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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Local Rule 7.1(c), Defendant, City of Boca Raton ("City"), files this Reply in support of its Motion to Dismiss (the "Motion") [ECF 34] the Complaint [ECF 1] ("Complaint"), filed by Plaintiffs, Robert W. Otto ("Otto") and Julie H. Hamilton ("Hamilton") (collectively, "Plaintiffs").

STANDARD OF REVIEW

Plaintiffs' Response to the Motion ("Response") briefly mentions the cases of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl, Corp. v. Twombly*, 550 U.S. 544 (2007), but then relies exclusively upon authority that predates these seminal Supreme Court decisions in contending that the Motion should be subjected to a high burden. Response at p. 2. Under the appropriate standard, "'naked assertion[s] devoid of 'further factual enhancement'" are not entitled to deference. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

I. HAMILTON LACKS STANDING TO SUE THE CITY.

As contended in the Motion, 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. Accordingly, the Complaint fails to allege any causal connection between Hamilton's alleged injury and the Ordinance. To the extent Hamilton asserts claims against the City, she lacks standing to do so, and her claims should be dismissed.

The Response contends that "Dr. Hamilton, in very certain terms, alleges that the City Ordinance is, indeed, harming her," and refers, in part, to the allegation in the Complaint that "Hamilton desire[s] to advertise [her] … SOCE counseling to clients and potential clients in the City …". Compl., ¶ 162. Because the Ordinance does not restrict Hamilton's (or anybody's) ability to advertise in any way, the reliance is misplaced.

It is true, as the Response points out, that the Complaint's comingled allegations (in ¶¶ 162-182) contend that *both* Hamilton and Otto are affected by *both* the City ordinance and the County Ordinance. These conclusory allegations notwithstanding, however, the only *specific, factual* allegation that Hamilton makes is that the cause of her alleged injuries is only the County's ordinance and not the Ordinance, because she does not practice in the City (Compl., ¶¶ 155-161). If Hamilton wants to contend that she is being thwarted from attempting to change the sexual

identity or gender identity of minors in a City "ice cream parlor" (Response, ECF 62, at 7), she must make the allegation in her Complaint.

The Response's secondary contention: that Hamilton's failure to properly allege that she has been affected by the Ordinance does not deprive this Court of subject matter jurisdiction under Rule 12(b)(1) (ECF 62, at 8), is true as far as it goes. However, since she has not alleged a claim against the City upon which relief can be granted, her claim should be dismissed under Rule 12(b)(6). *See, e.g., Sutter v. Hilton Garden Inns Management, LLC*, 2017 WL 933769, *2 (M.D. Fla. 2017) ("Even if [plaintiff] invokes subject-,matter jurisdiction, the action warrants dismissal under Rule 12(b)(6) because the complaint fails to state a claim…").

II. COUNT II SHOULD BE DISMISSED BECAUSE PLAINTIFFS LACK THIRD-PARTY STANDING.

The Response contends that "Plaintiffs' clients face substantial obstacles to bringing these claims." ECF 62, at 11. However, apparently recognizing that the Complaint fails to allege this prerequisite to a third-party standing claim, *see* Compl., ¶¶ 178-182; 203-211[1], Plaintiffs "request[s the] ability" to file an amended complaint. *Id.*

However, because there exists no hindrance to the minor clients' ability to seek their own judicial relief, no amendment would be appropriate. As argued in the Motion (and ignored in the Response), 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[e] obstacles that would prevent them from pursuing their own claims." *King v. Christie*, 981 F. Supp. 2d 296, 312 (D.N.J. 2013), *aff'd, King v. Governor of New Jersey*, 767 F.3d 216, 243-4 ("We agree with Defendants, however, that Plaintiffs have failed to establish that their clients are 'hindered' in their ability to bring suit themselves"). *See also Doe v. Governor of New Jersey*, 783 F.3d 150, 154 n. 4 (3d Cir. 2015) (same); *Welch v. Brown*, 58 F.Supp.3d 1079, 1091 (E.D. Ca. 2014) (same). And the courts have been unanimous: no court (to undersigned's knowledge) has ever recognized

[1] None of the allegations in the Complaint pertain in any way to Plaintiffs' clients' purported "obstacles to asserting his own rights," which Plaintiffs acknowledge to be an "element" of the cause of action. Response at p. 9. Moreover, the allegation that the Ordinance "deprive[s the minors] of the opportunity to even obtain the information about SOCE counseling" (Compl., ¶ 206) is belied by the Ordinance itself, which contains no such prohibition.

third-party standing so as to allow a psychologist to bring a challenge to a SOCE regulation on behalf of his or her minor patient.

III. THE COMPLAINT FAILS TO COMPLY WITH PLEADING REQUIREMENTS.

a. The Complaint Fails to Identify its Claims for Section 1983 Relief.[2]

As argued in the Motion, the Complaint is unclear regarding which counts are purportedly brought pursuant to 42 U.S.C. § 1983. As a result, the City is left to guess if Counts I, II, and/or III, which reference only the First Amendment, are intended to be Section 1983 claims, or whether they are direct constitutional claims seeking declaratory and/or injunctive relief.

The Response feigns indignation, ands points out that ¶ 18 of the Complaint provides "[t]his action **arises under the First and Fourteenth Amendments** to the United States Constitution **and is brought pursuant to 42 U.S.C. §1983**." ECF 62, at 4 (emphasis in original). Moreover, because ¶ 18 is one of the 182 paragraphs incorporated into each of the eight counts of the Complaint, it is "**in every count raised under the First and Fourteenth Amendments**" (*Id.*) (emphasis in original).

What the Response ignores, of course, is that the allegation that the case is brought "pursuant to 42 U.S.C. § 1983" is incorporated into *every* count. Thus, the Complaint incorporates the allegation that the claim is "brought pursuant to 42 U.S.C. § 1983" into the Counts IV, V and VI Florida Constitutional claims (Compl., ¶¶ 229, 249, 266) and the Count VII and VIII Florida Statutory claims (Compl., ¶¶ 282, 298). Thus, the incorporations provide no help in deciphering whether Counts I-III are Section 1983 claims, or direct constitutional claims.

While Plaintiffs are correct to point to *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313 (11th Cir. 2015) for the proposition that it is possible to properly incorporate general allegations into separate counts of a complaint, the Response properly qualifies the proposition

[2] The Motion cites two post-1993 Eleventh Circuit cases for the proposition that factual specificity is required to properly plead a Section 1983 action in this Circuit. *See* Motion at p. 9 (citing *GJR Investments v. Cty. of Escambia*, 132 F.3d 1359 (11th Cir. 1998) and *Wilson v. Strong*, 156 F.3d 1131 (11th Cir. 1998)). The Response dismisses the contention, relying (solely) upon *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) for the proposition that Section 1983 claims are no exception to "the liberal system of notice pleading." Response at p. 3. However, regardless of how "liberal" one chooses to categorize the appropriate pleading requirements, "with respect to § 1983 cases, we require plaintiffs to allege with specificity the facts upon which a claim is based 'in an effort to weed out nonmeritorius claims.'" *Cabbil v. McKenzie*, 595 Fed. App'x 843, 847 (11th Cir. 2014) (citing *Keating v. City of Miami*, 598 F.3d 753, 762-63 (11th Cir. 2010)).

when it states that a complaint may incorporate "relevant factual allegations into the relevant counts." ECF 62, at 4. Indeed, *Weiland* itself provides that a count (like Counts IV-VIII of the Complaint) that "includes constitutional amendments under which [plaintiff] is not entitled to relief *would be dispositive* in a Rule 12(b)(6) analysis." *Id.* at 1325 (emphasis supplied). Indeed, insofar as the Response suggests that incorporation of "general allegations" into each count of a complaint is *per se* proper so long as earlier counts are not incorporated, the suggestion is patently erroneous. *See, e.g., Owens-Benniefield v. Nationstar Mortgage LLC*, 2017 WL 1429064, *2 (M.D. Fla. April 21, 2017) (granting motion to dismiss, and providing "[i]n her amended complaint, [plaintiff] must incorporate only the factual allegations relevant to each separate count"); *P&M Corporate Finance, LLC v. Law Offices of David J. Stern*, 2016 WL 1045826, *3 (S.D. Fla. March 16, 2016) (Granting motion to dismiss a complaint because "[t]he result is that each count is replete with factual allegations immaterial to that specific count"); *Rosenberg v. Florida*, 2015 WL 13653967, *8 (S.D. Fla. Oct. 14, 2015) (Granting motion to dismiss because "each Count incorporates the entirety of the factual allegations, most of which are clearly inapplicable to each constitutional challenge").

b. The Complaint's Prayer For Relief Fails To Comply With Rule 8 And Seeks Unavailable Relief.

As noted in the Motion, none of the Complaint's eight, separate claims contains a separate prayer for relief. Rather, all demands for relief are incorporated into one, conclusory paragraph containing a prayer for relief for all counts. Compl., ¶¶ A-H. However, since certain remedies are unavailable for some of the causes of action alleged in the Complaint, the pleading is improper.

This argument is completely ignored in the Response. Accordingly, this basis for the Motion should be granted by default.

IV. THE COMPLAINT DOES NOT STATE A CLAIM FOR A FIRST AMENDMENT VIOLATION IN COUNT I.

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

1. The Ordinance Regulates Conduct, Rather Than Speech.

a. The Motion Does Not Require an Outside the Pleading Factual Determination.

On the most fundamental level regarding the issue raised in the Complaint -- whether the contention that the Ordinance violates the First Amendment states a cause of action -- the Response

refuses to engage at all. Instead, the Response relies on a series of irrelevant cases that didn't involve the legislative intent behind governmental regulations at all to posit that "questions of intent are factual questions" (ECF 62, at 12), and then dismisses the express Legislative intent described in the Ordinance as "self-serving statements regarding their intent which they stuffed into their discriminatory Ordinances" (*Id.* at 13). Unsurprisingly, the latter proposition is offered without citation to any authority at all.

The failure confirms that the Complaint should be dismissed. It is well established that a court will not "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). Instead, "[i]n determining whether the purpose of a law is to suppress protected speech, a court may examine a wide variety of materials, including the text of the statute, any preamble or express legislative findings associated with it, legislative history, and studies and information of which legislators were clearly aware." *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1280 (11th Cir. 2001). While a government alleged to have violated the First Amendment must provide some indication that its legislation was motivated by legitimate concerns rather than by an intent to suppress speech, "this burden [is not] a rigorous one….. [S]tate actors … must cite to *some* meaningful indication – in the language of the code or in the record of legislative proceedings – that the legislature's purpose in enacting the challenged statute was a [legitimate] concern rather than merely opposition to proscribed expression." *Id.* at 1283 (emphasis in original). *See also Zibtluda, LLC v. Gwinnett Coounty, Georgia*, 411 F.3d 1278, 1286 (11th Cir. 2005) (Noting that the *Renton* "Court looked no further than the ordinance itself, which recited as its purpose the protection and preservation of the quality of life in the city" in determining the intent of legislators). For this reason, complaints alleging that an ordinance violates the First Amendment because it was enacted with improper motives are oftentimes dismissed at the pleading stage because the "whereas clauses" of the ordinance belie the contention. *See, e.g., Summers v. City of Daytona Beach*, No. 6:12-cv-926-ORl-37TBS, 2013 WL 360376, *5 n. 7 (M.D. Fla. Jan. 30, 2013) (granting motion to dismiss because, *inter alia*, "[t]he ordinance in the instant case is plainly content neutral, as evidenced by the ordinance itself, which provided that "It is not the intent of the city to control or regulate noise based on the content or type of speech involved, or the speaker's viewpoint"). Here, the Ordinance explains its purpose and the authorities upon which it is based in its "whereas" clauses. No "issues of fact" preclude evaluation of the constitutionality of the Ordinance at this stage.

b. The Ordinance is a Regulation of Professional Conduct.

The Response contends that "SOCE counseling with minors involves nothing more than speech," and that "[i]t is [this] allegation, not Defendants' contrary claims, which must be accepted as true." ECF 62, at 17. Here, Plaintiffs miss the point. The Motion accepts in its entirety the allegation that Sexual Orientation Change Efforts are performed exclusively with words. The City does not contend that the Ordinance leaves the "words" unregulated while instead regulating some conduct other than the words. The point is, sometimes the words ARE the conduct. Some professionals deliver health care with a scalpel, and others do so with verbal therapy. And governments can prohibit both from engaging in dangerous medical practices. A government can bar therapists from using words that would harm their patients, just as it can bar surgeons from using rusty scalpels that would harm their patients. The former do not have the First Amendment right to cause harm any more than do the latter. A contrary result would be absurd. Plaintiffs contend that restrictions on speech are "unconstitutional prior restraints" (ECF 62, at 19), and that counseling "involves nothing more than speech." Taken together, the Complaint is necessarily premised on the untenable position that psychological counseling is an unregulatable profession.

The remainder of the Response is baffling. The Motion devotes an entire section to extensively discuss the new Supreme Court decision in *National Institute of Family & Life Advocates v. Becera*, 138 S,Ct. 2361 (2018) ("*NIFLA*"). ECF 34, at 7-9. Specifically excerpted from that decision are direct quotes such as "[s]tates 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); *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).

The Response does not rebut these references, or try to distinguish them. Indeed, *NIFLA* is not cited a single time in the Response. Instead, the Response contends that "Defendants do not even suggest that the Eleventh Circuit's en banc repudiation of their argument in *Wollschlaeger* [*v. Florida*, 848 F.2d 1294 (11th Cir. 2017)] has ever been overruled by the Supreme Court." ECF

62, at 18. Indeed, in overlooking *NIFLA*[3], the Response's ONLY argument against dismissal (that "words" can never constitute regulatable "conduct") is directly belied by a Supreme Court decision that is less than 3 months old. Since there is no valid response to the entirety of this section of the Motion, the Motion should be granted.

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

The Motion argued extensively that the Ordinance is only subject to rational basis review, and that because the Ordinance is rationally related to a practice which scores of medical and mental health organizations have found to be harmful, the Complaint does not state a cause of action. *See* ECF 34, at 10-11. This contention is ignored in its entirety by the Response.

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

Similarly, the Motion contends that, at most, the Ordinance is subject to intermediate scrutiny, and should be upheld if it "directly advances" a "substantial government interest," and is "not more extensive than necessary to serve that interest." The Motion further contends that the Ordinance, on its face, withstands such scrutiny. ECF 34, at 11-13. Once again, the argument is simply ignored in the Response. Simply contending that, under the Ordinance, Plaintiffs' "speech is chilled and restricted" (Response, ECF 62, at 18) does not state a cause of action. Many governmental regulations permissibly "restrict" speech. Plaintiffs' inability to articulate any basis to conclude that the purported speech restriction imposed by the Ordinance is constitutionally impermissible is fatal to their claims.

c. The Ordinance Is Not Unconstitutionally Vague.

Plaintiffs also refuse to substantively engage with regard to the vagueness challenge. The Motion devotes considerable detail to the Ordinance's definition of "conversion therapy," as well as the other types of therapy that remain expressly permitted under the Ordinance, which aids in explaining the prohibited conduct. Motion, ECF 34, at 13. It then cites authority for the proposition that when 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 . . . ." *Id*. It then cites to on-point authority that applied that standard to uphold similar SOCE regulations against vagueness

[3] A less charitable categorization might be that it "yields no confidence that the [Plaintiffs have] even read the [Motion] actually filed by [the City] in this case." Response, ECF 62, at 4.

challenges. *Id.* at 13-14. The entirety of the Response is simply to reiterate a single, conclusory allegation in the Complaint that the Ordinance requires people to "guess at their meaning and differ as to their application." Response, ECF 62, at 20 (citing Compl., ¶ 198). The Complaint (and defense thereof) is a classic "naked assertion devoid of further factual enhancement" within the meaning of *Twombly* and *Iqbal*, *supra*, which does not prevent dismissal.

V. EVEN IF PLAINTIFFS HAD STANDING TO ASSERT THEIR CLIENTS' CLAIMS, COUNT II FAILS TO STATE A CAUSE OF ACTION.

The Response does not challenge the contention made in the Motion that, if the Ordinance does not violate Plaintiffs' First Amendment right to speak, it does not violate their minor clients' alleged right to receive information, as alleged in Count II.

VI. THE COMPLAINT DOES NOT STATE A CLAIM FOR VIOLATION OF FREE EXERCISE OF RELIGION IN COUNT III AND V.

Much of the Response is oddly dedicated to confirming the legal standard articulated in the Motion: if the Ordinance is neutral and generally applicable, it need only satisfy a rational basis review under the First Amendment's Free Exercise Clause. If, instead, the Ordinance is not neutral and generally applicable, it is subject to strict scrutiny. *See* ECF 34, at 15; ECF 62, at 20-21. Moreover, neither the Complaint nor the Response contends that the Ordinance cannot withstand rational basis review, and the Motion does not contend that the Ordinance can withstand strict scrutiny. *Mo.Keeton v. Anderson-Wiely*, 664 F.3d, 865, 879 (11th Cir. 2011). The parties therefore agree: the Motion should be granted if the Ordinance is "neutral and generally applicable;" otherwise, it should be denied.

Other than confirming the legal standard, however, the Response does little to urge its position. In fact, only one material contention is made: a regulation that provides for "individualized exemptions" may constitute a "religious gerrymander" (ECF 62, at 22-23) that would belie the "neutrality" of the Ordinance. Once again, the City does not challenge the legal proposition: regulations that are neutral on their face (as is the Ordinance) may be deemed non-neutral if individualized exemptions evidence a covert hostility to religion. Factually, however, the Response only refers to Paragraphs 111-121 of the Complaint (ECF 62, at 23), and the referenced paragraphs of the Complaint only identify one purported "individualized exemption": the Ordinance "permits counseling relating to change of gender identity when the client is 'undergoing gender transition.'" Compl., ¶ 113. Neither the Complaint nor the Response makes any effort to explain why this "exemption" evidences covert religious hostility, and none is

apparent. Moreover, because there is no allegation in the Complaint that this "form of counseling [is] equally harmful to minors," it does not support an inference that the Ordinance was motivated by anti-religious animus. *King*, 767 F.3d at 242.

VII. PLAINTIFFS' *ULTRA VIRES* CLAIM (COUNT VI) SHOULD BE DISMISSED WITH PREJUDICE BECAUSE THE ORDINANCE IS NOT PREEMPTED BY FLORIDA LAW.

Because the Complaint is unclear with regard to the basis for its contention that the Ordinance is preempted by State law, the Motion contends both that (1) the Ordinance is not expressly preempted (because there is no express language in Chapter 491, Florida Statutes, or elsewhere, that prohibits local regulation of conversion therapy) (ECF 24, at 16-17), and (2) the Ordinance is not impliedly field-preempted (because Chapter 491 is a simple licensing regulation which does not regulate therapeutic conduct). Motion at pp. 17-18.

Two issues are raised in the Response. First, Plaintiffs misleadingly suggest that the Motion's implied preemption argument was premised on the fact that Florida has not pervasively regulated the "field" of conversion therapy (rather than the "field" of professional counseling). ECF 62, at 24. No such contention was made. The referenced language from the Motion pertained to a potential "express preemption" claim, that the Response makes clear is not being asserted in the Complaint. As the Motion clearly contends with regard to an "implied" preemption claim, Florida has not pervasively regulated "mental health professions" in Chapter 491, Florida Statutes. ECF 34, at 18.

Second, Plaintiffs suggest their "well-pled allegations" that "Florida has preempted the field of regulation of mental health professionals" (ECF 62, at 25) precludes dismissal. They are mistaken. Whether such preemption has occurred is a matter of law, not fact, and Plaintiffs' conclusory allegations are entitled to no deference. And conclusory allegations are all the Response has to offer. No substantive attempt is made to explain how a licensing scheme that does not regulate professional conduct in therapy sessions *at all* can be read as a *pervasive* regulation of such conduct so as to prohibit local regulation of the field.

VIII COUNT VII, THE PATIENT'S BILL OF RIGHTS CLAIM, FAILS TO STATE A CLAIM FOR RELIEF.

In Count VII, the Complaint alleges that the Ordinance violates the Florida Patient's Bill of Rights and Responsibilities ("FPBRR"), § 381.026, Fla. Stat. The Motion contends that this claim should be dismissed for two reasons. First, the FPBRR does not provide a private right of action against the City. § 381.026(3), Fla. Stat. ("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.") (emphasis added). This independent ground for dismissal is ignored entirely in the Response, and the Motion should accordingly be granted.

Secondly, the Motion contends that the claim fails because Plaintiffs are not "heath care providers" as defined by Section 381.026(2)(c), Fla. Stat. The Response (correctly) notes that the FPBRR requires "health care providers" to observe a patient's right to receive alternative health care treatments (Fla. Stat. s. 381.026(4)(d)(3)) from "health care practitioners," including alternative health care provided by marriage and family therapists. Response at pp. 25-6. The Response then (incorrectly) concludes that the FPBRR regulates marriage and family therapists. The argument should be rejected. Under the FPBRR, "health care providers" (which Plaintiffs are not) should "observe" that their patients have the right to receive care from "health care practitioners," such as (arguably) Plaintiffs. This fact does not alter in the least the fact that it is only health care providers who are required to "observe" the "rights of patients" contained within Fla. Stat. s. 381.026(4), including the patient's right to seek alternative care described in subsection (4)(d)(3). Since Plaintiffs are not "health care providers," the claim should be dismissed.

VIII. COUNT VIII, THE RELIGIOUS FREEDOM RESTORATION ACT CLAIM, SHOULD ALSO BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Count VIII is premised upon an alleged violation of Florida's Religious Freedom Restoration Act ("RFRA") Fla. Stat., § 761.01, *et seq.* Under RFRA, courts apply a strict scrutiny standard, as set forth in the statute, after an initial showing that the challenged regulation places a "substantial burden" on one's free exercise of religion. §761.03, Fla. Stat. The Motion contends that the Ordinance does not impose a "substantial burden," in part, by noting that SOCE is not a religiously compelled practice.

The Response notes that the referenced statute defines "exercise of religion" to include conduct motivated by a religious belief, even if the religious exercise is not compulsory. Response at p. 23 (citing Fla. Stat. s. 761.02(3). The Response misses the point. Whether or not SOCE counseling may be deemed an "exercise of religion," RFRA only applies if that religion has been "substantially burdened" by the regulation. And, as held in *Freeman v. Dep't of Hwy Safety & Motor Veh.*, 924 So. 2d 48, 56-57 (Fla. 5th DCA 2006), a religion is not "substantially burdened" by a regulation if the regulation only restricts what the religion itself does not compel.

WHEREFORE, for the reasons above-stated, the City requests that the Motion be granted.

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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