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-2896-T-02AAS
Plaintiffs,	)	
v.	)	
CITY OF TAMPA, FLORIDA,	)	
Defendant.	)	

PLAINTIFFS' CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANT, CITY OF TAMPA'S OBJECTIONS TO MAGISTRATE'S REPORTS AND RECOMMENDATIONS

Plaintiffs, pursuant to 28 U.S.C. § 636(b), Fed. R. Civ. P. 72(b), Local Rule 6.02, and this Court's Endorsed Order Setting Deadlines entered January 31, 2019 (Dkt. 151), file this consolidated response in opposition to Defendant, City of Tampa's, Objections to Magistrate's Report and Recommendation on Motion to Dismiss (Dkt. 155, Defendant's "MTD Objections" to Dkt. 148, Magistrate's "MTD R&R") and Defendant, City of Tampa's, Objections to Magistrate's Report and Recommendation Regarding Plaintiff's Motion for Preliminary Injunction (Dkt. 156, Defendant's "MPI Objections" to Dkt. 149, Magistrate's "MPI R&R") (Defendants' MTD Objections and MPI Objections, collectively hereinafter, Defendants' "Objections;" and Magistrate's MTD R&R and MPI R&R, collectively hereinafter, Magistrate's "R&Rs").

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INTRODUCTION

The Court should overrule the City's Objections and adopt the Magistrate's R&Rs to preliminarily enjoin the City's counseling ban ordinance as unconstitutional and preserve for trial the majority of Plaintiffs' claims.[1] The City barely engaged with the Magistrate's factual findings and legal reasoning, relying instead on general, conclusory, and drive-by objections. This response to the City's Objections demonstrates their lack and inability to displace the Magistrate's thorough findings and conclusions under the applicable standards of review.[2]

STANDARDS OF REVIEW

"Parties filing objections to a magistrate's report and recommendation must **specifically** identify those findings objected to. **Frivolous, conclusive, or general objections need not be considered by the district court**." *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988) (emphasis added). "[A] party that wishes to preserve its objection must clearly advise the district court and **pinpoint** the specific findings that the party disagrees with." *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009) (emphasis added). "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "And, in providing for a 'de novo determination' rather than de novo hearing, **Congress intended to permit whatever**

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[1] Although Plaintiffs do not agree with all findings and conclusions of Magistrate Judge Sansone, Plaintiffs did not file objections to her R&Rs, and do not press Plaintiffs' disagreements in this response (*but see infra* Argument pt. V (showing legal requirement for wholly enjoining ordinance instead of partially as recommended by Magistrate).

[2] Plaintiffs also incorporate herein by reference their factual and legal arguments in Plaintiffs' Motion for Preliminary Injunction with Incorporated Memorandum of Law (Dkt. 85, Plaintiffs' "MPI"), Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss and Plaintiffs' Reply in Support of Their Renewed Motion for Preliminary Injunction (Dkt. 114, Plaintiffs' "MTD Response/MPI Reply"), Plaintiffs' Post-Hearing Memorandum of Law in Support of Motion for Preliminary Injunction (Dkt. 145), and Plaintiffs' Objections to *Amicus Curiae* Equality Florida's Supplemental Amicus Brief (Dkt. 147).

reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980) (emphasis added); *cf. Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009) ("[A] district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge."). Thus, where a party "[does] not file specific objections to *factual findings* by the magistrate judge, there [is] no requirement that the district court de novo review those findings." *Garvey v. Vaughn*, 993 F.2d 776, 779 n.9 (11th Cir. 1993). "[W]hen no timely **and specific** objections are filed, case law indicates that the court should review the findings using a clearly erroneous standard." *Wiand v. Morgan*, 919 F. Supp. 2d 1342, 1346 (M.D. Fla. 2013) (emphasis added).[3]

KEY FACTS DETERMINED BY THE MAGISTRATE AND IN THE RECORD

A. The Magistrate's Foundational Findings That the Ordinance Prohibits Plaintiff Counselors' *Speech* Are Neither Objectionable nor Objected to by the City.

The Magistrate's R&Rs correctly highlight the same background facts regarding the content of the City's ordinance and its prohibition of Plaintiffs Vazzo's and Pickup's **voluntary, speech-only sexual orientation change efforts (SOCE) counseling** with minor "'clients who wish to reduce or eliminate unwanted same-sex sexual attractions, behaviors, or identity,'" or who "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.'"

[3] "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . **Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous**." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985) (emphasis added) (citations and internal quotation marks omitted).

(MTD R&R, Dkt. 148, at 2–5 (quoting, *inter alia*, Plaintiffs' First Amended Verified Complaint for Declaratory, Preliminary and Permanent Injunctive Relief, and Damages (Dkt. 78, "Amended Complaint"), ¶ 60; MPI R&R, Dkt. 149, at 2–4 (quoting, *inter alia*, Am. Compl., Dkt. 78, ¶¶ 9, 60).) The ordinance, as correctly observed by the Magistrate, **prohibits Plaintiff counselors from "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,'" and consequently, prohibits Plaintiff New Hearts Outreach from referring minor clients to the counselor Plaintiffs. (MTD R&R, Dkt. 148, at 3–4 (emphasis added) (quoting Am. Compl., Dkt. 78, ¶ 65); MPI R&R, Dkt. 149, at 3 (same).)

The City makes no specific objection to the foregoing foundational findings, nor can it because the findings are from unrebutted, verified allegations and the City's own admissions.[4] Thus, such findings are subject to this Court's review only for clear error, which is a bar the City cannot come close to reaching.

B. Tampa Intended and Interprets the Ordinance to Prohibit *Speech*.

The City did not object to the Magistrate's finding that the City admitted its intention to censor **speech** through the ordinance, both in the text of the ordinance itself, and in the post-enactment enforcement training materials prepared by the City's attorney overseeing enforcement. (MPI R&R, Dkt. 149, at 25–26 (citing ordinance, Dkt. 24-1, at PageID 347, and Pls.' Dep. Ex. 2, Dkt. 134-2, at 10.) First, the plain language of the ordinance targets counselors' speech as low-grade First Amendment **speech**:

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[4] *See also* MPI, Dkt. 85, at 3–7 ("Statement of Facts" citing to Am. Compl., Dkt. 78.)

WHEREAS, At least two federal circuit courts of appeal have upheld bans on conversion therapy. [15] Both courts found that bans on conversion therapy did not violate free speech rights; nor did such bans run afoul of the Free Exercise Clause; nor were such bans vague or impermissibly overbroad. Further the courts found that counseling is professional speech, subject to a lower level of judicial scrutiny because the government has a substantial interest in protecting citizens from ineffective or harmful professional practices; and

(Ordinance 2017-47, Dkt. 24-1, at PageID 347[5].)

Second, in the City's post-enactment training of its code officials responsible for enforcing the ordinance, the City's attorney responsible for enforcement doubled-down on the City's intent and interpretation of the ordinance to censor "professional speech":

CONVERSION THERAPY

Why only licensed professionals?

- Under the First Amendment - Certain categories of speech receive lesser judicial protection.
- Conversion Therapy is a form of "professional speech".
- "Thus, we hold that a prohibition of professional speech is permissible only if it directly advances the State's substantial interest in protecting clients from ineffective or harmful professional services, and is not more extensive than necessary to serve that interest."

King v. Governor of the State of New Jersey, 767 F.3d 216 (3rd Cir. 2014).

[5] The "two federal circuit courts" which "found that counseling is professional speech, subject to a lower level of judicial scrutiny" according to this recital are *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014), and *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (9th Cir. 2014). (Dkt. 24-1 at PageID 347, 347 n.15). On this point, both of the cases subsequently were abrogated by the Supreme Court in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018). (*See infra* Argument pt. II.A.1.)

(Pls.' Dep. Ex. 2, Dkt. 134-2, at 10; Simpson Dep., Dkt. 133-3, at 95:24–96:13; Pls.' Hr'g Slides, Dkt. 140-1, at 16; Hr'g Tr., Dkt. 138, at 32:7–34:16.) The City having failed to object to the Magistrate's factual findings on these critical admissions, they are subject to review for clear error, which they easily survive.

C. Tampa Intended and Interprets the Ordinance to Prohibit Speech of a Particular Viewpoint.

Not only does the ordinance text betray the City's intent to censor speech, it also betrays the City's intent to censor a particular viewpoint. As found by the Magistrate,

> 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") . . . .

(MPI R&R, Dkt. 149, at 30 (citing ordinance text).) The City's enforcement attorney confirmed the ordinance punishes a counselor's viewpoint that affirms a client's goal to change sexual orientation or gender identity. (Simpson Dep., Dkt. 133-3, at 66:8–21; Pls.' Hr'g Slides, Dkt. 140-1, at 2; Hr'g Tr., Dkt.138, at 15:1–16:12.) The Magistrate correctly discerned that, given the ordinance's expressly allowing the affirmation of a client's "transition" (change) from the client's biological gender, the City's interpretation otherwise disallowing the affirmation of a client's change of gender identity means that the counseling viewpoint affirming transition-change (**away from** biological gender) is allowed, while the counseling viewpoint affirming return-change (**to** biological gender) is prohibited.

D. There Is No Legislative or Other Record of Complaints of Harm from SOCE in Tampa.

As correctly found by the Magistrate, the City received no complaints of harm from SOCE provided in Tampa. (MPI R&R, Dkt. 149, at 35 (citing Def.'s Resps. & Objs. Pls.' Disc. Reqs.,

Dkt. 132-1, at 8); *see also* Pls.' Hr'g Slides, Dkt.140-1, at 18; Hr'g Tr., Dkt. 138, at 45:10–48:9.) The City did not object to this finding, which is based directly on the City's admission. Moreover, in proposing and enacting the ordinance, **the City made no effort to investigate or otherwise determine whether any such complaints existed**. (Maniscalco Dep., Dkt. 133-2, at 41:3–22; Pls.' Hr'g Slides, Dkt. 140-1, at 9; Hr'g Tr., Dkt. 138, at 45:10–48:9.) Furthermore, neither counselor Plaintiff has ever received a complaint or report of harm from any client receiving SOCE counseling. (Am. Compl., Dkt. 78, ¶¶ 105, 124.)

E. The Ordinance is Not Justified by "Overwhelming Research."

1. There is No "Overwhelming" Evidence of Harm, or Any Empirical Evidence at All. (Hr'g Tr., Dkt. 138, at 51:4–77:25.)

The City already admitted it cannot in any way quantify the purported risk of harm it claims to be posed by SOCE. (Maniscalco Dep., Dkt. 133-2, at 110:5–112:11 ("No, **nobody knows**."(emphasis added)); Hr'g Tr., Dkt. 138, at 75:9–77:25.) This means the City is unable to determine whether any risk of harm from speech-only counseling involving SOCE subject matter and client goals is greater than, or in any way different from, the risk of harm from speech-only counseling involving any other subjects or client goals. To be sure, such a comparison is impossible without empirical evidence of harm to compare, which does not exist. This fact stands in stark contrast to the City's repetitions that there is "overwhelming evidence" of harm from "conversion therapy." (*See, e.g.*, MPI Objs., Dkt. 156, at 3, 7, 9, 15, 16.) In fact, as shown by the various sources cited in the ordinance's recitals, there is no empirical evidence of harm from any SOCE counseling whatsoever, let alone speech-only SOCE counseling willingly sought and voluntarily received by minors.

The ordinance itself claims justification in "overwhelming research," which refers exclusively to fourteen sources appearing in the ordinance's recitals. (Ordinance, Dkt. 24-1, at

PageID 344–47.) The sources cited (collectively, the "Sources") comprise various reports, statements, and position papers, centering on the 2009 Report of American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (Dkt. 134-17, the "APA Report"). All of the other Sources either cite to the APA Report, or cite to no authorities at all for their positions.

The APA Report does not use the term "conversion therapy." Rather, the APA Report uses "the term sexual orientation change efforts (SOCE) to describe methods (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) that aim to change a person's same-sex sexual orientation to other-sex, regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved." (APA Rep., Dkt. 134-17, at 2 n.**.)

The APA Report discloses up front, and repeatedly throughout, that there is no empirical or other research supporting **any conclusions** regarding either efficacy **or harm** from SOCE, especially in children and adolescents. (APA Rep., Dkt. 134-17, at 3 ("[T]he recent SOCE research **cannot provide conclusions** regarding efficacy or safety . . . ."), pg. 7 ("The research on SOCE **has not adequately assessed** efficacy and safety."), pg. 37 ("These [recent] studies all use designs that **do not permit cause-and-effect attributions to be made**."), pg. 42 ("[T]he recent studies **do not provide valid causal evidence** of the efficacy of SOCE **or of its harm** . . . ."), pg. 42 ("[T]he nature of these studies **precludes causal attributions** for harm or benefit to SOCE . . . ."), pg. 42 ("We conclude that there is a **dearth of scientifically sound research** on the safety of SOCE. . . . Thus, **we cannot conclude how likely it is that harm will occur** from SOCE."), pg. 72 ("**There is a lack of published research on SOCE among children**."), pg. 73 ("**We found no empirical**

research on adolescents who request SOCE . . . ."), pg. 91 ("**We concluded that research on SOCE . . . has not answered basic questions of whether it is safe or effective and for whom**."), pg. 91 ("**[S]exual orientation issues in children are virtually unexamined**.") (all emphases added).) None of the other Sources adds anything to the empirical record unequivocally found to be lacking in the APA Report.

2. The APA Report Discloses Anecdotal Evidence of Benefits from SOCE at Least Equivalent to Anecdotal Evidence of Harm, and More Benefits Perceived by Religious Individuals.

Given the lack of empirical research on the outcomes of SOCE, the Task Force looked to participants' perceptions of SOCE, "in order to examine what may be perceived as being helpful or detrimental by such individuals, **distinct from a scientific evaluation of the efficacy or harm** . . . ." (APA Rep., Dkt. 134-17, at 49 (emphasis added).) The review did not show evidence of one outcome over the other. "[S]ome recent studies document that there are people who perceive that they have been harmed through SOCE, just as other recent studies document that there are people who perceive that they have benefited from it." (APA Rep., Dkt. 134-17, at 42 (citations omitted).)

Nonetheless, the Task Force found several reported benefits of SOCE perceived by participants: "(a) a place to discuss their conflicts; (b) cognitive frameworks that **permitted them to reevaluate their sexual orientation identity, attractions, and selves in ways that lessened shame and distress and increased self-esteem**; (c) social support and role models; and (d) **strategies for living consistently with their religious faith and community**." (APA Rep., Dkt. 134-17, at 49 (emphasis added) (citations omitted).) "Participants described the social support aspects of SOCE positively." (*Id.*)

The Task Force also observed that perceptions of harm may correlate specifically to "aversion techniques." (APA Rep., Dkt. 134-17, at 41 ("Early research on efforts to change sexual

orientation focused heavily on interventions that include **aversion** techniques. Many of these Studies did not set out to investigate harm. Nonetheless, these studies provide some suggestion that harm can occur from **aversive** efforts to change sexual orientation." (emphasis added)).) To illustrate, the Report gives some examples of aversion treatments:

> Behavior therapists tried a variety of aversion treatments, such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts. Other examples of aversive behavioral treatments included . . . shame aversion . . . .

(APA Rep., Dkt. 134-17, at 22.)

The Task Force also found that individuals' religious beliefs shape their experiences and outcomes:

> [P]eople whose motivation to change was strongly influenced by their Christian beliefs and convictions were **more likely to perceive themselves as having a heterosexual sexual orientation after their efforts.** [T]hose who were less religious were more likely to perceive themselves as having an LGB sexual orientation after the intervention. **Some . . . concluded that they had altered their sexual orientation, although they continued to have same-sex sexual attractions.**

(APA Rep., Dkt. 134-17, at 50 (emphasis added) (citations omitted).) "The participants had multiple endpoints, including LGB identity, 'ex-gay' identity, no sexual orientation identity, and a unique self-identity." (*Id.*) "Further, the findings suggest that **some participants may have reconceptualized their *sexual orientation identity* as heterosexual** . . . ." (*Id.* at 50 (bold emphasis added).)

3. The APA Report Excludes Gender Identity Change Efforts, Which Similarly Lack Empirical Research.

The APA Report addressed only sexual orientation: "Due to our charge, we limited our review to sexual orientation and **did not address gender identity** . . . ." (APA Rep., Dkt. 134-17, at 9 (emphasis added).)

Another Source cited by the Ordinances, however, points to the same lack of empirical research on the outcomes of gender identity change efforts:

> Different clinical approaches have been advocated for childhood gender discordance. **Proposed goals of treatment include reducing the desire to be the other sex**, decreasing social ostracism, and reducing psychiatric comorbidity. **There have been no randomized controlled trials of any treatment**. . . .

(AACAP Statement, Dkt. 24-4, at PageID 521 (emphasis added) (footnote omitted).) Also:

> **Given the lack of empirical evidence** from randomized, controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, and longitudinal evidence that gender discordance persists in only a small minority of untreated cases arising in childhood, **further research is needed** on predictors of persistence and desistence of childhood gender discordance as well as the long-term risks and benefits of intervention . . . .

(*Id.* at PageID 522 (emphasis added).)

As with the APA Report, the AACAP Statement leaves discretion with licensed professionals to make an informed decision, with the patient, about the most appropriate treatment. (*Id.* at PageID 522 ("As an ethical guide to treatment, 'the clinician has an obligation to inform parents about the state of the empiric database' . . . ." (footnote omitted), PageID 524 ("The ultimate judgment regarding the care of a particular patient must be made by the clinician in light of all of the circumstances presented by the patient and that patient's family, the diagnostic and treatment options available, and other available resources.").)

The APA itself more recently addressed issues of gender identity and minors which were not included in the APA Report. (*Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70(9) Am. Psychologist 832 (2015), https://www.apa.org/practice/guidelines/transgender.pdf. (Dkt. 135-1, hereinafter, "APA TGNC Guidelines").) As a discussion separate from SOCE, these later Guidelines make the point that "[t]he constructs of gender identity and sexual orientation are theoretically and clinically distinct, even though professionals and nonprofessionals frequently conflate them." (APA TGNC Guidelines, Dkt. 135-1, at PageID 2752.) Nonetheless, the APA recognized the same absence of research on gender identity change in children: "Due to the evidence that not all children persist in a TGNC identity into adolescence or adulthood, and because **no approach to working with TGNC children has been adequately, empirically validated**, consensus does not exist regarding best practice with prepubertal children." (*Id.* at PageID 2759 (emphasis added).) One distinct approach recognized by the APA "to address gender identity concerns in children" is an approach where "children are encouraged to embrace their given bodies and to align with their assigned gender roles." (*Id.*) And again, calling for more research, the APA concludes, "**It is hoped that future research** will offer improved guidance in this area of practice." (*Id.* (emphasis added) (citation omitted).)

Notwithstanding the APA's call for future research, however, the APA expressly sanctioned as **imperative** allowing a minor who has selected a gender identity different from his or her biological sex to choose to return:

> Emphasizing to parents the importance of allowing their child the freedom **to return to a gender identity that aligns with sex assigned at birth** or another gender identity at any point **cannot be overstated**, particularly given the research that suggests that not all young gender nonconforming children will ultimately express a gender identity different from that assigned at birth.

(APA TGNC Guidelines, Dkt. 135-1, at PageID 2760 (emphasis added).)

Other literature by a research scientist favorably cited in the AACAP Statement positively advances treatment to assist children in fading "cross-gender identity" by the time they reach adolescence. (Heino F. L. Meyer-Bahlburg, *Gender Identity Disorder in Young Boys: A Parent- and Peer-Based Treatment Protocol*, 7 Clinical Psychol. and Psychiatry 360 (2002) (Dkt. 135-2, hereinafter "Meyer-Bahlburg")), at 361[6] ("We expect that we can diminish these problems if we are able to speed up the fading of the cross-gender identity which will typically happen in any case.") (cited by AACAP Statement, Dkt. 24-4, at PageID 522, 526 (n.100)); *see also* Meyer-Bahlburg, Dkt. 135-2, at 365 ("The specific goals we have for the boy are to develop a positive relationship with the father (or a father figure), positive relationships with other boys, gender-typical skills and habits, to fit into the male peer group or at least into a part of it, and to feel good about being a boy.").)

4. The APA Report Commends a Client-Directed Approach to Therapy for Clients with Unwanted Same-Sex Attractions, Commends More Research on Voluntary SOCE, and Condemns Only Coercive Therapies.

For adults desiring "**to change their sexual orientation** or their behavioral expression of their sexual orientation, or both," the APA reported that "adults perceive a benefit when they are provided with **client-centered** . . . approaches" involving "identity exploration and development," "**respect for the client's values, beliefs, and needs**," and "permission and opportunity to explore a wide range of options . . . **without prioritizing a particular outcome**." (APA Rep., Dkt. 134-17, at 4.) The Task Force elaborated:

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[6] The CM/ECF system did not affix the Court's official filing header information, including page numbering, to the Meyer-Bahlburg study at Dkt. 135-2. Thus, citations are to the study's original page numbering.

> Given that there is diversity in how individuals define and express their sexual orientation identity, an affirmative approach is supportive of clients' identity development without an a priori treatment goal concerning how clients identify or live out their sexual orientation or spiritual beliefs. This type of therapy . . . can be helpful to those who accept, reject, or are ambivalent about their same-sex attractions. The treatment does not differ, although the outcome of the client's pathway to a sexual orientation identity does.

(APA Rep., Dkt. 134-17, at 5 (emphasis added).) "For instance, the existing research indicates that possible outcomes of sexual orientation identity exploration **for those distressed by their sexual orientation** may be: LGB identities[,] **Heterosexual sexual orientation identity**[,] Disidentifying from LGB identities[, or] Not specifying an identity." (*Id.* at pg. 60 (emphasis added) (citations omitted).)[7]

A key finding from the Task Force's review "is that those who participate in SOCE, **regardless of the intentions of these treatments**, and those who resolve their distress through other means, **may evolve during the course of their treatment in such areas as self awareness,**

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[7] In connection with its SOCE review and recommendations, the APA Report highlighted a problem with the sexual orientation terminology in the academic research:

> Recent studies of participants who have sought SOCE **do not adequately distinguish between sexual orientation and sexual orientation identity**. We concluded that the failure to distinguish these aspects of human sexuality has led SOCE research to obscure what actually can or cannot change in human sexuality. . . . **[S]ome individuals modified their sexual orientation identity** (e.g., individual or group membership and affiliation, self-labeling) **and other aspects of sexuality** (e.g., values and behavior). . . . **[I]ndividuals, through participating in SOCE, became skilled in ignoring or tolerating their same-sex attractions. Some individuals reported that they went on to lead outwardly heterosexual lives, developing a sexual relationship with an other-sex partner, and adopting a heterosexual identity**.

(APA Rep., Dkt. 134-17, at 3–4 (emphasis added).)

self-concept, and identity." (APA Rep., Dkt. 134-17, at 66 (emphasis added); *id.* at 61 ("Given . . . that many scholars have found that **both religious identity and sexual orientation identity evolve**, it is important for LMHP to explore the development of religious identity and sexual orientation identity." (emphasis added) (citations omitted)).)

The Task Force identifies the **same essential framework** "for children and adolescents who present a desire to change either their sexual orientation or the behavioral expression of their sexual orientation, or both, or whose parent or guardian expresses a desire for the minor to change."[8] (APA Rep., Dkt. 134-17, at 5.) Specifically, for children and youth, "[s]ervices . . . should support and respect age-appropriate issues of **self-determination**; services should also be provided in the least restrictive setting that is clinically possible and should maximize self-determination. At a minimum, **the assent of the youth should be obtained, including whenever possible a developmentally appropriate informed consent to treatment**." (*Id.* (emphasis added).)

The Task Force also highlighted the ethical importance of client self-determination, encompassing "the ability to seek treatment, consent to treatment, and refuse treatment. **The informed consent process is one of the ways by which self-determination is maximized in psychotherapy**." (APA Rep., Dkt. 134-17, at 68 (emphasis added); *see also id.* at 6 ("LMHP **maximize self-determination** by . . . providing effective psychotherapy that explores the client's assumptions and goals, without preconditions on the outcome [and] **permitting the client to decide the ultimate goal of how to self-identify and live out her or his sexual orientation**. . . .

[8] The APA Report defines "*adolescents* as individuals between the ages of 12 and 18 and children as individuals under age 12." (DE 126-22 (APA Rep.), pg. 71 n.58.)

[T]herapy that increases the client's ability to cope, understand, acknowledge, and integrate sexual orientation concerns into **a self-chosen life** is the measured approach.").)

The Task Force viewed the concept of self-determination as equally important for minors: "It is now recognized that **adolescents are cognitively able to participate in some health care treatment decisions**, and such participation is helpful. [The APA] encourage[s] professionals to seek the assent of minor clients for treatment." (APA Rep., Dkt. 134-17, at 74 (emphasis added) (citations omitted); *see also id.* at 77 ("The ethical issues outlined [for adults] are also relevant to children and adolescents . . . .").)

In light of this strong self-determination ethic regarding youth, the Task Force "recommend[ed] that when it comes to treatment that purports to have an impact on sexual orientation, **LMHP assess the adolescent's ability to understand treatment options, provide developmentally appropriate informed consent to treatment, and, at a minimum, obtain the youth's assent to treatment.**" (*Id.* at 79 (emphasis added).) "[F]or children and adolescents who present a desire to change their sexual orientation or their behavioral expression of their sexual orientation, or both, or whose guardian expresses a desire for the minor to change," the Task Force recommended "**approaches [that] support children and youth in identity exploration and development without seeking predetermined outcomes**." (*Id.* at 79–80 (emphasis added).) "LMHP should strive to maximize autonomous decision making and self-determination and avoid coercive and involuntary treatments."[9] (*Id.* at 76.) "The use of inpatient and residential treatments for SOCE is inconsistent with the recommendations of the field." (*Id.* at 74–75.)

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[9] The APA Report defines "*coercive treatments* as practices that compel or manipulate a child or adolescent to submit to treatment through the use of threats, intimidation, trickery, or some other form of pressure or force." (DE 126-22 (APA Rep.), pg. 71 n.59.) It defines "*involuntary*

Apart from recommending against coercive, involuntary, and residential treatments, the Task Force **did not recommend the end of SOCE**. Rather, without empirical evidence of SOCE efficacy or harm, the Task Force merely recommended that clients not be lead to **expect** a change in sexual orientation through SOCE. (APA Rep., Dkt. 134-17, at 66.) Indeed, The Task Force cited literature expressly **cautioning against declining SOCE** therapy for a client who requests it.

> LMHP who turn down a client's request for SOCE at the onset of treatment without exploring and understanding the many reasons why the client may wish to change may instill hopelessness in the client, who already may feel at a loss about viable options. . . . **[B]efore coming to a conclusion regarding treatment goals, LMHP should seek to validate the client's wish to reduce suffering and normalize the conflicts at the root of distress**, as well as create a therapeutic alliance that recognizes the issues important to the client.

(APA Rep., Dkt. 134-17, at 56 (emphasis added) (citation omitted).)

The Task Force also called for more research on SOCE. (APA Rep., Dkt. 134-17, at 91 ("Any future research should conform to best-practice standards for the design of efficacy research. Additionally, **research into harm and safety is essential**."), pg. 91 ("**Future research** will have to better account for the motivations and beliefs of participants in SOCE."), pg. 91 ("**This line of research should be continued and expanded to include conservatively religious youth and their families**.") (all emphases added).)

The Task Force also noted, "The debate surrounding SOCE has become mired in ideological disputes and competing political agendas." (APA Rep., Dkt. 134-17, at 92 (citation omitted).) One policy recommendation "urges the APA to: . . . Encourage **advocacy groups, elected officials**, policymakers, religious leaders, and other organizations to seek accurate

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treatment as that which is performed without the individual's consent or assent and which may be contrary to his or her expressed wishes." (*Id.* at 71 n.60.)

information and **avoid promulgating inaccurate information**." (*Id.* (emphasis added).) The Task Force's call for future research implicitly rejected the suggestion by some that "SOCE should not be investigated or practiced until safety issues have been resolved." (*Id.* at 91.)

Given the absence of empirical evidence on SOCE outcomes, and the emphasis on client-centered approaches, the Task Force recommended that choosing SOCE counseling be given to the discretion of licensed mental health providers (LMHP):

> [The APA Ethics Code] establishes that psychologists aspire to provide services that maximize benefit and minimize harm. . . . When applying this principle in the context of providing interventions, **LMHP assess the risk of harm, weigh that risk with the potential benefits, and communicate this to clients through informed consent procedures** that aspire to provide the client with an understanding of potential risks and benefits that are accurate and unbiased. . . .
>
> In weighing the harm and benefit of SOCE, LMHP can review with clients the evidence presented in this report. Research on harm from SOCE is limited, and some of the research that exists suffers from methodological limitations that make broad and definitive conclusions difficult. . . .

(APA Rep., Dkt. 134-17, at 67 (emphasis added) (citations omitted); *see also id.* at 6 ("LMHP reduce potential harm and increase potential benefits by basing their scientific and professional judgments and actions on the most current and valid scientific evidence, such as the evidence provided in this report.").)

5. The APA Report Specifically Calls for Therapists to Respect and Consider the Religious Values of Individuals Desiring Therapy.

The APA Task Force highlighted the particular stress experienced by individuals of conservative religious faiths who "struggle to live life congruently with their religious beliefs," and that this stress "had mental health consequences." (APA Rep., Dkt. 134-17, at 46–47.) "Some conservatively religious individuals felt a need to change their sexual orientation because of the

positive benefits that some individuals found from religion . . . .” (*Id.* at 47.) Thus, the Task Force “**proposed an approach that respects religious values and welcomes all of the client’s actual and potential identities** by exploring conflicts and identities without preconceived outcomes. This approach does not prioritize one identity over another and **may aide a client in creating a sexual orientation identity consistent with religious values**.” (APA Rep., Dkt. 134-17, at 67 (emphasis added) (citation omitted).) “Although there are tensions between religious and scientific perspectives, the task force and other scholars do not view these perspectives as mutually exclusive.” (APA Rep., Dkt. 134-17, at 67 (citations omitted).)

F. Tampa Did Not Tailor the Ordinance to Any Identified Interest or the Realities of SOCE Counseling.

The City Council Member who introduced the ordinance, Guido Maniscalco, desired to ban “torture” and other coercive therapy forced on unwilling minors, such as electroshock treatments and verbal and mental abuse. (Maniscalco Dep., Dkt. 133-2, at 26:21–32:6; Pls.’ Dep. Ex. 6, Dkt. 134-6; Hr’g Tr., Dkt. 138, at 38:22–44:25.) The ordinance, however, made no distinctions between practices deemed coercive, abusive, or “torture” on the one hand, and the speech-only counseling provided by Plaintiffs on the other, instead lumping everything together into the catchphrase “conversion therapy.” As the Magistrate correctly found, the City did not even consider any alternatives to the ordinance’s total ban, “despite the ordinance’s language that minors ‘are not effectively protected by other means.’” (MPI R&R, Dkt. 149, at 28; *see also* Maniscalco Dep., Dkt. 133-2, at 100:14–102:9 (“**We never debated anything else** because we specifically wanted the complete ban.” (emphasis added)); Pls.’ Hr’g Slides, Dkt. 140-1, at 43–45; Hr’g Tr., Dkt. 138, at 78:1–82:11.)

G. Tampa Knew the Ordinance Could Not Be Enforced by Its Code Officials.

The City's code enforcement officials tasked with enforcing the ordinance need only a high school diploma or equivalent for the position, and receive no training in marriage and family therapy or mental health counseling. (Ruggiero Dep., Dkt. 132-1, at 19:24–20:25; Pls.' Hr'g Slides, Dkt. 140-2, at 2; Hr'g Tr., Dkt. 138, at 85:15–88:14.) The officials are not trained to distinguish "conversion therapy" from other therapy, or qualified to tell the difference between "sexual orientation" and "gender identity," or how to know, for example, whether a child experiencing gender confusion has transitioned to a cross-gender identity or is still exploring the possibility. (Ruggiero Dep., Dkt. 133-1, at 69:16–70:7, 79:17–80:8, 100:12–101:25; Pls.' Hr'g Slides, Dkt. 140-2, at 3, 5–7; Hr'g Tr., Dkt. 138, at 88:15–89:11, 89:23–92:21.) Nonetheless, code officials must know what the ordinance prohibits in order to enforce it, and to fulfill their responsibilities to issue notices of violation. (Ruggiero Dep., Dkt. 133-1 at 25:8–11, 77:7–10; Pls.' Hr'g Slides, Dkt. 140-2, at 4, 8; Hr'g Tr., Dkt. 138, at 89:12–22, 92:22–93:7.)

To ameliorate code officials' lack of qualifications to enforce the ordinance, they are instructed to refer all potential "conversion therapy" cases to the City's legal department for handling. (Ruggiero Dep., Dkt. 133-1, at 24:10–25; Pls.' Dep. Ex. 2, Dkt. 134-2, at 15; Pls.' Hr'g Slides, Dkt. 140-2, at 9–11; Hr'g Tr., Dkt. 138, at 93:8–95:14.) The City's lawyer responsible for overseeing "conversion therapy" enforcement, however, does cannot define the term "gender identity" as used in the ordinance, and would look to the dictionary to interpret the ordinance. (Simpson Dep., Dkt. 133-3, at 67:20–68:17; Pls.' Hr'g Slides, Dkt. 140-2, at 12; Hr'g Tr., Dkt. 138, at 95:15–97:12.) The ultimate trier of ordinance violations is a City-appointed special master, but the City does not know whether any special master on its roster is a licensed mental health practitioner, and the City has no plans to appoint a special master with those credentials. (Simpson

Dep., Dkt. 133-3, at 104:9–16; Pls.' Hr'g Slides, Dkt.140-2, at 13; Hr'g Tr., Dkt. 138, at 97:13–98:10.)

ARGUMENT

I. PLAINTIFFS SUFFICIENTLY ALLEGED STANDING.

The Magistrate correctly determined that Plaintiffs sufficiently alleged standing on behalf of themselves and their minor clients, carefully applying the controlling authorities to Plaintiffs' unrebutted, verified allegations in the Amended Complaint.[10] (MTD R&R, Dkt. 148, at 7–10.) The City objects to the Magistrate's standing determination with respect to Plaintiffs' minor clients, though its objections could not be more general and conclusory. (MTD Objs., Dkt. 155, at 3; MPI Objs., Dkt. 156, at 4.) Thus, the City's standing objections "need not be considered by [this Court]." *Marsden*, 847 F.2d at 1548; *cf. Garvey*, 993 F.2d at 779 n.9 ("[T]here [is] no requirement that [this Court] de novo review those findings.").

Indeed, the City's only attempt to engage with the Magistrate's findings and reasoning is to mention, without citation, the recent order of Judge Rosenberg of the Southern District of Florida in *Otto v. City of Boca Raton*, No. 9:18-CV-80771-Rosenberg/Reinhart, 2019 WL 588645 (S.D. Fla. Feb. 13, 2019) (hereinafter, the "*Otto* Order"). (MTD Objs., Dkt. 155, at 3; MPI Objs., Dkt. 156, at 4.) But Judge Rosenberg's *Otto* Order pays no heed to the well-settled precedent recognized by the Magistrate, that "[i]f one plaintiff establishes standing, a court need not consider whether co-plaintiffs established standing, and the lawsuit may continue." (MTD R&R, Dkt. 148, at 9 (citing, *inter alia*, *Horne v. Flores*, 557 U.S. 433, 446–47 (2009), *and Ouachita Watch League*

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[10] The MPI R&R does not address Plaintiffs' standing, but the Magistrate implicitly accepted Plaintiffs' standing in recommending a preliminary injunction against the ordinance. (MPI R&R, Dkt. 149, at 37 ("[T]he **plaintiffs** established a likelihood of success on the merits . . . . Therefore, the **plaintiffs'** motion for preliminary injunction . . . should be **GRANTED-IN-PART** . . . ." (last emphasis in original)).)

v. Jacobs, 463 F.3d 1163, 1170 (11th Circ. 2006)).) Given that the City does not object to the Magistrate's standing determination regarding Plaintiff Vazzo, the City's other standing objections are inconsequential.

II. PLAINTIFFS ALLEGED AND DEMONSTRATED THE ORDINANCE VIOLATES THE FIRST AMENDMENT.

A. The Ordinance Is an Unconstitutional Content-Based Restriction on Plaintiffs' Speech.

1. The Ordinance Prohibits Speech as Speech.

The Magistrate correctly observed, "Under *King*, *Wollschlaeger*, and Ordinance 2017-47, **a communication during SOCE counseling is speech**." (MPI R&R, Dkt. 149, at 26 (emphasis added).) The City's objection that the ordinance prohibits "conduct" and not Plaintiffs' speech as a matter of law (MTD Objs., Dkt. 155, at 3–4; MPI Objs., Dkt.156, at 5–10) can be rejected out of hand. First, the City failed to object to the Magistrate's factual findings, from verified and unrebutted allegations, that Plaintiffs' actual counseling consists entirely of speech. (*See supra* Key Facts Determined by the Magistrate and in the Record (hereinafter, "Facts") pt. A; MTD R&R, Dkt. 148, at 3; MPI R&R, Dkt. 149, at 3; *see also* MPI, Dkt. 85, at 3–7 ("Statement of Facts" citing Am. Compl., Dkt. 78).) Second, the City cannot escape (and did not object to the Magistrate's findings of) the City's own admissions in the text of the ordinance and its in-house lawyer's training materials, that the ordinance is intended to prohibit speech. (*See supra* Facts pt. B; MPI R&R, Dkt. 149, at 25–26 (citing Dkt. 24-1 at 4 (ordinance recital); Dkt. 134-2 at 10 (city attorney training presentation)).)

Plaintiffs' talk therapy, whether or not it involves SOCE, is speech. The government cannot label the speech of professionals as conduct in order to restrain it without scrutiny. *See, e.g.*, *Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (hereinafter, "*NIFLA*") ("[T]his Court has not recognized 'professional speech' as a separate category of

speech. Speech is not unprotected merely because it is uttered by professionals."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015) (same); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (holding government may not apply alternative label to protected speech to evade First Amendment review, when only "conduct" at issue is speech); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (same); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.").

Indeed, as the *NIFLA* Court recently reiterated, permitting the government to label a professional's speech as unprotected conduct would eviscerate the protections afforded to doctors, lawyers, nurses, mental health professionals, and many others:

> All that is required to make something a profession . . . is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. **States cannot choose the protection that speech receives under the First Amendment**, as that would give them a powerful tool to impose invidious discrimination on disfavored subjects.

NIFLA, 138 S. Ct. at 2372.

The en banc Eleventh Circuit decision in *Wollschlaeger v. Florida* also compels the conclusion that the ordinance bans speech. There, the entire Eleventh Circuit rejected, **essentially word-for-word**, what the City proffers here, because "**characterizing speech as conduct is a dubious constitutional enterprise**." 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc) (emphasis added). The City's arguments entirely ignore this development.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), does not help the City. (*See* MTD Objs., Dkt. 155, at 4; MPI Objs., Dkt. 156, at 8–10.) The *Casey* Court held requiring doctors to furnish specific information to patients, **in connection with providing non-speech abortions**, did not violate the doctors' First Amendment rights not to speak. 505 U.S. at 884. By contrast, the

Tampa ordinance prohibits Plaintiffs' speech, which is **not** provided in connection with some other non-speech service, but rather **is** the service provided. (*See* Hr'g Tr., Dkt. 138, at 28:4–29:17 (distinguishing *Casey*).)

The City perseverates that the ordinance prohibits only the "practice" of "conversion therapy" and not any speech "about" it, variously referring to it as a "treatment" performed (156 at 5), a "counseling process" (156 at 7), and a "specific procedure" (156 at 9). But the City never explains, or comes close to explaining, what "practice," "treatment," "process," or "procedure"—**apart from speech**—is prohibited by the ordinance. The obvious reason is that the City cannot.

2. The Ordinance Restricts Speech Based on Its Content and Is Subject to Strict Scrutiny.

Like the Third Circuit in *King*, this Court should have "little doubt" in concluding that the ordinance bans speech on the basis of content. *See* 767 F.3d at 236 n.20. Indeed, like the statute in *King*, the ordinance "on its face, prohibits licensed counselors from speaking words with a particular content; *i.e.* words that 'seek[] to change a person's sexual orientation.'" *Id.* (alteration in original). "Thus . . . 'Plaintiffs want to speak to [minor clients], and whether they may do so under [the ordinance] depends on what they say.'" *Id.* (first alteration in original). That is textbook content discrimination.

Because the ordinance bans speech on the basis of content, unequivocal Supreme Court precedent requires the ordinance to survive strict scrutiny to be upheld. Indeed, in *Reed*, the Supreme Court issued its firm rule: **all** content-based restrictions on speech must receive strict scrutiny. 135 S. Ct. at 227 ("[A] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus towards the ideas contained in the regulated speech."). In handing down that firm rule, the Supreme Court unequivocally stated that it applied equally to any content-based regulation of the speech of

licensed professionals. *Id.* at 2229 ("it is no answer to say that the purpose of these regulations was merely to insure high professional standards").

NIFLA also confirmed that regulations on the speech of licensed professionals is no exception to this rule. In *NIFLA*, the Supreme Court affirmed *Reed*'s firm rule mandating strict scrutiny for all content-based restrictions on speech, expressly abrogated *King*'s and *Pickup*'s erroneous conclusion that content-based regulations of so-called professional speech do not receive strict scrutiny, and condemned the invidious discrimination inherent in bans on the speech of licensed professionals. *NIFLA*, 138 S. Ct. at 2371 (all content-based restrictions on speech receive strict scrutiny). Indeed, gutting *King* and *Pickup* by name, *NIFLA* stated that "[s]o defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny . . . . But, this Court has not recognized professional speech as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals." *Id.* at 2371–72 (emphasis added). And, confirming that content-based restrictions on the speech of licensed professionals receive strict scrutiny, *NIFLA* held that "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose invidious discrimination of disfavored subjects," *id.* at 2375, such as any counseling that seeks to help a minor reduce or eliminate their unwanted same-sex attractions, behaviors, and identity. Thus, binding precedent requires this Court to subject the ordinance to strict scrutiny. The Magistrate correctly did so, and this Court should overrule the City's objections.

3. The Ordinance Cannot Satisfy Strict Scrutiny.

a. The City Has the Burden of Proving the Constitutionality of Its Ordinance Under the Strict Scrutiny Standard.

The City bears the burden of demonstrating that the ordinance satisfies strict scrutiny.[11] As the Supreme Court has held: "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). As such, on a preliminary injunction motion, **the government**—not the movant—bears the burden of proof on narrow tailoring, because **the government** bears that burden at trial. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (holding, on preliminary injunction motion, "**the burden is on the government** to prove that the proposed alternatives will not be as effective as the challenged statute." (emphasis added)). The City indisputably bears the burden of proving narrow tailoring at trial. *See, e.g., United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *id.* at 2540 ("To meet the requirement of narrow tailoring, **the government must demonstrate** that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier" (emphasis added)). Thus, the City also bears—and falls woefully short of meeting—the burden of proving narrow tailoring here. *Gonzales*, 546 U.S. at 429; *Ashcroft*, 542 U.S. at 665. The Magistrate correctly concluded that it is the City, not Plaintiffs, who bears the burden of demonstrating narrow tailoring at the

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[11] Despite the Magistrate's finding that the City has a compelling interest in protecting minors from "harms caused by conversion therapy" (MPI R&R, Dkt. 149, at 27), Plaintiffs dispute that such an interest can be established in the absence of concrete or empirical evidence of actual harm, as opposed to supposition and conjecture (s*ee* MTD Response/MPI Reply, Dkt. 114, at 16–21.) As shown *supra* in the Facts pt. E, there is no such concrete or empirical evidence of harm from "conversion therapy," either in Tampa or in general.

preliminary injunction stage. (MPI R&R, Dkt. 149, at 27.) The City has offered no reason to disturb that finding.

b. The City Failed to Show That the Ordinance Was the Least Restrictive Means Available *at the Time of Enactment*.

The Magistrate also correctly concluded that the ordinance cannot survive strict scrutiny because it is not narrowly tailored. (MPI R&R, Dkt. 149, at 27–29.) To prove the narrow tailoring prong of strict scrutiny, the City must also demonstrate that the ordinance is the least restrictive means of remedying its claimed governmental interests. *See Boos v. Berry*, 485 U.S. 312, 329 (1988) (when content-based restrictions on speech are analyzed under strict scrutiny, an ordinance "is not narrowly tailored [where] a less restrictive alternative is readily available"); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (noting that under "the most exacting scrutiny" applicable to content-based restrictions on speech, the government must employ the least restrictive alternative to pass narrow tailoring). Plaintiffs "**must be deemed likely to prevail unless the government has shown that [Plaintiffs'] proposed less restrictive alternatives are less effective than enforcing the act**." *Ashcroft*, 542 U.S. at 666 (emphasis added).

The government must demonstrate that it "seriously undertook" efforts to address the problem "with less intrusive tools available to it." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014). In *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016), the Third Circuit stated that to meet the *McCullen* burden of showing that it seriously undertook to consider less speech restrictive alternatives, the government must put forward "**a meaningful record** demonstrating that those options would fail to alleviate the problems meant to be addressed." 824 F.3d at 371 (emphasis added). In fact, the concurrence highlights the majority's application of *McCullen*: "The majority opinion [requires that] a municipality **must now also prove that*, before adopting a regulation***

***that significantly burdens speech*, it either attempted or seriously considered and reasonably rejected less intrusive alternatives**." *Id.* at 379 (Fuentes, J., concurring) (emphasis added).

The *McCullen* Court expressly rejected the government's convenience as a justification for skipping the narrow tailoring step:

> The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."

134 S. Ct. at 2534. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540. In *Alford v. Walton County*, No. 3:16cv362/MCR/CJK, 2017 WL 8785115 (N.D. Fla. Nov. 22, 2017), the district court held that the government cannot meet its burden under *McCullen* when the "record reflects that the County admittedly failed to consider any less restrictive alternatives," and instead favored a total ban because it was "cleaner and easier." *Id.* at *8.

Thus, the City "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**." *Bruni*, 824 F.3d at 370 (emphasis added); *see also Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) ("As the Court explained in *McCullen*, however, the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem.")

The City neither tried nor closely examined **any** alternatives to its outright ban. (*See supra* Facts pt. F.) Instead, the City acted contrary to the APA Report recommendations and banned SOCE outright, foreclosing the further development of the scientific record on SOCE sought by the APA, and usurping for politicians and activists the discretionary judgment that the APA

deemed appropriate for licensed mental health professionals. The City's failure to consider any alternatives cannot satisfy the demanding narrow tailoring burden placed upon it by the Supreme Court in *McCullen*.

c. The City Failed to Consider Numerous Alternatives to the Ordinance's Outright Ban.

As the Magistrate correctly observed, "[t]he plaintiffs . . . put forward suggested alternatives to Ordinance 2017-47's total ban on conversion therapy—none studied or considered by the City." (MPI R&R, Dkt. 159, at 28–29.) For example, if the City was genuinely concerned about the purported harms of subjecting **unwilling** minors to **involuntary** SOCE counseling—forcing them to participate against their will—it could have banned **that** practice. Plaintiffs would not have needed to file this lawsuit, since they only provide voluntary SOCE counseling that minors request and wish to receive. (Am. Compl., Dkt. 78, ¶¶ 64–66, 68, 70, 106–07, 125.)

Yet another less restrictive means would have been to ban only aversive techniques or other **conduct**, in the genuine sense—not the City's contrived definition—of that word. If the City was genuinely concerned about the harms of electroshock therapy, or beatings, or induced vomiting, or any other bizarre and imagined "therapy" carried out through conduct, as opposed to pure speech, the City could have banned **those** practices. Plaintiffs would not have needed to file this lawsuit, since they engage in speech-only talk therapy. (Am. Compl., Dkt. 78, ¶¶ 64–66, 68, 70, 106–07, 125).

And another less restrictive alternative the City could have employed was to require informed consent from minors and their parents who seek voluntary SOCE counseling. The City cannot seriously contend that an alternative which has been considered effective and less restrictive of speech by large mental health professional organizations is somehow ineffective to achieve the City's purported purpose. Indeed, when similar legislation was considered in California, numerous

mental health organizations wrote to the legislature arguing that informed consent was a better and less restrictive approach. (Am. Compl., Dkt. 78, ¶ 185, Ex. E.) The City ignored this alternative, along with all of the others.

To be sure, Florida statutory law permits minors to consent to mental health counseling. Minors over the age of thirteen have the right to request, consent to, and receive mental health counseling when necessary. *See* Fla. Stat. § 394.4784(2) (providing minors over the age of 13 "**shall have the right to request, consent to, and receive outpatient crisis intervention services including individual psychotherapy, group therapy, counseling, or other forms of verbal therapy provided by a licensed mental health professional**" (emphasis added)); *see also* Fla. Stat. § 397.501(7)(e)(1) ("a minor **acting alone** has the legal capacity to voluntarily apply for and obtain substance abuse treatment" (emphasis added)). Florida law also permits a minor to request, consent to, and obtain medical services related to pregnancy. *See* Fla. Stat. § 743.065 ("An unwed pregnant minor may consent to the performance of medical or surgical care relating to her pregnancy.").

Furthermore, abundant precedent from the Supreme Court, the Eleventh Circuit, and the Florida Supreme Court evidences the ability of minors to give informed consent to medical treatment. *See, e.g.*, *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52, 75 (1976) (holding constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority, and noting minors can consent to certain medical procedures); *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995) (noting that minors are able to give consent for purposes of the Fourth Amendment); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 622 (Fla. 2003) (noting minor fully capable and statutorily permitted to give informed consent to medical services); *In re T.W.*, 551 So.2d 1186, 1195 (Fla. 1989) (noting

Florida law permits minors to give informed consent for significant medical decisions, even when such decisions have "dire possible consequences").

Finally, **it is** "**unconstitutional for a legislature to presume that all minors are incapable of providing informed consent**." *Thompson v. Oklahoma*, 487 U.S. 815, 854 (1988) (emphasis added). In sum, there are no barriers, legal or otherwise, to the informed consent alternatives that the City never considered and failed to adopt. Even without, but especially with their parents, minors can consent to voluntary SOCE counseling that they request and wish to receive. The City's failure to consider informed consent as an alternative means is a failure of narrow tailoring.

d. The Ordinance Is Not Narrowly Tailored Because It Is Wildly Underinclusive.

Although the Magistrate's MPI R&R did not address the narrow tailoring issue of underinclusivity, Plaintiffs raised it at the hearing. (Hr'g Tr., Dkt. 138, at 163:4–164:14.) Put simply, if the purpose of the ordinance is to protect children and youth from the purported harms of SOCE counseling, it is "'wildly underinclusive,'" further undermining any notion of narrow tailoring. *See NIFLA*, 138 S. Ct. at 2376 (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 802 (2011)). The ordinance regulates only licensed professionals, and expressly excludes "conversion therapy" offered by unlicensed religious counselors and clergy. If Tampa genuinely believes all "conversion therapy" is harmful to minors, then exempting unlicensed religious counselors and clergy from regulation makes no sense. Indeed, the APA Report on which Tampa ostensibly relies not only fails to present empirical evidence of harm from **any** kind of SOCE counseling, its non-empirical, anecdotal reporting of harm expressly does not differentiate between SOCE from licensed professionals and SOCE from unlicensed religious organizations or persons.

(APA Rep., Dkt. 134-17, at 2 n.**.[12]) If the City has any legitimate authority to regulate behavior by adults that is considered harmful to children, whether those adults are religious, or part of a religious institution, is irrelevant. Thus, Tampa cannot justify the underinclusivity of its ordinance on any claimed difference in harm between licensed SOCE and unlicensed religious SOCE, still further undermining any notion of narrow tailoring.

e. The City Abandoned Any Argument That Its Ordinance Satisfies Strict Scrutiny.

The City made no attempt prior to or at the hearing to show the Court that its ordinance satisfies strict scrutiny.[13] (Doc. 99 at 8–16; Hrg. Hr'g Tr. at 123:21–25.) By not attempting to argue how the ordinance could satisfy strict scrutiny in the event the Court applied it, the argument is abandoned. *See Raybon v. Alabama Space Sci. Exhibit Comm'n*, No. CV-17-S-372-NE, 2018 WL 4184580, at *11 (N.D. Ala. Aug. 31, 2018) ("Issues and contentions not raised in a party's brief are deemed abandoned." (citing *Chapman v. AI Transport*, 229 F.3d 1012, 1027 (11th Cir. 2000) (*en banc*)); *Ramsey v. Bd. of Regents of Univ. Sys. of Georgia*, No. 1:11-CV-3862-JOF-JSA, 2013 WL 1222492, at *29 (N.D. Ga. Jan. 30, 2013) ("When a party fails to address a specific claim, or fails to respond to an argument made by the opposing party, the Court deems such claim or argument abandoned."), *aff'd*, 543 Fed. Appx. 966 (11th Cir. 2013).

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[12] "In this report, we use the term sexual orientation change efforts (SOCE) to describe methods (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) that aim to change a person's same-sex sexual orientation to other-sex, **regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved**." (Doc. 134-17 at 2 n.** (emphasis added).)

[13] The City's lone, perfunctory footnote regarding strict scrutiny in its post-hearing memorandum (Dkt. 143 at 2 n.2) cannot avoid its waiver. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 (11th Cir. 2007) ("We will not address this perfunctory and underdeveloped argument.").

B. The Ordinance Is an Unconstitutional Viewpoint-Based Restriction on Plaintiffs' Speech.

The Magistrate correctly concluded that the ordinance is viewpoint-discriminatory. (MTD R&R, Dkt. 148, at 16–19; MPI R&R, Dkt. 149, at 29–30.) The City's overly conclusory objection is unavailing, merely rehashing its unpersuasive speech vs. conduct argument. (MTD Objs., Dkt. 155, at 4–5; MPI Objs., Dkt. 156, at 11–12.)

A viewpoint-based restriction on private speech has never been upheld by the Supreme Court or any court. Indeed, a finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667 (2011). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. In fact, **viewpoint-based regulations are always unconstitutional**. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 394 (1993) ("'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'") (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses"); *see also Searcy v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989) (the government "may not discriminate between speakers who will speak on the topic merely because it disagrees with their views"), *id.* at 1325 ("**The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis**." (emphasis added)); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment*

Doctrine, 63 U. Chi. L. Rev. 413, 444 ("the Court almost always rigorously reviews and then invalidates regulations based on viewpoint").

The ordinance is a textbook example of viewpoint discrimination. On its face, the ordinance purports to allow licensed therapists to discuss the subject of sexual orientation, but explicitly prohibits a particular viewpoint on that subject, namely that unwanted same-sex attraction can be reduced or eliminated to the benefit of the client, if the client so desires. The ordinance defines "conversion therapy" in such a way that it is clear that the City is targeting only one viewpoint, *i.e.*, SOCE that seeks to "eliminate or reduce sexual or romantic attractions or feelings **toward individuals of the same gender or sex**." (Ordinance, Dkt. 24-1, at PageID 348 (emphasis added).) Similarly, the ordinance encourages counselors to affirm and facilitate same-sex attractions when minor clients are questioning such feelings, but prohibits counselors from affirming minor clients' desires and goals to change unwanted same-sex attractions, even when the minor clients themselves request and seek that outcome. (*Id.*)

The ordinance also purports to prohibit licensed counselors from engaging in any practice that seeks to change behaviors, gender identity, or gender expression. (*Id.*) But the plain text of the ordinance demonstrates that it only prohibits such counseling for minor clients who wish to reduce or eliminate behaviors, identity, or expressions that differ from their biological sex. (*Id.*) That this is true cannot be questioned because the ordinance specifically exempts counseling that "provides support and assistance to a person undergoing gender transition." (*Id.*). To undergo "gender transition," one has to be—at minimum—seeking to change from one gender to the other. **Change is the definition of transition**. *See* Dictionary.com Unabridged, https://www.dictionary.com/browse/transition?s=t (last visited Mar. 3, 2019) ("movement, passage, or **change** from one position, state, stage, subject, concept, etc., to another; **change**" (emphasis added).) So, under the

ordinance, if a minor client wants to undergo or prepare to undergo radical surgery to alter his appearance or genitalia, the City has no problem with a counselor providing counseling to assist in **that** change. But, if a minor client merely wants to speak with a counselor about unwanted feelings concerning her gender identity or expression, the counselor is absolutely prohibited from engaging in such counseling if it aids the minor in reducing unwanted cross-gender identity, behaviors, or expressions. There can be no question that this is viewpoint discrimination.

The Supreme Court and several other courts have invalidated regulations of professional speech as unconstitutional viewpoint discrimination. *See Sorrell*, 131 S. Ct. 2653 (2011); *Legal Servs. Corp. v. Valazquez*, 531 U.S. 533 (2001); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). In these cases, the courts recognized the axiomatic truth that the government is not permitted to impose its viewpoint on speakers, even professional speakers subject to licensing requirements and regulation.

In *Velazquez*, the Court addressed a federal funding limitation on legal aid attorneys that operated in the same viewpoint-based manner as the Ordinances. *Velazquez*, 531 U.S. at 537–38. The law provided that attorneys could not receive funds if they challenged welfare laws. The Court invalidated the law as viewpoint discriminatory, because it had the effect of prohibiting "advice or argumentation that existing welfare laws are unconstitutional or unlawful," and thereby excluded certain "vital theories and ideas" from the lawyers' representation. *Id.* at 547–49.

In *Conant*, the Ninth Circuit invalidated a federal policy that punished physicians for communicating with their patients about the benefits or options of marijuana as a potential treatment. *Conant*, 309 F.3d at 633. The Ninth Circuit noted that the doctor-patient relationship is entitled to robust First Amendment protection:

> An integral component of the practice of medicine is the communication between a doctor and a patient. **Physicians must be**

> **able to speak frankly and openly to patients**. That need has been recognized by courts through the application of the common law doctor-patient privilege.

Id. at 636 (emphasis added). Far from being a First Amendment orphan, such professional speech "may be entitled to the strongest protection our Constitution has to offer." *Id.* at 637 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). The ban impermissibly regulated physician speech based on viewpoint:

> The government's policy in this case seeks to punish physicians on the basis of the content of doctor-patient communications. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger the policy. Moreover, the **policy does not merely prohibit the** discussion **of marijuana; it condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient**. Such condemnation of particular views is especially troubling in the First Amendment context.

Id. at 637–38 (emphasis added). The court rejected as inadequate the government's justification that the policy prevented clients from engaging in harmful behavior, and permanently enjoined enforcement of the policy. *Id.* at 638–39.

The ordinance here operates almost identically to the federal policy enjoined in *Conant*. Just as the policy in *Conant* prohibited physicians from speaking about the benefits of marijuana to a suffering patient, so does the ordinance prohibit counselors from speaking about the potential for reduction or elimination of unwanted same-sex attractions, or desires to "transition to another gender" (or de-transition to biological sex) that might benefit a client distressed by the unwanted desires. In both cases, the laws express a preference for the message the government approves and disdain attached to punishment for the viewpoint the government abhors. As was true of the law in *Conant*, the ordinance here should be invalidated as unconstitutional viewpoint discrimination.

It is not enough that the ordinance purports to protect a therapist's right to recommend or refer clients out for SOCE. (Ordinance, Dkt. 24-1, at PageID 347.) In reality, as soon as a therapist

informs a client that the talk therapy recommended by the therapist as beneficial and good is nonetheless illegal, the credibility of the therapist's viewpoint is immediately undermined, to the injury of the therapist's reputation and, more importantly, the therapeutic alliance. To be sure, this undermining of the therapist's viewpoint is intended, and intentionally discriminatory.

The City contends that *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) gives the government license to discriminate on the basis of content and viewpoint in this context. (MPI Objs., Dkt. 156, at 11.) But *R.A.V.* provides no such refuge. There, the Supreme Court noted 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." 505 U.S. at 387. What the City fails to grasp, however, is that such categories of so-called "unprotected speech" are severely limited by Supreme Court precedent to certain "well-defined and narrowly limited classes of speech," including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010). The reason such categories, though content-based, can be more easily restricted is because their "prevention and punishment [has] never been thought to raise any Constitutional problem." *Id.* at 469 (citing *Chaplinski v. New Hampshire*, 315 U.S. 568, 571 (1942)).

Not only is the counseling speech of licensed professionals glaringly absent from the severely restricted list, but the Supreme Court's recent precedents prove it has been explicitly excluded from the list of proscribable categories. *See NIFLA*, 138 S. Ct. at 2372 ("Speech is not unprotected merely because it is uttered by professionals."); *Reed*, 135 S. Ct. at 2229 (noting that professional speech is protected, and not one of the proscribable categories of speech). Thus, even if the First Amendment did not stand against all "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," *United States v. Stevens*, 559 U.S. 460, 472

(2010), this Court would still be bound by *NIFLA* and *Reed* to reject the City's contention that Plaintiffs' speech is akin to the long-recognized categories of unprotected speech discussed in *R.A.V.* Plaintiffs' speech does not fall within the narrowly limited classes of speech for which this Court can disregard the traditional strictures of the First Amendment.

Nor does the City solve its problem by appealing to *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011). *Keeton* dealt with a counseling student who was asked to participate in an educational remediation plan because the student "expressed an intent **to impose her personal religious views on her clients**, in violation of the ACA Code of Ethics." 664 F.3d at 872 (emphasis added). Indeed, the remediation plan itself stated that "the intent of the remediation plan is not necessarily to alter your views about sexual orientation," but instead to help the student "be aware of her views and not impose them on others." *Id.* The evidentiary record in the case also demonstrated that the school's intent in asking the student to complete a remediation program was "teaching Keeton not to impose her values on clients." *Id.* at 873. Such educational requirements were viewpoint neutral, according the Eleventh Circuit, because the focus of the entire education program was to instruct students that "all graduate students, regardless of personal beliefs, must counsel clients in accordance with the ACA Code of Ethics." *Id.* at 874. The Eleventh Circuit concluded by noting that the plan was viewpoint neutral because it was "aim[ed] at Keeton's unwillingness to comply with the ACA code of ethics" for students engaged in the practicum, not at her religious viewpoints. *Id.*

Keeton provides no refuge for the City because the ordinance here does not simply prohibit Plaintiffs from imposing their views on minor clients. If that is all the ordinance had done, it would have been unnecessary, since professional standards already prohibit therapists, including Plaintiffs, from imposing their viewpoints on unwilling clients. (Am Compl., Dkt., 78, ¶¶ 78–82.)

Moreover, if that is all the ordinance had done, Plaintiffs would not have needed to file this lawsuit, since they have no interest in imposing their views, beliefs, or values upon any of their clients, minors included. (Am. Compl., Dkt. 78, ¶¶ 64–66, 68, 70, 106–07, 125.)

Plaintiffs seek only to conduct client-directed and client-centered counseling where the **clients'** goals and fundamental right to **self**-determination are paramount. (Am. Compl., Dkt. 78, ¶¶ 64–66, 68, 70, 106–07, 125.) The Tampa ordinance prohibits Plaintiffs' speech-only SOCE counseling even when the clients themselves present with unwanted same-sex attractions, behaviors or identity, even when the clients themselves have the viewpoint that change is possible, and even when the clients themselves request and want Plaintiffs' talk therapy. *Keeton* therefore is wholly inapposite, because the ordinance does not merely prohibit Plaintiffs from **imposing** their viewpoints on their clients, but also prohibits Plaintiffs from **sharing** their viewpoints with their willing clients, and, more importantly, prohibits the clients themselves from seeking and receiving counseling that matches the clients' viewpoint. (Am. Compl., Dkt. 78, ¶¶ 27–28.)

C. The Magistrate Correctly Determined the Ordinance to Be Unconstitutionally Vague and Overbroad, and an Unconstitutional Prior Restraint.

The Magistrate correctly found that Plaintiffs sufficiently alleged, and established a likelihood of success on the merits of, Plaintiffs' First Amendment vagueness, overbreadth, and prior restraint claims. (MTD R&R, Dkt. 148, at 19–23; MPI R&R, Dkt. 149, at 30–32.) The City's objections to these determinations are conclusory, even incoherent, and otherwise fail to engage with the Magistrate's findings and conclusions. (MTD Objs., Dkt. 155, at 5–7; MPI Objs., Dkt. 156, at 12–14.) The City's failure to meaningfully engage the Magistrate's determinations obviates this Court's need to review the objections further.

D. The Deficiencies of the *Otto* Order Illuminate the Superiority of the Magistrate's R&R's.

The *Otto* Order is unhelpful on its face, for it (erroneously) punts on the critical issue of the applicable standard of constitutional review for the *Otto* plaintiffs' First Amendment claims:

- "At this early stage of the litigation, the Court need not resolve whether strict scrutiny is the applicable standard and whether the ordinances are the *least* restrictive means that Defendants could have used to achieve their interest in order to reach a decision regarding the Motion." (*Otto* Order at *2.)
- "The Court concludes that it is unclear what standard of review should apply to this case." (*Otto* Order at *16.)
- "[T]he Court declines to announce a standard of review for this case." (*Otto* Order at *26.)

Here, the Magistrate's MPI R&R, unlike the *Otto* Order, analyzed **and reached a conclusion** on the appropriate standard of review for Plaintiffs' First Amendment claims. (Dkt. 149 at 26 (concluding "strict-scrutiny analysis applies to laws banning SOCE counseling").)

To be sure, the *Otto* court properly recognized that the ordinances at issue regulate counseling "that is effectuated **entirely through speech**." (*Otto* Order at *2.) The court also concluded that "[t]he ordinances also arguably are content-based, as **they apply 'to particular speech because of the topics discussed or the idea or message expressed**.'" (*Id.*) Nonetheless, the *Otto* court remarkably decided it "need not resolve whether strict scrutiny is the applicable standard and whether the ordinances are the *least* restrictive means that Defendants could have use to achieve their interest . . . ." (*Id.*).

The *Otto* court also imposed the wrong burden of proof on the parties. Although the Supreme Court has held unequivocally that "the burdens **at the preliminary injunction stage** track the burdens at trial," *Gonzales*, 546 U.S. at 429, the *Otto* court improperly reversed the burdens for the counselor plaintiffs: "While at trial Defendants will have the burden of

demonstrating the constitutionality of their ordinances, at the preliminary injunction state, the burden is **on the Plaintiffs** to establish that they have a substantial likelihood of success on the merits at trial." (*Otto* Order at *2 (emphasis added).) *See Ashcroft*, 542 U.S. at 665 (holding, **on preliminary injunction motion**, "**the burden is on the government** to prove that the proposed alternatives will not be as effective as the challenged statute." (emphasis added)). Thus, the district court improperly yoked Counselors with the government's narrow tailoring burden, and counted **the government's** failure to convince the court on narrow tailoring as **Counselors'** failure:

> **It is not clear from the record at this stage that the ordinances are the 'least restrictive means' to protect minors** . . . . Regardless, the Court need not probe the depths of the least restrictive means requirement at this stage. For now, it is sufficient to conclude that whether one or both of the ordinances survive the least restrictive means analysis is a close question, **and Plaintiffs have not met their burden of demonstrating substantial likelihood of success on this point.**"

(*Otto* Order at *24 (emphasis added).)

The Third Circuit recently reversed the denial of preliminary injunctive relief on the same grounds:

> In considering whether to grant preliminary injunctive relief, the District Court observed that Defendants failed to produce evidence that "made a clear showing" the ordinance was narrowly tailored. Yet it determined that Plaintiffs bore the burden of demonstrating their likelihood of success on the merits, and they failed to do so on the scant record before it. **Plaintiffs contend that the District Court erred in placing this burden on them. We agree**.

Reilly v. City of Harrisburg, 858 F.3d 173, 179–80 (3d Cir. 2017) (emphasis added) (citation omitted), *as amended* (June 26, 2017).

The *Otto* court curiously cited *Wollschlaeger* to support its **in**decision on the applicable standard of review. (*Otto* Order at *14 ("In *Wollschlaeger*, the Eleventh Circuit declined to say whether intermediate or strict scrutiny would be the appropriate standard of review.").) If,

however, the district court had held the government defendants to the proper burden of proof on narrow tailoring, then the court would have been compelled to hold, as the Eleventh Circuit held in *Wollschlaeger*, that the ordinances could not withstand intermediate **or** strict scrutiny. *See Wollschlaeger*, 848 F.3d at 1301 ("[B]ecause these . . . provisions do not survive heightened scrutiny . . . we need not address whether strict scrutiny should apply to them.").

The Magistrate's superior effort in the R&R's before this Court is demonstrated by the Magistrate's engagement with **and decision on** the applicable standard of review, and engagement with the applicable burden of proof overlooked by the *Otto* court.

III. PLAINTIFFS ALLEGED AND DEMONSTRATED IRREPARABLE HARM ENTITLING THEM TO PRELIMINARY INJUNCTIVE RELIEF.

The Magistrate correctly recognized that Plaintiffs are presumptively harmed by any deprivation of their First Amendment rights. (Dkt. 149 at 32–33.). The City has put forward no facts to rebut this presumption. Rather, the City points only to the time elapsed between passage of the Ordinance and Plaintiffs' filing. (MPI Objs., Dkt. 156, at 14–15.) But the City misses the point. Plaintiffs' litigation decisions, including to seek limited discovery prior to the preliminary injunction hearing, lead to the discovery of critical evidence on which the Magistrate relied in concluding the ordinance to be unconstitutional. Without the record evidence obtained by Plaintiffs in discovery, especially on the strict scrutiny issue of narrow tailoring, the Magistrate would have had much less to work with, and this Circuit's "'strong policy of determining cases on their merits'" would have been undermined. *See Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1244–45 (11th Cir. 2015). Now this Court has the benefit of a developed preliminary injunction record on which to base the Court's review of the Magistrate's rulings.

Moreover, and not surprisingly, the City has not cited a single **First Amendment** case holding that a "delay" of eight months or less in bringing a constitutional challenge precludes a

finding of irreparable harm. Furthermore, given the relatively limited availability of qualified First Amendment counsel willing to represent Plaintiffs in an unpopular cause, any "delay" is understandable and excusable even if constitutionally relevant.

IV. NEITHER THE PUBLIC INTEREST NOR THE BALANCE OF HARMS PRECLUDES INJUNCTIVE RELIEF AGAINST THE UNCONSTITUTIONAL ORDINANCE.

The Magistrate correctly found both the balance of equities and public interest weigh in Plaintiffs' favor. (MPI R&R, Dkt. 149, at 33–35.) It is axiomatic that "the enforcement of an unconstitutional law vindicates no public interest." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) (citing *ACLU v. Ashcroft*, 322 F.3d 240, 251 n. 11 (3d Cir. 2003), *aff'd*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004)). Given that there is no evidence of harm from SOCE in Tampa prior to enactment of the ordinance, and certainly no evidence of harm at the hands of any Plaintiff, there is no public interest supporting the City's code enforcement or legal department officials wielding the unconstitutional ordinance, and no plausible risk of harm to anyone from enjoining it. Furthermore, if this unconstitutionally broad ordinance were enjoined, Tampa theoretically remains free to attempt a narrow, constitutional ordinance that prohibits only unprotected conduct while allowing Plaintiffs' protected talk therapy. *See Swartzwelder v. McNeilly*, 297 F.3d 228, 242 (3d Cir. 2002) (holding balance of interests favored injunction because, "[w]hile the preliminary injunction may impinge on significant interests of the City, **the preliminary injunction leaves the City free to attempt to draft new regulations** that are better tailored to serve those interests." (emphasis added)).

To be sure, this is exactly what happened in Massachusetts immediately after *McCullen*. Within just **thirty-four days** after Massachusetts' buffer zone was invalidated for lack of narrow tailoring, the Commonwealth enacted a new, narrower abortion facility access statute. *See* Mass. Gen. Laws Ann. ch. 266, § 120E 1/2 (eff. July 30, 2014). From start to finish, Tampa's Ordinance

took approximately seventy-five days to enact, and counsel boasted about the speed of that process. (Hr'g Tr., Dkt. 138, at 116:3–117:8.) There is no reason why Tampa could not try to beat that time with a new ordinance.

V. PARTIALLY ENJOINING THE ORDINANCE PRACTICALLY PROVIDES PLAINTIFFS THE RELIEF THEY SEEK, BUT WHOLLY ENJOINING THE ORDINANCE LIKELY IS REQUIRED AS A MATTER OF LAW.

A. The Magistrate Recommends a Limited Preliminary Injunction Against Enforcement of the Ordinance.

The Magistrate recognized, and Plaintiffs admit, the practical reality that Plaintiffs would not have challenged the ordinance if it only banned coercive or aversive physical treatments. (MPI R&R, Dkt. 149, at 35–37.) Based on this consideration, the Magistrate recommended a partial injunction of the ordinance. Although such a limited injunction practically provides Plaintiffs relief, and Plaintiffs did not object to the recommendation, Plaintiffs owe this Court the candor to point out the likely legal impropriety of such a limited injunction.

B. The Remedy for an Overbroad Ordinance Is to Invalidate It.

"The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law . . . ." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (citations and internal quotation marks omitted); *see also id.* ("Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces [the threat that an overbroad law may deter or chill protected speech]."); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("[A]ny enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.").

C. The Court Cannot Save the Ordinance by Limiting or Rewriting It.

"In considering a facial challenge, this Court may impose a limiting construction . . . only if [the ordinance] is 'readily susceptible' to such a construction. *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). Moreover, the Court must "not rewrite a . . . law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish [lawmakers'] incentive to draft a narrowly tailored law in the first place." *Stevens*, 559 U.S. at 481 (alteration in original) (citations and internal quotation marks omitted). The ordinance's total ban on "conversion therapy" is not susceptible to a limiting construction to cover, for example, only aversive or coercive therapy. Only rewriting the ordinance could accomplish such a limitation, and it would be improper for the Court do what Tampa should have done legislatively in the first place.[14]

The City passed the ordinance quickly. Limiting its scope to make it constitutional is the City's responsibility in the first instance, through its legislative branch. Plaintiffs do not concede the City can enact a constitutional ordinance banning "conversion therapy," but do posit that any chance of constitutionality is tied to an ordinance's not prohibiting speech, or if it does, on a viewpoint-neutral basis and narrowly tailored, with sufficient specificity to be enforceable by City officials who cannot currently distinguish aversive from non-aversive counseling or define the core concepts of sexual orientation and gender identity.

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[14] Plaintiffs do not concede Tampa has the authority to draft any ordinance prohibiting any category of SOCE, given the State of Florida's preemption of the field. However, Plaintiffs do acknowledge that they would lack standing to challenge an aversive-only or coercive-only therapy ban, since they have no interest in such therapies and such a ban would have no effect on them.

CONCLUSION

For all of the foregoing reasons, the City's Objections should be overruled, and the Magistrate's Reports and Recommendations adopted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this March 4, 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/ Roger K. Gannam
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