UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 9:18-cv-80771-ROSENBERG/REINHART

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

Plaintiffs,

v.

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

Defendants.

EQUALITY FLORIDA'S AMICUS BRIEF IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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EQUALITY FLORIDA'S AMICUS BRIEF
IN SUPPORT OF DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Amicus curiae Equality Florida Institute Inc. hereby submits its Amicus Brief in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION[1]

In late 2017, both Palm Beach County and the City of Boca Raton prohibited licensed mental health providers from performing treatment on minors that seeks to change their sexual orientation or gender identity. The City and the County made the determination that such treatment, commonly referred to as "conversion therapy," is ineffective, lacks any scientific basis, and poses a serious health risk to LGBTQ minors.

This legislative determination was supported by "overwhelming research" and the consensus of leading health organizations. Boca Raton Ordinance No. 5407 ("City Ordinance") at p. 5; Palm Beach County Ordinance No. 2017-046 ("County Ordinance") at p. 4 (collectively "the Ordinances"). For example:

- The American Academy of Child and Adolescent Psychiatry's 2018 Policy on Conversion Therapies, which states that such therapies "lack scientific credibility and clinical utility. Additionally, there is evidence that such interventions are harmful. As a result, 'conversion therapies' should not be part of any behavioral health treatment of children and adolescents." (https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx)

- A 1993 policy statement of the American Academy of Pediatrics, stating: "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." (http://pediatrics.aappublications.org/content/pediatrics/92/4/631.full.pdf)

- The 2015 report of the Substance Abuse and Mental Health Services Administration, a division of the U.S. Department of Health and Human Services, which concluded

[1] Internal citations, quotation marks, and alterations are omitted, and emphasis is added unless otherwise indicated.

> that conversion therapy is "not supported by credible evidence and has been disavowed by behavioral health experts and associations. . . . Most importantly, it may put young people at risk of serious harm." (https://store.samhsa.gov/shin/content/SMA15-4928/SMA15-4928.pdf, at 1.)

- The 2009 Report of the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation ("APA Task Force"), which conducted a systematic review of peer-reviewed journal literature on conversion therapy and "found no empirical evidence that providing any type of therapy in childhood can alter adult same-sex sexual orientation." (http://www.apa.org/pi/lgbt/ resources/ herapeutic-response.pdf, at 79)

Significantly, LGBTQ minors who undergo conversion therapy often perceive it as a form of family rejection, which carries serious health risks. In one study, lesbian, gay, and bisexual young adults who reported high levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, and 3.4 times more likely to use illegal drugs compared with peers from families that reported no or low levels of family rejection. *See* Caitlin Ryan, et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009).

Two federal circuit courts have squarely rejected the constitutional claims raised by Plaintiffs. In *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), the Ninth Circuit held that a California statute preventing licensed therapists from subjecting minors to conversion therapy was warranted by the professional consensus that these practices subject minors to a risk of serious harms while providing no therapeutic benefit. *Id*. at 1229. Likewise, in *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), the Third Circuit upheld a similar New Jersey law in light of the overwhelming professional consensus deeming conversion therapy to be unethical, ineffective, and unsafe. *Id*. at 237–240.

Plaintiffs have wrongly claimed in other litigation that the Supreme Court's recent decision in *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018),

"gutted" those decisions. *See* Motion for Preliminary Injunction, *Vazzo v. City of Tampa*, No. 8:17-cv-02896-CEG-AAS, ECF No. 85, at 2 (M.D. Fla. June 26, 2018). It did no such thing.

As discussed more fully below, *NIFLA*'s discussion of states' authority to regulate medical treatment is fully consistent with the holdings in *Pickup* and *King* that legislation protecting minors from conversion therapy is constitutional. Although *NIFLA* criticized *dicta* in *Pickup* and *King* suggesting that "professional speech" is "a separate category of speech that is subject to different rules," 138 S. Ct. at 2371, the *holdings* of *Pickup* and *King* did not turn on the dicta, but rather on the well-settled principle that legislation may regulate the practice of medicine (including mental health treatments), even when doing so incidentally restricts some professional speech. *Id.* at 2372.

The Supreme Court expressly reaffirmed that principle in *NIFLA*, explaining that the government "may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* And even more to the point here, it specifically reaffirmed the validity of laws that regulate speech "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id*. at 2373.

Wollschlaeger v. Governor, 848 F.3d 1293 (11th Cir. 2017) (en banc), which struck down a state law that barred physicians from asking patients about gun ownership, similarly highlighted the crucial difference between (1) regulations of professional treatments that incidentally burden professional speech, which are generally permissible, and (2) regulations that directly restrict speech based on its content, for reasons unrelated to protecting patient health and safety. Notably, there was a complete absence in that case of any evidence that professional organizations had determined that inquiries about gun ownership were "practically ineffective"

or "medically inappropriate"; to the contrary, the law invalidated there required doctors to depart from recommended professional guidelines. *See id*. at 1309, 1316.

Unlike the law in *Wollschlaeger*, the Ordinances at issue here regulate only one specific form of medical treatment—the provision of conversion therapy to minors—that has been determined not only to be ineffective but to be actually dangerous to the health and safety of minors. Their sole purpose is to protect minor patients from this harmful therapy, while specifying that therapists remain free to "express[] their views to patients [and] recommend[] [conversion therapy] to patients." City Ordinance at p. 4; County Ordinance at p. 3–4. They also expressly allow religious counseling of minors regarding their sexual orientation. City Ordinance § 9-105(c); County Ordinance § 4.

In sum, the Ordinances fall well within the City and County's power to protect minors from a dangerous and ineffective form of mental health treatment for them.

ARGUMENT

I. The Ordinances Do Not Violate The First Amendment's Speech Clause.

Under Supreme Court and Eleventh Circuit precedent,[2] the Ordinances are subject to rational basis review, just like other regulations of health care treatments that incidentally limit some speech while protecting the public from harmful practices. Here, the evidence relied upon by the City and County plainly meets that test. In fact, the harms caused by conversion therapy for minors are so great, the medical consensus of those harms is so strong, and the Ordinances

[2] In addition to the authorities discussed below, Equality Florida respectfully commends the Court's attention to two scholarly law review articles: Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 Yale L.J. Forum 150 (2017), and Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. Chi. L. Rev. 955 (2017).

are so narrowly-tailored to protect minors from those harms, the Ordinances would survive any level of review.

A. *NIFLA* Confirms That Governments May Regulate Professional Practice To Protect Public Health And Safety, As The Ordinances Do Here.

In *NIFLA*, the Court invalidated a California law requiring licensed pregnancy clinics to notify women that California provides free or low-cost service, including abortion and unlicensed clinics to notify women that California has not licensed them to provide medical services. *NIFLA*, 138 S. Ct. at 2368.

In doing so, the Supreme Court did not retreat from the settled proposition that governments have the power to protect patients from harm by regulating medical practitioners: "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech . . . and professionals are no exception to this rule." *Id.* at 2373. Instead, the Court specifically differentiated between (1) regulations of professional conduct that only incidentally burden speech, and (2) those that regulate "speech as speech." *Id.* at 2374. It confirmed that states may regulate medical practice to protect patients from harm, even when doing so incidentally restricts some speech. *Id.* at 2371.

The Court explained, however, that the required disclosures by licensed clinics were "not tied to a [medical] procedure" and instead "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed." The law directly regulated speech as such and improperly "compel[ed] individuals to speak a particular message." *Id.* at 2371.

Indeed, *NIFLA* involved a "content-based regulation of speech." *Id.* "By compelling individuals to speak a particular message," the mandated notices for licensed facilities "alter[ed] the content of their speech." *Id.* (citing *Riley v. Nat'l Fed'n of Blind North Carolina, Inc.*, 487

U.S. 781, 795 (1988)). The concurring opinion emphasized the serious constitutional concern over the "viewpoint discrimination" that is "inherent in the design and structure of the Act." *Id.* at 2379 (Kennedy, J. concurring).

The Court contrasted these untethered speech requirements with the informed consent requirement upheld in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992), which "regulated speech only as part of the *practice* of medicine." *NIFLA*, 138 S. Ct. at 2373 (emphasis in original). Here, like the regulation in *Casey*, the legislation is expressly limited to preclusion of one specific mental health treatment—the *practice* of conversion therapy for minors by licensed mental health therapists, a dangerous and discredited form of mental health treatment. The Ordinances expressly exempt all speech between Plaintiffs and their clients that is not part of the provision of that treatment.

As such, the Ordinances are subject only to rational basis review, which they plainly survive in light of the strong professional consensus of our nation's leading medical and mental health organizations that conversion therapy for minors not only is ineffective, it puts minor patients at risk of serious harms, including severe depression and suicidality. In contrast, there was no such justification established for the disclosure requirements at issue in *NIFLA*.

It bears emphasis that patients do not have a constitutionally protected right to obtain particular medical treatments that the government has found to be ineffective or unsafe. *See, e.g.*, *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."); *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495

F.3d 695, 711 (D.C. Cir. 2007) (holding there is no privacy right for terminally ill patients to access treatments whose safety had not yet been tested).

As the D.C. Circuit pointedly noted, "[n]o circuit court has acceded to an affirmative access claim." *Id*. at 710 n.18.

B. The Ordinances Are Permissible Under The First Amendment As Reasonable Regulations Of A Particular Medical Treatment That, At Most, Incidentally Restrict Speech As A Component of the Treatment.

Laws enacted pursuant to a state or locality's police power generally are entitled to "a presumption of legislative validity." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). Moreover, "[a] statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).

Simply put, when a professional regulation governs "occupational conduct, and not a substantial amount of protected speech," it is not subject to heightened scrutiny under the First Amendment. *Id*.; *accord Wilson v. State Bar of Ga*., 132 F.3d 1422, 1430 (11th Cir. 1998). In contrast, a regulation that directly restricts the opinions or information professionals may communicate to their clients or to the public is generally subject to heightened scrutiny. *Locke*, 634 F.3d at 1191; *see also NIFLA*, 138 S. Ct. at 2374.

In *Wollschlaeger*, the Eleventh Circuit adhered to this distinction between regulations that incidentally restrict professional speech and those that restrict such speech directly. *See* 848 F.3d at 1309. In doing so, the Court pointed to the California law protecting minors from conversion therapy as an example of a law that only incidentally restricts professional speech: "Importantly, . . . the law in *Pickup*—like the law in *Locke*—did not restrict what the practitioner could say or recommend to a patient or client." *Id.*

As both the circuit courts recognized in upholding laws such as the Ordinances here, the sole purpose of such legislation is to protect minor patients from a particularly harmful mental health treatment, not to prohibit speech. *Pickup*, 740 F.3d at 1230 ("Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, [conversion therapy], we conclude that any effect it may have on free speech interests is merely incidental"); *King*, 767 F.3d at 237 ("The New Jersey legislature has targeted [conversion therapy] counseling for prohibition because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients.").

In *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011), the Eleventh Circuit expressly held that requiring a counseling student at a state university to comply with professional standards prohibiting the performance of conversion therapy does not violate the First Amendment. In the same way, the Ordinances, at most, have only an incidental impact on speech and do not prevent therapists from expressing their opinion on any topic, including sexual orientation or conversion therapy. To eliminate any doubt on that score, the Ordinances specify that therapists are free to "express[] their views to patients [and] recommend[] [conversion therapy] to patients." City Ordinance at p. 4; County Ordinance at p. 3–4. Accordingly, the Ordinances are subject to ordinary rational basis review.

In *Dana's Railroad Supply v. Attorney General*, 807 F.3d 1235 (11th Cir. 2015), the Eleventh Circuit applied heightened scrutiny to a law that "bann[ed] merchants from uttering the word *surcharge*," but the Court did so expressly because the law directly regulated *only* speech, not conduct. *Id.* at 1251. The court stressed that its analysis of that unusual law should not be misconstrued as suggesting that ordinary commercial regulations that incidentally restrict some protected speech are subject to heightened scrutiny: "Laws that target real-world commercial

activity need not fear First Amendment scrutiny. Such run-of-the-mill economic regulations will continue to be assessed under rational-basis review." *Id.*

Rational basis review thus applies here because, like the challenged regulation in *Casey*, which "regulated speech only as part of the practice of medicine," *NIFLA*, 138 S. Ct. at 2373, the Ordinances only prohibits the *practice* of conversion therapy. In imposing that narrow restriction for licensed mental health therapists, the Ordinances expressly exempt all speech between Plaintiffs and their clients that is not part of the provision of that specific treatment of minors. The Ordinances do not prohibit mental health professionals from publicly or privately stating a belief in the efficacy or propriety of conversion therapy for minors or adults, or from publicly or privately stating religious or other beliefs about LGBTQ people. They do not require mental health professionals to make any affirmative statements about conversion therapy or any other subject. And they do not apply at all to either religious leaders or to conversion therapy with adult patients.

As such, the Ordinances are subject only to rational basis review, which they plainly survive.

C. The Ordinances Also Satisfy Heightened Scrutiny.

The Ordinances also would survive even heightened scrutiny because they are "justified by a compelling interest and [are] narrowly drawn to serve that interest." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 799 (2011).

1. The City And The County Have A Compelling Interest In Protecting Children From Harm.

The City and County enacted the Ordinances to carry out their interest in "protecting the physical and psychological well-being of minors." City Ordinance at p. 5; County Ordinance at

p. 4. Governments have a compelling interest in the health and well-being of their citizens. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *Watson v. Md.*, 218 U.S. 173, 176 (1910).

Furthermore, "[t]he state's authority over children's activities is broader than over like actions of adults… A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Mass.*, 321 U.S. 158, 168 (1944). Consequently, the Supreme Court "ha[s] sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionality protected rights." *N.Y. v. Ferber*, 458 U.S. 747, 757 (1982).

That interest is unquestionably served here, where the government seeks to protect minors who are "especially vulnerable to [the] practices" barred by the Ordinances. *King*, 767 F.3d at 238.

To be sure, such health and safety regulations must be aimed at real problems specifically identified by the government. *Brown*, 564 U.S. at 799. In *Brown*, for instance, the Supreme Court held that California could not ban violent video games for minors because the purported link between such games and harmful effects on children was not established. *Id*. at 800.

By contrast, the City and the County relied on "overwhelming research" that conversion therapy poses real dangers to its children. City Ordinance at p. 5; County Ordinance at p. 4. The detailed legislative findings in both Ordinances summarize that research and the conclusions of well-known, reputable professional and scientific organizations—including the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, and the U.S. Department of Health and Human Services—that

conversion therapy is highly correlated with depression, suicidality, substance abuse, and other serious harms.

Plaintiffs' only response to this voluminous evidentiary record is to quibble with some of the wording of part of a single, early report issued by the American Psychological Association (APA) in 2009. Dkt. 3 at 1, 11–12 (citing Am. Psychological Ass'n, *Appropriate Therapeutic Responses to Sexual Orientation* 91 (2009)). Read as a whole, however, its conclusions that conversion therapy is both ineffective and unsafe, particularly for minors, are clear.

Moreover, subsequent research and clinical experience have corroborated these risks for children. As also noted in the Ordinances' legislative findings, in 2015, the U.S. Substance Abuse and Mental Health Services Administration published a report summarizing this evidence and rejecting conversion therapy in children and adolescents.

Plaintiffs complain that the research showing the harms of conversion therapy is not absolutely conclusive. But the First Amendment does not require the government to delay action to protect children from serious threats of harm until it possesses conclusive scientific proof, particularly when acquiring such proof would produce the very harm the government seeks to avoid. *See FCC v. Fox Television Stations*, 556 U.S. 502, 519 (2009). Significantly, responsible professionals stopped conducting double-blind studies on conversion therapy precisely because it was harmful, particularly to minors. *See* APA Report at 91.

Plaintiffs wrongly claim that existing professional standards precluding this form of therapy for minors render the Ordinances unnecessary. The very fact that Plaintiffs still maintain they are entitled to subject minors to conversion therapy, despite the wealth of professional standards precluding such therapy as unethical and unsafe, demonstrates the compelling need for a specific prohibition by the government to protect its minor citizens.

2. The Ordinances Are Narrowly-Tailored To Advance That Compelling Interest.

The Ordinances prevent Plaintiffs only from "practic[ing] conversion therapy efforts on any individual who is a minor." City Ordinance at p. 6; County Ordinance at p. 7; *see also Pickup*, 740 F.3d at 1230. They therefore restrict no more speech than necessary to protect children from an ineffective and harmful mental health treatment. *See King*, 767 F.3d at 240; *Pickup*, 740 F.3d at 1223. They do not restrict "speech as speech," as in *NIFLA*, 138 S. Ct. 2374.

Plaintiffs' sole alternative suggestion—informed consent—is inadequate to accomplish that. As the Third Circuit recognized in *King*, "hostile social and family attitudes" may pressure vulnerable minors into signing informed consent forms despite their best interests. *King*, 767 F.3d at 240 (quoting APA Report at 17). Similarly, the APA explicitly rejected informed consent as an adequate safeguard against the harms of conversion therapy, noting that "simply providing [conversion therapy] to patients who request it does not necessarily increase self-determination but rather abdicates the responsibility of [therapists] to provide competent assessment and interventions that have the potential for benefit with a limited risk of harm." APA Report at 69.

Finally, informed consent is not an adequate safeguard when the government has determined that a treatment is unsafe or ineffective. *See Washington v. Glucksburg*, 521 U.S. 702, 728 (1997). When a medication or treatment provides no benefits and only causes harm, the premise of informed consent—allowing the patient to evaluate and weigh risks against benefits—does not exist.

D. The Ordinances Do Not Discriminate On The Basis Of Viewpoint.

Plaintiffs argue that the Ordinances unconstitutionally restrict the "viewpoint" of therapists who wish to practice conversion therapy on minors. They do no such thing. They merely prohibit the procedure itself for minors – not speech about the practices.

In *Keeton*, the Eleventh Circuit expressly rejected a counseling student's claim that a university had engaged in impermissible viewpoint discrimination by disciplining her for seeking to use conversion therapy in treating clients:

> [The school's] curriculum requires that all students be competent to work with all populations, and that all students not impose their personal religious values on their clients, whether, for instance, they believe that persons ought to be Christians rather than Muslims, Jews or atheists, or that homosexuality is moral or immoral. As such, [the school's] curriculum and the generally applicable rules of ethical conduct of the profession are not designed to suppress ideas or viewpoints but apply to all regardless of the particular viewpoint the counselor may possess.

Keeton, 664 F.3d at 874–75.

The Court emphasized that "Keeton remains free to express disagreement with ASU's curriculum and the ethical requirements of the ACA, but she cannot block the school's attempts to ensure that she abides by them if she wishes to participate in the clinical practicum, which involves one-on-one counseling, and graduate from the program." *Id*. Likewise, the Ordinances do not suppress any ideas or viewpoints, but rather apply to all licensed mental health professionals regardless of their particular viewpoints. Plaintiffs remain free to express disagreement with the Ordinances and the professional standards that they enforce.

Thus, and unlike in *NIFLA*, the City and County do not require Plaintiffs "to promote" the government's "own preferred message" regarding this practice. *NIFLA*, 138 S. Ct. at 2379. Plaintiffs are not required to engage in any speech at all.

E. The Ordinances Are Not Unconstitutionally Vague Or Unconstitutional Prior Restraints.

Even when a law regulates speech, it need not be absolutely clear or provide perfect guidance to survive a vagueness challenge. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). It need only provide people with a reasonable opportunity to understand what conduct it prohibits. *Hill v. Colo.*, 530 U.S. 703, 732 (2000). The Ordinances do so.

Both Ordinances carefully define the conduct they do and do not prohibit. City Ordinance at p. 6; County Ordinance at p. 5. Moreover, "conversion therapy" and "SOCE" are terms of art within the professional counseling community and describe a distinct practice in which Plaintiffs themselves claim to specialize. Dkt. 1 at 24, 27–28; *see also King*, 767 F.3d at 241; *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1363–64 (E.D. Cal. 2012).

Plaintiffs' claimed confusion about possible applications of the Ordinances is unavailing. "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill*, 530 U.S. at 733; *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982) (law must be "impermissibly vague in all of its applications").

Here, the Ordinances provide more than sufficient clarity. *Pickup*, 42 F. Supp. 3d at 1366 (noting California's law does not prohibit a therapist from merely mentioning conversion therapy, recommending a book on conversion therapy, or referring minors for conversion therapy); *King v. Christie*, 981 F. Supp. 2d 296, 328 (D.N.J. 2013) (same analysis regarding New Jersey statute). In fact, the Ordinances affirmatively specify that therapists are free to "express[s] their view to patients [and] recommend[] [conversion therapy] to patients." City Ordinance at pp. 4–5; County Ordinance at pp. 3–4.

Plaintiffs' claim that the Ordinances are prior restraints of expression also has no merit. *See* Dkt. 3, 15–16. "[T]he regulations [the Supreme Court has] found invalid as prior restraints have had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Ward*, 491 U.S. at 795 n.5. They involved permitting or licensing requirements for protests, parades, publishing, or some other form of First Amendment activity.

By contrast, the Ordinances only regulate mental health therapy itself, not the expression of opinions. *Pickup*, 740 F.3d at 1230 (holding that California statute "does not restrain Plaintiffs from imparting information or disseminating opinions"). Under Plaintiffs' theory, any professional regulation that touches on speech, however slightly, would be a "prior restraint" subject to strict scrutiny. Such a novel rule would negate the well-established powers of governments to regulate professional practices to protect their citizens.

II. The Ordinances Do Not Violate Plaintiffs' Religious Rights.

Neutral laws of general applicability, such as the Ordinances, need only satisfy rational basis review under the First Amendment's Free Exercise Clause. *Keeton*, 664 F.3d at 879–80. This is true even of laws that have the incidental effect of burdening a particular religious practice. *Id.*; *cf. City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (rejecting statutory application of strict scrutiny to laws that burden free exercise).

The Ordinances are both neutral and generally applicable. Far from evincing hostility toward religion, both Ordinances create express exemptions for religious leaders providing religious counseling. The evident purpose of these Ordinances is not to target religiously motivated conduct but rather to preclude a therapeutic practice that poses a serious health risk to LGBTQ children. *See Welch v. Brown*, 834 F.3d 1041, 1045 (9th Cir. 2016) (rejecting challenge to California conversion therapy law based on the Free Exercise Clause).

The fact that Plaintiffs' or their clients' interest in the performance of such therapy may be driven by religious belief is not sufficient to impute religious animus to the City or County. *See King*, 767 F.3d at 242–43. Indeed, aside from the conclusory allegation that the Ordinances "target Plaintiffs' and their clients' sincerely held religious beliefs," Dkt. 1 at 41, Plaintiffs allege no facts that suggest the Ordinances were motivated by impermissible animus in violation of the Free Exercise clause. *See Keeton*, 664 F.3d at 1380 (finding no free exercise violation where plaintiff "has not established that [the challenged regulation] is aimed at particular religious practices"); *Welch*, 834 F.3d at 1047 (same).

Nor do the Ordinances violate the Florida Constitution, which expressly specifies that "[r]eligious freedom shall not justify practices inconsistent with public morals, peace or safety." Fla. Const. art. I § 3. This plain language provides less protection than that provided by the First Amendment. *Warner v. City of Boca Raton*, 267 F.3d 1223, 1226 n.3 (11th Cir. 2001). Here, because conversion therapy is a practice "inconsistent with public safety" for minors, it falls squarely within the practices expressly excluded from the Florida Constitution's protection.

Finally, there is no violation of Florida's Religious Freedom Restoration Act of 1998 (FRFRA), Fla. Stat. §§ 761.01–.061, as the Ordinances do not place a "substantial burden" on the free exercise of religion. The Florida Supreme Court has interpreted "substantial burden" narrowly to require proof that a law "either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004).

The Ordinances do neither. Plaintiffs have alleged no facts to suggest that the Ordinances compel them to engage in an activity their religion forbids or that their religion requires them to practice conversion therapy on minor clients.

Plaintiffs' desire to provide professional mental health treatments that attempt to change a child's sexual orientation does not rise to the level of a requirement of their faith. *See Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 56-57 (Fla. App. 2006) (holding refusal to provide Muslim woman with driver's license after she would not take a photo without her veil was not substantial burden because Islam allows veil to be removed for government photos).

Plaintiffs are free to express and practice their religious views. They are simply precluded from engaging in the prohibited therapy with children when providing treatment as licensed mental health providers.

CONCLUSION

For the reasons stated above, as well as those set forth in the filings of Palm Beach County, the City of Boca Raton, and Amicus Curiae The Trevor Project, Amicus Curiae Equality Florida respectfully asks that the Court deny the Plaintiffs' preliminary injunction motion.

Dated: September 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day a true and correct copy of the foregoing was electronically filed with the Clerk of Court using CM/ECF, which will send notification to the registered attorney(s) of record that the documents have been filed and are available for viewing and downloading.

Dated: September 18, 2018

/s/ *Jennifer A. Yasko*
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