

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:18-CV-80771-ROSENBERG/REINHART**

ROBERT W. OTTO, PH.D., LMFT, and
JULIE H. HAMILTON, PH.D., LMFT,

Plaintiffs,

v.

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

Defendants.

**DEFENDANT PALM BEACH COUNTY'S REPLY TO PLAINTIFFS' CONSOLIDATED
RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

COMES NOW, Defendant PALM BEACH COUNTY ("County"), by and through undersigned counsel, replies to Plaintiffs' Consolidated Response in Opposition to Defendants' Motions to Dismiss [DE 62], and in support thereof, states the following:

The County's Motion to Dismiss Plaintiffs' Verified Complaint [DE 39] already addresses the arguments in Plaintiffs' Consolidated Response in Opposition to Defendant's Motion to Dismiss [DE 62]. The following authority provides further support for the County's position that the Plaintiffs' Complaint [DE 1] should be dismissed for lack of standing and failure to state a claim upon which relief may be granted.

1. Otto Lacks Standing to Challenge the County's Ordinance.

The County asks this Court to dismiss the complaint of Plaintiff Robert Otto, LMFT, Ph.D (Otto) against the County. Otto argues in his Opposition to the Defendants' Motion to Dismiss that this Honorable Court must speculate that Otto's place of practice is limitless and essentially speculate that he could practice anywhere in the world. DE 62, p. 7. However, Otto's blanket argument outside the four-corners of his Complaint is irrelevant as to the issue of standing and the facts that are actually alleged in the Complaint. In the Complaint, Otto specifically alleges that he "engages in SOCE counseling in the City of Boca Raton, which is located in Palm Beach County, Otto is subject to *potential* fines under the City Ordinance and County Ordinance." DE 1, ¶ 127. (Emphasis added). Otto does not allege that he *currently engages* in SOCE counseling in

unincorporated Palm Beach County or in any other municipalities. Similarly, Otto does not allege that he *desires* to engage in SOCE counseling in *unincorporated* Palm Beach County or in any other municipalities. Indeed, Otto actually alleges that he is concerned with “potential” or future fines under the City Ordinance or County Ordinance because he “engages in SOCE counseling in the City of Boca Raton, which is located in Palm Beach County.” *Id.* “When analyzing a defendant’s motion to dismiss we must evaluate standing based on the facts alleged in the complaint, and we may not speculate concerning the existence of standing or piece together support for the plaintiff.” *Duty Free Ams., Inc. v. Estee Lauder, Cos.*, 797 F. 3d 1248, 1271 (11th Cir. 2015) (internal quotations and citations omitted). Otto fails to allege any facts to support his standing to challenge the County’s Ordinance.

2. Hamilton’s Standing Is Not Conceded.

Plaintiff Julie Hamilton, LMFT, Ph.D (Hamilton) erroneously assumes that because the County did not object to Hamilton’s standing to challenge the County’s Ordinance in its Motion to Dismiss, that the County somehow affirmatively concedes that Hamilton has standing. DE 62, p. 8. However, even assuming, that the County did concede (which the County did not), standing is not a matter that can be stipulated or even conceded to by the parties. *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 77 F. 2d 598, 606-607 (11th Cir. 1985) (the district court is obliged to ensure that this jurisdictional standing requirement is satisfied and the court is not free to rely on the party’s concession on standing). Furthermore, even though the County did not raise the issue as to Hamilton’s standing to challenge the County’s Ordinance in its Motion to Dismiss, “[a] plaintiff does not acquire standing merely because the defendant raises no objection.” *Id.* at 606. Accordingly, Hamilton makes a baseless and legally unsupportable argument that the County can and did concede to (which the County did not) her jurisdictional standing in this lawsuit. While the County did not challenge Hamilton’s standing in its Motion to Dismiss, it reserves the right to do so in this litigation. *See* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

3. The Ordinance States the Intent.

Plaintiffs also mischaracterize the County’s legal arguments as a factual dispute in terms of the County’s “intent.” DE 62, p. 19. The County’s arguments focus on the text of the Ordinance when interpreting whether the ban discriminates based on content or viewpoint. Plaintiffs’ allegations in paragraphs 186, 188, and 195 are legal conclusions that neither the County nor this

Court need accept as true for purposes of a motion to dismiss. When considering a motion to dismiss, the court may consider the pleading and attached exhibits. *Fox v. First Data Merch. Servs., LLC.*, 2018 US Dist. LEXIS 15787, *6 (S.D. Fla. Jan. 30, 2018) (internal quotations and citations omitted). Plaintiffs attached the County's Ordinance as Exhibit B to their Complaint. DE 1-5. The Ordinance expressly states the County's "intent." DE 1-5, p. 4. There is no factual dispute as to what is stated in the Ordinance. *See* DE 1, ¶ 69. The closest the Complaint comes to alleging a different intent by the County is in paragraph 1, when Plaintiffs allege that the County's justification is "purported" and states that the County does "not like the goals, objectives, or desires of certain clients when it comes to one type of counseling." *Id.* at ¶ 1. But, when there is a conflict between allegations in the pleading and the exhibits, the exhibits control. *Fox*, 2018 US Dist. LEXIS 15787 at *6 (internal quotations and citations omitted). To the extent the Court finds that this conflict cannot be resolved by looking to the Ordinance, the legislative history of the Ordinance, which may be considered in a motion to dismiss, does clearly refute Plaintiffs' allegation that the County simply did not "like the goals" of conversion therapy. The legislative history shows that the County was concerned with protecting minors from the harms of conversion therapy.

4. Judicial Notice of Public Records Is Appropriate.

The Plaintiffs take issue with the County's use of the videos and transcripts of the Palm Beach County Board of County Commissioners' public meetings in support of its Motion to Dismiss. DE 62, p. 14. The Eleventh Circuit has held that a district court may take judicial notice of public records and consider them on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment. *Universal Express, Inc. v. U.S. Sec. & Exch. Comm'n*, 177 F. App'x 52, 53 (11th Cir. 2006). Section 119.011, Florida Statutes defines public records as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." The videos of the County's public meetings were made in connection with the transaction of official business of the County, the public meeting of the County. The transcripts of the videos, though in a different physical form, reflect the audio recording of the public meeting. Accordingly, both are "public records."

The public records filed in support of the County's motion to dismiss include videos and transcripts of the public meetings where the County considered, debated, and enacted the Ordinance, and are offered, not for the truth of any statement contained therein, but to demonstrate what was before the County when it enacted the Ordinance. *See Turner v. Wells*, 879 F.3d 1254, 1272 n.5 (11th Cir. 2018). Though Plaintiffs may disagree with the content of the statements made by members of the public to the County at public meetings, there is no reasonable disagreement that the videos¹ and transcripts² of the meetings truly and correctly reflect what was presented to the County in public meetings when enacting the Ordinance. The matters before the County when enacting the Ordinance are central to Plaintiffs' claims about "intent," and may be relevant if this Court determines, as Plaintiffs advocate, that heightened or strict scrutiny applies. In a similar case, the Honorable Judge Sansone granted the City of Tampa's request for the court to take judicial notice of similar public records related to the passage of an ordinance banning conversion therapy. *See Vazzo v. City of Tampa*, No. 8:17-cv-2896-T-36AAS, DE 51, (M.D. Fla. Mar. 15, 2018).

Accordingly, for these reasons and those included on the notices of filing, the County requests that this Honorable Court take judicial notice of the video of the Palm Beach County Board of County Commissioners Public Meetings and the corresponding transcripts.

5. The Ordinance Regulates Professional Conduct, and Does Not Implicate the First Amendment.

The County's professional-conduct argument flows from the June 26, 2018, Supreme Court opinion recognizing "professional conduct" as a separate category in First Amendment analysis. *See Nat'l Inst. of Fam. & Life Advocates v. Becerra*, ("NIFLA"), 138 S. Ct. 2361, 2371-72 (2018); *see also* DE 39, p. 4-7. The County's professional-conduct argument remains untouched by the Eleventh Circuit's dicta in a distinguishable case. The Plaintiffs' "dubious constitutional enterprise" refrain comes from the Eleventh Circuit's discussion of the *Pickup* case, which the court distinguished and said "did not speak to the issues before [it]." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1309 (11th Cir. 2017). In determining the appropriate standard of review and after discussing Justice White's framework for evaluating professional speech, the Eleventh Circuit said:

¹ The County provided an affidavit that the videos were true and correct copies of the video recording of the public meetings. *See* DE 43-1.

² The transcripts were made and certified by a registered professional reporter. *See* DE 36-1, p. 88; DE 37-1, p. 101.

The Ninth Circuit also adopted Justice White’s approach, but in a case upholding a California law prohibiting mental health practitioners from providing sexual orientation change efforts (SOCE) therapy—meant to change a person’s sexual orientation from homosexual to heterosexual—to children under the age of 18. *See Pickup v. Brown*, 740 F.3d 1208, 1225-29 (9th Cir. 2013) (as amended on rehearing). **Importantly, however, the law in *Pickup*—like the law in *Locke*—did not restrict what the practitioner could say or recommend to a patient or client.** *See id.* at 1223 (explaining that the California law did not prevent mental health providers “from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic” or from “recommending SOCE to patients, whether children or adults”). The *Pickup* panel, therefore, concluded that the law “regulate[d] conduct” even though it covered the verbal aspects of SOCE therapy. *See id.* at 1229.

There are serious doubts about whether *Pickup* was correctly decided. As noted earlier, characterizing speech as conduct is a dubious constitutional enterprise. *See also id.* at 1215-21 (O’Scannlain, J., dissenting from denial of rehearing en banc) (criticizing the *Pickup* panel for, among other things, not providing a “principled doctrinal basis” for distinguishing “between utterances that are truly ‘speech,’ on the one hand, and those that are, on the other hand, somehow ‘treatment’ or ‘conduct’”). **In any event, *Pickup* is distinguishable on its facts and does not speak to the issues before us. To the extent that *Pickup* provides any relevant insight,** it recognizes that “doctor-patient communications *about* medical treatment receive substantial First Amendment protection,” *id.* at 1227, and is therefore consistent with our approach.

Id. (emphasis added).

Because the Eleventh Circuit’s discussion of *Pickup*, in its own opinion, was not necessary to the holding of the case, and because the Eleventh Circuit did not decide whether conversion therapy is speech or conduct; the discussion of *Pickup* in *Wollschlaeger* is dicta.³ “And dicta is not binding on anyone for any purpose.” *See Edwards v. Prime Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010). This Court is “bound to follow the Supreme Court’s instructions on the matter instead of the implications of any dicta in [an Eleventh Circuit] opinion.” *See Castillo v. Florida*, 722 F.3d 1281, 1291 (11th Cir. 2013). On the issue of “professional conduct,” the Supreme Court recently instructed that, though it has not yet recognized “professional speech” as a separate constitutional category, its precedents do recognize and afford less protection for “professional conduct.” *See NIFLA*, 138 S. Ct. at 2371-72.

³ *See United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (“As our cases frequently have observed, dicta is defined as those portions of an opinion that are not ‘not necessary to deciding the case then before us.’”) (citations omitted).

Not only is the relied upon *Wollschlaeger* comment about “professional conduct” dicta, the case is also distinguishable. After its comments about *Pickup*, the Eleventh Circuit went on to find the Ninth Circuit case *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) more persuasive and analogous. 848 F.3d at 1309. In *Conant*, the government was not permitted to restrict a physician’s communications about marijuana, but was permitted to prosecute a physician who unlawfully prescribed marijuana. 309 F.3d at 635. Finding communication to be at issue, the *Wollschlaeger* court held that Florida’s restrictions on physician’s ability to inquire, keep records, and harass patients on the topic of gun ownership were unconstitutional content and viewpoint-based restrictions on the physician’s speech. 848 F.3d at 1307-10. The court then upheld the anti-discrimination provision, construing it to narrowly apply to “non-expressive, conduct such as failing to return messages, charging more for the same services, declining reasonable appointment times, not providing test results on a timely basis, or delaying treatment.” *Id.* at 1317. In other words, *Wollschlaeger* read the anti-discrimination provision to only regulate treatment or conduct of the regulated professionals and accordingly found no constitutional violation. *See id.*

Unlike the physician communication at issue in *Conant* and *Wollschlaeger*, the Ordinance here does not prohibit a practitioner from recommending conversion therapy, discussing their views on conversion therapy, or asking whether a client has in the past considered or received conversion therapy. The Ordinance disallows a practitioner from “engag[ing] in conversion therapy on any minor ...” with “conversion therapy” defined as “the practice of seeking to change an individual’s sexual orientation or gender identity ...” The argument that the Ordinance regulates professional conduct, not protected speech, is premised on the text of the Ordinance and the law cited in the motion to dismiss, *see* DE 39, p. 4-7, not on factual determinations.⁴

⁴ The citation to the transcript of the Board of County Commissioners meeting on page 7 of the County’s motion to dismiss, though informative legislative history that may be properly considered, is not determinative of whether conversion therapy is inherently expressive. The Complaint asserts similar facts concerning the non-expressive nature of providing therapy that are specific to Plaintiffs’ practices: “Dr. Otto does not coerce his clients into engaging in SOCE counseling, but respects the clients’ right to self-determination and treats each client with unconditional positive respect regardless of the client’s concept of self or feelings of unwanted same-sex attractions, behaviors, or identity.” and “... Dr. Hamilton does not impose an agenda on her clients, nor does she determine clients’ goals for therapy. Clients set their own goals for therapy.” DE 1, ¶¶ 130, 144.

The Court may determine at the motion to dismiss stage whether the conduct proscribed by the Ordinance is protected by the First Amendment. *See e.g., Doe v. Gov. of N.J.*, 783 F.3d 150, 156 (3d Cir. 2015) (affirming dismissal of First Amendment complaint concerning SOCE ban in its entirety); *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 113-14 (3d Cir. 2013) (affirming the dismissal of First Amendment claim after determining that there was no protected right of access to a polling place for news-gathering purposes); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1103 (10th Cir. 2006) (affirming the dismissal of a First Amendment claim because law at issue did not restrict any “expressive conduct,” or implicate the First Amendment); *Petersen v. Fla. Bar*, 720 F. Supp. 2d 1351, 1368 (M.D. Fla. 2010) (dismissing a First Amendment challenge to the Florida Bar’s elder law certification rules because the rules “do not have a sufficiently substantial impact on conduct protected by the First Amendment to render them unconstitutional”); *see generally Sykes v. McDowell*, 786 F.2d 1098, 1103 (11th Cir. 1986) (“Whether certain activity or speech is protected by the first amendment is a question of law for the district court.”) (citations omitted). A court may even apply strict scrutiny at the motion to dismiss stage. *See Dickerson v. Stualet*, 877 F. Supp. 1556, 1561 (M.D. Fla. 1995) (applying strict scrutiny and holding that “Florida's Midwifery Practice Act is a constitutionally acceptable regulation of speech” at the motion to dismiss stage). For the reasons stated in the County’s motion to dismiss, the County urges the Court to go no further in its analysis than holding that the Ordinance does not implicate the First Amendment, and that, therefore, Plaintiffs have not pled a cause of action under the First Amendment.

6. Plaintiffs’ Fail to State a Claim under the FRFRA.

With respect to Plaintiffs’ Florida Religious Freedom Restoration Act (“FRFRA”) claim, the County agrees that “[t]he FRFRA clearly prohibits a reviewing court from conducting a factual inquiry which questions the validity or centrality of a plaintiff’s beliefs.”⁵ The parties also agree that *Warner v. City of Boca Raton*, 887 So. 3d 1023 (Fla. 2004) defines the “substantial burden” pleading requirement, which has been described as a “narrow definition” and a “high standard.”⁶ But the parties disagree that the Plaintiffs’ allegations satisfy that requirement. Plaintiffs’

⁵ *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1034 n.10. (Fla. 2004).

⁶ *Freeman v. Dep't of High. Saf. & Motor Vehs.*, 924 So. 2d 48, 56 (Fla. 5th DCA 2006) (discussing *Warner*) (“The narrow definition of substantial burden adopted by the supreme court tempers the act's strict scrutiny requirement. A plaintiff must meet a high standard to show a substantial burden on religious freedom.”).

allegations concerning what is “consistent” with their beliefs miss the mark. Plaintiffs must (but do not) allege that their religion either requires them to do what the Ordinance forbids, that is to engage in a practice (as a licensed professional) that seeks to change the sexual orientation or gender identity of a minor or forbids them to do what the Ordinance requires,⁷ that is to refrain from providing conversion therapy to minors in Palm Beach County.

Such conclusory allegations, if pled, would be contradicted by the factual allegations of the Complaint: specifically, that Hamilton, when confronted with “minors who have expressed that they were happy identifying as gay, lesbian, or bi-sexual,” did not provide therapy to help those minors to change their attractions, behavior, or identity, DE 1, ¶ 148, and that Otto had a minor client “who identified as homosexual and came seeking help for issues other than sexual orientation” but Otto’s therapy “never included efforts to change sexual orientation,” *id.* at ¶ 133. Neither Plaintiff requires a minor client receiving their therapy to adopt the goal of changing their sexual orientation or gender identity. *See id.* at ¶¶ 131, 144. Plaintiffs’ allegations show that, in practice, their religious beliefs neither require them to provide conversion therapy nor forbid them from refraining from providing conversion therapy.

Moreover, even if Plaintiffs had pled that their religion required them to provide conversion therapy or forbade them from refraining from providing conversion therapy, the Court should still find that the Ordinance does not place a substantial burden on their religion because Plaintiffs are still permitted to provide conversion therapy to adults. *See Men of Destiny Ministries, Inc. v. Osceola Cty.*, 20 Fla. L. Weekly Fed. D314 (U.S. M.D. Fla. November 6, 2006) (“MDM is free to run its rehabilitation program in the other areas of the County that are zoned for the sort of facility it currently operates. And MDM may attempt to rehabilitate these individuals in other ways, such as by operating through counseling rather than by operating an in-patient facility. So long as MDM remains able to attempt to rehabilitate drug addicts and alcoholics, its religious exercise has not been substantially burdened under the FRFRA. *See, e.g., Warner*, 887 So. 2d at 1035 (concluding that city’s prohibition on vertical grave markers, but not horizontal ones, merely inconvenienced

⁷ Contrary to Plaintiffs’ reading of the Ordinance to mandate certain forms of counseling, the text of the Ordinance does not require Plaintiffs – or any provider – to engage in any affirmative conduct. The Ordinance does permit Plaintiffs, should they so choose, to provide certain types of therapy that are expressly excluded from the definition of “conversion therapy.” Plaintiffs may avoid any conflict with their religion by declining to engage in the types of therapy to which they object.

plaintiffs' religious exercise and therefore did not constitute a substantial burden under the FRFRA).”). Accordingly, because Plaintiffs have not alleged a substantial burden under the FRFRA, Plaintiffs fail to state a cause of action under the FRFRA and the count should be dismissed.

7. Plaintiffs Cannot State a Claim under the FPBRR.

The County does not concede that Plaintiffs, Plaintiffs’ clients, or any person can bring a cause of action under Florida Patient’s Bill of Rights and Responsibilities (“FPBRR”), which does not create a private cause of action. *See* § 381.026(3), Fla. Stat. (2018) (“This section shall not be used for any purpose in any civil or administrative action and neither expands nor limits any rights or remedies provided under any other law.”); *see also* *Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 986 (Fla. 1994) (“In general, a statute that does not purport to establish civil liability but merely makes provision to secure the safety or welfare of the public as an entity, will not be construed as establishing a civil liability.”) (citation omitted). Plaintiffs’ FPBRR claim should be dismissed.

8. Plaintiffs’ Conclusory Allegations and Legal Conclusions Fail to State a Claim upon which Relief May Be Granted.

Plaintiffs’ “[c]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent a dismissal.” *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1262 (11th Cir. 2004) (string citations omitted); DE 62, pp. 18-27. Plaintiffs cite numerous examples in their Opposition to the Defendants’ Motion to Dismiss of legal conclusions that are masquerading as factual allegations in the Complaint. DE 62, pp. 19-27 (“The City and County Ordinances, on their face and as applied, are unconstitutional prior restraints.”). These legal conclusions are unsupported by sufficient factual allegations and therefore should not prevent this Court from dismissing the Complaint for the reasons detailed in the County’s Motion to Dismiss and elaborated upon in this Reply.

WHEREFORE, for these reasons and those stated in the County’s Motion to Dismiss [DE 39] the County asks this Court to dismiss Plaintiffs’ Complaint [DE 1] in its entirety for lack of standing and failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(1), 12(b)(6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the authorized CM/ECF filers.

/s/ Rachel Fahey _____

Rachel Fahey, Esquire

Kim Ngoc Phan, Esq.

Palm Beach County Attorney's Office

300 N. Dixie Highway, Ste. 359

West Palm Beach, Florida 33401

Email: rfahey@pbcgov.org

dfishel@pbcgov.org, mjcullen@pbcgov.org

kphan@pbcgov.org, ldennis@pbcgov.org