health professionals," including "most notabl[y]" "[t]he legislature's intent for uniform discipline," which the SOCE ordinance "threatens." (*Id.* at 14-16). However, "although the plaintiffs demonstrated they might succeed on the merits of their implied-preemption claim, the plaintiffs' success is not necessarily likely nor probable considering the general reluctance to find implied intent and the lack of case law concluding the legislature preempted regulation of a profession like mental health counseling." (*Id.* at 17-18).
- (2) "Plaintiffs demonstrated a likelihood of success on their content-based-law claim." (*Id.* at 21). This is because "a communication during SOCE counseling is speech," Tampa's ordinance is a content-based restriction of that speech, and, under the Supreme Court's holding in *NIFLA* and the Eleventh Circuit's holding in *Wollschlaeger*, Tampa's ordinance must be subjected to strict scrutiny. (*Id.* at 25-26). Tampa's ordinance fails strict scrutiny for lack of narrow tailoring, because,

like Palm Beach County and Boca Raton, “the City considered no lesser restrictions on mental health professionals’ speech” and “the City considered no alternatives to its total ban on conversion therapy.” (*Id.* at 27-28). In particular, Tampa failed to consider “plausible alternatives” to the total ban, such as a more limited ban of only “involuntary SOCE counseling,” and/or only “aversive conversion therapy techniques.” (*Id.* at 28-29).

- (3) “[P]laintiffs sufficiently demonstrated they are likely to succeed on the merits of their First Amendment claim that [Tampa’s] Ordinance 2017-47 is viewpoint discrimination,” because the “facts also sufficiently demonstrate the plaintiffs’ claim that the City adopted Ordinance 2017-47 because the City disagreed with the viewpoint mental health counselors express during SOCE counseling.” (*Id.* at 29-30).
- (4) “[P]laintiffs similarly demonstrated they are likely to succeed on the merits of their claim that Ordinance 2017-47 is overbroad,” because, given the law’s viewpoint discrimination, “the plaintiffs are likely to prove that every application of the ordinance creates the risk ideas might be suppressed.” (*Id.* at 30-31).
- (5) “[P]laintiffs sufficiently demonstrated a likelihood of success on the merits of their claim that Ordinance 2017-47 is an unconstitutional prior restraint on the plaintiffs’ free speech,” because the law “restricts the plaintiffs’ speech during SOCE counseling before they can express it.” (*Id.* at 31).
- (6) “[P]laintiffs sufficiently demonstrated a likelihood of success on the merits of their claim that Ordinance 2017-47 is unconstitutionally vague,” because the law “authorizes and encourages discriminatory enforcement by code enforcement officers (who may or may not have any medical or mental health counseling training) against the viewpoints of mental health professionals who provide SOCE counseling.” (*Id.* at 31-32).
- (7) Because “plaintiffs demonstrated they are likely to succeed on the merits of most of their First Amendment free-speech claims,” a “seemingly automatic conclusion of irreparable injury” must follow. (*Id.* at 33).
- (8) “[T]he balance of equities tips in the plaintiffs’ favor because the City failed to show any harm it would suffer if enforcement of Ordinance 2017-47 is enjoined

and the City has no legitimate interest in enforcing an ordinance likely to be ruled unconstitutional.” (*Id.* at 34).

- (9) “[P]laintiffs sufficiently demonstrated Ordinance 2017-47’s overbroad prohibition on non-coercive, non-aversive SOCE counseling consisting entirely of speech or ‘talk therapy’ is likely unconstitutional. The public has no interest in enforcing an unconstitutional ordinance.” (*Id.* at 35). “[T]he City and Equality Florida’s argument that minors will be harmed by SOCE counseling if Ordinance 2017-47 is enjoined is undermined by the fact the City received no complaints related to any minor harmed by SOCE counseling within the city limits.” (*Id.*) “In the absence of any harm to the public, the plaintiffs, therefore, sufficiently demonstrated it is in the public’s interest to enjoin Ordinance 2017-47’s prohibition on SOCE counseling.” (*Id.*)

Because of the foregoing reasons, Judge Sansone concluded that an injunction should issue such that **“the City may not enforce the ordinance against mental health professionals who provide non-coercive, non-aversive, SOCE counseling—which consists entirely of speech, or ‘talk therapy’—to minors within the city limits.”** (*Id.* at 36 (emphasis added)). The court concluded that Tampa could still enforce its SOCE ban against aversive therapy techniques like electroshock therapy. (*Id.*)

As Plaintiffs here demonstrated in their briefing and at the hearing, the Ordinances before this Court fail for at least the same reasons as Tampa’s ordinance. They should meet the same fate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this January 30, 2019, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Plaintiffs

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**ROBERT L. VAZZO,
DAVID H. PICKUP, SOLI DEO
GLORIA INTERNATIONAL, INC.
d/b/a NEW HEARTS OUTREACH
TAMPA BAY**

Plaintiffs,

v.

Case No. 8:17-cv-2896-T-02AAS

CITY OF TAMPA,

Defendant,

_____ /

REPORT AND RECOMMENDATION

The City of Tampa moves to dismiss the plaintiffs’ first amended complaint. (Doc. 84). Amicus Equality Florida supports the City’s motion to dismiss. (Doc. 92).

The plaintiffs—Robert Vazzo, David Pickup, and New Hearts Outreach—failed to state a plausible claim for relief under the Free Exercises Clauses of the federal and Florida constitutions. And the plaintiffs cannot state a claim for relief under the Florida Patient’s Bill of Rights and Responsibilities. The plaintiffs, however, allege a plausible claim for relief on all other claims. The City’s motion to dismiss, therefore, should be **GRANTED-IN-PART** and **DENIED-IN-PART**.

I. BACKGROUND

On April 6, 2017, the City adopted Ordinance 2017-47, which the mayor later signed and approved. (Doc. 24-1, pp. 2–8). Section 14-312 of that ordinance states the following:

Sec. 14-312.—Conversion Therapy Prohibited

It shall be unlawful for any Provider to practice conversion therapy efforts on any individual who is a minor regardless of whether the Provider receives monetary compensation in exchange for such services.

(*Id.* at 7). The ordinance defines “conversion therapy” and “provider” as follows:

Sec. 14-311.—Definitions.

(a) *Conversion therapy* or *reparative therapy* means, interchangeably, any counseling, practice or treatment performed with the goal of changing an individual’s sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex. Conversion therapy does not include counseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptances, 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.

. . .

(c) *Provider* means any person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training under chapters 456, 458, 459, 490, or 491 of the Florida Statutes, as such chapters may be amended, including but not limited to, medical practitioners, osteopathic practitioners, psychologists, psychotherapists, social workers, marriage and family therapists, and licensed counselors. A Provider does not include members of the clergy who are acting in their roles as clergy or pastoral

counselors and providing religious counseling to congregants, as long as they do not hold themselves as operating pursuant to any of the aforementioned Florida Statutes licenses.

(Doc. 24-1, p. 6).

Messrs. Vazzo and Pickup are licensed marriage and family therapists whose practices include providing sexual-orientation-change-efforts (SOCE) counseling. (Doc. 78, ¶¶14–15, 102, 116). According to the plaintiffs, SOCE counseling is therapy provided to “clients who wish to reduce or eliminate same-sex sexual attractions, behaviors, or identity.” (*Id.* at ¶60). Messrs. Vazzo and Pickup perform SOCE counseling by using “speech to help clients understand and identify their anxiety or confusion regarding their attractions, or identity and then help the client formulate the method of counseling that will most benefit that particular client.” (*Id.* at ¶65). Mr. Vazzo is licensed to practice mental health counseling in Florida. (*Id.* at ¶14). Mr. Pickup is not licensed in Florida, but he is “undergoing the necessary requirements” to become licensed. (*Id.* at ¶15).

New Hearts Outreach is a Christian ministry in Tampa. (*Id.* at ¶¶16, 126). New Hearts Outreach’s goal is to foster “sexual and relational wholeness in people’s lives through the hope of Jesus Christ.” (*Id.* at ¶126). New Hearts Outreach aims to connect “the sexually and relationally challenged to Jesus Christ.” (*Id.* at ¶132). To achieve the goal of its ministry, New Hearts Outreach refers individuals, including minors, “struggling with unwanted same-sex attractions, behaviors, or identity” to licensed mental health professions to receive counseling. (Doc. 78, ¶¶133–34).

Mr. Vazzo is a “provider” under Ordinance 2017-47. (Doc. 78, ¶112). If Mr. Pickup becomes licensed in Florida, he will also be a “provider” under the ordinance. (*Id.* at ¶¶114, 116). Ordinance 2017-47 prohibits mental health counselors from providing SOCE counseling to minors. (*Id.* at ¶7). As a result, Messrs. Vazzo and Pickup cannot provide SOCE counseling to minors in Tampa. (*Id.* at ¶¶112, 116). Nor can New Hearts Outreach refer minors to Messrs. Vazzo and Pickup for SOCE counseling in Tampa. (*Id.* at ¶135).

The plaintiffs sued the City¹ and allege Ordinance 2017-47 violates their rights to freedom of speech under the First Amendment (Count I); their clients’ rights to receive information under the First Amendment (Count II); the plaintiffs’ rights to free exercise of religion under the First Amendment (Count III); the plaintiffs’ rights to liberty of speech under the Florida Constitution (Count IV); the plaintiffs’ rights to free exercise and enjoyment of religion under the Florida Constitution (Count V); Article VIII, Section 2(b) of the Florida Constitution (Count VI); the Florida Patient’s Bill of Rights and Responsibilities (Count VII); and the Florida Religious Freedom and Restoration Act (Count VIII).

The City moves to dismiss all the plaintiffs’ claims. (Doc. 84). Equality Florida,

¹ The plaintiffs originally sued Sal Ruggiero (manager of the City’s Neighborhood Enhancement Division) too, but the plaintiffs later voluntarily dismissed their claims against him. (Docs. 137, 141).

a civil-rights organization participating in this case as *amicus curiae*,² supports the City's motion. (Doc. 92). The plaintiffs oppose the City's motion to dismiss. (Doc. 114). The undersigned will now address the City's motion.

II. LEGAL STANDARD

A defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must include enough facts to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is facially plausible when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

The court must accept factual allegations in the complaint as true and view them most favorably to the nonmoving party. *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007); *Cunningham v. Dist. Attorney's Office for Escambia Cty.*, 592 F.3d 1237, 1255 (11th Cir. 2010) (citation omitted). Although a complaint need not contain detailed factual allegations, conclusory allegations are not entitled to a presumption of truth. *Twombly*, 550 U.S. at 55, 570 (citations omitted); *Iqbal*, 556 U.S. at 679. Legal conclusions must be supported by factual allegations. *Iqbal*, 556 U.S. at 679.

A court may properly dismiss a complaint that rests on "conclusory allegations,

² (See Doc. 60) (denying Equality Florida's motion to intervene and instead allowing Equality Florida to participate as *amicus curiae*).

unwarranted factual deductions, or legal conclusions masquerading as facts.” *Infante v. Bank of Am. Corp.*, 468 F. App’x 918, 919 (11th Cir. 2012) (citations omitted). A complaint fails to state a plausible claim for relief when the plaintiffs’ claims fail as a matter of law. *See GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1266 (11th Cir. 2012) (affirming district court’s Rule 12(b)(6) dismissal of Section 1983 claim that failed to state a facial challenge under the Second Amendment as a matter of law).

When ruling on a motion to dismiss, the court is limited to analyzing the four corners of the complaint. *See Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1267 (11th Cir. 2002) (citations omitted) (stating when a judge considers matters outside the pleadings, a Rule 12(b)(6) motion to dismiss is converted to a Rule 56 motion for summary judgment). That said, the court may consider extrinsic documents when ruling on a Rule 12(b)(6) motion to dismiss if (1) the documents are central to the plaintiff’s claim and (2) the documents’ authenticity is not challenged. *U.S. ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 811 (11th Cir. 2015) (citations omitted). The court may also consider judicially-noticed documents. *Id.* (citation omitted).

The undersigned took judicial notice of the City’s certified copy of Ordinance 2017-47 (Docs. 24-1; 24-2; 24-3; 24-4; 24-5; 24-6; 24-7), the City’s Clerk file (Docs. 25-1, 25-2), the transcripts of the legislative proceedings about Ordinance 2017-47 (Docs. 26-1; 26-2; 26-3; 26-4), and the DVDs of the legislative proceedings (Doc. 54). (Doc. 51). The undersigned will therefore consider these materials when ruling on the City’s motion to dismiss. But the undersigned takes no judicial notice of the truth of

the statements contained in the City's Clerk file, transcripts, or DVDs, consistent with the undersigned's previous ruling. (Doc. 51).

III. ANALYSIS

In its motion to dismiss, the City raises three arguments about the plaintiffs' standing. (Doc. 84, pp. 10–11). The City first argues Messrs. Vazzo and Pickup lack standing to assert claims on behalf of their minor clients.³ (*Id.* at 10). Second, the City argues New Hearts Outreach lacks standing to assert claims on behalf of its constituents. (*Id.*). Third, the City argues Mr. Pickup lacks standing because he is not a licensed mental health provider in Florida. (*Id.* at 11).

The City also argues the plaintiffs' complaint fails to state a plausible claim for relief on all claims. (*Id.* at 11–25). Equality Florida similarly argues the plaintiffs' complaint fails to state a claim for relief on all claims. (Doc. 92).

The undersigned will first address the City's arguments about standing before analyzing whether the plaintiffs' complaint alleges plausible claims for relief.

A. The Plaintiffs' Standing

Messrs. Vazzo and Pickup bring their claims individually and on behalf of their minor clients. (Doc. 78). New Hearts Outreach similarly brings its claims on its

³ Although the amended complaint's caption states Messrs. Vazzo and Pickup bring claims individually and on behalf of their "patients," the plaintiffs more frequently refer to their patients as "clients." (*Compare* Doc. 78, p. 1) (stating Messrs. Vazzo and Pickup bring claims on behalf of their "patients") (*with* Doc. 78, ¶165) (alleging Messrs. Vazzo and Pickup use speech during SOCE counseling to help their "clients"). The undersigned therefore references the plaintiffs' "clients" throughout this report.

behalf and on behalf of its “members, constituents, and clients.” (Doc. 78).

The City argues the plaintiffs failed to allege the elements necessary to establish third-party standing on behalf of their minor clients and minor constituents. (Doc. 84, p. 10). The City also argues Mr. Pickup lacks standing to bring his claims individually because he is not licensed to practice mental health counseling in Florida. (*Id.* at 11). The City does not dispute Mr. Vazzo’s standing to bring his individual claims.

The jurisdiction of federal courts is constitutionally limited to certain “cases” and “controversies.” U.S. Const. art. III., § 2; *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). To satisfy the case-or-controversy requirement, a plaintiff must establish he has standing to sue the defendants. *Clapper*, 568 U.S. at 408. To establish standing, a plaintiff’s injury must be (1) concrete, particularized, and actual or imminent; (2) fairly traceable to the challenged action; and (3) redressable by a favorable ruling. *Id.* at 409 (quotation and citations omitted).

A plaintiff, who suffers concrete injury, may assert the rights of a third party if (1) the plaintiff and the third party have a close relationship and (2) the third party faces some obstacle to asserting his or her own rights. *Planned Parenthood Ass’n of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991) (citation omitted). A minor’s physician is often a proper plaintiff to challenge legislation that restricts the minor’s medical decisions, and the minor’s physician is often an effective advocate for their minor clients. *See id.* (discussing Supreme Court decisions that

allowed doctors to assert causes of action on behalf of their patients) (citations omitted); *see also Singleton v. Wulff*, 428 U.S. 106, 117–18 (1976) (concluding physician could assert rights of third-party women patients, in part, because those women may be chilled from asserting their own rights because of privacy concerns over the medical procedures publicly challenged in court).

If one plaintiff establishes standing, a court need not consider whether co-plaintiffs established standing, and the lawsuit may continue. *Horne v. Flores*, 557 U.S. 433, 446–47 (2009) (citations omitted); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006) (citation omitted); *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1281–82 (N.D. Fla. 2016) (citations omitted).

The court need not consider whether Mr. Pickup established individual standing or whether Mr. Pickup and New Hearts Outreach sufficiently established third-party standing because Mr. Vazzo has standing to maintain this suit individually and on behalf of his minor clients. Mr. Vazzo is a mental health counselor, licensed in Florida, who offers SOCE counseling to minor clients. (Doc. 78, ¶¶14, 100, 102). Ordinance 2017-47 prevents Mr. Vazzo from providing SOCE counseling to minor clients in Tampa. (*Id.* at ¶112). If he prevails and the court concludes Ordinance 2017-47 is unconstitutional, Mr. Vazzo could then provide SOCE counseling to minor clients in Tampa. The plaintiffs’ amended complaint therefore establishes (1) Mr. Vazzo suffers actual injury (2) fairly traceable to Ordinance 2017-47 that (3) can be redressed by a favorable ruling. So, the amended complaint

establishes Mr. Vazzo has individual standing.

The amended complaint also sufficiently establishes Mr. Vazzo has standing to bring third-party claims on behalf of his minor client in Tampa. Most relevant here, the amended complaint alleges the following:

108. Vazzo has had numerous clients in Florida, provides counseling to clients in Florida, and constantly receives inquiries from all over the state concerning SOCE counseling.
109. Vazzo has been contacted by individuals in the City who desire to discuss and engage in SOCE counseling with Vazzo.
110. Vazzo currently has a minor client who is fifteen years old and desires SOCE counseling from Vazzo in the City. Vazzo's client desires to receive SOCE counseling from a licensed professional counselor with expertise in this particular area.

. . . .

112. Vazzo is prohibited from engaging in SOCE counseling with his minor client because of the ordinance, and his client is currently prohibited from receiving such counseling from a licensed professional.

(Doc. 78, ¶¶108–10, 112). These allegations establish that Mr. Vazzo has a close relationship with his minor client in Tampa. And, given the sensitive nature of SOCE counseling—which the amended complaint describes in detail—the plaintiffs sufficiently demonstrate the Tampa minor's privacy interest presents an obstacle to bringing claims on his or her own behalf. The plaintiffs sufficiently demonstrate Mr. Vazzo has standing to bring claims individually and on behalf of his minor client in Tampa. The court therefore need not consider the City's other challenges to standing.

B. Count I: First Amendment Freedom of Speech

The plaintiffs allege Ordinance 2017-47 violates the free-speech protection under the First Amendment because the ordinance is an unconstitutional prior restraint on the plaintiffs' speech (Doc. 78, ¶179); the ordinance constitutes viewpoint discrimination (*Id.* at ¶180); the ordinance is an unconstitutional content-based regulation (*Id.* at ¶182); the ordinance is unconstitutionally vague (*Id.* at ¶192); the ordinance is underinclusive (*Id.* at ¶193);⁴ and the ordinance is unconstitutionally overbroad (*Id.* at ¶194).

The City and Equality Florida argue the plaintiffs' amended complaint fails to state a claim for relief as a matter of law under the First Amendment's free-speech protection. (Doc. 84, pp. 11–15; Doc. 92, pp. 4–15). The undersigned will analyze whether the plaintiffs sufficiently pleaded each of their free-speech claims in turn—albeit in a different order.

1. The Plaintiffs' Claim that Ordinance 2017-47 is Unconstitutionally Content-Based

The City argues Ordinance 2017-47 is constitutional because it satisfies intermediate scrutiny. (Doc. 84, pp. 11–15). To support its argument, the City

⁴ Neither the City nor Equality Florida argue the plaintiffs failed to state a First Amendment claim under their “unconstitutionally-underinclusive” theory. (Docs. 84, 92). Equality Florida only addresses the plaintiffs’ “underinclusive” argument when, in its post-hearing supplement, Equality Florida argues Ordinance 2017-47 is narrowly tailored to promote a government interest. (Doc. 143, pp. 9–10). Therefore, the undersigned and the court need not consider whether the plaintiffs stated a plausible claim for relief under an “unconstitutionally-underinclusive” theory.

primarily relies on *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3rd Cir. 2014). In *King*, the Third Circuit decided free-speech claims identical to the plaintiffs' claims here failed to state a claim for relief as a matter of law under the First Amendment's free-speech protection. *Id.* at 220. The City argues *King* should persuade the court that the plaintiffs have no free-speech claim under the First Amendment. (Doc. 84, pp. 13–14).

Equality Florida similarly argues the plaintiffs cannot allege a free-speech violation as a matter of law. (Doc. 92, pp. 4–15). Equality Florida argues that, under Eleventh Circuit precedent, Ordinance 2017-47 satisfies both rational-basis scrutiny and heightened (intermediate) scrutiny. (*Id.*). According to Equality Florida, Ordinance 2017-47 satisfies rational-basis scrutiny because the ordinance incidentally limits speech while protecting the public from harmful practices. (*Id.* at 4–8). Equality Florida also argues Ordinance 2017-47 satisfies heightened (intermediate) scrutiny because the ordinance is narrowly tailored to serve a compelling interest, namely protecting children from harm. (*Id.* at 8–12). Therefore, Equality Florida concludes the plaintiffs cannot plead a free-speech violation under the First Amendment as a matter of law. (*Id.*).

The First Amendment protects each individual's freedom of speech. U.S. Const. amend. I; *see also* 42 U.S.C. § 1983 (prohibiting persons acting under color of any ordinance from violating individuals' constitutional rights). Two types of laws commonly come into play in First Amendment challenges: content-neutral laws and

content-based laws. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *United States v. Playboy Ent. Grp.*, 529 U.S. 803 (2000); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

The plaintiffs allege Ordinance 2017-47 is a content-based law. (Doc. 78, ¶182). A law is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed*, 135 S. Ct. at 2227 (citations omitted). Content-based laws also include laws that cannot be justified without reference to the content of the regulated speech and laws the government adopted because it disagrees with the message the regulated speech conveys. *Id.*; *Ward*, 491 U.S. at 791 (citation omitted).

Content-based laws must satisfy strict-scrutiny analysis. *Playboy*, 529 U.S. at 813. That is, the law must be narrowly tailored to promote a compelling governmental interest. *Id.* If a less strict alternative would promote the government’s compelling interest, the government must use that alternative. *Id.* Content-based laws are presumptively invalid. *R.A.V.*, 505 U.S. at 382 (citations omitted).

The plaintiffs sufficiently pleaded that Ordinance 2017-47 is a content-based law. The plaintiffs allege Ordinance 2017-47 prohibits licensed mental health professionals from providing conversion therapy, including SOCE counseling, to minors in Tampa. (Doc. 78, ¶7). The ordinance therefore prohibits Messrs. Vazzo and Pickup from providing SOCE counseling to minors in Tampa, according to the

plaintiffs. (Doc. 78, ¶¶112, 116). The plaintiffs also allege the ordinance prevents New Hearts Outreach from referring minors to Messrs. Vazzo and Pickup for SOCE counseling in Tampa. (*Id.* at ¶135).

In their amended complaint, the plaintiffs allege Messrs. Vazzo and Pickup only use speech when they provide SOCE counseling to minors. (*Id.* at ¶¶60–71). According to the plaintiffs, when Messrs. Vazzo and Pickup provide SOCE counseling “[t]hey sit down with their clients and talk to their clients about the clients’ goals, objective, religious beliefs, desires, and identity.” (*Id.* at ¶63). The plaintiffs allege Messrs. Vazzo and Pickup use speech to “assist a client with their [sic] stated desires and objectives in counseling, which sometimes can include reducing or eliminating the client’s unwanted same-sex attractions.” (*Id.* at ¶69). And the plaintiffs allege Ordinance 2017-47 prohibits Messrs. Vazzo and Pickup from providing SOCE counseling because of the content of their speech during SOCE counseling. (*Id.* at ¶¶112, 116).

The plaintiffs also sufficiently pleaded that, as a content-based law, Ordinance 2017-47 fails strict-scrutiny analysis. The plaintiffs allege that the City has no compelling interest that Ordinance 2017-47 promotes. (Doc. 78, ¶ 182). The plaintiffs also allege that “[i]nformed consent provisions outlining the required disclosure prior to engaging in SOCE counseling with a minor would have been far less restrictive” of the plaintiffs’ speech. (Doc. 78, ¶185). The plaintiffs’ complaint, therefore, sufficiently alleges Ordinance 2017-47 violates the First Amendment because the

ordinance is a content-based law that fails strict-scrutiny analysis.

Contrary to the City's contention, *King* does not preclude the plaintiffs' content-based-law claim as a matter of law, especially in light of recent case law. *King* held that mental health counselor's speech during SOCE counseling is speech. 767 F.3d at 229 (stating that "speech is speech, and it must be analyzed as such for purposes of the First Amendment") (citations omitted). But *King* also held that the counselor's speech during SOCE counseling was not subject to strict-scrutiny analysis because a counselor's speech during SOCE counseling is "professional speech." *Id.* at 233. Instead, *King* held that prohibitions on professional speech are constitutional if the law directly advances the government's interest "in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest"—otherwise called intermediate-scrutiny analysis. *Id.* Finding the New Jersey law that prohibited SOCE counseling satisfied intermediate scrutiny, *King* affirmed summary judgment against mental health counselors who challenged the law. *Id.* at 247.

King's holding that intermediate-scrutiny analysis applies to counselors' speech during SOCE counseling was later abrogated in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018). *NIFLA* explicitly rejected *King's* holding that professional speech is subject to different standards of review under the First Amendment than other speech. *Id.* at 2371–2372. *NIFLA* instead held that the traditional analyses that apply to content-based laws also apply

to professional speech that is neither commercial nor incidental to professional conduct. 138 S. Ct. at 2371–74.

Under *King* and *NIFLA*, the plaintiffs sufficiently pleaded Ordinance 2017-47 is an unconstitutional content-based law. *King* holds mental health counselors’ speech during SOCE counseling is speech under the First Amendment. 767 F.3d at 229; *see also Wollschlaeger v. Governor, Florida*, 848 F.3d 1293 (2017) (holding doctor-patient communications about gun ownership are speech under the First Amendment). *NIFLA* holds traditional constitutional analyses, including strict-scrutiny analysis, applies to content-based regulations on professional speech. 138 S. Ct. at 2371. The plaintiffs’ complaint sufficiently alleges that Ordinance 2017-47 is a content-based law that fails strict-scrutiny analysis. The City and Equality Florida’s argument that the plaintiffs cannot plead a free-speech claim under the First Amendment as a matter of law is unsuccessful.

2. The Plaintiffs’ Claim that Ordinance 2017-47 is Unconstitutional Viewpoint Discrimination

The City argues Ordinance 2017-47 commits no viewpoint discrimination. (Doc. 84, p. 15). To supports its argument, the City relies on *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

Equality Florida also argues⁵ Ordinance 2017-14 commits no viewpoint

⁵ Although the court allowed Equality Florida to appear as amicus in this case (Doc. 60), Equality Florida brings up issues the City failed to raise. (*See* Doc. 92, pp. 14–15) (arguing Ordinance 2017-47 is not overbroad); (Doc. 142) (introducing evidence neither the City nor the plaintiffs introduced at the November 15th hearing). Absent

discrimination because the ordinance prohibits the SOCE counseling procedure—not speech about SOCE counseling. (Doc. 92, pp. 12–13). Equality Florida also relies on *Keeton* to support Equality Florida’s argument about viewpoint discrimination. (*Id.*).

Viewpoint discrimination occurs when the government targets specific views speakers have on a subject. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted). A content-based law can, in practice, be viewpoint discriminatory. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (citations omitted); *RAV*, 505 U.S. at 391.

To prevail on a viewpoint-discrimination claim, the plaintiff must prove (1) the government law regulating his or her speech is unreasonable and (2) the law is not viewpoint neutral. *See Keeton*, 664 F.3d at 872 (discussing how courts analyze viewpoint-discrimination claims in nonpublic forums). The “crucial or ultimate fact” that determines whether a law is viewpoint discriminatory is the government’s motivation for passing the law. *Id.* Laws that discriminate based on viewpoint are presumptively unconstitutional. *Rosenberger*, 515 U.S. at 828 (citation omitted).

exceptional circumstances, amici curiae may not expand the scope of issues presented by the parties to the court. *See Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1257–58 (11th Cir. 2017) (quotation and citations omitted) (stating that amici curiae may not expand the scope of an appeal); *see also Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500–01 (S.D. Fla. 1991) (quotation and citations omitted) (stating that amici appear for the benefit of the court and the court determines the extent and manner of participation by amici). So, the undersigned would not normally address new issues or arguments Equality Florida raises. But, given the procedural posture of this case and the City incorporating Equality Florida’s arguments (Doc. 143, p. 5), the undersigned addresses Equality Florida’s raised arguments.

The plaintiffs sufficiently pleaded Ordinance 2017-47 is unconstitutional viewpoint discrimination. The plaintiffs allege Ordinance 2017-47 is viewpoint discriminatory. (Doc. 78, ¶180). Specifically, the plaintiffs allege the ordinance “authorizes only one viewpoint on SOCE counseling and unwanted same-sex sexual attractions, behaviors, and identity by forcing Plaintiffs to present only one viewpoint on the otherwise permissible subject matter of same-sex attractions, behaviors, or identity.” (*Id.* at ¶181). The plaintiffs further allege Ordinance 2017-47 “forces Plaintiffs’ clients and their parents to receive only one viewpoint on this otherwise permissible subject matter.” (*Id.* at ¶181).

The amended complaint alleges Ordinance 2017-47 is unreasonable because it “imposes unjustifiable and unreasonable restrictions” on the plaintiffs’ speech. (*Id.* at ¶187). The plaintiffs also allege the City passed Ordinance 2017-47 because the City disagreed with the content of the communications that occur during SOCE counseling between the mental health therapist and the client. (*Id.* at ¶¶31–71). The plaintiffs therefore sufficiently pleaded necessary elements to bring a viewpoint-discrimination claim under the First Amendment.

The City and Equality Florida’s argument that *Keeton* precludes the plaintiffs’ viewpoint-discrimination claim is not convincing. In *Keeton*, a university required a graduate student, who believed homosexuality was a “personal choice subject to individual change,” to participate in a remediation plan to improve her ability to work with “gay, lesbian, bisexual, transgender, and queer or questioning” clients. 664 F.3d

at 867–68. The student claimed the remediation plan constituted viewpoint discrimination because she claimed the university imposed the plan because of her views on homosexuality. *Keeton*, 664 F.3d at 872.

Keeton held that evidence failed to support the student’s viewpoint-discrimination claim. *Id.* at 872. The university imposed the remediation plan on the student because she earlier expressed her intent to impose her religious beliefs on her client—not because the university disagreed with the student’s viewpoint. *Id.* at 872. *Keeton* held the university’s remediation plan was not viewpoint discrimination because the ethical requirement that counselors not impose their values on their clients applied without reference to the content or viewpoint of the counselors’ speech. *Id.* at 874 (citation omitted).

The plaintiffs here allege the City passed Ordinance 2017-47 because of its disagreement with the content of communications that occur during conversion therapy, including SOCE counseling—not because of ethical concerns that apply without reference to counselors’ speech. (Doc. 78, ¶¶31–71). So, *Keeton* does not preclude the plaintiffs’ viewpoint-discrimination claim as a matter of law.

3. The Plaintiffs’ Claim that Ordinance 2017-47 is Unconstitutionally Vague

Equality Florida argues Ordinance 2017-47 is not unconstitutionally vague as a matter of law because the ordinance sufficiently details which conduct is prohibited and which conduct is allowed. (Doc. 92, pp. 13–14). Equality Florida also argues “conversion therapy” and “SOCE counseling” are terms of art in the counseling

community; so, counselors will understand what conduct the ordinance prohibits. (Doc. 92, pp. 13–14).

A law that imposes penalties for a new offense must sufficiently inform citizens what conduct will expose them to that law’s penalties. *Connally v. Gen. Contr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted). A plaintiff who claims that a law is unconstitutionally vague must prove either (1) the law fails to provide people of ordinary intelligence to understand what conduct the law prohibits or (2) the law authorizes or encourages arbitrary and discriminatory enforcement. *Konikov v. Orange Cty.*, 410 F.3d 1317, 1329 (11th Cir. 2005) (citations omitted).

The amended complaint sufficiently alleges Ordinance 2017-47 is unconstitutionally vague. The plaintiffs allege the ban on counseling aimed at reducing or eliminating sexual attractions, behaviors, or identity is vague because “sexual orientation and gender identity are difficult to define and encompass a number of factors, including behavior, practices, identity, attractions, sexual fantasy, romantic attractions, and erotic desires.” (Doc. 78, ¶88). The plaintiffs allege Messrs. Vazzo and Pickup “are left to guess at what counseling practice might constitute a violation” because of the ordinance’s vagueness. (*Id.* at ¶89).

The plaintiffs also allege Ordinance 2017-47 fails to “specify which clients would be classified as seeking to ‘change’ and those that would merely be deemed conforming their behavior with their original ‘sexual orientation.’” (*Id.* at ¶90). The amended complaint also alleges the ordinance allows counselors to “provide

counseling that provides ‘acceptance, support, and understanding’ of a client’s unwanted same-sex attractions, behaviors, or identity.” (Doc. 78, ¶93). But the plaintiffs allege, under the ordinance, Messrs. Vazzo and Pickup cannot “provide acceptance and support to a client who comes in for counseling and requests assistance in seeking to eliminate unwanted same-sex attractions, behaviors, or identity.” (*Id.* at ¶94).

The plaintiffs’ allegations plausibly claim Ordinance 2017-47 is unconstitutionally vague.

4. The Plaintiffs’ Claim that Ordinance 2017-47 is Unconstitutionally Overbroad

Equality Florida argues Ordinance 2017-47 is not overbroad. (Doc. 92, pp. 14–15). According to Equality Florida, the plaintiffs’ claim that the ordinance is unconstitutionally overbroad is simply a disagreement with the City’s legislative findings when it passed the ordinance. (*Id.* at 15).

The overbreadth doctrine allows courts to invalidate laws that limit freedom of speech if the “impermissible applications of the law are substantial ‘when judged in relation to the statute’s plainly legitimate sweep.’” *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (citation omitted); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011). A law is overbroad when every application of the law creates the risk that ideas might be suppressed, such as when the law gives overly broad discretion to the person enforcing it. *Foryth Cty. v. Nationalist Movement*, 505 U.S. 123, 129–30 (1992) (citations omitted); *Catron v. City of St. Petersburg*, 658 F.3d, 1260, 1269 (11th Cir.

2011). Invalidating a law because it is overbroad is a “strong medicine” and a “last resort.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *Locke*, 634 F.3d at 1192; *Catron*, 658 F.3d at 1260.

The plaintiffs’ amended complaint sufficiently alleges Ordinance 2017-47 is unconstitutionally overbroad. The plaintiffs allege the ordinance “vests unbridled discretion in government officials . . . to apply or not apply the ordinance in a manner to restrict free speech, and subjects Plaintiffs to ethical code violations.” (Doc. 78, ¶191). The plaintiffs further allege Ordinance 2017-47 is unconstitutionally overbroad because “it chills and abridges the free speech rights of all licensed mental health providers in the City of Tampa who use counseling techniques to provide assistance to a minor seeking to reduce or eliminate his or her unwanted same-sex attractions, behaviors, or identity and does not leave open alternative methods of communication.” (*Id.* at ¶194).

The plaintiffs’ allegations in their amended complaint are enough to plausibly claim Ordinance 2017-47 is unconstitutionally overbroad. The court should therefore allow the plaintiffs to proceed on their First Amendment claim that Ordinance 2017-47 is unconstitutionally overbroad.

5. The Plaintiffs’ Claim that Ordinance 2017-47 is an Unconstitutional Prior Restraint on Their Free Speech

The plaintiffs allege Ordinance 2017-47 is an unconstitutional prior restraint on their free speech. (*Id.* at ¶179). A prior restraint on speech is a governmental restriction on speech before its expression. *Black’s Law Dictionary* 1387 (10th ed.

2014). There is a “heavy presumption” against prior-restraint laws. *Forsyth*, 505 U.S. at 130 (citations omitted).

The plaintiffs’ amended complaint sufficiently alleges Ordinance 2017-47 is an unconstitutional prior restraint on their speech because they allege the ordinance prohibits Messrs. Vazzo and Pickup from using speech necessary to provide SOCE counseling to minors. (Doc. 78, ¶¶112, 116).

C. Count II: First Amendment Right to Receive Information

The plaintiffs allege Ordinance 2017-47 violates the rights of their minor clients and constituents to receive information under the First Amendment. (Doc. 78, ¶¶197–205). The City and Equality Florida argue the plaintiffs failed to sufficiently plead a right-to-receive-information claim because the plaintiffs failed to sufficiently plead a free-speech claim. (Doc. 84, pp. 15–16; Doc. 92, p. 13).

The free-speech protection under the First Amendment applies to the speaker and the listener. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) (citations omitted). If a plaintiff plausibly alleges a free-speech claim, the plaintiff can also assert a right-to-receive-information claim. *See id.* (stating “[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted”) (footnote omitted); *see also Democracy Rising PA v. Celluci*, 603 F. Supp. 2d 780, 790–91 (M.D. Pa. 2009) (stating plaintiffs must establish willing speakers exist to maintain “right to listen” claim) (citation omitted).

The plaintiffs plausibly alleged Ordinance 2017-47 violates their clients’ and

constituents’ right to receive information under the First Amendment. The plaintiffs allege their clients and constituents have a “desire to receive SOCE counseling and the information that Plaintiffs can provide on reducing or eliminating unwanted same-sex attractions, behaviors, and identity.” (Doc. 78, ¶200). The plaintiffs further allege Ordinance 2017-47 prohibits their clients and constituents from receiving SOCE counseling. (*Id.* at ¶201).

The plaintiffs’ allegations supporting their right-to-receive-information claim, combined with the plaintiffs’ allegations that sufficiently pleaded free-speech claims (explained in Section III(B) of this report and recommendation), demonstrate the plaintiffs have a plausible claim for relief on their right-to-receive-information claim. The court should therefore reject the City and Equality Florida’s arguments that the plaintiffs failed to state a claim for relief on their right-to-receive information claim.

D. Count III: First Amendment Right to Free Exercise of Religion

The plaintiffs allege Ordinance 2017-47 violates their right to free exercise of religion under the First Amendment. (Doc. 78, ¶¶206–23).

The City argues the plaintiffs failed to state a claim for relief under the First Amendment’s free-exercise clause because Ordinance 2017-47 is (1) neutral, generally applicable, and does not targets religiously motivated conduct and (2) narrowly tailored to serve a compelling governmental interest. (Doc. 84, pp. 16–17).

Equality Florida also argues the plaintiffs failed to state a claim for relief under the First Amendment’s free-exercise clause. (Doc. 92, pp. 15–16). Like the

City, Equality Florida argues the ordinance is neutral, generally applicable, and does not target religious conduct. (Doc. 92, pp. 15–16). Equality Florida also points out Ordinance 2017-47 has an exemption for religious leaders who provide religious counseling. (*Id.* at 15). According to Equality Florida, the plaintiffs failed to allege facts to show the City was motivated by animus toward the plaintiffs’ religious beliefs when the City passed Ordinance 2017-47. (*Id.* at 16). Equality Florida concludes that these facts, and the fact that strict-scrutiny analysis does not apply to free-exercise claims, establish the plaintiffs failed to state claim for relief under the First Amendment’s free-exercise clause. (*Id.*).

The First Amendment protects the free exercise of religion. U.S. Const. amend. I. To satisfy the First Amendment’s free-exercise clause, a law must be (1) neutral and (2) generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). The neutrality inquiry asks whether the object of the law is to infringe or restrict conduct because of its religious motivation. *Id.* at 533 (citations omitted). The general-applicability prong asks whether the government “in a selective manner impose[s] burdens only on conduct motivated by religious belief.” *Id.* at 543 (citations omitted).

A law that is neutral and generally applicable need only satisfy rational-basis review. *Keeton*, 664 F.3d at 880 (citations omitted). That is, the law need only be rationally related to a legitimate governmental interest. *Id.* (citations omitted). Laws subject to rational-basis review are presumed constitutional. *Id.* (citation omitted).

If a law is neither neutral nor generally applicable, then the law must be narrowly tailored to advance a compelling governmental interest (strict-scrutiny analysis).

Lukumi, 508 U.S. at 531.

Relevant to this analysis, the plaintiffs allege:

211. Ordinance 2017-47, on its face and as applied, targets Plaintiffs’ and their clients’ beliefs regarding human nature, gender, ethics, morality, and SOCE counseling, which are informed by the Bible and constitute central components of their sincerely held religious beliefs. Ordinance 2017-47 causes them a direct and immediate conflict with their religious beliefs by prohibiting them from offering, referring, and receiving counseling that is consistent with their religious beliefs.

. . .

215. Ordinance 2017-47, on its face and as applied, is neither neutral nor generally applicable, but rather specifically and discriminatorily targets the religious speech, beliefs, and viewpoint of those individuals who believe change is possible, and thus expressly on its face and as applied constitutes a substantial burden on sincerely held religious beliefs that are contrary to the City-approved viewpoint on same-sex attractions, behavior, or identity.

. . .

220. Ordinance 2017-47, both on its face and as-applied, specifically targets religion for disparate treatment and has set up a system of individualizes exemptions that permits certain counseling on same-sex attractions, behaviors, or identity while denying religious counseling on the same grounds.

(Doc. 78, ¶¶211, 215, 220).

The plaintiffs’ amended complaint fails to state a claim for relief under the First Amendment’s free-exercise clause. The plaintiffs allege no facts showing the City’s object or goal in enacting Ordinance 2017-47 was to infringe upon or restrict

SOCE counseling because of any religious motivation. The plaintiffs also failed to allege facts showing the City selectively imposes burdens on conduct motivated by religious belief. The ordinance instead applies to all providers, regardless of religious belief or motivation. So, the ordinance need only satisfy rational-basis scrutiny.

The City's stated interest in passing Ordinance 2017-47 is to protect "the physical and psychological well-being of minors." (Doc. 24-1, p. 5). The government has a compelling interest in protecting the physical and psychological well-being of minors. *Sable Commc'ns of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Ordinance 2017-47, therefore, satisfies the rational-basis requirement of a legitimate governmental interest.

The ordinance also satisfies the other requirement of rational-basis analysis because the ordinance is rationally related to the City's interest in protecting the physical and psychological well-being of minors. Under rational-basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993) (citations omitted). The City determined, based on research conducted by organizations, like the American Psychological Association, that prohibiting conversion therapy, including SOCE counseling, would protect the physical and psychological well-bring of minors. (Doc. 24-1, pp. 2–6). Ordinance 2017-47 therefore goes beyond "rational speculation unsupported by evidence or empirical data." So, the ordinance satisfies rational-basis analysis because the

ordinance is rationally related to a legitimate government interest.

The plaintiffs failed to state claims for relief under the Free Exercise Clause because the amended complaint includes no allegations that the object of the ordinance is to target religiously-motivated conduct. The amended complaint also includes no allegations that the City selectively imposes burdens on conduct motivated by religious belief. So, the plaintiffs failed to sufficiently plead that Ordinance 2017-47 is neither neutral nor generally applicable. As a result, Ordinance 2017-47 is subject to rational-basis scrutiny, which the ordinance satisfies. The court should grant the City's motion to dismiss the plaintiffs' claim under the Free Exercise Clause (Count III).

E. Count IV: Florida Constitution Right to Liberty of Speech

The plaintiffs allege Ordinance 2017-47 violates their rights to liberty of speech under the Florida Constitution. (Doc. 78, ¶¶224–43). A city may not pass a law “to restrain or abridge the liberty of speech or of the press.” Art. I, § 4, Fla. Const. The liberty-of-speech protection under the Florida Constitution mirrors the free-speech protection under the First Amendment. *See Simmons v. State*, 944 So. 2d 317, 323–29 (Fla. 2006) (analyzing a claim under the First Amendment simultaneously with the Florida Constitution's liberty-of-speech protection); *Fla. Cannery Ass'n v. State, Dept. of Citrus*, 371 So. 2d 503, 517–19 (Fla. 2d Dist. Ct. App. 1979) (same).

The plaintiffs sufficiently pleaded all their free-speech claims under the First Amendment for the reasons discussed in Section III(B) of this report. The plaintiffs

therefore also sufficiently pleaded their liberty-of-speech claim under the Florida Constitution. The court should deny the City's motion to dismiss the plaintiffs' liberty-of-speech claim (Count IV).

F. Count V: Florida's Free Exercise Clause

The plaintiffs allege Ordinance 2017-47 violates the Florida Constitution's religious-freedom protection. (Doc. 78, ¶¶244–61). The Florida Constitution protects against laws that prohibit or penalize the free exercise of religion. Art. I, § 3, Fla. Const. Claims under Florida's Free Exercise Clause are analyzed the same as claims under the First Amendment. *See Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d Dist. Ct. App. 2002) (stating the court found no authority to treat free-exercise claims under the First Amendment and Florida Constitution differently); *see also Bush v. Holmes*, 886 So. 2d 340, 365 (Fla. 1st Dist. Ct. App. 2004) (stating Florida courts generally interpret Florida's Free Exercise Clause "as coequal to the federal clause") (citation omitted).

The plaintiffs failed to allege a free-exercise claim under the First Amendment for the reasons stated in Section III(D) of this report. The plaintiffs therefore also failed to allege a free-exercise claim under the Florida Constitution. The court should grant the City's motion to dismiss the plaintiffs' free-exercise claim under the Florida Constitution (Count V).

G. Count VI: Preemption under Article VIII, Section 2(b) of the Florida Constitution

The plaintiffs allege Ordinance 2017-47 violates Article VIII, Section 2(b) of

the Florida Constitution because the City had no authority to adopt a law in a field preempted by the Florida Legislature—in this case, the field of regulating mental health professionals. (Doc. 78, ¶¶262–75).

The City argues the plaintiffs failed to state claims for relief under their preemption theory because the amended complaint has no allegations that the Florida Legislature expressly preempted laws that regulate mental health professionals. (Doc. 84, p. 21). The City also argues the plaintiffs failed to sufficiently allege implied preemption because the laws on which the plaintiffs rely for their claim “are completely silent as to any pervasive scheme evidencing a legislative attempt to preempt the City from prohibiting conversion therapy within its jurisdiction.” (*Id.*). According to the City, regulation of health and safety matters are primarily left to local governments. (*Id.* at 22).

Equality Florida argues the City had the authority, under its home rule powers, to prevent mental health professionals from harming minors. (Doc. 92, p. 17). According to Equality Florida, nothing in the Florida Statutes the plaintiffs cited prevent municipalities from imposing civil penalties on mental health providers. (*Id.* at 18). Equality Florida argues the Florida Legislature intended for municipalities to regulate professions when appropriate. (*Id.*). So, Equality Florida concludes the plaintiffs cannot prove express or implied preemption applies to Ordinance 2017-47 and the plaintiffs failed to state a claim under Article VIII, Section 2(b) of the Florida Constitution as a matter of law. (Doc. 92, p. 20).

Article VIII, Section 2(b) of the Florida Constitution states the following:

POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

A city ordinance may be beyond the city’s authority under the Florida Constitution if (1) the Legislature preempted a particular subject area or (2) the city ordinance conflicts with a state statute. *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 885–86 (Fla. 2010) (citation omitted); *Orange Cty. v. Singh*, No. SC18-79, ___ So. 3d ___, 2019 WL 98251, at *3 (Fla. Jan. 4, 2019) (citations omitted).⁶

The Florida Legislature can preempt an area of law in two ways: express or implied preemption. *Sarasota Alliance*, 28 So. 3d at 886. Express preemption requires a specific legislative statement—courts cannot imply or infer express preemption. *Id.* (citations omitted). The Florida Legislature accomplishes express preemption when the legislature uses clearing language stating its intent. *Id.* (citation omitted).

Implied preemption exists when “the legislature scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy

⁶ *Singh* supersedes *Sarasota Alliance* because the ordinance at issue in *Singh* (challenged under preemption theory) was adopted in reaction to the holding in *Sarasota Alliance*. See *Singh*, 2019 WL 98251, at *3 (discussing the ordinance at issue). The legal standards *Sarasota Alliance* explained, however, remain unchanged. See *Singh*, 2019 WL 98241, at *4 (explaining the court’s decision).

reasons exist for finding such an area to be preempted by the Legislature.” *Sarasota Alliance*, 28 So. 3d at 886 (quotation marks and citation omitted). The Florida Legislature impliedly preempts an area of law when local legislation might endanger the legislature’s “pervasive regulatory scheme.” *Id.* (citation omitted).

The court must look at the whole state regulation and the regulation’s object and policy to determine if implied preemption applies. *State v. Harden*, 938 So. 2d 480, 486 (Fla. 2006) (citation omitted). “The nature of the power exerted by the legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute” are vital to determining if implied preemption applies. *Sarasota Alliance*, 28 So. 3d at 886 (citation omitted). Another crucial factor in determining whether implied preemption exists is whether the state’s statutory scheme specifically recognizes the need for local control. *See id.* at 887 (discussing *GLA and Assocs., Inc. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th Dist. Ct. App. 2003)). Courts must be careful when imputing an intent that prohibits “a local elected governing body from exercising its home rule powers.” *D’Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017) (citation omitted).

The plaintiffs sufficiently pleaded a claim for relief under an implied-preemption theory. The amended complaint alleges the Florida Legislature preempted the field of regulating mental health professionals through Chapter 491, Florida Statutes. (Doc. 78, ¶268). The plaintiffs allege Chapter 491, and its accompanying regulation, outline procedures that apply to disciplining mental health

professionals. (*Id.* at ¶¶269–70). The plaintiffs allege the City exceeded its authority when it adopted Ordinance 2017-47 because the state legislature preempted regulations of mental health professionals. (*Id.* at ¶274). These allegations are enough to state a plausible claim for relief under an implied-preemption theory.

The plaintiffs, however, failed to state claims for relief under an express-preemption theory. In their complaint, the plaintiffs cite no express statement or specific language in Chapter 491, Florida Statutes, which governs “Clinical, Counseling, and Psychotherapy Services,” in which the Florida Legislature expressly preempted local regulations over mental health counseling. Nor does Chapter 491 have such an express statement. *See* Fla. Stat. §§ 491.002–491.016 (listing laws that apply to mental health counseling). The plaintiffs’ amended complaint, therefore, fails to state claim for relief under an express-preemption theory.

The court should deny the City’s motion to dismiss the plaintiffs’ claim that Ordinance 2017-47 violates Article VIII, Section 2(b) of the Florida Constitution (Count VI). The court should allow the plaintiffs to proceed under an implied-preemption theory—but not an express-preemption theory.

H. Count VII: Florida Patient’s Bill of Rights and Responsibilities

The plaintiffs allege Ordinance 2017-47 violates the Florida Patient’s Bill of Rights and Responsibilities. (Doc. 78, ¶¶276–291). The City argues the plaintiffs fail to state a claim for relief under the Florida Patient’s Bill of Rights because the plaintiffs are not “health care providers” under the statute; nor are the plaintiffs’

minor clients “patients” under the statute. (Doc. 84, pp. 22–23). The City further argues the Florida Patient’s Bill of Rights expressly prohibits using the statute in civil actions. (*Id.* at 24).

Equality Florida similarly argues the Florida Patient’s Bill of Rights prohibits using the statute in civil actions. (Doc. 92, p. 20). Equality Florida also argues the plaintiffs fail to state a claim under the Patient’s Bill of Rights because conversion therapy is not an effective treatment option under the statute. (*Id.*).

In relevant part, the Florida Patient’s Bill of Rights states:

1. A patient has the right to impartial access to medical treatment or accommodations, regardless of race, national origin, religion, handicap, or source of payment.
2. A patient has the right to treatment for any emergency medical condition that will deteriorate from failure to provide such treatment.
3. A patient has the right to access any mode of treatment that is, in his or her own judgment and the judgment of his or her health care practitioner, in the best interests of the patient, including complementary or alternative health care treatments, in accordance with the provision of s. 456.41.

Fla. Stat. § 381.026(4)(d). The purpose of the Florida Patient’s Bill of Rights is to promote the interests and well-being of patients of health care providers and promote better communication between patients and health care providers. § 381.026(3). The Patient’s Bill of Rights, however, “shall not be used for any purpose in any civil or administrative action and neither expands nor limits any rights or remedies provided under any other law.” § 381.026(3).

Private rights of action must be either express or clearly implied from the text of the statute. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 313–17 (2012) (discussing the private-right canon that presumes against implied rights of action); see also *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 n.9 (1979) (discussing factors courts use to determine if a statute provides for a private remedy). The central inquiry is whether the legislature intended to create, either expressly or by implication, a private right of action. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). Without statutory intent establishing the legislature wanted to create a private right of action, no cause of action exists and “courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (citations omitted).

The plaintiffs cannot state a claim for relief under the Florida Patient’s Bill of Rights because that statute creates no private cause of action. The amended complaint contains no allegation that the Florida Patient’s Bill of Rights has a statutory provision that allows for a private right of action. The Florida Patient’s Bill of Rights has no such provision. See Fla. Stat. § 381.026 (listing the patient’s rights). The “purpose” section instead expressly states the statute cannot be used in civil actions. § 381.026(3). The lack of a private-right provision and the statute’s stated purpose establishes the Florida Legislature did not intend to create a private right of action under the Florida Patient’s Bill of Rights and Responsibilities. The plaintiffs

therefore cannot bring a claim under that statute. The court should grant the City's motion to dismiss the plaintiffs' claims under the Florida Patient's Bill of Rights and Responsibilities (Count VII).

I. Count VIII: Florida Religious Freedom and Restoration Act

The plaintiffs allege Ordinance 2017-47 violates the Florida Religious Freedom and Restoration Act (FRFRA). (Doc. 78, ¶¶292–303). The City argues the plaintiffs fail to state a claim for relief under FRFRA because the ordinance does not substantially burden the plaintiffs' exercise of religion. (Doc. 84, p. 24). The City also argues Ordinance 2017-47 is narrowly tailored to further a compelling governmental interest. (*Id.* at 24–25).

Equality Florida similarly argues the plaintiffs' amended complaint fails to allege Ordinance 2017-47 substantially burdens the free exercise of religion. (Doc. 92, pp. 16–17). According to Equality Florida, the plaintiffs allege no facts showing the ordinance either compels them to engage in activity their religion forbids or prohibits them from engaging in conduct their religion requires. (*Id.* at 17). Equality Florida instead argues the ordinance allows the plaintiffs to express and practice their religious views. (*Id.*).

FRFRA states the following:

- (1) The government shall not substantially burden a person's free exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) is in furtherance of a compelling governmental interest; and

(b) is the least restrictive means of furthering that compelling governmental interest.

Fla. Stat. § 761.03. Before a claimant can challenge a law under FRFRA, the claimant must establish he or she has a sincerely-held religious belief the law affects. *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1032 n.7 (2004) (quotation and citation omitted); *Freeman v. Dep't of Highway Safety and Motor Vehicles*, 924 So. 2d 48, 54 (Fla. 5th Dist. Ct. App. 2006). The claimant must then establish the challenged law substantially burdens his or her sincerely-held religious belief. *Freeman*, 924 So. 2d at 54. A law substantially burdens a claimant's sincerely-held religious belief when the law "compels the religious adherent to engage in conduct his religion forbids or forbids him to engage in conduct that his religion requires." *Warner*, 887 So. at 1033 (citation omitted). After the claimant satisfies those requirements, the burden shifts to the government to establish that the law is the least restrictive means of furthering a compelling governmental interest. *Id.* at 1034 (citation omitted).

The plaintiffs' amended complaint alleges a plausible claim for relief under FRFRA. The plaintiffs allege they have sincerely-held religious beliefs that require them to provide counseling to minors who struggle "with unwanted same-sex attractions, behaviors, or identity." (Doc. 78, ¶¶296–98). The plaintiffs allege Ordinance 2017-47 prohibits them from offering counseling consistent with their religious beliefs. (Doc. 78, ¶299). And the plaintiffs allege Ordinance 2017-47 is not the least restrictive means of furthering any compelling governmental interest. (*Id.*

at 301–02). These allegations are enough to state a plausible claim for relief under FRFRA. The court should deny the City’s motion to dismiss the plaintiffs’ cause of action under FRFRA (Count VIII).

IV. CONCLUSION

The plaintiffs’ amended complaint fails to state a claim for relief under the Free Exercise Clauses under the federal and Florida constitutions (Counts III and V). The amended complaint also cannot state a claim for relief under the Florida Patient’s Bill of Rights and Responsibilities (Count VII). But the plaintiffs’ amended complaint alleges plausible claims for relief on the remaining causes of action. Therefore, the City’s motion to dismiss (Doc. 84) should be **GRANTED-IN-PART** and **DENIED-IN-PART** as follows:

1. The City’s motion to dismiss to plaintiffs’ freedom-of-speech claims under the First Amendment (Count I) should be **DENIED**.
2. The City’s motion to dismiss the plaintiffs’ right-to-receive-information claim under the First Amendment (Count II) should be **DENIED**.
3. The City’s motion to dismiss the plaintiffs’ religious-free-exercise claim under the First Amendment (Count III) should be **GRANTED**.
4. The City’s motion to dismiss the plaintiffs’ liberty-of-speech claim under the Florida Constitution (Count IV) should be **DENIED**.
5. The City’s motion to dismiss the plaintiffs’ religious-free-exercise claim under the Florida Constitution (Count V) should be **GRANTED**.

6. The City's motion to dismiss the plaintiffs' preemption claim (Count VI) should be **DENIED**. The plaintiffs should be allowed to proceed on their implied-preemption theory—but not their express-preemption theory.
7. The City's motion to dismiss the plaintiffs' claims under the Florida Patient's Bill of Rights and Responsibilities (Count VII) should be **GRANTED**.
8. The City's motion to dismiss the plaintiffs' claims under the Florida Religious Freedom Restoration Act (Count VIII) should be **DENIED**.

RECOMMENDED in Tampa, Florida, on January 30, 2019.



AMANDA ARNOLD SANSONE
United States Magistrate Judge

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days from the date of this service bars an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. § 636(b)(1).

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**ROBERT L. VAZZO,
DAVID H. PICKUP, SOLI DEO
GLORIA INTERNATIONAL, INC.
d/b/a NEW HEARTS OUTREACH
TAMPA BAY**

Plaintiffs,

v.

Case No. 8:17-cv-2896-T-02AAS

CITY OF TAMPA,

Defendant,

_____ /

REPORT AND RECOMMENDATION

The plaintiffs—Robert Vazzo, David Pickup, and New Hearts Outreach—move for a preliminary injunction enjoining the City of Tampa from enforcing Ordinance 2017-47. (Docs. 85, 145). The City and amicus Equality Florida oppose the plaintiffs’ motion. (Docs. 98, 99, 142, 143). The plaintiffs’ motion for a preliminary injunction focuses on two of the eight claims in their first amended complaint: their free-speech claims under the First Amendment (Count I) and their claim that the City lacked the authority to enact Ordinance 2017-47 under the Florida Constitution (Count VI). (Docs. 85, 145).

The plaintiffs failed to establish a substantial likelihood of success on the merits of their claim that the City lacked the authority to enact Ordinance 2017-47

(Count VI). But the plaintiffs established a substantial likelihood of success on the merits of their free-speech claims under the First Amendment (Count I). The plaintiffs also established they will suffer irreparable injury if the court enters no injunction; the threatened injury to the plaintiffs outweighs the damage a limited injunction would cause the City; and a limited injunction against enforcing Ordinance 2017-47's ban against non-coercive, non-aversive SOCE counseling—that consists entirely of speech or “talk therapy”—is in the public interest. Therefore, the plaintiffs' motion for a preliminary injunction should be **GRANTED-IN-PART** and **DENIED-IN-PART**.

I. GENERAL BACKGROUND

The plaintiffs move to enjoin the enforcement of Ordinance 2017-47, which prohibits mental health professionals from practicing conversion therapy on minors. (Doc. 85, Doc. 24-1). The ordinance defines conversion therapy to include counseling or treatment aimed at changing an individual's sexual orientation or gender identity. (Doc. 24-1, p. 6). Conversion therapy, under the ordinance, also includes counseling an individual with the goal of eliminating or reducing “sexual or romantic attractions or feelings toward individuals of the same gender or sex.” (*Id.*).

Messrs. Vazzo and Pickup are licensed marriage and family therapists¹ whose practices include providing sexual-orientation-change-efforts (SOCE) counseling.

¹ Mr. Vazzo is licensed to practice mental health counseling in Florida. (Doc. 78, ¶14). Mr. Pickup is not licensed in Florida, but he is in the process of obtaining his Florida license. (*Id.* at ¶15).

(Doc. 78, ¶¶14–15, 102, 116). According to the plaintiffs, SOCE counseling helps clients, including minors, “reduce or eliminate same-sex sexual attractions, behaviors or identity.” (*Id.* at ¶60). During SOCE counseling, Messrs. Vazzo and Pickup use speech to help their clients “understand and identify their anxiety or confusion regarding their attractions, or identity and then help the client formulate the method of counseling that will most benefit that particular client.” (*Id.* at ¶65).

According to the plaintiffs, clients, including minors, initiate SOCE counseling by giving their informed consent. (*Id.* at ¶8). The plaintiffs allege some clients request SOCE counseling to “address the conflicts between their sincerely held religious beliefs and goals to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity.” (Doc. 78, ¶9).

New Hearts Outreach is a Christian ministry in Tampa. (*Id.* at ¶¶16, 126). Part of its ministry is to refer individuals, including minors, “struggling with unwanted same-sex attractions, behaviors, and identity” to mental health professionals to receive SOCE counseling. (*Id.* at ¶¶132–34).

Messrs. Vazzo and Pickup cannot provide SOCE counseling to minors in Tampa under Ordinance 2017-47. (*Id.* at ¶¶112, 116). Nor can New Heart Outreach refer minors to Messrs Vazzo and Pickup for SOCE counseling in Tampa. (*Id.* at ¶135). If Messrs Vazzo and Pickup provided SOCE counseling to minors in Tampa, they would be subject to penalties of a \$1,000 fine for the first violation and a \$5,000 fine for each following violation. (Doc. 24-1, p. 7).

The plaintiffs sued the City and allege Ordinance 2017-47 violates their federal and state constitutional rights. (Doc. 78). Most relevant to their motion for preliminary injunction, the plaintiffs allege Ordinance 2017-47 violates their right to freedom of speech under the First Amendment (Count I). (*Id.* at ¶¶177–96). The plaintiffs also allege Ordinance 2017-47 violates the Florida Constitution because the state legislature preempted the field of regulating mental health professionals (Count VI). (*Id.* at ¶¶262–75).

Before turning to the substance of the plaintiffs’ motion for a preliminary injunction, the undersigned will provide the procedural background leading to this point of the litigation.

II. PROCEDURAL BACKGROUND

The City adopted Ordinance 2017-47 on April 6, 2017, and the mayor approved the ordinance four days later. (Doc. 24-1, p. 8). The plaintiffs began this lawsuit against the City on December 4, 2017. (Doc. 1). At the same time they filed their complaint, the plaintiffs moved for a preliminary injunction enjoining the City’s enforcement of Ordinance 2017-47. (Doc. 3).

After moving for an extension of time, which the undersigned granted, the City moved to dismiss the plaintiffs’ original complaint on January 12, 2018. (Docs. 19, 22). The city also submitted its response to the plaintiffs’ motion for preliminary injunction on January 12th. (Doc. 23). The plaintiffs moved to submit a consolidated response that would include a response to the City’s motion to dismiss and a reply in

further support of their motion for preliminary injunction. (Doc. 37). The undersigned allowed the plaintiffs to submit a consolidated response, which the plaintiffs submitted on January 29, 2018, after asking for a one-day extension. (Docs. 39, 41, 43).

Between January and March 2018, the plaintiffs and Equality Florida—a civil-rights organization that helped draft Ordinance 2017-47—argued over whether the court should allow Equality Florida to intervene. (Docs. 30, 42, 45, 50). The plaintiffs and the City also argued over whether the court should allow the City to file DVDs and other documents of the legislative proceedings for Ordinance 2017-47. (Docs. 27, 44). On March 15, 2018, the undersigned granted the City’s motion to file its DVDs and other documents. (Doc. 51). That same day, the undersigned issued a report that recommended allowing Equality Florida to participate in this litigation as *amicus curiae*. (Doc. 52). After the parties’ two-week period to object to the undersigned’s March 15th report and recommendation, the court adopted the undersigned’s report and recommendation. (Doc. 60).

The plaintiffs and the City then jointly moved to stay discovery pending the court’s ruling on the plaintiffs’ motion for preliminary injunction and the City’s motion to dismiss. (Doc. 49). The court denied the parties’ motion to stay discovery. (Doc. 61). In the meantime, the undersigned scheduled a hearing on the plaintiffs’ motion for preliminary injunction and the City’s motion to dismiss. (Doc. 59). The undersigned scheduled the hearing for June 7, 2018, despite providing the parties

multiple dates in April because, according to the parties and Equality Florida, June 7th was the earliest date available for all parties. (Doc. 59, p. 2 n.2).

On May 25, 2018—less than two weeks before the scheduled hearing on the plaintiffs’ motion for preliminary injunction and the City’s motion to dismiss—the plaintiffs moved to amend their complaint. (Doc. 71). As a result, the undersigned cancelled the June 7th hearing. (Doc. 72). The court granted the plaintiffs’ motion to submit an amended complaint and denied as moot the plaintiffs’ original motion for preliminary injunction and the City’s motion to dismiss. (Docs. 76, 79, 80).

The plaintiffs submitted their first amended complaint, the operative complaint, on June 12, 2018. (Doc. 78). The plaintiffs also submitted their current motion for preliminary injunction on June 26th—the same day the City moved to dismiss the plaintiffs’ first amended complaint. (Docs. 84, 85).

Following the parties’ joint request, the undersigned adopted the parties’ proposed briefing schedule. (Doc. 88). Under that schedule, the last briefing concerning the plaintiffs’ motion for preliminary injunction and the City’s motion to dismiss was due August 10, 2018. (Doc. 87, p. 2). At the same time the undersigned adopted the parties’ briefing schedule, the undersigned provided the parties multiple dates in August and September to hold the hearing on the motions. (Doc. 88, p. 2). The parties could not choose from the dates provided, so the undersigned provided dates in October to hold the hearing. (Doc. 94).

The parties eventually agreed to hold the hearing on October 10, 2018, which

the undersigned then scheduled. (Docs. 97, 99). But the parties then had discovery disputes, which resulted in the October 10th hearing being rescheduled to November 15, 2018. (Docs. 106, 111, 118, 119, 121, 125, 128, 130).

On November 15th, the undersigned finally held the hearing on the plaintiffs' motion for preliminary injunction and the City's motion to dismiss. (Doc. 136). At the conclusion of the hearing, the undersigned allowed the parties and Equality Florida to submit supplemental briefs by December 3, 2018, which they did. (Docs. 142, 143, 145). Undisputedly, the plaintiffs' motion for a preliminary injunction is fully ripe for the court's determination.

III. LEGAL STANDARD

A party moving for a preliminary injunction must establish (1) the party has a likelihood of success on the merits; (2) the party will suffer irreparable injury if the court issues no injunction; (3) the threatened injury to the moving party outweighs whatever damage the injunction may cause the opposing party; and (4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citations omitted). The burden is on the moving party to clearly establish that all four factors for a preliminary injunction are met. *Siegel*, 234 F.3d at 1176 (citations omitted).²

² The Eleventh Circuit requires the party moving for a preliminary injunction to satisfy all four factors. *Siegel*, 234 F.3d at 1176 (citations omitted). A question exists whether the Supreme Court requires all four factors to be met. *See Winter*, 555 U.S.

A preliminary injunction is an extraordinary remedy. *Winter*, 555 U.S. at 24 (citation omitted). When a court enjoins a municipal ordinance, “the court overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government.” *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). As a result, courts must grant preliminary injunctions against municipal ordinances only if an injunction “is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts.” *Id.* Courts must particularly consider the public consequences of issuing a preliminary injunction. *Winter*, 555 U.S. at 24.

The plaintiffs focused only on their free-speech claims under the First Amendment (Count I) and their claim that the City lacked authority to enact Ordinance 2017-47 under the Florida Constitution (Count VI) in their briefing in support of their motion for a preliminary injunction and at the November 15th hearing. Therefore, the undersigned will focus on those claims only and will not analyze the merits of issuing an injunction based on the plaintiffs’ other six claims.

The undersigned’s analysis will begin with determining whether the plaintiffs established a likelihood of success on the merits on their preemption and First

at 391–92 (Ginsburg, J., dissenting) (stating that preliminary-injunction analyses require a sliding-scale approach, which *Winter* did not reject). In this case, whether the court adopts the Eleventh Circuit’s approach or a sliding-scale approach, the plaintiffs meet all four factors on their free-speech claim under the First Amendment.

Amendment claims. The undersigned will then turn to whether the plaintiffs satisfied the other requirements for a preliminary injunction

IV. ANALYSIS

A. Likelihood of Success on the Merits

1. Count VI: The Plaintiffs' Claim that the City Lacked Authority to Enact Ordinance 2017-47

In their briefing and oral arguments concerning Count VI of the amended complaint, in which the plaintiffs allege the City lacked authority under the Florida Constitution to enact Ordinance 2017-47, the plaintiffs argue three theories: the Florida Legislature expressly preempted the area of regulating mental health professionals; the Florida Legislature impliedly preempted the area of regulating mental health professionals; and Ordinance 2017-47 conflicts with Florida law governing mental health professionals. (Docs. 85, 114, 145). The undersigned will address each argument, beginning with the plaintiffs' conflict-of-laws argument.

a. Conflict-of-Laws Argument

Although missing from Count VI of their amended complaint, the plaintiffs argue they are likely to succeed on a claim that Ordinance 2017-47 conflicts with Chapter 491, Florida Statutes, which governs "Clinical, Counseling, and Psychotherapy Services." (Doc. 85, pp. 23–24). The plaintiffs argue the ordinance conflicts with Chapter 491 because it imposes additional fees and penalties on conduct—in this case, SOCE counseling—legal in other parts of Florida. (*Id.* at 23).

The plaintiffs failed to allege a conflict-of-laws claim in their first amended

complaint. Their claim under Article VIII, Section 2(b) of the Florida Constitution focuses exclusively on preemption. (See Doc. 78, ¶¶262–75) (alleging Chapter 491, Florida Statutes, preempts regulation of mental health professionals). In fact, the plaintiffs only use the word “conflict” to describe the alleged conflict between clients’ “unwanted same sex attractions, behaviors, or identity,” clients’ religious beliefs and Ordinance 2017-47. (*Id.* at ¶¶4, 9, 45, 79, 97–99, 208, 211, 213, 246, 249, 251, 296, 299). The plaintiffs cannot establish a likelihood of success on a claim they failed to plead in their amended complaint. A preliminary injunction based on a conflict-of-law claim—which the plaintiffs never alleged—is therefore inappropriate.

b. Express-Preemption Claim

The plaintiffs allege Ordinance 2017-47 violates Article VIII, Section 2(b) of the Florida Constitution because the City had no authority to adopt a law in a field preempted by the Florida Legislature—in this case, the field of regulating mental health professionals. (*Id.* at ¶¶262–75).

Article VIII, Section 2(b) of the Florida Constitution states the following:

POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

A city ordinance may be beyond the city’s authority under the Florida Constitution if the legislature preempted a particular subject area. *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 885–86 (Fla. 2010) (citation

omitted); *Orange Cty. v. Singh*, No. SC18-79, ___ So. 3d ___, 2019 WL 98251, at *3 (Fla. Jan. 4, 2019) (citations omitted).³

The Florida Legislature can preempt an area of law in two ways: express or implied preemption. *Sarasota Alliance*, 28 So. 3d at 886. Express preemption requires a specific legislative statement—courts cannot imply or infer express preemption. *Id.* (citations omitted). The Florida Legislature accomplishes express preemption when the legislature uses clear language stating its intent. *Id.* (citation omitted).

Finding express preemption “is a very high threshold to meet.” *D’Agastino v. City of Miami*, 220 So. 3d 410, 422 (Fla. 2017) (citations omitted). If a preemption claim requires inferences, that claim fails the test for express preemption. *Id.* at 23 (citations omitted). Courts have little justification to create preemption in a state statute because the legislature can easily do so by including clear language that expressly preempts an area of law. *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 (Fla. 2d Dist. Ct. App. 2005) (citation omitted).

The plaintiff failed to establish a likelihood of success on the merits on an express-preemption claim. In their complaint, the plaintiffs cite no express statement or specific language in Chapter 491, Florida Statutes, which governs “Clinical,

³ *Singh* supersedes *Sarasota Alliance* because the ordinance at issue in *Singh* (challenged under preemption theory) was adopted in reaction to the holding in *Sarasota Alliance*. See *Singh*, 2019 WL 98251, at *3 (discussing the ordinance at issue). The legal standards *Sarasota Alliance* explained, however, remain unchanged. See *Singh*, 2019 WL 98241, at *4 (explaining the court’s decision).

Counseling, and Psychotherapy Services,” in which the legislature expressly preempted local regulations over mental health counseling. Nor does Chapter 491 have such an express statement. *See* Fla. Stat. §§ 491.002–491.016 (listing laws that apply to mental health counseling). The plaintiffs’ exemption claim instead requires inferences. (*See* Doc. 85, pp. 22–24) (arguing Chapter 491 creates a pervasive regulatory scheme). So, the plaintiffs can only plausibly claim the Florida Legislature impliedly preempted the field of regulating mental health professionals. A preliminary injunction based on an express-preemption claim is therefore inappropriate.

c. Implied-Preemption Claim

The plaintiffs argue they are likely to succeed on the merits of their implied-preemption claim. (Doc. 85, pp. 22–24). The City argues the plaintiffs failed to demonstrate the Florida Legislature intended to preempt the area of regulating mental health professionals. (Doc. 99, pp. 22–25).

Implied preemption exists when “the legislature scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.” *Id.* (quotation marks and citation omitted). The Florida Legislature impliedly preempts an area of law when local legislation might endanger the legislature’s “pervasive regulatory scheme.” *Sarasota Alliance*, 28 So. 3d at 886 (citation omitted).

The court must look at the whole state regulation and the regulation’s object

and policy to determine if implied preemption applies. *State v. Harden*, 938 So. 2d 480, 486 (Fla. 2006) (citation omitted). “The nature of the power exerted by the legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute” are vital to determining if implied preemption applies. *Sarasota Alliance*, 28 So. 3d at 886 (citation omitted). Another crucial factor in determining whether implied preemption exists is whether the state’s statutory scheme specifically recognizes the need for local control. *See id.* at 887 (discussing *GLA and Assocs., Inc. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th Dist. Ct. App. 2003)).

Courts must be careful when imputing an intent that prohibits “a local elected governing body from exercising its home rule powers.” *D’Agastino*, 220 So. 3d at 421 (citation omitted); *see also Black’s Law Dictionary*, 850 (10th ed. 2014) (defining “home rule” as the measure of autonomy state legislatures give local governments). A municipality in Florida has broad authority to exercise its home rule powers not expressly limited by the constitution, general or special law, or county charter. Fla. Stat. § 166.021(4); *Masone v. City of Aventura*, 147 So.3d 492, 494–95 (Fla. 2014) (citations omitted). Implied preemption is limited to areas where the Florida Legislature expressed its will to be the sole regulator. *Phantom of Clearwater*, 894 So. 2d at 1019 (quotation and citations omitted).

Some factors weigh in favor of concluding the Florida Legislature intended to preempt the area of regulating mental health professionals. To begin, Chapter 491

has no language expressly recognizing local regulation of mental health professionals. *See Fla. Stat. §§ 491.002–491.016* (listing laws that apply to mental health counseling). Statutory language that expressly recognizes local regulation weighs against finding implied preemption. *See Sarasota Alliance*, 28 So. 3d at 887–88 (finding no implied preemption in the state Election Code, which “specifically delegates certain responsibilities and powers to local authorities”); *Phantom of Clearwater*, 894 So. 2d at 1019 (finding no implied preemption in Chapter 791, which regulates the sale of fireworks, because the statute “expressly delegates enforcement to local government” and “authorizes boards of county commissioner to set and require surety bonds” from fireworks vendors). The lack of language expressly recognizing local control in Chapter 491, therefore, weighs in favor of finding implied preemption.

Another factor that weighs in favor of finding implied preemption in Chapter 491 is the reluctance to allow municipalities to regulate an area traditionally left to the state. The state legislature has the power to regulate professions that affect the health, safety, and welfare of the public. *Gillett v. Fla. Univ. of Dermatology*, 197 So. 852, 855 (Fla. 1940). If doubt exists about whether a municipality has a specific power, that doubt is resolved against the municipality. *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 803 (Fla. 1972) (citation omitted). A municipality has no power “in the absence of specific delegation of power” in its city charter. *Fleetwood Hotel*, 261 So. 2d at 803 (citation omitted). An area of statewide

concern is not the proper subject of a municipal government’s legislation. *Lowe v. Broward Cty.*, 766 So. 2d 1199, 1204–05 (Fla. 4th Dist. Ct. App. 2000).

Mental health counseling is a profession the state legislature has the power to regulate. *See* Fla. Stat. § 491.002 (referring to mental health counseling as a profession). And the City failed to cite to a specific delegation of power in its charter that allows the City to regulate mental health counseling. These two facts, combined with the presumptive doubt against municipal powers, weigh in favor of finding implied preemption in Chapter 491.

Perhaps the most notable factor weighing in favor of finding implied preemption in Chapter 491 is the statute’s disciplinary provision. *See* Fla. Stat. § 491.009 (listing “acts that constitute grounds for denial of a license or disciplinary action”). Section 491.009 states that mental health professionals can be penalized if they violate Section 456.072(1), Florida Statutes. Chapter 456 regulates health professions and occupations. Fla. Stat. §§ 456.001–456.50. Section 456.072 lists acts that constitute grounds for discipline and specifically states the following:

The purpose of this section is to facilitate uniform discipline for those actions made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

Fla. Stat. § 456.001(8).⁴ When read together, Sections 491.009 and 456.001(8) state

⁴ The doctrine of incorporation by reference requires some expression in a document of an intention to be bound by the referenced document. *See Kanter v. Boutin*, 624 So. 779, 781 (Fla. 4th Dist. Ct. App. 1993) (discussing the doctrine of incorporation by reference in the context of contract law).

the purpose of the disciplinary provisions in Section 491.009 is to have uniform discipline standards for mental health counselors.

The legislature's intent for uniform discipline is an important consideration in determining whether implied preemption exists. *See D'Agastino*, 220 So. 2d at 426 (concluding county's disciplinary proceedings conflicted with those outlined in state law); *Classy Cycles, Inc. v. Bay Cty.*, 201 So. 3d 779,788 (Fla. 1st Dist. Ct. App. 2016) (concluding the legislature impliedly preempted county ordinances, which included penalties for failure to obtain motorcycle insurance, because the legislature "created a pervasive scheme of regulation" for motor-vehicle insurance).

Ordinance 2017-47 threatens the legislature's desired uniformity because other municipalities may choose to allow mental health professionals to provide conversion therapy. A mental health professional could therefore be subject to discipline in Tampa for providing conversion therapy but subject to no discipline in a neighboring municipality within the same county. This potential threat to uniform discipline under Section 491.009 weighs in favor of finding implied preemption.

But factors also weigh against finding implied preemption in Chapter 491. Courts are notably hesitant to impute an intent to the legislature because the legislature knows how to expressly preempt an area of regulation. *See City of Hollywood v. Mulligan*, 934 So. 1238, 1245–46 (finding no express preemption in the Florida Contraband Forfeiture Act because the legislature removed previous statutory language that reserved power to regulate forfeiture to the state);

D'Agastino, 220 So. 3d at 423 (stating implied preemption involving a municipality's home rule powers is disfavored). So, the hesitancy to find implied preemption in state statutes weighs in favor of finding no implied preemption.

The plaintiffs also failed to cite a case in which a court concluded the Florida Legislature preempted regulation of a profession, like mental health counseling. Nor did the undersigned find such case law. These factors—courts' hesitation to conclude implied preemption exists and lack of case law concluding the state legislature preempted regulation of a profession—weigh in favor of concluding no implied preemption in Chapter 491—at least at this early stage of the litigation.

A plaintiff moving for a preliminary injunction establishes substantial likelihood of success on the merits when the plaintiffs shows a probability he or she will succeed on the merits. *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1354 n.2 (11th Cir. 1983) (citations omitted). “A probability signifies that an event has a better than fifty-percent chance of occurring.” *Mercantile Texas Corp. v. Bd. of Gov. of Fed. Reserve Sys.*, 638 F.2d 1255, 1268 (5th Cir. Unit A 1981).⁵ “[T]he word ‘substantial’ does not add to the quantum of proof required to show a likelihood of success on the merits.” *Shatel Corp.*, 697 F.2d at 1354 n.2.

The undersigned concludes that, although the plaintiffs demonstrated they might succeed on the merits of their implied-preemption claim, the plaintiffs' success

⁵ The former Fifth Circuit's decisions are binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

is not necessarily likely nor probable considering the general reluctance to find implied intent and the lack of case law concluding the legislature preempted regulation of a profession like mental health counseling. The plaintiffs therefore failed to establish a likelihood of success on the merits of their implied-preemption claim based on the record currently available to the court.

A party moving for a preliminary injunction must establish all four factors needed for a preliminary injunction. *Siegel*, 234 F.3d at 1176 (citations omitted). The court should not grant a preliminary injunction based on the plaintiffs' implied-preemption claim because the plaintiffs failed to establish a likelihood of success on the merits. The court also need not consider whether the plaintiffs satisfied the other three factors for a preliminary injunction based on their implied-preemption claim because the plaintiffs failed to establish a likelihood of succeed on the merits.

* * *

The plaintiffs cannot demonstrate a substantial likelihood of success on a claim that Ordinance 2017-47 conflicts with Florida law because the plaintiffs failed to allege a conflict-of-laws claim in their amended complaint. The plaintiffs also failed to demonstrate a likelihood of success on the merits of their claim that the Florida Legislature preempted the area of regulating mental health professionals. The court therefore should not enjoin enforcement of Ordinance 2017-47 based on the plaintiffs' claim that the City lacked authority to enact Ordinance 2017-47 (Count VI).

The undersigned will now turn to whether the plaintiffs demonstrated a

likelihood of success on the merits on their free-speech claims under the First Amendment.

2. Count I: Plaintiffs' Claim that Ordinance 2017-47 Violates their Freedom of Speech under the First Amendment

Count I of the plaintiffs' first amended complaint, which alleges Ordinance 2017-47 violates the free-speech protections under the First Amendment, alleges six theories on why the ordinance is unconstitutional: Ordinance 2017-47 is an unconstitutional content-based law; the ordinance commits viewpoint discrimination; the ordinance is unconstitutionally vague; the ordinance is unconstitutionally overbroad; the ordinance is underinclusive; and the ordinance is an unconstitutional prior restraint on free speech. (Doc. 78, ¶¶179, 180, 182, 192–94).

In their briefing and oral arguments at the November 15th hearing, the plaintiffs focused on the likelihood of success on their claims that Ordinance 2017-47 is a content-based law; the ordinance commits viewpoint discrimination; the ordinance is unconstitutionally vague; the ordinance is unconstitutionally overbroad; and the ordinance is an unconstitutional prior restraint of free speech. The undersigned will therefore focus on whether the plaintiffs demonstrated a substantial likelihood of success on those claims.

a. Content-Based-Law Claim

The First Amendment protects freedom of speech. U.S. Const. amend. I; *see also* 42 U.S.C. § 1983 (prohibiting persons acting under color of any ordinance from violating individuals' constitutional rights). Two types of laws commonly come into

play in First Amendment challenges: content-neutral laws and content-based laws. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *United States v. Playboy Ent. Group*, 529 U.S. 803 (2000); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

A law is content-neutral when its restrictions “are justified without reference to the content of the regulated speech.” *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citations omitted). A law that has an incidental effect on some speakers or messages is content-neutral if the regulation serves a purpose unrelated to the content of expression. *Ward*, 491 U.S. at 791 (citation omitted).⁶

A law is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed*, 135 S. Ct. at 2227 (citations omitted). Content-based laws also include laws that cannot be justified without reference to the content of the regulated speech and laws the government adopted because it disagrees with the message the regulated speech conveys. *Id.*; *Ward*, 491 U.S. at 791 (citation omitted).

Content-based laws must satisfy strict-scrutiny analysis. *Playboy*, 529 U.S. at 813. That is, the law must be narrowly tailored to promote a compelling

⁶ A content-neutral law must be narrowly tailored to serve a significant governmental interest. *Creative Non-Violence*, 468 U.S. at 293 (citations omitted). A law is narrowly tailored when it is “not substantially broader than necessary to achieve the government’s interest.” *Ward*, 491 U.S. at 799. The regulation need not be the least restrictive or least intrusive means of serving a significant governmental interest. *Id.* at 798–99. But the law must “leave open ample alternative channels” for communicating the affected speech. *Id.* at 791.

governmental interest. *Id.* If a less strict alternative would promote the government's compelling interest, the government must use that alternative. *Id.* Content-based laws are presumptively invalid. *R.A.V.*, 505 U.S. at 382 (citations omitted).

The plaintiffs argue Ordinance 2017-47 is an unconstitutional content-based law because the ordinance prohibits Messrs. Vazzo and Pickup from providing SOCE counseling, which “takes place only through speech.” (Doc. 114, p. 3). According to the plaintiffs, the City adopted Ordinance 2017-47 because the City disagrees with the content of the speech that takes place during SOCE counseling. (*Id.* at 4; Doc. 85, p. 11). So, the plaintiffs argue strict-scrutiny analysis applies and the ordinance fails that test because it is not the least restrictive means of furthering a compelling governmental interest. (Doc. 114, pp. 16–27).

The City argues the plaintiffs failed to demonstrate a likelihood of success on their content-based-law claim because the ordinance is narrowly tailored to satisfy a significant governmental interest. (Doc. 99, pp. 8–19). Equality Florida similarly argues the plaintiffs failed to demonstrate a likelihood of success on their First Amendment claims. (Doc. 98, p. 4).

The undersigned concludes the plaintiffs demonstrated a likelihood of success on their content-based-law claim. To understand this conclusion, an overview of the four most relevant cases is necessary—two of which directly address bans on conversion therapy, including SOCE counseling.

The first case is *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). *Pickup* addressed a California law banning SOCE counseling. *Id.* at 1221. The plaintiffs in *Pickup* included SOCE counselors, including David Pickup (also the plaintiff in this case), who claimed the California ban on SOCE counseling violated their free-speech rights under the First Amendment. *Id.* at 1224. *Pickup* held the state ban on SOCE counseling regulated conduct—not speech. *Id.* at 1229. *Pickup* then applied rational-basis review (meaning the law must bear a rational relationship to a legitimate state interest) to the California ban on SOCE counseling because any effect the ban had on the plaintiffs’ speech during SOCE counseling was “merely incidental.” *Id.* at 1231. Finding the state had a legitimate interest in protecting minors and the legislature reasonably relied on reports and opinions that asserted SOCE counseling was harmful and ineffective, *Pickup* held the state ban on SOCE counseling satisfied rational-basis review and was therefore constitutional. *Id.* at 1231–32.

The next case to consider is *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014). *King*, decided over eight months after *Pickup*, addressed a New Jersey law that banned SOCE counseling. *Id.* at 221–22. The plaintiffs in *King* also included counselors who brought free-speech claims under the First Amendment against the state law. *Id.* at 220–21. *King* disagreed with *Pickup* and held communications during SOCE counseling between the counselor and client are speech—not conduct—for First Amendment analyses. 767 F.3d at 224–29. *King* also held, however, speech during SOCE counseling is professional speech and laws prohibiting professional

speech “are constitutional only if they directly advance the state’s interest in protecting its citizens from harmful or ineffective practices and are no more extensive than necessary to serve that interest.” *Id.* at 223. *King* held the state ban was constitutional because the state had a substantial interest in protecting citizens from harmful professional practices; the legislature relied on substantial evidence when passing the state ban, including reports from professional and scientific organizations; and the plaintiffs provided no other adequate suggestion on how the state could protect minors. *Id.* at 236–40.

The first binding case most relevant here is the 2017 decision in *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc). *Wollschlaeger* addressed Florida law provisions prohibiting doctors and medical professionals from asking patients whether they had firearms in their homes. *Id.* at 1303. *Wollschlaeger* holds a communication between a doctor and a patient about ownership of firearms is speech under the First Amendment. 848 F.3d at 1307 (citing *King*’s holding that communication during SOCE counseling is speech under the First Amendment). *Wollschlaeger* further holds prohibiting doctors from discussing firearm ownership with their patients is a content-based law. *Id.* But *Wollschlaeger* declined to decide whether heightened-scrutiny analysis or strict-scrutiny analysis applied to the doctors’ speech about firearm ownership. *Id.* at 1308. Instead, *Wollschlaeger* did not need to reach strict-scrutiny analysis because the majority of the Eleventh Circuit, sitting en banc, concluded the prohibition on doctors asking about firearm ownership

failed heightened (intermediate) scrutiny because the challenged provision failed to address concerns identified by the six anecdotes the legislature relied on when passing the law. 848 F.3d at 1317.

The last, and most recent, case to consider is *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018). At issue in *NIFLA* was a California law requiring pregnancy centers to post a notice advising patients the state provided free or low-cost abortions for women. *Id.* at 2369. The plaintiffs, including pregnancy centers devoted to opposing abortion, claimed the California law violated their free-speech protections under the First Amendment. *Id.* at 2370. In *NIFLA*, a divided Supreme Court held the California law was content-based because the law altered the pregnancy centers’ speech by requiring the centers “to inform women how they can obtain state-subsidized abortion.” *Id.* at 2371.

NIFLA expressly rejected the analyses in *Pickup* and *King* recognizing “professional speech” as a separate category of speech subject to different constitutional analysis. *Id.* at 2371–72.⁷ Instead, professional speech is usually given less protection if it is commercial speech or if a law regulates professional conduct that incidentally involves speech. *NIFLA*, 138 S. Ct. at 2372. Although stating traditional strict-scrutiny analysis applies to a content-based law that regulates neither commercial speech nor conduct that incidentally involves speech, *NIFLA*

⁷ Although *NIFLA* rejected the free-speech analysis in *Pickup* and *King*, the Supreme Court denied petitions for writs of certiorari in *Pickup* and *King*. *Pickup v. Brown*, 134 S. Ct. 2871 (2014); *King v. Christie*, 135 S. Ct. 2048 (2015).

applied intermediate scrutiny to the California law requiring pregnancy centers to post notices. *See NIFLA*, 138 S. Ct. at 2375 (stating, “We need not [determine whether professional speech is exempt from ordinary First Amendment principles] because the licensed notice cannot survive even intermediate scrutiny”).

These four cases taken together indicate strict-scrutiny analysis applies to laws banning SOCE counseling. The Ninth Circuit’s holding in *Pickup* that SOCE counseling is conduct—not speech—was rejected by the Third Circuit in *King*, which held communications during SOCE counseling are speech under the First Amendment. 767 F.3d at 224–29. The Eleventh Circuit, sitting en banc, held in *Wollschlaeger* a doctor-patient communication about firearm ownership is speech under the First Amendment and approvingly cited *King*’s similar holding. 848 F.3d at 1307. And *NIFLA* held that traditional First Amendment analyses apply to professional speech that is neither commercial nor incidentally affected by a law regulating conduct. 138 S. Ct. at 2372.⁸

Importantly, the City and Equality Florida’s arguments that SOCE counseling is conduct and therefore Ordinance 2017-47 regulates conduct is undermined by the

⁸ *But see NIFLA*, 138 S. Ct. at 2373 (suggesting if speech is “tied to a procedure” it can be subject to content-based regulation) (citations omitted); *Planned Parenthood v. Casey*, 505 U.S. 845 (1992) (plurality) (rejecting free-speech claim under the First Amendment against state law that required doctors to give women information about abortion because the doctors’ free-speech rights were affected “only as part of the practice of medicine, subject to reasonable . . . regulation by the state”); *Pickup*, 740 F.3d at 1229 (stating the law prohibiting SOCE counseling “bans a form of treatment”).

language in Ordinance 2017-47 itself, which specifically refers to counseling as speech in a “whereas clause” adopted as part of Section One of the ordinance. (See Doc. 24-1, p. 4) (stating “courts found that counseling is professional speech, subject to a lower level of judicial scrutiny”); (Doc. 134-2, p. 10) (a city attorney’s PowerPoint presentation on code enforcement refers to conversion therapy as professional speech); (see also Doc. 52, p. 10) (acknowledging Equality Florida’s claim that it was “actively involved in the enactment of [Ordinance 2017-47]”).

Under *King*, *Wollschlaeger*, and Ordinance 2017-47, a communication during SOCE counseling is speech. Under *King* and *Wollschlaeger*, laws that ban certain communications between medical professionals and their patients are content-based laws. And under *NIFLA*, content-based laws that prohibit professional speech that is neither commercial nor incidentally affected by a law regulating conduct are subject to traditional First Amendment analyses. See also *Wollschlaeger*, 848 F.3d at 1323–27 (Wilson, J., concurring) (stating strict-scrutiny analysis applies to the state law that prohibited doctors from asking patients about firearm ownership). Therefore, applying this case law, Ordinance 2017-47 is a content-based law subject to strict-scrutiny analysis. The plaintiffs must therefore establish Ordinance 2017-47 is not narrowly tailored to promote a compelling governmental interest.

The undersigned will now analyze whether the plaintiffs are likely to succeed in proving Ordinance 2017-47 fails strict scrutiny.

i. Compelling Governmental Interest

The stated purpose of Ordinance 2017-47 is to protect the physical and psychological well-being of minors from harms caused by conversion therapy. (Doc. 24-1, p. 5). The government has a compelling interest in protecting the physical and psychological well-being of minors. *Sable Commc'ns of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). So, Ordinance 2017-47 serves a compelling governmental interest.

ii. Narrowly Tailored

A content-based law must be narrowly tailored to serve a compelling governmental interest. *Reed*, 135 S. Ct. at 2231 (citation omitted). To meet the narrow-tailoring requirement, the government must prove plausible alternatives, which burden less speech than the enacted law, would fail to achieve the government's interest. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (citation omitted); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (stating the Court considered less-restrictive alternatives when analyzing whether a law is narrowly tailored).

The court will not assume plausible alternatives will fail to protect compelling interests; "there must be some basis in the record, in legislative findings or otherwise, establishing the law as enacted as the least restrictive means." *Denver Area Educ. Telecommuc'ns Consortium, Inc. v. FCC*, 518 U.S. 727 807 (1996) (citations omitted) (Kennedy & Ginsburg, JJ., concurring in part, concurring in the judgment in part, dissenting in part). If a less restrictive means would serve the compelling

governmental interest, the government must use that alternative. *Playboy*, 529 U.S. at 813 (citations omitted).

The plaintiffs sufficiently demonstrated they are likely to succeed in proving Ordinance 2017-47 is not narrowly tailored to serve the City’s interest in protecting minors because the City considered no lesser restrictions on mental health professionals’ speech. The City’s designated party representative under Federal Rule of Civil Procedure 30(b)(6), who was also the City Council member who sponsored the ordinance, testified the City considered no alternatives to its total ban on conversion therapy. (Doc. 133-2, p. 98). Consistent with that testimony, the City put forward no evidence at the hearing to show it considered any alternatives to a complete ban on conversion therapy despite the ordinance’s language that minors “are not effectively protected by other means.” (Doc. 24-1, p. 5).

The plaintiffs, on the other hand, put forward suggested alternatives to Ordinance 2017-47’s total ban on conversion therapy—none studied or considered by the City. For example, the plaintiffs argue the City could have enacted a ban on involuntary SOCE counseling—as opposed to the voluntary, consensual counseling the plaintiffs provide. (Doc. 114, p. 22). The plaintiffs also suggest the City could have more narrowly banned aversive conversion therapy techniques, like electroshock therapy, while permitting the plaintiffs’ “speech-only talk therapy.”

(*Id.*)⁹ And the plaintiffs suggest the City could have required informed consent from minors and parents before a mental health counselor could provide SOCE counseling to a minor. (*Id.* at 31–32); *but see King*, 767 F.3d at 239–40 (finding an informed-consent requirement would not adequately protect minors).

The City failed to demonstrate how plausible alternatives, which the City apparently never considered before enacting Ordinance 2017-47, could not achieve the City’s compelling interest in protecting minors. The plaintiffs are likely to succeed in proving that Ordinance 2017-47 is not narrowly tailored to promote the City’s interest in protecting the physical and psychological well-being of minors. Therefore, the plaintiffs are likely to succeed on the merits on their claim that Ordinance 2017-47 is an unconstitutional content-based law under the First Amendment.

b. *Viewpoint-Discrimination Claim*

The plaintiffs sufficiently demonstrated they are likely to succeed on the merits of their First Amendment claim that Ordinance 2017-47 is viewpoint discrimination. Section IV(A)(2)(a) of this report discusses how Ordinance 2017-47 is a content-based

⁹ At the hearing on the plaintiffs’ motion for preliminary injunction, the City argued it determined both aversive and non-aversive conversion therapies threatened the well-being of minors; so, a ban on just aversive techniques is not plausible. The City’s argument, however, is undermined by Ordinance 2017-47’s legislative findings, which make no distinction between aversive and non-aversive techniques. (*See* Doc. 24-1, pp. 2–6) (listing the City’s findings). Further, the City’s designated party representative testified he did not know what the terms “aversive therapy” and “non-aversive therapy” meant. (Doc. 133-2, p. 36).

law for which the City considered no alternatives. These facts also sufficiently demonstrate the plaintiffs' claim that the City adopted Ordinance 2017-47 because the City disagreed with the viewpoint mental health counselors express during SOCE counseling. (*See also* Doc. 24-1, p. 6) (prohibiting counseling aimed at "chang[ing] . . . gender identity, or gender expression" while allowing counseling "that provides support and assistance to a person undergoing gender transition"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted) (stating viewpoint discrimination occurs when the government targets specific views on a subject); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (citations omitted) (stating content-based laws can be viewpoint discriminatory). The plaintiffs therefore sufficiently demonstrated they are likely to prove Ordinance 2017-47 is unconstitutional viewpoint discrimination.

c. Unconstitutionally-Overbroad Claim

The plaintiffs similarly demonstrated they are likely to succeed on the merits of their claim that Ordinance 2017-47 is overbroad. A law is overbroad when every application of the law creates the risk that ideas might be suppressed, such as when the law gives overly broad discretion to the person enforcing it. *Nationalist Movement*, 505 U.S. at 129–30 (citations omitted); *Catron v. City of St. Petersburg*, 658 F.3d, 1260, 1269 (11th Cir. 2011). Because the plaintiffs are likely to succeed in proving Ordinance 2017-47 constitutes viewpoint discrimination, the plaintiffs are likely to prove that every application of the ordinance creates the risk ideas might be

suppressed. In other words, if the City adopted Ordinance 2017-47 because it disagreed with the ideas expressed during SOCE counseling, every application of Ordinance 2017-47 creates the risk the ideas expressed during SOCE counseling might be suppressed. Therefore, the plaintiffs demonstrated they are likely to succeed on the merits of their claim that Ordinance 2017-47 is overbroad.

d. Prior-Restraint Claim

The plaintiffs also sufficiently demonstrated Ordinance 2017-47 restricts the plaintiffs' speech during SOCE counseling before they can express it. *See Black's Law Dictionary* 1387 (10th ed. 2014) (defining prior restraint on speech as a government restriction on speech before its expression); *Foryth Cty. v. Nationalist Movement*, 505 U.S. 123, 129–30 (1992) (citations omitted) (stating there is a “heavy presumption” against prior-restraint laws). So, the plaintiffs sufficiently demonstrated a likelihood of success on the merits of their claim that Ordinance 2017-47 is an unconstitutional prior restraint on the plaintiffs' free speech.

e. Unconstitutionally-Vague Claim

The plaintiffs sufficiently demonstrated a likelihood of success on the merits of their claim that Ordinance 2017-47 is unconstitutionally vague. A plaintiff who claims that a law is unconstitutionally vague must prove either (1) the law fails to provide people of ordinary intelligence to understand what conduct the law prohibits or (2) the law authorizes or encourages arbitrary and discriminatory enforcement. *Konikov v. Orange Cty.*, 410 F.3d 1317, 1329 (11th Cir. 2005) (citations omitted). The

plaintiffs sufficiently demonstrated the City adopted Ordinance 2017-47 because it disagreed with the ideas and messages expressed during SOCE counseling. The ordinance therefore authorizes and encourages discriminatory enforcement by code enforcement officers (who may or may not have any medical or mental health counseling training) against the viewpoints of mental health professionals who provide SOCE counseling. So, the plaintiffs established a likelihood of success on the merits on their claim that Ordinance 2017-47 is unconstitutionally vague.

B. Irreparable Harm

The plaintiffs argue they are suffering irreparable harm because of Ordinance 2017-47 and will continue to do so without a preliminary injunction. (Doc. 85, p. 24; Doc. 114, pp. 27–29).

The City and Equality Florida argue the plaintiffs failed to demonstrate they will suffer irreparable harm without an injunction because the plaintiffs waited almost eight months after the ordinance’s enactment to begin this lawsuit and repeatedly delayed in seeking injunctive relief. (Doc. 98, pp. 3–4; Doc. 99, pp. 28–30; Doc. 143, pp. 3–4).

The party requesting an injunction must demonstrate he or she will likely suffer irreparable harm without an injunction. *Winter*, 555 U.S. at 22 (citations omitted). A party’s months-long delay in seeking a preliminary injunction “militates against a finding of irreparable harm.” *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Preliminary injunctions are meant to provide “speedy

and urgent action to protect a plaintiff's rights before a case can be resolved on the merits." *Wreal*, 840 F.3d at 1248 (citations omitted). That said, the Supreme Court instructs the loss of First Amendment freedoms constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373–74 (citation and footnote omitted).

Section II of this report illustrates the plaintiffs' months-long delay in seeking injunctive relief against Ordinance 2017-47. The plaintiffs' actions in this litigation repeatedly prevented a decision on their motion for preliminary injunction. These actions would normally weigh heavily against finding a likelihood of irreparable injury without an injunction. But the plaintiffs demonstrated they are likely to succeed on the merits of most of their First Amendment free-speech claims. Because of the seemingly automatic conclusion of irreparable injury in a First Amendment action, the plaintiffs sufficiently demonstrated they will likely be irreparably harmed without an injunction.

C. Balance of Equities

The plaintiffs argue the balance of equities tips in their favor because the City will not be harmed if enforcement of Ordinance 2017-47 is enjoined. (Doc. 85, p. 25; Doc. 114, pp. 29–30).

The party moving for a preliminary injunctive must demonstrate the balance of equities tips in his or her favor. *Winter*, 555 U.S. at 20. In other words, the threatened injury to the plaintiff must outweigh any harm the defendant might suffer. *Gen. Contractors*, 896 F.2d at 1284 (citations omitted); *see also Benisek v.*

Lamone, 138 S. Ct. 1942, 1944 (2018) (stating that years-long delay in seeking preliminary injunctive relief weighs against the plaintiff when considering balance of equities).

The plaintiffs sufficiently demonstrated their First Amendment rights will be irreparably harmed without a preliminary injunction. The City, however, failed to show any harm it may suffer if enforcement of Ordinance 2017-47 is enjoined. The City and Equality Florida instead focus on potential harm to non-defendants, especially minors, if the ordinance is enjoined. (Doc. 98, pp. 4–8; Doc. 99, pp. 30–35; Doc. 143, pp. 4–5). But the public interest is a separate factor in determining whether the court should grant a preliminary injunction. *Winter*, 555 U.S. at 20. Further, a “city has no legitimate interest in enforcing an unconstitutional ordinance.” *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Therefore, the balance of equities tips in the plaintiffs’ favor because the City failed to show any harm it would suffer if enforcement of Ordinance 2017-47 is enjoined and the City has no legitimate interest in enforcing an ordinance likely to be ruled unconstitutional.

D. Public Interest

The plaintiffs argue enjoining Ordinance 2017-47 is in the public interest because the ordinance is unconstitutional and the City presented no evidence of minors being harmed by SOCE counseling within city limits. (Doc. 85, p. 25; Doc. 114, pp. 29–30). The City and Equality Florida argue enjoining Ordinance 2017-47

is against the public interest because minors could be potentially harmed by conversion therapy while enforcement of the ordinance is enjoined. (Doc. 98, pp. 4–8; Doc. 99, pp. 30–35; Doc. 143, pp. 4–5).

The plaintiffs sufficiently demonstrated Ordinance 2017-47’s overbroad prohibition on non-coercive, non-aversive SOCE counseling consisting entirely of speech or “talk therapy” is likely unconstitutional. The public has no interest in enforcing an unconstitutional ordinance. *KH Outdoor*, 458 F.3d at 1272–73 (citations omitted). Further, the City and Equality Florida’s argument that minors will be harmed by SOCE counseling if Ordinance 2017-47 is enjoined is undermined by the fact the City received no complaints related to any minor harmed by SOCE counseling within the city limits. (Doc. 132-1, p. 8). In the absence of any harm to the public, the plaintiffs, therefore, sufficiently demonstrated it is in the public’s interest to enjoin Ordinance 2017-47’s prohibition on SOCE counseling.

E. Limited Injunction

An injunction should be no broader than necessary to avoid the harm on which the injunction is based. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (discussing how traditional courts of equity had discretion to “tailor a remedy” to the issue before the court); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 933 n.81 (D.C. Cir. 1984) (discussing limited injunctions in the context of international litigation); *Uber Promotions, Inc. v. Uber Tech., Inc.* 162 F. Supp. 3d 1253, 1281–82 (N.D. Fla. 2016) (granting limited preliminary injunction

narrowly tailored to address the harm to the plaintiff); *Occupy Ft. Myers v. City of Ft. Myers*, 882 F. Supp. 2d 1320, 1339 (M.D. Fla. 2011) (granting limited injunction that enjoined parts of city ordinance found likely to violate the First Amendment in Section 1983 case).

The plaintiffs here repeatedly state that if Ordinance 2017-47 only banned aversive conversion-therapy techniques, like electroshock therapy, the plaintiffs would not be challenging the ordinance's constitutionality because Messrs. Vazzo and Pickup only provide non-aversive therapy. (*See, e.g.*, Doc. 114, p. 3) (stating the plaintiffs would not have filed this lawsuit if the ordinance only banned aversive therapy because Messrs. Vazzo and Pickup do not provide that therapy).

The City and Equality Florida also sufficiently demonstrated minors in the city limits could be harmed by techniques like electroshock therapy if enforcement of Ordinance 2017-47 is completely enjoined. (*See, e.g.*, Doc. 98, p. 6) (discussing dangers of coercive conversion therapy).

The lack of harm to the plaintiffs' First Amendment rights if Ordinance 2017-47's ban on aversive conversion therapy remains and the possible harm to minors if the ordinance is completely enjoined weigh in favor of a limited injunction. The court should preliminarily enjoin the enforcement of Ordinance 2017-47 to the extent the City may not enforce the ordinance against mental health professionals who provide non-coercive, non-aversive, SOCE counseling—which consists entirely of speech, or “talk therapy”—to minors within the city limits. This type of limited injunction will

balance the plaintiffs' First Amendment rights and the health and safety of minors within the city limits.

V. CONCLUSION

The plaintiffs failed to establish a likelihood of success on the merits of their claims that the City lacks authority to enact Ordinance 2017-47 (Count VI). The court should not grant a preliminary injunction on that basis.

But the plaintiffs established a likelihood of success on the merits of most of their First Amendment claims against Ordinance 2017-47 in Count I. The plaintiffs also demonstrated irreparable harm without an injunction; the balance of equities tips in the plaintiffs' favor; and partially enjoining enforcement of Ordinance 2017-47 is in the public interest. Therefore, the plaintiffs' motion for preliminary injunction (Doc. 85) should be **GRANTED-IN-PART** and **DENIED-IN-PART** as follows:

1. The plaintiffs' motion for preliminary injunction should be **GRANTED** to the extent that the City should be enjoined from enforcing Ordinance 2017-47 against mental health professionals who provide non-coercive, non-aversive SOCE counseling—which consists entirely of speech, or “talk therapy”—to minors within the city limits.
2. The plaintiffs' motion for preliminary injunction should be **DENIED** to the extent that the plaintiffs seek to completely enjoin the enforcement of Ordinance 2017-47.

3. If the court agrees a limited preliminary injunction should issue, in its order, the court should require the plaintiffs to provide a proposed preliminary injunction order consistent with the court's order, Local Rules 4.06(b)(1), 4.05(b)(3)(iii), and Federal Rule of Civil Procedure 65(d).

RECOMMENDED in Tampa, Florida, on January 30, 2019.



AMANDA ARNOLD SANSONE
United States Magistrate Judge

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days from the date of this service bars an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. § 636(b)(1).