

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,

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

Plaintiffs,

v.

CITY OF TAMPA, FLORIDA,

Defendant.

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**DEFENDANT, CITY OF TAMPA'S, OBJECTIONS TO MAGISTRATE'S  
REPORT AND RECOMMENDATION REGARDING PLAINTIFF'S  
MOTION FOR PRELIMINARY INJUNCTION**

Defendant, City of Tampa, Florida ("The City" or "Defendant"), by and through the undersigned counsel and pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, 28 U.S.C. § 636(b)(1) and Local Rule 6.02(a), M. D. Fla. R., files this Objection to the Report and Recommendation (Dkt. 149) of the Honorable Magistrate Judge regarding Plaintiffs' Motion for Preliminary Injunction enjoining the City of Tampa from enforcing Ordinance 2017-47 (Dkt. 85, 145), (the "Ordinance"). The Report and Recommendation granting Plaintiffs' Motion for Preliminary Injunction should not be followed and the Plaintiffs' Motion for Preliminary Injunction should be denied.

## I. DeNovo Review

As a preliminary matter, in the Eleventh Circuit, a district judge may, after conducting a careful and complete review of the findings and recommendations, accept, reject or modify the Magistrate Judge’s Report and Recommendation. 28 U.S.C. § 636(b)(1); see *Williams v. Wainright*, 681 F.2d 732 (Eleventh 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 of which the specific objection has been made by a party.” *Jeffrey S. v. State Bd. of Educ.*, 896 F. 2d 507, 512 (11<sup>th</sup> Cir. 1990) (quoting H. R. 1609, 94<sup>th</sup> Cong. § 2 (1976)).

## II. Introduction

“[T]his case presents a conflict between one of society’s cherished rights – freedom of expression – and one of the government’s most profound obligations – the protection of minors.” District Court Judge Robin Rosenberg at the outset of her recent decision in *Otto v. City of Boca Raton, Fl.*, N.O. 9:18-CV-80771, 2019 WL 588645, at \*1, (S.D. Fla. Feb. 13, 2019) citing *American Booksellers v. Webb*, 919 F. 2d 1493, 1495 (11<sup>th</sup> Cir. 1990). As Judge Rosenberg goes on to state that “At its core, this case is about whether Defendants can prohibit the licensed therapists from administering SOCE therapy to minors where the available medical and subject matter literature concludes that the therapy is harmful to minors.” The City of Tampa agrees with Judge Rosenberg’s description and given the substantive identity between this case and the *Otto* case, adopts them in full. But, while Judge Rosenberg’s description is certainly an accurate description, nevertheless, this case, along with the *Otto* case, is also a case of first impression in the Middle District of Florida and, for that matter, the Eleventh Circuit.

Because there is overwhelming evidence that conversion therapy, with respect to minors, is harmful, even dangerous, there is ample precedent supporting a governmental ban on the practice of conversion therapy. Nonetheless, Plaintiffs seek the entry of a preliminary injunction enjoining the enforcement of the Ordinance because, according to their Amended Complaint, it violates the Plaintiffs' freedom of speech under the First Amendment to the United States Constitution. The City's objections, set forth below, are addressed to specific aspects of the Report and Recommendation submitted by the Magistrate Judge of the Plaintiffs' case and, therefore, the City's objections will focus first and foremost on the Plaintiffs' First Amendment claims.

### **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.

In the Report and Recommendation the Magistrate Judge addresses each of the four requirements for entering a preliminary injunction; thus, the City's objections will follow the same outline. The Report and Recommendation initially notes that the Plaintiffs' Motion for Preliminary Injunction focuses on only two of the eight claims in their First Amended Complaint. Specifically, those two claims are Count I (Free Speech Claims Under the First Amendment), and Count VI (The City Lacks the Authority to Enact Ordinance 2017-47 under the Florida Constitution). The Magistrate Judge rejected the Plaintiffs' claim for relief alleged in Count VI and, thus, the City's objections apply only to the remaining Count I of Plaintiffs' First Amended Complaint.

#### **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. Requirements for Entering Preliminary Injunction**

##### **A. Likelihood of Success on the Merits**

In her report, the Magistrate Judge observes that the Plaintiffs' First Amended Complaint asserts six theories to justify their argument that the Ordinance is unconstitutional. More specifically, the Magistrate Judge identifies those theories as:

1. The Ordinance is an unconstitutional content-based law
2. The Ordinance commits view point discrimination
3. The Ordinance is unconstitutionally vague
4. The Ordinance is unconstitutionally overbroad
5. The Ordinance is underinclusive; and
6. The Ordinance is an unconstitutional prior restraint on free speech. (Dkt. 149, pg. 19).

As it relates to the Report and Recommendation's findings and conclusions with respect to the first requirement, likelihood of success on the merits, the City objects to the Report and Recommendation with respect to five of these theories.<sup>1</sup> Each of these theories will be addressed in turn.

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<sup>1</sup> This theory does not appear to be a significant issue in the Magistrate Judge's Report.

### 1. Plaintiffs' Content Based Law Theory

The Magistrate Judge concluded that the Ordinance is a content-based law subject to strict scrutiny analysis. To reach this conclusion the Magistrate Judge reviewed the relevant prior case law, specifically *Pickup v. Brown*, 740 F. 3d., 1208 (9<sup>th</sup> Cir. 2014), *King v. Governor of New Jersey*, 767 F.3d 216 (3<sup>rd</sup> Cir. 2014), *Wollschlaeger v. Governor, Florida*, 848 F. 3d 1293 (11<sup>th</sup> Cir. 2017) (*en banc*) and, finally, *Nashville Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S.Ct. 2361 (2018).<sup>2</sup>

Addressing binding Eleventh Circuit law first, the Magistrate Judge also misapplied Eleventh Circuit law as set forth in *Wollschlaeger, supra*, to support her conclusion that the Ordinance creates an unconstitutional content-based speech restriction. *See* PI R&R at 26. *Wollschlaeger* struck down a state law that barred physicians from asking patients about gun ownership and therefore directly prohibited all speech between doctors and patients about a particular health-related subject. There is no such restriction here. Under the Ordinance, licensed therapists are entirely free to speak with their patients about sexual orientation, gender identity, and conversion therapy, and to express any views they may have about them. The Ordinance only prohibits them from *performing* a particular form of harmful mental health treatment – one that often continues for months or even years – on minor patients.

*Wollschlaeger* does not stand for the broad proposition that any regulation of the speech used by health care providers during medical treatment must be subjected to strict scrutiny. In fact, the Court in *Wollschlaeger* acknowledged the distinction between (1) regulations like the gun law, which directly prohibited speech “about” a medical topic and (2) regulations like California’s

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<sup>2</sup> Although the Magistrate Judge discussed both *Pickup* and *King*, in order to avoid unnecessary repetition of the City’s prior arguments with respect to those decisions, the City’s objection on this theory will focus on binding precedent only i.e., *Wollschlaeger* and *NIFLA*.

conversion therapy law, which regulate a particular medical treatment itself. *See* 848 F.3d at 1309. “Importantly, . . . the law in *Pickup* [the California law prohibiting licensed professionals from practicing conversion therapy on minors] —like the law in *Locke*—did not restrict what the practitioner could say or recommend to a patient or client.” *Id.*

Unlike the gun law, the Ordinance does not regulate speech because it is about a particular topic; rather it regulates speech only when it is used in conjunction with a particular medical treatment on minor patients. That is entirely consistent with the distinction the Supreme Court recognized in *Casey* and expressly affirmed in *NIFLA*, as well as with the Eleventh Circuit’s holding in *Keeton*, i.e., that requiring a student to comply with professional counseling standards does not violate the First Amendment. As these controlling precedents acknowledge, there is a significant and, indeed, dispositive difference between preventing a medical professional from talking about a particular medical issue and barring a medical professional from performing a dangerous treatment that authorities in the field have found to be dangerous.

Here, the only speech barred by the Ordinance is “*the manner of delivering the treatment*.” Plaintiffs are essentially writing a prescription for a treatment that will be carried out verbally.” *Otto*, 2019 WL 588645, at \*15 (emphasis in original). Consistent with *Wollschlaeger*, Judge Rosenberg correctly relied on the critical distinction between laws that, for example, “prohibit[] *discussion* of gun ownership with patients” or “*recommend[ing]* marijuana for medical use,” and those that, like the Ordinance, prohibit specific “[medical] treatments that are effectuated through speech.” *Id.* at \*14, \*15 (emphasis in original). Respectfully, the Magistrate Judge’s failure to apply this very significant distinction was error.

Finally, in *Wollschlaeger*, the record showed that the gun law was enacted to protect gun rights, not to protect patient health and safety. The court observed that there was “no claim, much

less any evidence, that routine questions to patients about the ownership of firearms are medically inappropriate, ethically problematic, or practically ineffective.” *Id.* at 1316. To the contrary, the law invalidated in *Wollschlaeger* required doctors to depart from professional guidelines recommended by the American Medical Association and the American Academy of Pediatrics. *Id.* (Emphasis supplied.)

Here, the Ordinance is consistent with the consensus of mental health professional associations that conversion therapy of any kind is not only ineffective, but poses a risk of serious harm to minors.

Although the Magistrate Judge’s analysis did consider *Pickup* and *King* in addition to *Wollschlaeger*, ultimately it was her reading and application of the Supreme Court’s holding in *NIFLA* that led to her conclusion that the Ordinance is a content-based law and, therefore, subject to strict-scrutiny analysis under the First Amendment. In reaching this conclusion, the Magistrate Judge misapplied the Supreme Court’s opinion in *NIFLA* by failing to recognize that the Ordinance is, on its face, a regulation of a specific counseling process, not a regulation of pure speech. Stated differently, the Ordinance is a ban on conversion therapy treatment that licensed mental health counselors provide to their minor clients, but not a wholesale ban on speech related to sexual orientation, gender identity, or any related topic. This distinction is important not only as a starting point for understanding *NIFLA*’s relevance to this case but in determining the applicable level of First Amendment scrutiny.

As the Magistrate Judge recognized, courts should be very reluctant to overturn the will of the people as expressed through its elected officials. This, the City submits, is a bedrock rule of law that is at the core of our republican form of government. When the City Council unanimously voted to pass the Ordinance, it did so based on overwhelming evidence that conversion therapy is

harmful, and possibly even fatal, to minor patients receiving that therapy. In fact, in footnote 8 of her Report, the Magistrate Judge noted that under *NIFLA* suggests if speech is tied to the provision of a specific medical (counseling) procedure, its regulation is “content-based”. But *NIFLA* also confirmed the government’s long-standing authority to regulate the practice of medicine (which would include counseling) even when such regulations implicate speech as a part of a particular medical treatment or procedure. *NIFLA* at 2372. Even more to the point, the *NIFLA* Court specifically acknowledged the Court’s prior decision applying only a rational basis review to a “law that ‘regulated speech’ only as a part of the practice of medicine, subject to reasonable licensing and regulation by the State”. *NIFLA* at 2373, citing *Planned Parenthood of Southeastern 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.

*NIFLA* was decided in a very different context. In *NIFLA*, the Court very clearly explained that the California law struck down in that case did not regulate a particular medical procedure or any speech used in connection with any procedure. *NIFLA* at 2373. Thus, as the Court stated in *NIFLA*, the California law regulated “speech as speech”. *NIFLA* at 2374.

Juxtaposed to *NIFLA*, the Court in *Casey* specifically discussed the First Amendment as it applied to the context of that particular case, a context far more analogous to this case. In doing so, 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. (Emphasis supplied.)

Like the regulation in *Casey* (but unlike the regulation in *NIFLA*) the Ordinance does not restrict “speech as speech,” but, instead, implicates speech “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 simply to regulate speech as speech. When it enacted the Ordinance, the City Council very specifically restricted it to children. And, in doing so, its policy decision was made in the face of overwhelming evidence that conversion therapy is potentially harmful to minors.

Further, under the Ordinance, Plaintiffs are free to communicate to their patients (or others for that matter), publicly or privately, any information or views Plaintiffs may hold about the morality of same sex attraction, gender identity, or anything else related to conversion therapy. The only thing Plaintiffs may not do is subject minor patients to a specific procedure i.e., conversion therapy that has been overwhelmingly rejected by the medical professional community as dangerous and ineffective for minors.

Finally, it is particularly important that the *NIFLA* Court did not ignore its prior holding in *Casey*. Instead, it confronted *Casey* head-on. And, in doing so, it provided the analytical criteria for resolving the First Amendment issues in this case. Indeed, the *NIFLA* Court’s distinction of *Casey* is instructive and leads to the very reason that *Casey* applies here. Specifically, the *NIFLA* Court very clearly held that *Casey* did not apply in that case because the regulation in *Casey* was a regulation of “professional conduct” that only incidentally burdened speech. So it is here. As

noted above, the Ordinance prohibits - and is clearly only intended to prohibit - professional conduct, not speech that may be incidentally involved. And, it follows that any concomitant burden on speech is also incidental in the government's unquestioned right to reasonably regulate the practice of mental health counseling, particularly as it relates to minors.

Restrictions on non-expressive conduct that only incidentally burden speech do not implicate the protections of the First Amendment. See *Sorrell v. INS Health, Inc.*, 564 U.S. 552, 567 (2011). As the Report and Recommendation recognizes, 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 v. Rock Against Racism*, 491 U.S. 781 (1989). Content-neutral laws, as the Magistrate Judge noted, must be narrowly tailored to serve a significant governmental interest. See, Report and Recommendation footnote 6 at page 20. (Dkt. 149, pg. 6) To be narrowly tailored, the Ordinance must not be "substantially broader than necessary to achieve the government's interest", citing *Ward*. As the Magistrate Judge further noted, the regulation need not be the least restrictive or least intrusive means of serving a significant governmental interest but, nevertheless, the law must leave open ample alternative channels "for communicating the affected speech." Here, the Ordinance achieves both narrow tailoring to promote its significant governmental interests (the protection of minors) while leaving open a broad array of alternative channels to the Plaintiffs, or any citizen, to communicate about any aspect of conversion therapy. In short, the Ordinance is content-neutral and thus, at most, is subject to an intermediate level of First Amendment scrutiny, not strict scrutiny. Applying that standard of review, the Ordinance easily passes constitutional muster.

## 2. Plaintiffs' Viewpoint Discrimination Theory

The Magistrate Judge found that Plaintiffs sufficiently demonstrated that they are likely to succeed on the merits of their First Amendment claim that Ordinance 2017-47 is viewpoint discriminatory. (Doc. 149, p. 29–30.) But this analysis hinges upon a finding that the Ordinance is a content-based law that was enacted “because the city disagreed with the viewpoint mental health counselors expressed during SOCE counseling.” (Doc. 149.) For this to be true, however, the Ordinance would have to regulate the Plaintiffs’ views about SOCE counseling. That is not the case.

Here, the purpose of the Ordinance is to protect the physical and psychological well-being of minors from a form of therapy that has been contraindicated and particularly harmful to minors. (Doc. 24-1, ¶ 3.) Any reference to SOCE is to identify the subject matter or type of harmful treatment 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 any discussion of gender identity, sexual orientation or conversion therapy. (Doc. 24-1, ¶ 5, emphasis added.) Indeed, it is the practice of conversion therapy on minors that is prohibited, not the viewpoint of Plaintiffs’ concerning gender identity or sexual orientation. To the extent that the Ordinance could be viewed as content-based, the Supreme Court has held that “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388, 112 S. Ct. 2538, 2545, 120 L. Ed. 2d 305 (1992).

Moreover, consistent with the City’s interest in proscribing the harmful practice of conversion therapy, the Ordinance expressly excludes from the definition “counseling that

provides support and assistance to a person undergoing gender transition.” This is because providing counseling and support is a different kind of therapy that does not have the harmful implications that the Ordinance is tailored to protect minors against. *McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014) (“The First Amendment does not require States to regulate for problems that do not exist.”) (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992)). At its core, the Ordinance regulates the practice of SOCE, not the Plaintiffs’ views regarding the benefits of conversion therapy, gender identity, or gender expression. Thus, the Court should find that the Ordinance is not viewpoint discriminatory and that Plaintiffs have not established a likelihood of success.

### **3. Plaintiffs’ Unconstitutionally Vague Theory**

The Magistrate Judge also found that the Plaintiffs demonstrated a substantial likelihood of success on the merits of their 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 Magistrate Judge found that the Ordinance was adopted because the City disagreed with the ideas and messages expressed during SOCE counseling and, therefore, creates discriminatory enforcement by officers against the “viewpoints of mental health professionals who provide SOCE counseling.” (Doc. 149, p. 32.) As detailed above, the Ordinance does not restrict the ideas and messages expressed during a counseling session or seek to curtail a particular viewpoint. It is only the treatment of SOCE counseling on minors that the Ordinance seeks to prohibit. Therefore, this Court should find that

the Plaintiffs have not sufficiently demonstrated a likelihood of success on the merits of their claim that the Ordinance is unconstitutionally vague.

#### **4. Plaintiffs' Unconstitutionally-Overbroad Theory**

Likewise, the Magistrate Judge found that the Plaintiffs are likely to succeed on the merits of their claim that the Ordinance is overbroad. (Doc. 149, p. 30–31.) Again, this finding is contingent upon her ruling that the Ordinance constitutes viewpoint discrimination and therefore creates a risk that ideas relating to SOCE counseling might be suppressed. “[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)). The Supreme Court, however, has cautioned courts against finding a law overbroad and has instructed that it should be employed by the court “sparingly and only as a last resort.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973). Because the Ordinance does not create a risk of suppressing Plaintiffs’ ideas about conversion therapy, but rather only the practice of conversion therapy on minors, the Court should find that the Ordinance is not unconstitutionally overbroad and Plaintiffs have not established a likelihood of success.

#### **5. Plaintiffs' Underinclusive Theory**

As noted previously, this theory, although identified in the Report, was not substantively discussed.

## 6. Plaintiffs' Unconstitutional Prior Restraint on Free Speech Theory

The Magistrate Judge similarly found that Plaintiffs demonstrated a substantial likelihood of success on the merits of their claim that the Ordinance is an unconstitutional prior restraint on Plaintiffs' free speech. (Doc. No. 149, p. 31.) More specifically, that the Ordinance restricts the Plaintiffs' speech before they can express it. 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). To be sure, 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 regulates the practice of conversion therapy on minors. Even if the court finds that it does regulate some form of speech, the Ordinance penalizes those who perform conversion therapy on minors after such treatment has been performed and does not prohibit any communications regarding conversion therapy to minors. Accordingly, the City requests that this Court find that the Ordinance is not a prior restraint and the Plaintiffs have not established a likelihood of success.

### **B. Irreparable Harm**

In her Report and Recommendation, the Magistrate Judge readily acknowledged that Section 2 of her Report illustrated the Plaintiffs' months-long delay in seeking injunctive relief against the Ordinance. And, indeed, the Magistrate Judge further acknowledged that the Plaintiffs' actions repeatedly prevented a decision on their Motion for Preliminary Injunction. To be specific, the record reveals that from the date the Plaintiffs filed their complaint in early December, 2017,

it was almost a year later when the hearing on their Motion for Preliminary Injunction was actually heard. But, perhaps even more to the point, Plaintiffs did nothing to accelerate a ruling on their Motion for Preliminary Injunction and as the Magistrate Judge noted, their actions actually delayed a decision on that motion. And, finally, the Magistrate Judge acknowledged that Plaintiffs' actions would normally weigh heavily against finding the likelihood of irreparable harm without an injunction.

Nevertheless, the Magistrate Judge concluded that because, in her opinion, the Plaintiffs are likely to succeed on the merits of most of their First Amendment free-speech claims, the Plaintiffs' irreparable harm is, effectively, automatic. The City objects to this conclusion because as set forth above, the likelihood that Plaintiffs will succeed on their First Amendment claims is, likewise, questionable or, at a minimum, no worse than the City's likelihood of defeating those First Amendment claims. Given that calculus, Plaintiffs' delay in seeking enforcement of their rights would clearly indicate a reduced need for preliminary injunctive relief. See, *Shurtleff v. City of Boston*, 337 F. Supp. 3<sup>rd</sup> 66 (D. Mass. 2018).<sup>3</sup>

**C. Balance of the Equities**

The City, likewise, objects to the Magistrate Judge's conclusion that the City failed to show any harm it would suffer if enforcement of the Ordinance is enjoined. It is beyond argument that the City, as a governmental entity, has a very important obligation to protect its minor citizens. It is also beyond argument that that protection should be pro-active so as to prevent harm as opposed to reactive, particularly as it relates to minor children. That is precisely what the City has addressed in enacting the Ordinance based on overwhelming evidence that SOCE therapy, including

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<sup>3</sup> The Plaintiffs' counsel in *Shurtleff* includes the Plaintiffs' counsel in this case also.

conversion therapy and reparative therapy, may pose a serious threat to the health and wellbeing of the affected person.

The Magistrate Judge justifies her conclusion by stating that the City has no legitimate interest in enforcing an unconstitutional ordinance. Perhaps so, but the constitutionality of the Ordinance or, more specifically, the lack of constitutionality, is yet to be decided. As noted above, the likelihood that the Plaintiffs will succeed on the merits is, at most, no better than the likelihood that the City will succeed on the merits. And when the Ordinance is adjudicated, one way or the other, the City obviously would take the appropriate action to comply with the law. That day is yet to come and until then, the balance of the equity should be in favor of protecting the City's children under the facts and circumstances that are in the record of this case at this point in time.

**D. The Public Interest**

The Supreme Court has held that where the public interest is affected, it must be considered in any injunction proceeding. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). Thus, this Court's evaluation of the policy implications and consequences of the requested preliminary injunction in this case is mandatory.

Given the record before the Court, and the stakes involved, the City is deeply concerned that enjoining its Ordinance banning conversion therapy on minors could easily result in irreparable harm not to Plaintiffs but, instead, to minor children within the city limits of Tampa.

The public's interest is particularly poignant in this case because the empirical and anecdotal evidence supporting the Ordinance was, indeed, overwhelming. So much so that the City Council overwhelmingly approved it at the conclusion of both public hearings leading to its enactment. The Ordinance, therefore, is the clear embodiment of the public's will as implemented by the public's duly elected representatives.

Moreover, the City carefully tailored its Ordinance to ensure that the subject matter of the Ordinance can be freely discussed and debated in the larger marketplace of ideas. Thus, the public interest factor has already been thoroughly addressed through the City Council's careful and principled determination that the procedure known as "conversion therapy" is, in fact, dangerous to minors. Given the Plaintiffs' less than urgent effort described in Section B, above, that public interest will be best served in this case by denying Plaintiffs' request for preliminary injunctive relief.

### **CONCLUSION**

For the above reasons, the Court should reject the Recommendations of the Magistrate Judge and deny the Motion for Preliminary Injunction.

### **REQUEST FOR ORAL ARGUMENT**

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

Dated this 16<sup>th</sup> day of February, 2019.

/s/ Robert V. Williams  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> 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