IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, DAVID H. PICKUP, LMFT, individually and on behalf of his patients, and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY, individually and on behalf of its members, constituents and clients,

Plaintiffs,

v.

CITY OF TAMPA, FLORIDA,

Defendant.
_____/

Case No. 8:17-cv-02896-T-02AAS

DEFENDANT, CITY OF TAMPA'S, OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION ON MOTION TO DISMISS

Defendant, City of Tampa, Florida (the "City" or "Defendant"), by and through the undersigned counsel and pursuant to Federal Rule of Civil Procedure Rule 72(a), 28 U.S.C. § 636(b)(1), and Local Rule 6.02(a), files this Objection to the Report and Recommendation (Doc. 148) of the Honorable Magistrate Judge on the City of Tampa's Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 84).*

I. Introduction

"[T]his case presents a conflict between one of society's most cherished rights—freedom of expression—and one of the government's most profound obligations—the protection of

* Many of the points made in the City's Objections to the Magistrate Judge's Report and Recommendation with respect to Plaintiffs' Motion for Preliminary Injunction are repeated here. However, to achieve brevity, any of those points are set forth in this submission and incorporated by reference.

minors." District Court Judge Robin Rosenberg recognized the dueling obligations of this case at the outset of her recent decision in *Otto v. City of Boca Raton, Fla.*, No. 9:18-CV-80771, 2019 WL 588645, at *1 (S.D. Fla. Feb. 13, 2019) (quoting *American Booksellers v. Webb*, 919 F. 2d 1493, 1495 (11th Cir. 1990)). Because there is overwhelming evidence that conversion therapy is contraindicated and harmful to minors, the City has a compelling governmental interest to protect this vulnerable class from the practice of conversion therapy and the Ordinance serves to protect minors from this harmful practice.

The City moved to dismiss all counts of the Amended Complaint because it fails to state a claim upon which relief can be granted and should be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). The Report and Recommendation denied the City's Motion to Dismiss as to Count I, Count II, Count IV, Count VI, and Count VIII. This Court should not adopt the Report and Recommendation for the reasons discussed below.

II. *DeNovo* Review

As a preliminary matter, in the Eleventh Circuit, a district judge may accept, reject or modify the Magistrate Judge's Report and Recommendation after conducting a careful and complete review of the findings and recommendations. 28 U.S.C. § 636(b)(1); *see Williams v. Wainright*, 681 F.2d 732 (11th Cir. 1982). A district judge "shall make a *de novo* determination of those portions of the report or specify those findings or recommendations to which the objection is made." 28 U.S.C. § 636(b)(1). Accordingly, this requires the district judge to "give fresh consideration to those issues to which the specific objection has been made by a party." *Jeffrey S. v. State Bd. of Educ.,* 896, F. 2d 507, 512 (11th Cir. 1990) (quoting H. R. 1609, 94th Cong. § 2 (1976)).

III. Rule 72 Requirements

Federal Rule of Civil Procedure 72 requires that all objections to the Magistrate Judge's Report and Recommendation be both timely and specific. Accordingly, the City's objections are set forth below in accordance with those requirements.

IV. Lack of Standing

As Judge Rosenberg ruled in her recent Order, although the Plaintiffs had standing in that case, the minor clients did not. The City agrees with that analysis and, therefore, objects to the Report to the extent that the Magistrate Judge concluded that Plaintiffs' clients have standing in this case.

V. Objection to Report and Recommendation as to Count I

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 fails to state a plausible claim for relief when the plaintiff's claims fail as a matter of law. *See GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1266 (11th Cir. 2012).

A. Content-Based Discrimination

The Magistrate Judge found that Plaintiffs' Amended Complaint sufficiently alleges that Ordinance 2017-47 violates Plaintiffs' First Amendment right to freedom of speech. The Report and Recommendation finds that the Plaintiffs sufficiently pleaded that Ordinance 2017-47 is a content-based law and fails strict-scrutiny analysis. However, the Ordinance is a ban on the practice of conversion therapy and, not a ban on speech as speech. Plaintiffs are perfectly free to share their views on conversion therapy to minors but they are prohibited from conducting the treatment of conversion therapy on minors. Here, Plaintiffs allegations that the Ordinance is a content-based law because it prohibits licensed mental health professionals from providing

conversion therapy and also prohibits Plaintiffs' speech, fails as a matter of law and is, therefore, insufficient to withstand a Rule 12(b)(6) motion.

This case turns on the government's compelling interest to protect minors from a harmful counseling treatment. In this regard, this case is analogous to *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 884 (1992). *Casey* involved a First Amendment challenge to a state law requiring doctors to provide certain information to patients seeking abortions. The Supreme Court in *Casey* held that the Pennsylvania law at issue was constitutional and did not abridge the First Amendment. The Court in *Casey* specifically discussed the First Amendment as it applied to the context of that case. The Court concluded that the statute did not violate the First Amendment because:

> All that is left of Petitioner's argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and child birth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated [citation omitted], but only as part of the practice of medicine subject to reasonable licensing and regulation of the State [citation omitted, emphasis added]. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Casey* at 884.

Like the regulation in *Casey*, the Ordinance does not in any way restrict "speech as speech." Indeed, if there is any restriction on speech at all, it is "only as part of the practice of medicine." *Casey* at 2373-74. The Court's constitutional reasoning in *Casey* is the same reasoning that the Magistrate Judge should have applied in this case because it cannot be credibly argued that the City Council enacted the Ordinance to regulate pure speech as speech. Therefore, the Ordinance is not a content-based ordinance and the Plaintiffs fail as a matter of law to state a claim for relief.

B. Plaintiffs' Viewpoint-Discrimination Theory

The Magistrate Judge found that Plaintiffs sufficiently pleaded a claim for viewpoint discrimination. The Report and Recommendation, however, declined to apply the rationale

employed in by the Eleventh Circuit in *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011). *Keeton* involved a graduate student who alleged violations of her First Amendment free speech and free exercise rights. In affirming the denial of a motion for preliminary injunction, the Eleventh Circuit recognized that requiring adherence to professional standards prohibiting conversion therapy does not constitute viewpoint discrimination. Here, the purpose of the Ordinance is to protect the physical and psychological well-being of minors from a particular treatment that has been contraindicated and particularly harmful to minors. (Doc. 24-1) Any reference to SOCE is to identify the subject matter or type of harmful therapy the Ordinance is directed to curtail to serve the City's compelling interest in protecting a particularly vulnerable group—minors. The Ordinance makes it unlawful for a provider to "*practice* conversion therapy efforts on any individual who is a minor" but does not prohibit discussion of gender identity or sexual orientation conversion with a minor. (Doc. 24-1, emphasis added.) Thus, to emphasize again, it is the practice of conversion therapy on minors that is prohibited, not the speech or viewpoint of Plaintiffs' about their views about gender identity or sexual orientation. Therefore, the Court should find that the Plaintiffs have failed to state a plausible claim for viewpoint-discrimination because the Ordinance does not discriminate against Plaintiffs views on conversion therapy.

C. Unconstitutionally Vague Claim

The Magistrate Judge also found that the Plaintiffs sufficiently pleaded a claim that the Ordinance 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 Ordinance is not unconstitutionally vague as it sufficiently details which conduct is prohibited and which conduct is allowed. People with ordinary intelligence would understand what conduct the law prohibits. Conversion therapy is defined in the Ordinance as "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 to reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex." (Doc. 24-1). Accordingly, the Court should find that Plaintiffs failed to adequately allege ultimate facts demonstrating that the Ordinance is unconstitutionally vague.

D. Unconstitutionally Overbroad Claim

The Magistrate Judge found that the Plaintiffs' Amended Complaint sufficiently alleges that the Ordinance is unconstitutionally overbroad. "[A] party [may] challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker...." *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1269 (11th Cir. 2011) (quoting *Forsyth Cnty. v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 2401, 120 L.Ed.2d 101 (1992)). Because the Ordinance does not create a risk of suppressing Plaintiffs' ideas about conversion therapy but, instead, only prohibits the practice of performing conversion therapy on minors, the Court should find that the Ordinance is not unconstitutionally overbroad. Therefore, the Court should find that Plaintiffs failed to state a claim that the Ordinance is overbroad.

E. Prior-Restraint Claim

Last, the Magistrate Judge found that Plaintiffs' Amended Complaint sufficiently alleged that the Ordinance is an unconstitutional prior restraint on Plaintiffs' free speech. Prior restraint

has been defined "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 2771, 125 L. Ed. 2d 441 (1993). A prior restraint forbids certain communications before they occur, which is distinguishable from a subsequent punishment for prior speech. *Alexander*, 509 U.S. at 553–54 ("[O]ur decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments."). The Ordinance is not a prior restraint because it does not regulate communications or speech before it occurs. Instead, it prohibits the practice of conversion therapy on minors and provides for a penalty only after such practice has occurred. Since the Ordinance is not a prior-restraint but a punishment for engaging in conversion therapy on minors, Plaintiffs failed to state a claim for relief that the Ordinance is an unconstitutional prior restraint. Accordingly, the City requests that this Court find that Plaintiffs failed to state a claim that the Ordinance is a prior restraint.

CONCLUSION

For the above reasons, the Court should not adopt the Report and Recommendation of the Magistrate Judge and should enter its Order consistent with the City's above objections.

REQUEST FOR ORAL ARGUMENT

Defendant, City of Tampa, requests oral argument in connection with its above-stated objections.

Dated this 16th day of February, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of February, 2019, I caused a true and correct copy of the foregoing to be served via electronic mail on counsel for Plaintiff, Horatio G. Mihet (hmihet@lc.org), Roger Gannam (rgannam@lc.org), and Daniel J. Schmid (dscmid@lc.org).

/s/ Robert V. Williams
Attorney