IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

ROBERT W. OTTO, PH.D. LMFT, individually and on behalf of his patients, and JULIE H. HAMILTON, PH.D., LMFT, individually and on behalf of her patients,	)	Civil Action No. 9:18-cv-80771-RLR
Plaintiffs,	)	
v.	)	
CITY OF BOCA RATON, FLORIDA, and COUNTY OF PALM BEACH, FLORIDA,	)	
Defendants.	)	

PLAINTIFFS' OBJECTION TO MAGISTRATE JUDGE'S DISCOVERY RULING AND REQUEST FOR EXPEDITED CONSIDERATION

Plaintiffs, ROBERT W. OTTO, PH.D. LMFT, individually and on behalf of his patients, and JULIE H. HAMILTON, PH.D., LMFT, individually and on behalf of her patients, pursuant to Rule 72(a), Fed. R. Civ. P., and Mag. J. Rule 4, S.D. Fla. L.R., object to the discovery ruling made by Magistrate Judge Bruce Reinhart in open court at the discovery hearing held on September 12, 2018 (DE 87), as clearly erroneous and contrary to law. A transcript of Judge Reinhart's ruling (the "Ruling") is attached hereto as Exhibit A.

Due to the upcoming Rule 30(b)(6) depositions of Defendants on **September 20 and 21**, which are directly affected by the Ruling objected to herein, Plaintiffs respectfully request expedited consideration of this Objection. Plaintiffs' counsel, whose offices are in Orlando, will be in West Palm Beach on September 19 for the September 20–21 depositions, and thus are available on September 19 for a hearing on this Objection.

INTRODUCTION

> **[L]ocal governments routinely . . . regulate professional conduct, and more specifically medical treatments.**

(Def. City of Boca Raton's Resp. Opp'n Pls.' Mot. Prelim. Inj., DE 83, at 4 (emphasis added).)

> **[L]ocal governments will legislate in the area of regulating mental health care providers.**

(Def. Palm Beach Cnty.'s Resp. Pls.' Renewed Mot. Prelim. Inj., DE 85, at 16 (emphasis added).)

Defendants admit that the discovery Plaintiffs seek is relevant by arguing the very point Defendants want to examine: If local governments "routinely" regulate medical treatments and mental health care providers, then when have Defendants done so? The answer—likely never before their respective counseling bans—is critical to Plaintiffs' claims that Defendants respective ordinances are pretextual and constitute official animus and discrimination against Plaintiffs' counseling viewpoints. The Magistrate Judge's Ruling denying Plaintiffs discovery on this point was clearly erroneous and contrary to law, and should be overruled.[1]

As shown in the parties' Joint Discovery Memorandum submitted to the Magistrate Judge (DE 75), the discovery at issue in this Objection to the Ruling comprises interrogatories 10–13 and corresponding production requests 25–28 in Plaintiff Otto's Second Set of Discovery Requests ("Second Requests"), and deposition topic 13 in Plaintiffs' First Amended Notice of Taking Depositions of Defendants under Rule 30(b)(6) ("Plaintiffs' Deposition Notice," DE 75-1) (collectively, the disputed interrogatories, production requests, and deposition topic are referred to herein as the "Regulation Discovery"); and Defendants' respective objections to the Regulation Discovery ("City Responses to Second Interrogatories," DE 75-2; "City Responses to Second Production Requests," DE 75-3; "County Responses to Second Requests," DE 75-4; "Defendants' Objections to Deposition Notice," DE 75-5.)

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[1] "Discovery motions do not dispose of the case before the court and are thus non-dispositive within the meaning of Rule 72(a)." *U.S. ex rel. Carter v. Halliburton*, 266 F.R.D. 130, 132 (E.D. Va. 2010). "The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a).

> The "clearly erroneous" standard requires the district judge to accept the factual findings and conclusions of the magistrate judge unless, after reviewing the entire record, the district judge has a strong, unyielding belief that a mistake has been made.
>
> Under the "contrary to law" requirement, the district judge reviews pure questions of law de novo, and factual findings for clear error. Mixed questions of law and fact invoke a sliding scale of review pursuant to which the more fact intensive the question, the more deferential the level of review (though never more deferential than the clear error standard); the more law intensive the question, the less deferential the level of review.

In re Celexa & Lexapro Mktg. & Sales Practices Litig., 293 F. Supp. 3d 247, 250 (D. Mass. 2018) (internal quotation marks and citations omitted).

ASSIGNMENTS OF ERROR

I. THE MAGISTRATE JUDGE SHOULD HAVE OVERRULED DEFENDANTS' OBJECTIONS TO THE REGULATION DISCOVERY BECAUSE DEFENDANTS' RESPECTIVE REGULATION OF OTHER PROFESSIONALS, OR THE ABSENCE OF SUCH REGULATION, IS HIGHLY RELEVANT TO CONSTITUTIONAL TAILORING AND PREEMPTION.

A. Defendants' Relevance Objections and the Magistrate Judge's Ruling.

The disputed Regulation Discovery seeks information regarding Defendants' respective regulation of mental health or other professions or professionals apart from the counseling bans in suit. (Pls.' Dep. Not., DE 75-1 at 4; City Resps. 2d Interrogs., DE 75-2, at 2–3; City Resps. 2d Production Reqs., DE 75-3, at 2–3; Cnty. Resps. 2d Reqs., DE 75-4, at 2–5, 7; Defs.' Objs. Dep. Not., DE 75-5, at 4.) Plaintiffs' primary claims in this litigation include:

- Defendants' respective counseling ban ordinances are the first and only regulations of their kind in each jurisdiction, driven by animus towards Plaintiffs' viewpoint and not by any legitimate compelling interest.
- There is already pervasive regulation of mental health professionals by the State of Florida, preempting local government regulation in the field.
- As a result of the pervasiveness of the State regulation of mental health professionals, and in deference to the State's interest and competency in enforcing such regulation, local governments cannot and do not regulate in this field.

Defendants deny each of the foregoing claims and, as shown above, claim quite the contrary to be true – that local governments such as theirs "**routinely**" regulate medical treatments, health care providers, and other professionals. Nonetheless, despite this critical factual dispute, Defendants objected to providing the Regulation Discovery on grounds of relevance and proportionality. (*Id.*) To resolve this dispute for preliminary injunction purposes, **Plaintiffs offered to limit the information sought to regulations enforced by Defendants' respective officials within the last three years**. Defendants rejected Plaintiffs' offer, maintaining both their relevance and proportionality objections to the limited scope. The Magistrate Judge should have overruled Defendants' objections because the requested discovery—especially as limited by Plaintiffs—is both relevant and proportional to the needs of this case.

The Magistrate Judge's Ruling on the relevance of the Regulation Discovery provides, in pertinent part:

> [L]et me also be a little more fulsome on the record as to my ruling as to [the Regulation Discovery] because I suppose that is probably the one you are going to want to pay most concern to and you may want to take issue with. So let me flesh out my ruling a little bit.
>
> It has been suggested that the evidence requested in [the Regulation Discovery] is relevant to allow the Plaintiffs to make a number of evidentiary inferences that would be probative in this case.
>
> One is that the alleged compelling reason for these ordinances is pretextual. And the inference to be drawn is that because . . . they have either not enacted or enforced other ordinances designed to protect minors suggests that this interest being asserted at this time is pretextual.
>
> So that is one evidentiary inference that the Plaintiffs have suggested that they want to draw. I do not believe that is a proper inference to be drawn. So I do not believe it is relevant because I do not believe the fact just because they never did it in the past doesn't mean they couldn't have and might not have had a million other reasons not to do it.
>
> . . . .
>
> The argument has also been made that the inference that should be drawn is that the ordinances are either pretextual or not narrowly tailored because they cannot be enforced. That existing staffing, existing resources, and existing expertise are insufficient to make this a meaningful ordinance. And therefore, it is not properly narrowly tailored.
>
> I would allow questioning about resources and staffing and training, things of that nature, to try to establish whether there is a current expertise that would allow the enforcement of these ordinances or the ability to enforce these ordinances.
>
> I would allow questioning about whether the parties have developed any training or any other plan to try to train enforcement officials, or those who would be enforcing ordinances.
>
> . . . .
>
> And as to the preemption issue, which I believe was the third evidentiary inference that the Plaintiffs wanted to draw, given that preemption really turns on the intent of the state the inference that wants to be drawn is that because the city and the county have not ever taken any action to try to regulate in this area, suggests that they

> have either consented to or acknowledged that the state is preempting this area and I do not believe that is a relevant or proper inference.
>
> I believe what the state intends is what the state intends and how the city or the county responds to that is simply not relevant. So I am not going to articulate all of that in a written ruling.

(Ex. A, Ruling, 9:9–11:21.)

B. The Magistrate Judge's Relevance Determination is Both Clearly Erroneous and Contrary to Law.

"It is well-settled that the definition of relevance sets a remarkably low bar . . . ." *Pinilla v. Northwings Accessories Corp.*, No. 07-21564-CIV, 2007 WL 2826608, at *4 (S.D. Fla. Sept. 25, 2007); *Berencen v. Charter Oak Fire Ins. Co.*, No. 07-21328 CIV, 2007 WL 2460765, at *3 (S.D. Fla. Aug. 24, 2007) ("[T]he bar to establishing relevance is exceedingly low . . . ."). "Evidence is relevant if [] it has **any tendency** to make a fact more or less probable than it would be without the evidence [and] the fact is of consequence in determining the action." Fed. R. Evid. 401 (emphasis added). The Magistrate Judge's Ruling is both contrary to law and clearly erroneous because the Regulation Discovery sought by Plaintiffs is relevant to their constitutional and preemption claims against Defendants' ordinances. Defendants' arguing that local governments "routinely" regulate medical treatments and mental health care providers (*see* Introduction, *supra*) concedes these points.

The Regulation Discovery is relevant first to Plaintiffs' constitutional claims against the ordinances, which require a narrow tailoring analysis. (Pls.' Mot. Prelim. Inj., DE 8, at 12–15.) The absence or presence of other ordinances regulating mental health or other professionals is relevant to Defendants' respective capacities and competence to enforce such ordinances, which in turn is relevant to the question whether the ordinances are narrowly tailored to Defendants' asserted "compelling interest in protecting the physical and psychological well-being of minors . . . ." (City Ordinance, DE 1-4, at 5; County Ordinance, DE 1-5, at 4.) In other words, Defendants' inability to enforce their ordinances because they have neither the experience, knowledge, nor appropriately credentialed personnel to police counseling offices is relevant to whether the ordinances are narrowly tailored (or even rationally related) to Defendants' claimed compelling interests.

The Magistrate Judge's Ruling confirms that information sought by the Regulation Discovery is relevant, but then (erroneously) prohibits the discovery as "not proportional." (*See*

infra, § II.A.) Specifically, the Ruling confirms the propriety of questioning Defendants' 30(b)(6) witnesses on the competence of their officials to enforce the counseling bans:

> I would allow questioning about **resources** and **staffing** and **training**, things of that nature, to try to establish whether there is a current **expertise** that would allow the enforcement of these ordinances or the **ability to enforce** these ordinances.

(Ex. A, Ruling, 10:21–25 (emphasis added).) Thus, the 30(b)(6) deposition question, "What experience do your code enforcement officials have in enforcing regulations of mental health professionals or their practices?" is eminently relevant. Any answer other than "none," however, would demand of any competent advocate the follow-up question, "Then, **what** regulation of mental health professionals or their practices do your officials have experience enforcing?" But this is exactly the kind of question Defendants claim to be irrelevant, and refuse to designate a witness to answer. If the Ruling is upheld, Defendants will be given cover to deprive Plaintiffs of information that even the Magistrate Judge agreed is relevant. To avoid this unfair result, the Regulation Discovery must be allowed.

The Regulation Discovery is relevant also to Plaintiffs' claim that the ordinances are void *ab initio* because impliedly preempted by state law, and otherwise in conflict with state law. (Compl., DE 1, at 48–53 (Counts VI, VII); Pls.' Mot. Prelim. Inj., DE 8, at 17–19.) "Preemption is implied when the legislative scheme is so pervasive as to 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." *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010) (internal quotation marks omitted). The absence of **any** regulation of mental health professions and professionals by either Defendant, especially when viewed in light of Defendants' purported compelling interests, is relevant evidence that Defendants heretofore have submitted to the state's "will to be the sole regulator" of mental health and similarly situated professionals. *See Lake Hamilton Lakeshore Owners Ass'n, Inc. v. Neidlinger*, 182 So. 3d 738, 743 (Fla. 2d DCA 2015) (internal quotation marks omitted).

In the same way, the absence of **any** regulation of mental health professionals by either Defendant is also relevant to the existence of a strong public policy favoring exclusive state regulation of the field, which is the second part of the implied preemption analysis. Moreover, public policy would oppose any attempt to regulate mental health professionals by unqualified municipal employees. Another principal contention of Plaintiffs in this lawsuit is that dog catchers

and other code enforcement officials are neither trained nor trainable to police talk therapy in counseling offices, unless such officials hold professional degrees equivalent to those of the health professionals they are charged with regulating. Thus, whether Defendants have undertaken to enforce any regulations against mental health or other professionals is critically relevant to Plaintiffs' claims and the implied preemption public policy analysis.

While it is true, as Defendants argued to the Magistrate Judge, that "there's always a first" regulation of any subject, it is also true that any such first regulation begs the question, "Why now?" Also, why intrude on minors' talk therapy sessions with licensed counselors involving **voluntary** SOCE counselling? Assuming Defendants' counseling ban ordinances are the first regulations of mental health professionals and practices in Defendants' respective jurisdictions, as available evidence strongly suggests (and Defendants strongly implied), these questions are critically relevant to determining Plaintiffs' claims of Defendants' official animus and discrimination against Plaintiffs' counseling viewpoint.

Defendants' respective avoidance of regulation of mental health professionals prior to their counseling bans is highly relevant to the implied preemption inquiry, in that such avoidance more than **tends** to prove that the state's pervasive regulation of the field indicates its intent to be the sole regulator **to such an extent that the municipalities have acquiesced**. And such prior acquiescence is especially relevant in the case of municipalities like Defendants that claim a compelling interest justifies their regulation.

C. This Court Already Ordered Defendants to Respond to Plaintiffs' Second Requests, Which Include the Regulation Discovery, over Defendants' Relevance and Timing Objections.

Defendants previously asked the Court to delay their responding to Plaintiffs' Second Requests, which include the Regulation Discovery, on grounds of timing and claimed irrelevance to the preliminary injunction proceedings. (Def. City's Mot. Ext. Time and Prot. Order, DE 30, at 2 ("There is simply no reason to, at this time, engage in voluminous discovery **unrelated to the Motion for Preliminary Injunction**." (emphasis added)); Def. Cnty.'s Resp. Pls.' Disc. Mem., DE 28.) The Court, however, ordered Defendants to respond to Plaintiffs' Second Requests (which include the Regulation Discovery), and gave Defendants more time to do so, even moving the preliminary injunction hearing back to accommodate the additional time. (Paperless Order, DE 42 ("**The parties shall respond to the discovery that has already been served**, pursuant to the deadline the parties agree to . . . . The Court hereby moves the Preliminary Injunction

Hearing . . . .” (emphasis added).) The Court’s Order implicitly confirmed the relevance of the Regulation Discovery to the preliminary injunction proceedings. If Defendants intended not to answer the Regulation Discovery anyway, they should have informed the Court instead of seeking more time to object to it in its entirety. On account of the requests being supposedly voluminous and burdensome, Defendants requested and received a two-week extension, requiring the moving of the hearing, only to then assert a blanket objection. These tactics should not be countenanced.

II. THE MAGISTRATE JUDGE SHOULD HAVE OVERRULED DEFENDANTS’ OBJECTIONS TO THE REGULATION DISCOVERY BECAUSE DEFENDANTS MADE NO SHOWING WHATSOEVER OF PLAUSIBLE BURDEN TO SUPPORT THEIR PROPORTIONALITY OBJECTIONS.

A. Defendants’ Proportionality Objections and the Magistrate Judge’s Ruling.

Though required by the Court’s Standing Discovery Order (DE 12, at 3), the City’s proportionality objections to the Regulation Discovery do not “include a specific explanation describing . . . why the requested discovery is disproportionate in light of the factors listed in Rule 26(b)(1).” (City Resps. 2d Interrogs., DE 75-2, at 2; City Resps. 2d Produc. Reqs., DE 75-3, at 2–3.) The County’s proportionality objections included an explanation perfunctorily reciting the Standing Discovery Order factors, but essentially just contended Plaintiffs should find the information themselves by searching the County’s website for County Commission Meeting Agendas and videos, and the County’s Code of Ordinances.[2] (Ex. D, Cnty. Resps. 2d Reqs., at 2–5, 7.)

The Magistrate Judge’s Ruling on proportionality provides, in pertinent part:

> But, even if [the Regulation Discovery] were relevant [to pretext], I do not believe that the burden of having to go back and produce or prepare a witness to testify about innumerable ordinances that could have applied to the health sciences and preparing the documentation and the witness to address that topic,

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[2] This formulation of the County’s objections was directed to the original scope of the requests, **prior to Plaintiffs’ substantially limiting the requests** to regulations enforced by the County for the last three years. The County has not undertaken to revise its already insufficient objections to match this limited scope. Furthermore, the County has not—and cannot—explain how it would be easier for Plaintiffs to search for County enforcement information than it would be for the County to provide it. Rule 33(d) only permits a party answering interrogatories to refer to records when “the burden of deriving or ascertaining the answer will be substantially the same for either party,” which cannot be satisfied here.

> given the minimal probative value, if any, of that inference is proportional.
>
> So I would find it is not proportional. . . .
>
> . . . .
>
> So in light of the fact that I am allowing that discovery [on the training, expertise, and ability of enforcement officials], I believe the marginal additional discovery of having to actually produce, or identify, or testify about other ordinances would be cumulative and, therefore, not proportional.

(Ex. A, Ruling, 10:6–11:9.)

B. The Magistrate Judge's Proportionality Determination is Both Clearly Erroneous and Contrary to Law.

In considering Defendants' proportionality objections, some first principles must be kept in view: "The Federal Rules of Civil Procedure strongly favor full discovery whenever possible." *Farnsworth v. Procter & Gamble Co.,* 758 F.2d 1545, 1547 (11th Cir.1985). And, "[t]he overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result." *Oliver v. City of Orlando*, No. 606CV-1671-ORL-31DAB, 2007 WL 3232227, at *1 (M.D. Fla. Oct. 31, 2007). Defendants' proportionality objections are insufficient to displace Plaintiffs' need for, and right to, the relevant discovery.

Even assuming that the relevance of the Regulation Discovery is only "minimal" or "marginal" (which Plaintiffs do not concede; *see supra*, § I.B), the proportionality analysis cannot be completed without consideration of Defendants' actual burden in preparing or producing the discovery. Fed. R. Civ. P. 26(b)(1) ("whether the burden or expense of the proposed discovery outweighs its likely benefit"). On this point, Defendants have utterly failed. Defendants have not explained what actual burden would be involved in their providing the requested information. "The application of proportionality should be **based on information** rather than speculation." *Digital Assurance Certification, LLC v. Pendolino*, 6:17-CV-72-ORL-41TBS, 2017 WL 4342316, at *9 (M.D. Fla. Sept. 29, 2017) (emphasis added). Moreover, "[a] District Court must assess whether a Magistrate Judge's decision was 'clearly erroneous or contrary to law' only based on the **facts actually before the Magistrate Judge**." *Tafas v. Dudas*, 530 F. Supp. 2d 786, 796 n.3 (E.D. Va. 2008) (emphasis added). Defendants put no facts before the Magistrate Judge to demonstrate any

plausible burdensomeness. Thus, the Magistrate Judge's proportionality determination was entirely speculative and therefore contrary to law.

Plaintiffs' review of Defendants' respective ordinance codes reveals that neither purports to regulate mental health or other professionals apart from the counseling bans in suit. But Plaintiffs' review of the ordinance codes cannot answer the question posed by the Regulation Discovery: Did Defendants enforce any regulation against mental health or other professionals during the last three years, and how? Plaintiffs are entitled to Defendants' answers, so as to narrow the disputed issues and potential for surprise in the preliminary injunction proceedings.

Furthermore, if the answer is "no" or "none," then it is difficult to conceive of a less burdensome task for Defendants than preparing a written response or 30(b)(6) witness to say so. How many code enforcement departments tasked with regulating mental health or other professionals can each Defendant possibly have? One? Maybe two? Certainly not more than three. (*See, e.g.*, County Ordinance, DE 1-5, 6:10–14 ("[T]his ordinance is enforceable by the County's Code Enforcement Officers . . . .").) Defendants' counsel's inquiring with this necessarily limited universe of department heads is not overly burdensome, and certainly not more burdensome than tasking Plaintiffs with the impossible quest of gleaning Defendants' actual enforcement efforts from simply reading their ordinances.

The Ruling is also clearly erroneous to the extent the Magistrate Judge found the Regulation Discovery to be cumulative on the issue of enforcement officials' competence to enforce the counseling bans. (Ex. A, Ruling, 11:5–9.) As illustrated above by the example questions regarding enforcement officials' experience (*supra*, § I.B), the connectedness of an official's experience in enforcing any other regulation of mental health professionals or practices (discovery prohibited by the Ruling) to the official's training, expertise, and ability to enforce the counseling ban ordinances (discovery expressly permitted by the Ruling) demonstrates that the Regulation Discovery is separately and additionally relevant on the competency issue, not cumulative, and imposes no prejudicial burden on Defendants.

CONCLUSION

For all of the foregoing reasons, the Magistrate Judge's Ruling, sustaining Defendants' relevance and proportionality objections, should be overruled, and Plaintiffs respectfully request the Court's expedited consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this September 15, 2018, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

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ROBERT W. OTTO, et al.,
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Defendants.

September 12, 2018

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EXCERPT OF HEARING PROCEEDINGS

BEFORE THE HONORABLE BRUCE REINHART
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Thereupon, following excerpt proceedings were held:)

THE COURT: I think the law is very, very clear that questions of privilege under Rule 501 in a federal case are resolved on federal law and not on state law.

The state law may inform at certain levels, but certainly the federal law of work product and attorney/client privilege is robustly developed and that would be the law that would be applied in this case.

Let me address each of the points, then, in turn and I guess I will do it backwards since it is fresher in my mind. I do believe that the Plaintiff is entitled to do some discovery about the process by which the Defendants reviewed documents and produced documents for all the reasons that Mr. Gannam said.

And I think they are allowed to probe the process by which what was searched for? Where do you keep your records? Well, did you look in all the places that you keep your records? Standard stuff pretty much in 30(b)(6) in document depositions.

So the location of records. The process by which the searches were done. What terms were used to search and things like that. I do not know that anybody really objects to that other than burden and I will get to that in a second.

In terms of, you know, why didn't you search? Why did you search? If the answer is privileged, then the answer is

privileged. Then the parties should lodge the privilege objection at the time.

Under our local rule the Plaintiff should, at that point, continue to ask the necessary questions to try to establish whether or not a privilege exists.

And as we know, if you study the federal law, just because an attorney does something does not make it privileged. It has to be done for the purpose of providing legal counsel intended to remain confidential, et cetera.

So my inclination as -- so as to those sorts of why questions, I am inclined to allow -- I am going to allow those questions to be asked subject to objection.

And then, subject to if the Plaintiff believes that the objection is not well-founded or there is no basis for privilege, they can ask the followup questions to try to establish the privilege and our local rule actually goes through how you do that.

So I am not ruling that the county has to answer those followup questions if they believe they are objectionable or that the city has to answer the followup questions if they believe they are objectionable, but I am just advising everyone that under the local rule that is the process that should be followed. And that to the point Miss Fahey made of the federal law privilege, both work product and the attorney/client privilege will apply.

As to the burden, I did hear kind of implied in Miss Fahey's argument the concern about burden that you have produced a lot of documents. And how do you prepare a witness when you produce thousands and thousands of pages of documents when the Plaintiff could pull out document 712 and go where did you find this?

So if that is the concern I hear that concern. I don't anticipate -- as Mr. Gannam said, he's only got seven hours. I do not think he is going to spend a lot of time going document by document.

But I do think it would be helpful and I would order that as to topic number 12 that the Plaintiff provide a more detailed categorization of the particular categories of documents or areas of documentation that you are going to request with a goal to minimize the burden that we just talked about.

I want the Plaintiff to get the deposition that they are entitled to. I want them to have a witness who can answer the questions that they want to ask, but I want the county to have a fair chance to prep their witness and not waste a lot of time prepping for topics that are not going to be covered.

So I will direct the parties to just meet and confer in addition over Paragraph 12, including the city. Miss Flanagan I keep forgetting you because you are not here, but including the city.

And Mr. Gannam, I will just ask you to try to narrow that down. Try to focus them. I suspect these are not the type of deposition questions where, you know, surprising the other side with that question is really part of the strategy.

So in as much detail as you are comfortable, advise the other parties the general areas you are going to ask about so that you have a witness who can answer your questions. Okay. So that my order as to number 12.

I am going to rule on any objections based upon a transcript that is developed, but I will order a narrowing of the request. So I guess I am overruling the objection in part and sustaining the objection in part as to number 12.

As to number 8 again, I am not going to rule in a vacuum on hypothetical questions as to the prospective application of the ordinance. How will you do this in the future?

I am not sure those are proper questions. I am not sure that the cases that have been cited support wide ranging hypotheticals about will you try to enforce it if we say this or will you try to enforce it if we say that?

But I am not comfortable ruling on those in the abstract. I would like to see those questions and deal with them as fully developed on the record. What I do not believe are proper questions would be, what do you determine this -- essentially the equivalent of asking a lawyer to interpret a

statute. What does this word mean, sorts of questions.

And again, if the Plaintiff wants to ask them the Defendants will object. And I will rule as need be, but I am giving the Plaintiff some advance, all parties some advance indication of my general thoughts on that.

And again, I think here the problem is that there is no historical pattern to refer to because usually that is where this line of questioning gets developed. Well, in the past you have never enforced it against someone who lives in this neighborhood. Why?

And I think that is a fair question, but again will you ever do such a thing? It invites a particular set of answers that may or may not be helpful. So I want to see the questions and see the answers in that regard.

So as to number 8, I am going to defer any ruling on that. And again, make your objections on the record. Develop the record as fully as you feel appropriate. And if I need to address those questions, I will address those questions in a subsequent hearing.

And again, I think process based questions, what process will the county or the city use if it receives a complaint under this ordinance? And the answer may be we don't know yet. We haven't figured that out. We are waiting to see if the ordinance even lives.

I don't know what the answer will be. And I do not

want to speculate without hearing what the answer will be, but I would think those sorts of process questions are probably okay but, again, I want to see them in context.

Hypothetical questions about what will you do in the future if, kind of advisory opinion type questions I have more concern about but, again, I want to see those in context before I rule. So that is my ruling as to topic number 8. I am deferring, but I am giving you some thoughts on that.

And finally, as to topic number 13, discovery as to the other ordinances, I will sustain the objection. I am not sure it is relevant. I do not believe it is relevant to the preemption issue at all.

To the extent the inference that wants to be drawn is you say you are concerned about this, but you have never done anything about it before. I am not sure that is a proper inference. I don't know that this discovery really gets you there.

And it would otherwise be cumulative from the discovery that I have indicated that they can ask about the staffing and any plans to enforce and those sorts of factual questions.

So as to just the general broad based questions about tell us all the other ordinances you have and whether you have tried to enforce them against medical professionals, I will sustain that objection.

Any other issues that the Court needs to resolve today as it relates to the discovery memorandum on behalf of the Plaintiffs?

MR. GANNAM: Your Honor, before we move to that, may I ask will the Court enter a written ruling along the lines of the last time we were here to guide us in this case?

THE COURT: I usually would enter -- I am not going to enter a lengthy opinion, but we will enter a written order of some kind or another, but let me also be a little more fulsome on the record as to my ruling as to number 13 because I suppose that is probably the one you are going to want to pay most concern to and you may want to take issue with. So let me flesh out my ruling a little bit.

It has been suggested that the evidence requested in request number 13 is relevant to allow the Plaintiffs to make a number of evidentiary inferences that would be probative in this case.

One is that the alleged compelling reason for these ordinances is pretextual. And the inference to be drawn is that because they have not enforced other inference -- they have either not enacted or enforced other ordinances designed to protect minors suggests that this interest being asserted at this time is pretextual.

So that is one evidentiary inference that the Plaintiffs have suggested that they want to draw. I do not

believe that is a proper inference to be drawn. So I do not believe it is relevant because I do not believe the fact just because they never did it in the past doesn't mean they couldn't have and might not have had a million other reasons not to do it.

But, even if it were relevant, I do not believe that the burden of having to go back and produce or prepare a witness to testify about innumerable ordinances that could have applied to the health sciences and preparing the documentation and the witness to address that topic, given the minimal probative value, if any, of that inference is proportional.

So I would find it is not proportional. And as I said earlier, I would also find -- so that is my ruling as to that.

The argument has also been made that the inference that should be drawn is that the ordinances are either pretextual or not narrowly tailored because they cannot be enforced. That existing staffing, existing resources, and existing expertise are insufficient to make this a meaningful ordinance. And therefore, it is not properly narrowly tailored.

I would allow questioning about resources and staffing and training, things of that nature, to try to establish whether there is a current expertise that would allow the enforcement of these ordinances or the ability to enforce these ordinances.

I would allow questioning about whether the parties have developed any training or any other plan to try to train enforcement officials, or those who would be enforcing ordinances.

So in light of the fact that I am allowing that discovery, I believe the marginal additional discovery of having to actually produce, or identify, or testify about other ordinances would be cumulative and, therefore, not proportional.

And as to the preemption issue, which I believe was the third evidentiary inference that the Plaintiffs wanted to draw, given that preemption really turns on the intent of the state the inference that wants to be drawn is that because the city and the county have not ever taken any action to try to regulate in this area, suggests that they have either consented to or acknowledged that the state is preempting this area and I do not believe that is a relevant or proper inference.

I believe what the state intends is what the state intends and how the city or the county responds to that is simply not relevant. So I am not going to articulate all of that in a written ruling.

I have tried to make it as clear as I can on the record. We will have a transcript available if you want to order the transcript and all parties have reserved all objections to the Court's rulings this morning.

Anything further, Mr. Gannam?

MR. GANNAM: Just to note for the Court's benefit and this may never come up again, as we indicated in our correspondence with the Court in our papers there were several other matters that we did work through and appear to have resolved.

By agreement the supplemental responses from both Defendants were provided yesterday at the time we agreed to. We don't anticipate there would be any problem with those, but if there are still matters to be resolved related to these requests, of course we would just bring those up then.

THE COURT: Absolutely.

And let me compliment all counsel. I can see in the papers that I am seeing in the process of tracking this case, counsel are working very hard to work together. You have to represent your individual clients.

Plaintiffs have to ask for things. Defendants have to say no. Defendants have to ask for things. Plaintiffs have to say no and then you work through it. I see compromise. I see professionalism. I see outstanding lawyering on both sides of this case.

So I am here to do my job, which is to resolve these sorts of issues. So you never have to apologize or be squeamish about bringing issues to my attention. This is what I am paid to do. I am happy to do it. I am happy to do it

with excellent lawyers like you who make my job easy by framing the issues for me.

So when is the 30(b)(6) depositions scheduled?

MR. MIHET: They were scheduled for Monday and Tuesday.

THE COURT: Of next week?

MR. MIHET: Of next week, but by agreement we have decided to do them on Thursday and Friday instead.

THE COURT: Wonderful.

Okay. So if issues come up -- I will tell you in advance, except in dire emergencies, I really do not like to rule during the deposition and be contacted. The witnesses are here. Counsel are here.

I know counsel for the Plaintiff have come in from other parts of the state, but it is not like you are flying in from another country. If we have to reconvene the deposition after I rule, I do not think that would be unduly burdensome.

So if it is an absolute emergency and you need to call me during the depositions, I will entertain it, but it is rare that I will do that, but if after the depositions there are issues that have arisen and objections that need to be ruled upon, feel free to do what you did in this case.

Contact us. We will set a date. We will do a joint discovery memo and I will rule.

Okay. Anything further from the Plaintiffs?

MR. GANNAM: No, Your Honor.
THE COURT: From the county?
MS. FAHEY: No, Your Honor.
THE COURT: Miss Flanigan, on behalf of the city?
MS. FLANIGAN: No, Your Honor. Thank you.
THE COURT: All right. Thank you all very much. Excellent work in this case and we will be in recess.
Thank you.
MR. GANNAM: Thank you.
(Thereupon, the proceedings concluded.)

CERTIFICATE

I hereby certify that the foregoing transcript is an accurate excerpt transcript of the proceedings in the above-entitled matter.

09/13/18

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