UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

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

Plaintiffs,

vs.

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

Defendants.

_____/

DEFENDANT, CITY OF BOCA RATON'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Local Rule 7.1 and the Amended Discovery Plan for Preliminary Injunction Motion [ECF 50], Defendant, City of Boca Raton ("City"), files this its memorandum in opposition to the Motion for Preliminary Injunction [ECF 8] (the "Motion") filed by Plaintiffs, Robert W. Otto ("Otto") and Julie H. Hamilton ("Hamilton") (collectively, "Plaintiffs") and submits its Memorandum of Law in opposition to the Motion.

OVERVIEW

On October 10, 2017, the City passed Ordinance No. 5407 ("Ordinance"), which prohibits conversion therapy—treatment performed with the goal of changing an individual's sexual orientation or gender identity—on minors within City limits. *See* Ordinance, ECF No. 1-4, 6:10-14.[1] The Ordinance:

> does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders.

Id. at 4:21-24. Clergy and other religious leaders, moreover, are exempt from the Ordinance and may provide guidance and counseling to minors, so long as it is not performed under the guise of licensed mental health therapy. *Id.* at 6:26-7:3.

Defendant, Palm Beach County ("County") has passed a similar (albeit, not identical) ordinance. *See* ECF No. 1-5.

The Ordinance is justified by overwhelming research from leading health organizations that demonstrate that conversion therapy on minors[2] is both harmful and lacking in psychological or other medical foundation.[3] *See id.* 1:11-5:11. The City determined, in enacting the Ordinance, that it has "a compelling interest in protecting the physical and psychological well-being of minors"[4] against exposure "to serious harms caused by sexual orientation and gender identity

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[1] Hereinafter cited as "Ordinance, page: line."

[2] The Ordinance sometimes refers to "conversion therapy" as "sexual orientation change efforts," or its abbreviation, SOCE. Ordinance, 2:5-8.

[3] The Ordinance specifically references articles, reports, position statements, policy statements, and resolutions from the American Academy of Pediatrics; the American Psychiatric Association; the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation; the American Psychological Association; the American Psychoanalytic Association; the American Academy of Child & Adolescent Psychiatry; the Pan American Health Organization; the American School Counselor Association; the Substance Abuse and Mental Health Services Administration (a division of the U.S. Dep't of Health and Human Services); and the American College of Physicians. Ordinance, 1-4.

[4] The Ordinance defines "minor" as any person less than 18 years of age. Ordinance, 6:20.

change efforts." *Id.* at 5:3-6 (emphasis added). The City also found that minors receiving such treatment from licensed therapist within City limits "are not effectively protected by other means, including but not limited to, other state statutes, local ordinances or federal legislation." *Id.* at 5:12-15 (emphasis added).

MEMORANDUM OF LAW[5]

Applicable Standard for Preliminary Injunction

The requirements for obtaining a preliminary injunction are well-settled: "[A] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Council, Inc.*, 555 U.S. 7, 21 (2008). Moreover, as the Court recently reiterated, "a preliminary injunction is an 'extraordinary remedy never awarded as of right. *Benisek v. Lamone*, 138 S.Ct. 1942, 1943 (2018). *See also Regions Bank v. Kaplan*, 2017 WL 344914, *2 (M.D. Fla. 2017) (preliminary injunction is an extraordinary and drastic remedy).

I. PLAINTIFFS DO NOT HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Ordinance Does Not Unconstitutionally Discriminate on the Basis of Viewpoint.

1. The Ordinance Is A Regulation Of Professional Conduct, Supported By A Rational Basis.

a. The Ordinance Regulates Conduct, Rather Than Speech.

The United States Supreme Court recently reaffirmed the ability of governments to regulate professional conduct, even if that conduct incidentally involves speech. *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"). "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372 (citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992). "While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it . . . ." *Id.* (citing *Sorell v. IME Health Inc.*, 564 U.S. 552, 567 (2011)); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949);

[5] The relevant facts are derived from the Complaint, and for the purposes of this Motion only, are accepted as true.

U.S. v. Stevens, 559 U.S. 460, 468 (2010)). A law may regulate speech, for example, "'as part of the practice of medicine, subject to reasonable licensing and regulation by the state.'" *Id.* (emphasis in original) (quoting *Casey*, 505 U.S. at 884).

Unlike the California statute at issue in *NIFLA*—which improperly compelled speech that was not "tied to a [medical] procedure at all"—the Ordinance is expressly tied to a specific procedure (psychological conversion therapy), and does not compel any speech at all. *NIFLA*, 138 S. Ct. at 2374 (emphasis added). It is a specific, dangerous, and ineffective mental health procedure that the Ordinance bans. Therefore, the *NIFLA* Court's focus upon, and rejection of, "professional speech" as a separate First Amendment category is not applicable to the Ordinance, which does not ban "professional speech" (or any speech for that matter). The Ordinance bans a mental health procedure, conversion therapy for minors, expressly found to be valid, constitutional regulation of conduct in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated on other grounds*, *NIFLA*, *supra* ; *King v. Christie*, 981 F.Supp.2d 296 (D.N.J. 2013), *aff'd* 767 F.3d 216 (3rd Cir. 2014), *abrogated on other grounds*, *NIFLA*, *supra*; and *Doe v. Christie*, 33 F.Supp.3d 518 (D.N.J. 2014), *aff'd sub nom*, *Doe ex rel. Doe v. Governor of N.J.*, 783 F.3d 150, 155 (3d Cir. 2015). Those regulations, like the Ordinance and unlike the regulations in *NIFLA*, are constitutional - not because they regulate professional speech, but because they regulate professional conduct (which conduct may incidentally involve speech). The Court in *NIFLA*, in rejecting "professional speech" as a category of speech, also expressly reaffirmed that regulation of professional conduct is constitutionally permissible.

For example, the decision in *Pickup* did not turn on whether the California statute governed "professional speech." *See* 740 F.3d 1229. Rather, the court examined a "continuum" in determining whether the challenged ban improperly regulated speech or properly regulated conduct. *Id.* at 1227. Along the spectrum, the court discussed "professional speech," a phrase the *NIFLA* court declined to recognize as a separate category of speech. At the end of the continuum are regulations of professional conduct, "where we conclude that [the challenged statute] lands." *Id.* at 1229. When regulating professional conduct, "the state's power is great, even though such a regulation may have an incidental effect on speech." *Id.* (citing *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White J., concurring) ("Just as offer and acceptance are communications incidental to the regulatable transaction called a contract, the professional's speech is incidental to the conduct of the profession.")).

The same was true for the SOCE regulation at issue in *King v. Christie, supra*. There, the district court held that "psychotherapists are not entitled to special First Amendment protection merely because they use the spoken word as therapy," 981 F.Supp.2d at 319, and rejected the First Amendment challenge because the New Jersey SOCE regulation governed conduct, rather than speech:

> To be clear, the line of demarcation between conduct and speech is whether the counselor is attempting to communicate information or a particular viewpoint to the client or whether the counselor is attempting to apply methods, practices, and procedures to bring about a change in the client – the former is speech and the latter is conduct.

Id.; *see also Doe v. Christie*, 33 F. Supp. 3d at 525 ("[The challenged SOCE regulation] regulates mental health treatment – albeit in the form of talk therapy – not any particular speech of counselors or therapists involving certain views") (emphasis in original); *Booth v. Pasco County*, 757 F.3d 1198, 1210 (11th Cir. 2014) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.") (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

States and local governments routinely (and constitutionally) regulate professional conduct, and more specifically, medical treatments. *See Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider."); *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) ("[T]he decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health.").[6]

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[6] "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir.1968), *cert. denied*, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62, (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (additional citations omitted). *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs, *Rumsfeld v.*

As reconfirmed by the *NIFLA* Court, "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." 138 S.Ct. at 2372. Moreover, regulations of conduct, rather than speech, do not implicate the First Amendment in general, or "viewpoint discrimination" contentions in particular. The Ordinance "regulates only treatment, and nothing … requires us to analyze a regulation of treatment in terms of content and viewpoint discrimination." *Pickup*, 740 F.3d at 1231. There can be no dispute, then, that the above authorities remain "good law" for purposes of evaluating Plaintiffs' claims herein.

b. Since the Ordinance Regulates Professional Conduct, the Rational Basis Test Applies, and the Ordinance Should Be Deemed Valid.

The rational basis test is used to determine the constitutionality of regulations of professional conduct, and the Court should apply the rational basis test here in reviewing the Complaint's First Amendment claims. *Lange-Kessler v. Dep't of Educ. of the State of New York*, 109 F.2d 137 (2d Cir. 1997) (finding that regulation of the medical profession is afforded rational basis review); *King*, 981 F.Supp.2d at 312 ("Ultimately, if the statute does not implicate or burden constitutionally protected speech or expression in any manner, I apply rational basis review").

"Rational basis scrutiny is a highly deferential standard that proscribes only the very outer limits of a legislature's power." *Williams v. Pryor,* 240 F.3d 944, 948 (11th Cir. 2001) (citing, *inter alia, Romer v. Evans,* 517 U.S. 620, 632 (1996)). Under this standard, a statute comes to the court bearing "a strong presumption of validity." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). "The rational basis test asks (1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government's objective and the means it has chosen to achieve it." *Leib v. Hillsborough Cty. Pub. Transp. Comm'n,* 558 F.3d 1301, 1306 (11th Cir. 2009). A state is under no obligation to produce evidence supporting the rationality of the legislation and, indeed, the legislature need not even have actually been motivated by the rational reason presented to the court when it enacted the challenged law. *Beach Commc'ns,* 508 U.S. at 314–15; *Leib,* 558 F.3d at 1306. Rather, the challenger bears "the burden to negative every conceivable basis which might support [the law]." *Beach Commc'ns*, 508 U.S. at 315; *Williams*, 240 F.3d at 948. "Only in an exceptional

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Forum for Academic and Inst. Rights, Inc., 547 U.S. 47, 62 (2006); why 'an ordinance against outdoor fire' might forbid 'burning a flag,' *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992); and why antitrust laws can prohibit 'agreements in restraint of trade,' *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949))."

circumstance will a statute not be rationally related to a legitimate government interest and be found unconstitutional under rational basis scrutiny." *Williams*, 240 F.3d at 948.

Here, the City clearly has the power to regulate the particular conduct in question. *See* Section VIII (discussing preemption). Neither the Florida Constitution nor Florida statutes preempt the City's authority to legislate mental health treatments and the conduct of mental health professionals. *See Hillsborough Cty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons . . . is unquestionably at the core of the State's police power," which extends to "state and local governments."). The City clearly has a legitimate—in fact, compelling—interest in the health and safety of its minor residents. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.").

The Ordinance is rationally related to this government interest by banning conversion therapy for minors—a procedure which scores of medical and mental health organizations have found to be harmful—within the City.[7] *See* Ordinance (citing numerous medical and mental health reports).[8] Like the statute at issue in *Pickup*, the Ordinance "bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients. [The law] merely prohibits licensed mental health providers from engaging in SOCE with minors." *Pickup*, 740 F.3d at 1229.[9] Accordingly, the Ordinance meets the rational basis test

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[7] In fact, intransient nature of homosexuality has even been judicially recognized by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (noting that "in more recent years [] psychiatrists and others recognize[] that sexual orientation is both a normal expression of human sexuality and immutable") (emphasis added).

[8] The Ordinance, moreover, does not preclude Plaintiffs or any other mental health professional from voicing their sincerely held religious beliefs or candidly expressing their disdain for homosexuality. What it does preclude, however, is professional counseling with the goal of changing a minor's sexual orientation or gender identity. Ordinance, 6:10-19.

[9] *See also Casey*, 505 U.S. at 884 ("All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated [], but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State []. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.") (internal citations omitted).

as rationally related regulation of a mental health procedure for the health and safety of minors, and Plaintiffs' First Amendment cause of action is unlikely to succeed.

2. Even If the Ordinance Regulates Speech, the Ordinance Withstands Heightened Scrutiny.

Although routinely challenged, no court has ever found a SOCE regulation to be unconstitutional. As discussed, *supra*, most courts that have considered SOCE regulations have found the laws to regulate conduct, rather than speech, and have upheld the regulations under a rational basis analysis. The Third Circuit in *King*, however, held that a SOCE regulation did restrict speech, but rejected the contention that that the regulation was subject to strict scrutiny. There, as here, therapists' claims that SOCE regulations "prohibit[] them from expressing the viewpoint 'that same sex attractions can be reduced or eliminated to the benefit of the client'" were rejected as "a misreading of the [regulation." *King*, 767 F.3d 237. The regulation

> Allows Plaintiffs to express this viewpoint, in the form of their personal opinion, to anyone they please, including their minor clients. What [the SOCE regulation] prevents Plaintiffs from doing is expressing this viewpoint in a very specific way – by actually rendering the professional services that they believe to be effective and beneficial. Arguably, any time a professional engages in a particular professional practice she is implicitly communicating the viewpoint that such practice is effective and beneficial. The prohibition of this method of communicating a particular viewpoint, however, is not the type of viewpoint discrimination with which the First Amendment is concerned. If it were, State legislatures could never ban a particular professional practice without triggering strict scrutiny. Thus, a statute banning licensed psychotherapists from administering treatments based on phrenology would be subject to strict scrutiny because it prevents these therapists from expressing their belief in phrenology by putting it into practice. Such a rule would unduly undermine the State's authority to regulate the practice of licensed professions.

Id.

Instead, the *King* court determined that the SOCE regulation should be evaluated under intermediate scrutiny. *Id.* at 235-37. Under intermediate scrutiny, a regulation must be upheld if it "directly advances" a "substantial government interest," and is "not more extensive than necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557 (1980); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011). The Eleventh Circuit applies intermediate scrutiny to regulations deemed content-based restrictions of commercial and other speech afforded lesser protections. *See, e.g., Ocheesee Creamery LLC v.*

Putnam, 851 F.3d 1228, 1240 (11th Cir. 2017); *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293 (11th Cir. 2017); *Dana's Railroad Supply v. Attorney General of State of Florida*, 807 F.3d 1235, 1246 (11th Cir. 2015).

The *King* court determined that the SOCE regulation withstood intermediate-level scrutiny because "protecting … citizens from harmful professional practices is unquestionably substantial" (*King*, 767 F.3d at 237); because the governmental interest was "even stronger because [the regulation] seeks to protect minor clients – a population that is especially vulnerable to such practices" (*Id.* at 237-38); and because the regulation "'directly advances' [the government's] stated interest in protecting minor citizens from harmful professional practices." *Id.* at 239. And while there has yet to be an SOCE decision in this Circuit, Eleventh Circuit jurisprudence makes clear that the Ordinance's regulation of mental health procedures passes muster even if analyzed under intermediate scrutiny. For instance, in *Wollschlaeger*, the court analyzed a Florida statute that, *inter alia*, prohibited medical professionals from asking their patients about ownership of a firearm unless the professional could articulate specific safety concerns. *Wollschlaeger*, 848 F.3d at 1303. In so doing, the court underwent intermediate-level scrutiny to determine if the statute "directly advanced a substantial governmental interest and [if the statute was] drawn to achieve that interest." *Id.* at 1312. The State of Florida defended the statute as a "regulat[ion of] the medical profession," and the *Wollschlaeger* court noted that the government "does have a substantial interest in regulating professions like medicine." *Wollschlaeger*, 848 F.3d at 1316. However, the statute was held to be invalid because it lacked a legislative basis in fact:

> There is no claim, much less any evidence, that routine questions to patients about the ownership of firearms are medically inappropriate, ethically problematic, or practically ineffective. Nor is there any contention (or, again, any evidence) that blanket questioning on the topic of firearm ownership is leading to bad, unsound, or dangerous medical advice.

Id. at 1316.

Under similar analysis, the validity of the Ordinance is likely to be upheld. Here, there is overwhelming evidence[10] that SOCE is, in fact, medically inappropriate, and that it is a dangerous medical procedure. *See supra*, pp. 2-3. Moreover, as opposed to the statute at issue in

[10] While the Complaint purports to challenge the scientific validity of the various SOCE studies upon which the Ordinance is based, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived as true by the governmental decisionmaker." *Kentner v. City of Sanibel*, 750 F.3d 1274, 1281 (11th Cir. 2014).

Wollschlaeger, the Ordinance does not restrict Plaintiffs from "expressing their views" on the subject, and expressly allows them to "recommend SOCE," and even "refer[] minors to unlicensed councilors." The Ordinance is therefore valid, and a preliminary injunction should not issue. *See King, supra.*

The Motion's suggestion that the authorities upon which the City relied in adopting the Ordinance were insufficient (Motion at pp. 11-12) should be rejected. Although the Motion cites to select portions of the 2009 Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation ("APA Report") in an attempt to undermine it as a proper basis for the Ordinance, there are other portions of the APA Report that support the City's concern that SOCE therapy can pose serious health risks. For example, in the summary of the APA Report, it states that "studies … indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts." APA Report at p. 9. Moreover, in the conclusion of the APA Report, the authors report that they "found that there was some evidence to indicate that individuals experienced harm from SOCE. APA Report at p. 10. The APA Report also provides that: "the peer-reviewed empirical research on the outcome of efforts to alter sexual orientation provides little evidence of efficacy and some evidence of harm." APA Report at p. 2.

To the extent there is less than absolute certainty as to the adverse impact of SOCE, it would be imprudent to require the City to conduct additional studies on children by subjecting them to conversion therapy. *See FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1813 (2009) (Refusing to require Congress to present studies where minors were intentionally exposed to indecent television broadcasts to establish a basis for regulations).

The government has a compelling interest in protecting the physical and psychological well-being of minors. *See Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely"); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (the state has a "compelling interest in protecting the physical and psychological well-being of minors").

Finally, with regard to the specific Plaintiffs herein, while they purport to advise their minor clients that SOCE may be ineffective in changing their sexual orientation, they do not advise that the therapy may be harmful. *See, e.g.*, Otto's "Informed Consent for Counseling Regarding

Unwanted Same-Sex Attractions and Behaviors," appended to Otto's deposition at Exhibit 5 ("Your therapist also wants you to know that there are some mental health professionals and others who suggest you should not have the goal of reducing or eliminating your unwanted feelings or attractions, and that some people believe that such counseling is unlikely to assist you. As noted above, your therapist disagrees with such conclusions…") (ECF 81-6).

B. The Ordinance Does Not Discriminate on the Basis of Content.

1. The Ordinance Is A Regulation Of Professional Conduct.

The Motion's contention that the Ordinance constitutes a content-based speech restriction suffers the same fate as does its earlier contention that the Ordinance discriminates against speech on the basis of viewpoint: since the Ordinance regulates conduct, rather than speech, no First Amendment scrutiny at all is required, and the Ordinance is easily justified because it is supported by a rational basis. *See* Section I(A)(1), *supra.*

2. Even If the Ordinance Regulates Speech, the Ordinance Withstands Heightened Scrutiny.

Of all the courts to have evaluated SOCE regulations, all but one has dismissed challenges on the basis that the regulations govern conduct, rather than speech. The exception, as before, is the Third Circuit in *King*. Even *King*, however, which found the regulation to discriminate against speech on the basis of content, rejection the contention that the regulation should be subjected to strict scrutiny. In distinguishing *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653 (2011) (relied upon in the Motion at 3, 5, 10 and 13), the *King* court noted that "the Supreme Court has held that a statute does *not* trigger strict scrutiny 'when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.'" *King*, 767 F.3d at 236 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)). The *King* court held that the SOCE regulation at issue therein "fits comfortably within this category of permissible content discrimination" because "the … legislature has targeted SOCE counseling for prohibition because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients." *Id.* at 237.

C. The Ordinance Is Not Unconstitutionally Vague.

A statute must "provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 743 (2000). The Complaint contends that the Ordinance is vague and "leave[s] Plaintiffs guessing at what practices are

permitted or prohibited." Compl., ¶ 97; ¶ 198. However, the Ordinance clearly defines "conversion therapy," which is then distinguished from other types of therapy that remain permitted. Ordinance, 6:10-19.[11] Where a regulation prohibits specific conduct with respect to a profession or "group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard [for vagueness] is lowered . . . ." *U.S. v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993) (internal quotations omitted). "Conversion therapy" and "SOCE" are terms of art within the professional counseling community and describe a distinct practice in which Plaintiffs claim to specialize. Compl., ¶¶ 126; 142; *see also Pickup v. Brown*, 42 F. Supp. 3d 1347, 1363-64 (E.D. Cal. 2012) (citing *Weitzenhoff* and finding a conversion therapy ban for minors not vague).

Plaintiffs, individuals with specialized knowledge of terms of art within their profession, clearly understand what the Ordinance prohibits, as they admit in their own allegations. For example, Otto alleges that he provides his clients with an informed consent form which 'explains the controversial nature of SOCE counseling, including the fact that some therapists do not believe sexual orientation can or should be changed, and informs the client of the potential benefits and risks associated with SOCE counseling." Compl., ¶ 128. "Even if, 'at the margins,' there is some conjectural uncertainty as to what the statute proscribes, such uncertainty is insufficient to void the statute for vagueness because 'it is clear what the statute proscribes in the vast majority of its intended applications,' namely therapy intended to alter a patient's sexual orientation." *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1366 (E.D. Cal. 2012) (finding the challenged SOCE ban was not void for vagueness) (quoting *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1155 (9th Cir. 2001)).

[11] "Conversion therapy" or "reparative therapy" means, interchangeably, any counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to efforts to change behaviors, gender identity or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex. Conversion therapy does not include counseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change sexual orientation or gender identity. Ordinance, 6:10-19 (emphasis added).

E. The Ordinance Is Not *Ultra Vires*.

Plaintiffs claim in Count VI that the City's enactment of the Ordinance was *ultra vires* and in violation of Article VIII, § 2(b)[12], of the Florida Constitution[13] and § 166.021, Florida Statutes.[14] Florida is a home rule state, and the Florida Constitution explicitly authorizes municipalities to "exercise any power for municipal purposes except as otherwise provided by Florida law." Fla. Const. Art. 8 § 2(b). Count VI misunderstands the doctrine of preemption, and the Ordinance is neither expressly or impliedly preempted under any of Plaintiffs' cited authorities (or otherwise).

a. The Ordinance Is Not Expressly Preempted.

One type of constitutional preemption acknowledged in Florida, express preemption, requires a specific legislative statement that cannot be implied or inferred and must be accomplished by clear language stating an intended preemption. *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010); *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006). "[T]he legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act" except "[a]ny subject expressly prohibit by the constitution or "[a]ny subject expressly preempted to state or county government by the constitution or by general law." § 166.021(3)(b)-(c), Fla. Stat.

Plaintiffs fail to cite any legislative action expressly preempting municipalities from enacting ordinances prohibiting conversion therapy for minors. To the extent Plaintiffs cite § 491, Title XXXII, Florida Statutes, or Section 64B4-5.001, Florida Administrative Code, as a source of "express" preemption, neither law expressly preempts regulation of mental health

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[12] Article VIII, § 2(b) authorizes municipal home rule, allowing municipalities to "exercise any power for municipal purposes except as otherwise provided by law." Art. VIII, § 2(b), Fla. Const.

[13] Count VI also references Article VIII, § 1(g), Fla. Const., which governs counties operating under county charters and is, thus, inapplicable to the claim against the City.

[14] Section 166.021, Fla. Stat., recognizes that "the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except . . . [a]ny subject expressly prohibited by the constitution [and] . . . [a]ny subject expressly preempted to state or county government by the constitution or by general law." § 166.021, Fla. Stat.

professionals by local government.[15] *See* Compl., ¶ 275; §§ 491.002-16, Fla. Stat.; § 64B4-5.001, Fla. Admin. Code.[16] Accordingly, Florida law does not expressly preempt the Ordinance.[17]

b. The Ordinance Is Not Impliedly Preempted.

Implied preemption, on the other hand, occurs when "the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." *D'Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017); *Browning*, 28 So. 3d at 886. In determining if implied preemption applies, the court must look 'to the provisions of the whole law, and to its object and policy.'" *Browning*, 28 So. 3d at 886 (quoting *State v. Harden*, 938 So. 2d 486, 489 (Fla. 2006)). Findings of implied preemption are generally "disfavored," and courts "must be careful and mindful in attempting to impute intent to the Legislature to preclude a local elected governing body from exercising its home rule powers." *D'Agastino*, 220 So. 3d at 421, 423; *see also Exile v. Miami-Dade Cty.*, 35 So. 3d 118, 119 (Fla. 3d DCA 2010) (noting the "severely restricted and strongly disfavored doctrine of implied preemption"); *Randolph v. Family Network on Disabilities of Fla., Inc.*, No. 4:11-cv-555-RS-WCS, 2012 WL 71719 (M.D. Fla. Jan. 10, 2012) (upholding ordinance prohibiting discrimination based on sexual orientation and finding no implied preemption). *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 ("Florida courts are reluctant to conclude that a municipality is preempted from exercising its local powers in the absence of an express exemption, particularly in light of the ease with which the Florida Legislature can expressly preempt a local authority if intended.") (citations omitted).

Even assuming, *arguendo*, Plaintiffs' claim is based on implied preemption (which they fail to specify), under this disfavored doctrine, a plain reading of Chapter 491 clearly shows that the City's Ordinance is not impliedly preempted by said legislation. The intent of Chapter 491 is

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[15] The Complaint incorrectly refers to "Fla. Admin. Code. Ann r. 64B-5001," a rule that does not exist. Compl., ¶¶ 275-278. Rather, Section 64B4-5.001 provides the disciplinary guidelines for professionals licensed pursuant to § 491.002, Fla. Stat.

[16] Section 491 merely regulates the licensing scheme for mental health professionals, "establishing minimum qualifications for entering into and remaining in" this field, and Section 64B4-5.001 of Florida's Administrative Code codifies the disciplinary scheme for violations of Section 491. §§ 491.002-16, Fla. Stat.; § 64B4-5.001, Fla. Admin. Code.

[17] Moreover, Plaintiffs' passing reference to proposed legislation in the Florida Legislature is merely a red herring. Compl., ¶ 278. Whether the Legislature considered legislation relating to conversion therapy in the past is of no consequence here, nor is the Florida Legislature the sole regulator of mental health providers in Florida, based on the plain language Chapter 491, Title XXXII, Fla. Stat., as Plaintiffs incorrectly claim in Paragraph 278. Compl., ¶ 278.

merely to "establish[] minimum qualification for entering into and remaining in the respective [mental health] professions"—clearly a licensing regulation detailing the requirements to obtain certain professional titles and specializations. § 491.002, Fla. Stat. The regulation of the types of therapy that a professional, licensed pursuant to Chapter 491, may offer to minors is not referenced, merely the qualifications required to provide such therapies. Thus, regulation of conversion therapy for minors is clearly not an area impliedly preempted to the state. To wit, the Supreme Court has recognized that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cty. v. Automated Med Labs Inc.*, 471 U.S. 707, 716 (1985) (emphasis in original); *see also Craig v. Boren*, 97 S. Ct. 451, 458 (1976) ("[T]he protection of public health and safety represents an important function of state and local governments.").

Similarly, Section 456.003, Fla. Stat., which outlines the legislative intent for Florida's professional regulation statutes, provides that the state may regulate professions for the preservation of health, safety, and welfare of the public when "[t]he public is not effectively protected by other means [such as] local ordinances." § 456.003(2)(b), Fla. Stat. Both the precedential case law and Florida's statutes shows that municipalities can and should regulate professions when appropriate, as the City has done in the Ordinance. Because neither the Florida Constitution nor general law addresses the mental health procedure of conversion therapy, there is no basis Plaintiffs' claim that Florida law impliedly preempts the Ordinance.

E. Plaintiffs Do Not Have Standing.

1. Hamilton Lacks Standing to Challenge the Ordinance.

The Complaint challenges the validity of two separate ordinances, promulgated by two different governmental entities, banning conversion therapy for minors—(1) the Ordinance, applicable only within City-limits [ECF No. 1-4]; and (2) the County's ordinance [ECF No. 1-5], applicable throughout the County, unless a municipality within the County has "adopted an ordinance in conflict." ECF No. 1-5, 6:6-8. Unlike Otto's allegation that he maintains a counseling practice in the City (Compl., ¶ 125), Hamilton makes no such claim. Rather, she merely alleges that she practices therapy "in Palm Beach County." Compl., ¶ 140. In fact, Hamilton's factual allegations regarding the cause of her alleged injuries address only the County's ordinance and not the Ordinance (Compl., ¶¶ 155-161).

In deposition, Hamilton conceded that she does not practice outside of Palm Beach Gardens, but "there would be occasions" where she might "want to be able to provide

psychotherapy services" elsewhere. Deposition of Julie H. Hamilton, ECF 72-2, pp. 329-330. She testified that, if an injunction were to be entered, there would be no other legal impediment that would prevent her from providing services in Boca Raton. *Id.* at 331.

The threat of prosecution of Hamilton in Boca Raton is, at most, speculative. These allegations are insufficient to confer standing. *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1329 (11th Cir. 2000).

2. Otto Lacks Standing.to Challenge the Ordinance.

The prohibition contained in the Ordinance is very narrow: it only prohibits a provider from "practice[ing] conversion therapy on any individual who is a minor." Ordinance, ECF 1-4, at 8. "Conversion therapy" is defined as "treatment performed with the goal of changing an individual's sexual orientation or gender identity". *Id.* at p. 7.

Otto makes it crystal clear in his deposition testimony that he does not, and has no desire to, practice "conversion therapy":

Q: So let's assume that you have a client that that expresses a desir to change his or her sexual orientation. Do you then undergo efforts in an attempt to, in fact, change that client's sexual orientation?

A: I've already said that I can't do that. That's like trying to say you go to the doctor and here, "I'd like to be nine feet tall. Would you try to change me?" That's impossible. The doctor is not going to change you to do that. So I cannot change a client to do that.

You can ask that in lots of different ways, but the answer is always going to be "I cannot change a client."

Q: Okay. In an equally clear way, would you agree that that being the case, you don't attempt to change a client's sexual orientation?

A: Yes. With the caveat that I don't want the way you asked that question to imply that, whether or not I attempt to do it or not, that is something that could be attempted or that I could do it if I did attempt to do it. Okay.

Q: I understand.

A: I don't attempt it. I cannot do it even if I were to attempt it.

Q: Understood. But you understand people – people sometimes attempt things that are unlikely to be successful. I can go home and attempt –

A: I did not attempt it, and I cannot do it.

Q: Very good, sir.

Much in the way that I can attempt to go home and dunk a basketball even though I can't do it, right? So you understand the distinction I'm drawing?

A. Yes, I do.

Q: And you made it clear that you neither can nor do you attempt to change –

A: That's correct.

Q: --sexual orientation?

A: That is correct.

Deposition of Robert W. Otto, ECF 81-1, pp. 44-46.

3. Plaintiffs Lack Third-Party Standing.

Plaintiffs allege in Count II that the Ordinance violates their minor clients' right to receive information under the First Amendment. However, generally speaking, "[i]t is a well-established tenet of standing that 'a litigant cannot rest a claim to relief on the legal rights or interests of third parties.'" *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 (3d Cir. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Courts will only recognize third-party standing:

> provided three important criteria are satisfied: the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.'

Harris v. Evans, 20 F.3d 1118, 1112 (11th Cir. 1994) (quoting *Powers*, 499 U.S. at 411).

Here, the Complaint wholly fails to allege the elements necessary to obtain third-party standing. *See* Compl., ¶¶ 178-182; 203-211. A substantive review of the Complaint also reveals that Plaintiffs cannot meet the *Powers* factors. Specifically, there exists no apparent hindrance to the minor clients' ability to seek their own judicial relief.

Courts have rejected therapists' attempts to assert third-party standing when challenging conversion therapy bans for minors (as the Court should here) because, *inter alia*, the therapist could not meet the third standing factor demonstrating that the minor clients "fac[ed] obstacles that would prevent them from pursuing their own claims." *King v. Christie*, 981 F. Supp. 2d 296, 312 (D.N.J. 2013). Because minors affected by conversion therapy regulations have, in fact, filed suit pseudonymously in both *Doe ex rel. Doe v. Governor of New* Jersey, 783 F.3d 150 (3d Cir.

2015) (affirming dismissal of First Amendment complaint by minor children regarding conversion therapy ban for failure to state a claim), and *Pickup, et al. v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (affirming in part dismissal of conversion therapy ban lawsuit brought by both therapist and minor children) *abrogated on other grounds by Nat'l Inst. of Family and Life Advoc. v. Becerra*, 138 S. Ct. 2361 (2018), no "obstacles" prevent the minors from exercising their purported rights directly. Because Plaintiffs have not (and cannot) allege a hindrance to their clients' ability to protect their own interests, a requirement for third-party standing, Plaintiffs are unlikely to prevail.

II. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM.

Plaintiffs cannot carry their burden of establishing that they are likely to suffer irreparable harm in the absence of preliminary relief. They fail to state a claim upon which relief can be granted at all, and certainly not harm that is irreparable. Moreover, the claim for monetary damages, by its very nature, belies a claim of irreparable harm. *Ferrero v. Associated Materials, Inc*,, 923 F.2d 1441, 1449 (11th Cir. 1991).

Moreover, Plaintiffs are incapable of establishing irreparable harm because, *inter alia*, the Ordinance (1) does not prevent them from speaking to the public about SOCE; (2) does not prevent them from expressing their views to their patients; (3) does not prevent them from administering SOCE to their adult clients; and (4) does not prevent them from referring minor clients to religious leaders. *See* Ordinance at pp. 4-5.

Finally, Plaintiffs' delay of approximately eight months before challenging the Ordinance militates against a finding of irreparable harm. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months – though not necessarily fatal – militates against a finding of irreparable harm…. Indeed, the very idea of a *preliminary* injunction is premised on the need for speedy and urgent action to protest a plaintiff's rights before a case can be resolved on the merits") (emphasis in original).

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH AGAINST GRANTING PRELIMINARY RELIEF.

The balance of hardships, and consideration of public interest, clearly outweigh any threatened injuries to Plaintiffs if the injunction is not issued. The Ordinance identifies numerous medical and mental health organizations that have found that SOCE poses a serious threat to health and well-being of the affected persons, and many such organizations have also concluded that there is a lack of credible evidence that such therapy is effective. Those Legislative findings are

explicitly recited within the Ordinance. In contrast, the infringement on Plaintiffs' purported rights is exceedingly narrow: on one activity (trying to change a sexual orientation; while otherwise allowing the "expressi[on of] their views to patients"); in one forum (a counseling office); and with one particular client (a minor).

For the above-stated reasons, the City respectfully requests that the Motion be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail on September 10, 2018 on all counsel of record on the attached Service List.

Respectfully submitted,

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SERVICE LIST

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

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