

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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

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

Plaintiffs,

vs.

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

Defendants.

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**UNOPPOSED MOTION FOR LEAVE TO FILE RESPONSE TO PLAINTIFFS' NOTICE  
OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PRELIMINARY INJUNCTION**

Defendant, City of Boca Raton ("City"), moves this Court for an order allowing it to respond to Plaintiffs' Notice of Supplemental Authority in Support of Preliminary Injunction [DE 138] (the "Notice"), and states:

1. Plaintiffs purported to provide the Court with the "supplemental authority" of two magistrate judge's recommended orders from an unrelated case pending in the Middle District of Florida on January 30, 2019 [DE 138].

2. Far from simply providing the Court with copies of the referenced recommended orders, however, the Notice is, in fact, a four-page memorandum that attempts to explain why those recommended orders are relevant to this case, and argument that attempts to explain why those recommended orders support Plaintiffs' position herein.

3. While the recommended orders attached to the Notice may have been appropriate for submission, the four pages of explanation and argument are not. *See Barron v. Snyder's-Lance, Inc.*, 2014 WL 2686060, \*2 (S.D. Fla. 2014) (Striking a notice of supplemental authority (but accepting the cases attached to the notice) because “[t]wo pages of quotations and Plaintiffs’ gloss as to the meaning of these cases do not constitute ‘brief statements.’ Moreover, because Plaintiffs’ Notice contains legal argument, it has, for all intents and purposes, prompted additional rounds of briefing”).

4. For purposes of equity, the City should be entitled to briefly respond to the Notice. The City’s proposed response is appended hereto as Exhibit “A.”

5. The undersigned has conferred with all parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues raised in the motion. Horatio Mihet, Esq., counsel for Plaintiffs and Rachel Fahey, Esq., counsel for Codefendant, County of Palm Beach, Florida, do not oppose this motion.

WHEREFORE, the City respectfully requests that the Court accept the City’s Response to Plaintiffs’ Notice of Supplemental Authority, appended hereto as Exhibit “A.”

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 12, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Daniel L. Abbott  
Daniel L. Abbott

**SERVICE LIST**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 18-CIV-80771-RLR**

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**RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendant, City of Boca Raton ("City"), files this its Response to Plaintiffs' Notice of Supplemental Authority [DE 138] (the "Notice"), and states:

1. The Reports and Recommendations appended to the Notice are not "decisions issued ... by the United States District Court for the Middle District of Florida" (Notice at p. 1). Instead, they are magistrate judge reports and recommendations. The "decisions" will be made, de novo, by the district court judge. Indeed, in anticipation of the defendant's objections to those recommended orders, the district judge has already ordered a briefing schedule. *Vazzo et. al. v. City of Tampa*, Case No. 8:17-cv-2896-T-02AAS, M.D. Fla. [DE 151].

2. The primary, preliminary issue to be determined in both *Vazzo* and the instant case is whether the challenged ordinances regulate speech, or whether they instead regulate conduct. The magistrate in *Vazzo* recognized that an ordinance that regulates conduct, rather than speech

(or only regulates speech incidentally) will withstand First Amendment challenge. *See* Ex. B to the Notice, at p. 25, fn 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’).

3. The magistrate judge in *Vazzo* rejected Tampa’s “conduct” argument because

Importantly, the City and Equality Florida’s arguments that SOCE counseling is conduct and therefore Ordinance 2017-47 regulates conduct is undermined by the 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)....<sup>1</sup>

Ex. B to the Notice, at pp. 25-6.

4. The City (of Boca Raton) ordinance, in stark contrast, *does not* refer to counseling as speech. Instead, the City ordinance legislatively determined that “prohibition of SOCE does not violate first amendment rights,” [DE 104 at p. 4], and bases that finding on *Pickup v. Brown*, 740 F.3d 1208 (9<sup>th</sup> Cir. 2014), which expressly held that a SOCE ban was a permissible regulation of conduct, rather than speech [*id.*]. The City Ordinance expressly (and only) makes it unlawful for “any provider to practice conversion therapy.” [DE 104 at p. 7].

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<sup>1</sup> Indeed, it is not clear how the City of Tampa was even able to present a “conduct” justification for its ordinance. In its motion to dismiss, “[t]he City [of Tampa] argues [its] Ordinance ... is constitutional because it satisfies intermediate scrutiny.” *See* Ex. A to the Notice, at p. 11.

5. Thus, Plaintiffs are mistaken when they contend “Tampa’s ordinance banning SOCE counseling for minors ... is **virtually identical** to the Ordinances before this Court.” Notice at p. 1 (emphasis in original). In the most critical of respects, the Tampa ordinance is **virtually opposite** the City’s Ordinance, insofar as speech versus conduct implications are involved. Indeed, insofar as the *Vazzo* magistrate decided that the “speech or conduct” question turned on the legislative findings of the City that imposed the SOCE ban (and she apparently did), the magistrate’s recommended order supports denial of Plaintiffs’ motion for preliminary injunction.

Respectfully submitted,

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