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' REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

"[R]egulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) ("*NIFLA*") (internal alterations and citation omitted). "Throughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities." *Id*. To the long list of faraway despotic regimes the Supreme Court condemned for this practice, *id*., two new regimes, much closer to home, may now be added: Defendants City of Boca Raton, Florida ("City") and Palm Beach County, Florida ("County"). By prohibiting licensed therapists from providing **voluntary** Sexual Orientation Change Efforts ("SOCE") counseling – consisting **solely** of pure speech – to minors who **request** and **wish** to receive it, Defendants have done exactly what the Supreme Court has condemned – they have "fail[ed] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Id*.

The Supreme Court in *NIFLA* did far more than just condemn Defendants' authoritarian schemes in the abstract. It **abrogated** the two cases upon which Defendants built their entire schemes – *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014) and *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (9th Cir. 2014) – because those cases purported to permit what the First Amendment cannot allow: the classification of speech uttered by professionals as "conduct," for the purpose of prohibiting it while evading constitutional scrutiny. *NIFLA*, 138 S. Ct. at 2371-72. Left without any cover for their unconstitutional Ordinances, Defendants are so committed to suppressing the speech and viewpoint of Plaintiffs that even now they do not abandon them. Instead, they contort the Supreme Court's clear teaching in *NIFLA* beyond recognition, pretend that *King* and *Pickup* are still good law, and incredibly maintain that the voluntary SOCE counseling provided by Plaintiffs to their minor clients who request and wish to receive it is merely "professional conduct" – a constitutional orphan – even though it consists solely and entirely of **speech**, and even though the en banc Eleventh Circuit has denounced this tactic as a "dubious constitutional enterprise." *Wollschlaeger v. Florida*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc).

Stripped to its essence, Defendants' arguments are nothing short of a brazen invitation for this Court to overrule the en banc Eleventh Circuit and the Supreme Court, and resurrect the interred logic of *King* and *Pickup*, so that Defendants can go on suppressing Plaintiffs' speech they

abhor. At the end of the day, however, the Constitution must prevail, because "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and the people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2375.

For the reasons that follow, and the reasons in Plaintiffs' preliminary injunction motion, Plaintiffs' are entitled to the injunctive relief sought because they are likely to succeed on the merits.

SUMMARY OF KEY FACTS DEVELOPED IN DISCOVERY

Since Plaintiffs filed their Motion for Preliminary Injunction (DE 8, "MPI"), the parties have engaged in deposition and written discovery limited to preliminary injunction issues. The evidentiary record developed through these discovery efforts supplements the sworn facts set forth in Plaintiffs' Verified Complaint (DE 1, "VC"). Key facts relevant to Plaintiffs' MPI are summarized below, and are further developed in the argument section.

- The "overwhelming research" recited by both Defendants as justification for their respective Ordinances does not exist. (*See infra* § I.D.3, 4.)
- Prior to enacting their respective Ordinances, Defendants received no evidence or complaint of harm purportedly caused by voluntary SOCE within their jurisdictions. (*See infra* § I.D.2.)
- Prior to enacting their respective Ordinances, Defendants did not consider any less restrictive alternatives to the blanket therapy bans contained in their Ordinances. (*See infra* § I.E.2.)
- Prior to enacting their respective Ordinances, Defendants knew the Ordinances would be unenforceable. (*See infra* § I.E.3.)
- Prior to enacting their respective Ordinances, Defendants knew the Ordinances regulated subject matter preempted to the State. (*See infra* § II.A.)
- Defendants interpret their Ordinances to prohibit therapists from assisting minors who present with their own goals to change their sexual orientation or gender identity, regardless of the therapists' intent. (*See infra* § I.A.2.)

LEGAL ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CHALLENGE TO THE ORDINANCES.

A. Plaintiffs Have Standing to Challenge the Ordinances Because the Talk Therapy They Want to Provide Would Violate the Ordinances According to Defendants.

1. Hamilton Wants to and Does Practice in the City of Boca Raton.

The City contends that Hamilton does not have standing to challenge the City Ordinance because the threat of prosecution of Hamilton for violating the City Ordinance is too speculative. (City Opp'n, DE 83, at 14–15.) The City is wrong for two reasons. First, Hamilton's unrebutted deposition testimony clearly establishes that she wants to be able to see adult and minor clients in Boca Raton, has made arrangements for office space to do so, and even has a minor client whom she would see in Boca Raton but for the City Ordinance. (Hamilton, 329:24–335:17.) Hamilton has also paid the City of Boca Raton business tax for the annual periods ending September 30, 2018, and September 30, 2019, and has provided in-person counseling in the City of Boca Raton since this lawsuit was filed. (Decl. of Pl. Julie H. Hamilton, Ph.D., LMFT, ¶ 2.) Hamilton's practice and desired practice in Boca Raton are more than sufficient to provide standing to challenge the City Ordinance.

2. Otto Wants to Provide Therapy That the Ordinances Prohibit.

The City and County both contend that Otto does not have standing to challenge their Ordinances because he does not practice "conversion therapy," because he does not "'attempt to change a client's sexual orientation.'" (City Opp'n, DE 83, at 15–16; Cnty. Opp'n, DE 85, at 2.) But Defendants grossly misrepresent Otto's testimony to make this argument. Within the portions of Otto's testimony cited by Defendants, Otto described his practice:

> [T]his is client-centered and client-directed with clients' goals. So when you ask me about trying to change somebody, I am not trying to change anybody on anything. **These are client issues that clients want to seek change on, and they come asking for assistance** as they walk through that journey, and we talk about that process in speech.

(Otto, 44:13–20 (emphasis added).)

According to the County's 30(b)(6) witness, the same therapy content can be both allowed by the Ordinance and prohibited by the Ordinance, depending on whether the intent is to change a minor's sexual orientation or gender identity. (Hvizd, 260:11–262:12, 266:14–267:18.) If an adolescent born female, but who identifies as a male for a time, seeks therapeutic help to change her gender identity back to female to align with her biological body, the ordinance prohibits licensed therapists from helping her. (Hvizd, 268:15–25.) Indeed, according to the County, if a minor desires and intends to change gender identity and presents that goal to a licensed therapist, the therapist is prohibited by the Ordinance from assisting with the minor's goal, **regardless of whether the therapist also intends to change the minor's gender identity**. (Hvizd, 269:2–270:2.)

The City interprets its Ordinance the same way, as explained by its 30(b)(6) witness:

> Q. Okay. So, if a minor shows up and the minor has the intent of changing their sexual orientation or gender identity --
>
> A. Uh-huh.
>
> Q. -- but the therapist engages in counseling, practice or treatment and the therapist doesn't share that intent, then that would not be a violation of the ordinance?
>
> A. **I think it would. I think that, if the therapist treats -- if the practice is gender identity conversion or sexual orientation conversion, whether or not it's prompted by the parents, by the therapist, by the child, themselves, that is banned by the ordinance.**
>
> Q. Okay.
>
> A. That's my understanding.
>
> Q. Okay. And so, just so we're clear then, if the minor wishes to receive this type of counseling **and the therapist wishes to provide the minor with that which the minor seeks, which is to assist the minor with the minor's goals**, if those goals are to change sexual orientation or gender identity, then that would be prohibited by the ordinance?
>
> A. **That's my understanding, yes.**

(Woika, 154:23–158:13 (emphasis added).)

Thus, Otto risks violating the Ordinances by assisting minor clients who want to change their sexual orientation, even if Otto himself has no intent or ability to change them, and can only

assist them with changes they want to make. Otto's desire to engage in counseling that helps minors achieve their change goals with respect to sexual orientation is sufficient for his standing to challenge the Ordinances.

3. Plaintiffs Have Standing to Challenge The Ordinances On Behalf Of Their Clients.

The Supreme Court and the Eleventh Circuit have long recognized the rights of doctors and mental health professionals to bring constitutional challenges on behalf of their clients. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood Ass'n of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981). Plaintiffs' assertion of their clients' constitutional rights is consistent with Article III standing requirements because their clients' "enjoyment of the right [to receive the SOCE counseling they seek] is inextricably bound up with the activity the litigant wishes to pursue." *Singleton*, 428 U.S. at 114-15. As such, "the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 115. The Eleventh Circuit has noted that doctor or mental health professionals have standing to bring claims on behalf of their clients when (1) plaintiff has suffered concrete injury, (2) plaintiff and the third party have a close relationship, and (3) the third party faces some obstacles to asserting his own rights. *Miller*, 934 F.2d at 1465 n.2. Plaintiffs easily satisfy each of these elements.

a. Plaintiffs have suffered concrete and irreparable injury.

As Plaintiffs' Verified Complaint demonstrates, Plaintiffs are currently suffering irreparable injury. (VC, ¶¶ 162–182.[1]). Indeed, the Ordinances are prohibiting Plaintiffs from engaging in, providing or facilitating voluntary, speech-only SOCE counseling with minor clients and constituents who desire to receive it, and the Ordinances are unconstitutionally prohibiting such counseling on the basis of its content and viewpoint. (VC, ¶¶ 186–88.) Plaintiffs are also currently suffering irreparable injury under the yoke of a presumptively unconstitutional prior

[1] The City expressly **accepts as true** the allegations of Plaintiffs' Verified Complaint for preliminary injunction purposes. (City Opp'n, DE 83, at 2 n.2.) The County offers no evidence to the contrary either.

restraint. (VC, ¶ 185); *see also infra* §§ I.B–E. Plaintiffs have clearly shown more than sufficient concrete injury to satisfy Article III.

b. Plaintiffs and Their Clients Have the Requisite Close Relationship.

It has long been held that the relationship of a health professional and patient satisfies the requisite relationship for third party standing. *See, e.g.*, *Singleton*, 428 U.S. at 117 ("the physician is uniquely qualified to litigate the constitutionality of the [government's] interference with, or discrimination against" medical decision); *Miller*, 934 F.2d at 1465 n.2 (holding that the relationship between doctor and patient is sufficiently close for standing); *Deerfield*, 661 F.2d at 334 (same); *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1284 (M.D. Ala. 2013) ("federal courts **routinely** recognize a [doctor's] standing to assert the claims of its patients" (emphasis added)); *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 358 (2d Cir. 2016) ("**a physician or other professional may raise the *constitutional* rights … of his or her patients**" (bold emphasis added; italics original)). The constitutionally protected right to make decisions concerning one's mental health and health care is "one in which the physician is intimately involved." *Singleton*, 428 U.S. at 117. Indeed, "[t]he closeness of the relationship is patent." *Id.*; *see also Miller*, 934 F.2d at 1465 n.2 (same).

Here, Plaintiffs and their clients establish a therapeutic alliance in their counseling and the relationship between them is sufficiently close. Indeed, Plaintiffs' clients have specifically sought them out because they offer counseling consistent with the clients' religious beliefs. (VC, ¶¶ 129, 145.) This relationship is inherently close and sufficient for Article III standing. *See Penn. Psychiatric Soc'y v. Green Springs Health Serv., Inc.*, 280 F.3d 278, 289 (3d Cir. 2002) ("Psychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf. This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights.").

c. Plaintiffs' Clients Face Obstacles to Litigation.

Plaintiffs' clients face substantial obstacles to bringing these claims. Indeed, "[f]or one thing, [they] may be chilled from such assertion by a desire to protect the very privacy of [their] decision from the publicity of a court suit." *Singleton*, 428 U.S. at 117. "[T]he psychotherapist-patient privilege is rooted in the imperative need for confidence and trust." *Jaffree v. Redmond*, 518 U.S. 1, 10 (1996). "[D]isclosure of confidential communications made during counseling

sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.*

"The stigma associated with receiving mental health services presents a considerable deterrent to litigation." *Penn. Psychiatric Soc'y*, 280 F.3d at 290 (citing *Parham v. J.R.*, 442 U.S. 584 (1979) (Stewart, J., concurring)). This consideration is only increased when such counseling involves intimate details concerning a minor's development, growth, and sexuality. Indeed, even the fear of stigmatization associated with bringing claims in a public forum "operates as a powerful deterrent to bringing suit." *Id.* As the Tenth Circuit has held, "**adolescents seeking health care related to sexuality or mental health care may be chilled from asserting their own rights by a desire to protect the very privacy of the care they seek from the publicity of a court suit**." *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 1990) (emphasis added).

The desire to keep private the intimate details associated with SOCE counseling are clearly obstacles for Plaintiffs' clients and constituents to bring their claims in public court. The mere fact that Defendants passed the Ordinances is *ipso facto* proof that Plaintiffs' clients are likely to be stigmatized and subjected to opprobrium for seeking the kind of counseling that offends the Defendants' sensibilities. And, to make matters worse, Plaintiffs' clients are minors and thus face a separate set of obstacles to litigation.

In sum, Plaintiffs have shown more than enough to establish third party standing to challenge the Ordinances on behalf of their minor clients.

B. Defendants' Efforts to Characterize Plaintiffs' Speech as Conduct and Thereby Evade First Amendment Review Is a "Dubious Constitutional Enterprise" That Fails as a Matter of Binding Law.

Although a deluge of flood waters from binding precedent have risen around them, Defendants cling to the flimsy raft they have constructed that Plaintiffs' talk therapy is solely "professional conduct" which Defendants have free-floating authority to regulate without scrutiny under the First Amendment. (City Opp'n, DE 83, at 2–7; Cnty. Opp'n, DE 85, at 4–7.) Defendants' contention is not surprising given that it had been previously espoused by other government entities attempting to silence SOCE counselors, but binding and unequivocal precedent from the Supreme Court and the en banc Eleventh Circuit, and even the out-of-circuit authority on which Defendants principally rely, **require** this Court to reject and sink Defendants' argument.

1. Defendants Could Have Regulated Only Conduct, but Chose Instead to Also Regulate Plaintiffs' Pure Speech.

Defendants and their amici purposefully conflate hypothetical aversive therapy that takes place through conduct (which, to Plaintiffs' knowledge, no one engages in within the field of SOCE counseling), with non-aversive voluntary counseling that takes place only through speech (which Plaintiffs engage in). Defendants justify the Ordinance's indiscriminate ban on the latter by pretending that it is the former.

To be sure, if Defendants had wanted to ban only "conduct," they could have enacted an ordinance that bans so-called "aversive techniques" or "aversion treatments," such as the hypothetical (and ridiculous) practice of hooking patients up to electrodes and administering electric shock therapy to rid them of certain thoughts or behaviors. (*See, e.g.,* APA Rep., DE 85-5, at 22.) If Defendants had banned only **that** kind of therapy, then their "conduct" argument might have a theoretical leg to stand on. More importantly, if Defendants had banned only **that** type of therapy, Plaintiffs would not have needed to file this lawsuit, since neither Plaintiffs nor any therapists they have ever heard of engage in this type of SOCE therapy. (VC, ¶¶ 71–72.)

What Defendants banned instead is pure speech. Plaintiffs have demonstrated in their Verified Complaint that they "help clients with their unwanted same-sex attractions, behaviors, and identity **by talking with them**," (VC, ¶ 73 (emphasis added)), that "**[s]peech is the only tool** that Plaintiffs use in their counseling with minors seeking to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity," (*id.* at ¶ 74 (emphasis added)), and that "**[t]he only thing that happens in their counseling sessions is speech**." (*Id.* (emphasis added)). Plaintiffs have also demonstrated that they do not seek to impose their viewpoints, values, or beliefs on their clients, but instead conduct client-directed and client-centered counseling, where the **clients'** goals and fundamental right to **self**-determination are paramount. (*Id.* at ¶¶ 75–77, 79, 81, 131, 144). Defendants do not dispute that **this** is the true nature of Plaintiffs' counseling.[2] Nor could they.

It is therefore crucially important for the Court to know that every time Defendants and their amici refer to "professional conduct" or just "conduct," they purport to include Plaintiffs' pure speech, because that is what the Ordinance bans. As demonstrated in the next sections, however, Defendants labor in vain to categorize and lump in Plaintiffs' speech with "conduct."

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[2] *See* note 1, *supra*.

2. Supreme Court Precedent Compels a Finding That Plaintiffs' "Talk Therapy" Is Speech.

The Supreme Court has, on numerous occasions, held that a state cannot simply label the **speech** of professionals as **conduct** and obtain some free-floating power to restrain it without scrutiny. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2371–72 ("this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015) (same); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (government may not concoct some alternative label on protected speech to evade First Amendment review, when the only "conduct" at issue is speech); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (same); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.").

Indeed, as the *NIFLA* Court recently reiterated, permitting the government to slap a clever label on a professional's speech would eviscerate the protections afforded to doctors, lawyers, nurses, mental health professionals, and many others.

> All that is required to make something a profession . . . is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. **States cannot choose the protection that speech receives under the First Amendment**, as that would give them a powerful tool to impose invidious discrimination on disfavored subjects.

NIFLA, 138 S. Ct. at 2372 (emphasis added).

3. Binding en banc Eleventh Circuit Precedent Requires a Finding That Plaintiffs' "Talk Therapy" Is Speech.

While the Supreme Court's numerous and unequivocal statements alone should have demonstrated to Defendants the constitutional error of their way, the en banc Eleventh Circuit drove a stake through the heart of Defendants' attempt to deploy a labeling scheme to evade the condemnation of the First Amendment. In *Wollschlaeger v. Florida*, the entire Eleventh Circuit rejected, **word-for-word**, what Defendants proffer here, because "**characterizing speech as conduct is a dubious constitutional enterprise**." 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc) (emphasis added). Defendants entirely ignore this development, and continue instead their rote reliance on the contrary holding of *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (*see, e.g.*, City

Opp'n at 3–6; Cnty. Opp'n at 5–6), even though, in the same breath, the en banc Eleventh Circuit relegated *Pickup* to the dustbin of constitutional history: "There are serious doubts about whether *Pickup* was correctly decided." *Wollschlaeger*, 848 F.3d at 1309.

In *Wollschlaeger*, much like Defendants here, the government argued that "the First Amendment is not implicated because any effect on speech is merely incidental to the regulation of professional conduct." *Id.* at 1308. But, as do the Ordinances here, the law in question "expressly limit[ed] the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict[ed] their ability to communicate and/or convey a message." *Id.* The Eleventh Circuit had no doubt these restrictions "trigger First Amendment scrutiny. '**[S]peech is speech, and it must be analyzed as such for the purposes of the First Amendment**.'" *Id.* at 1308 (emphasis added) (quoting *King v. Governor of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014)). Indeed, "[w]hat the Supreme Court said in concluding its analysis in *Button* seems to **fit like a glove here**: A state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* (quoting *Button*, 372 U.S. at 439 (emphasis added)).

The Ordinances here are not some "mere incidental" regulations of speech – they are flat prohibitions on **the only tool** that Plaintiffs employ in the exercise of their profession – **speech**. (*See* VC, ¶ 74). As far as Plaintiffs are concerned, the Ordinances only impact what they **say**, not what they **do**, because – as alleged in the Verified Complaint and recapitulated in Section I.B.1., *supra*—they don't do anything in therapy sessions with minor clients other than **speak**. (VC, ¶¶ 71–82). What Plaintiffs say to their minor clients is therefore as "incidental" to speech as walking is to ambulation. *Wollschlaeger*, 848 F.3d at 1309.

Stripped down to its essence, Defendants' argument is nothing short of an invitation for this Court to overrule the en banc Eleventh Circuit's clear mandate in *Wollschlaeger*, based upon Defendants' (mis)understanding of other case law. This, Defendants cannot do, because this is not how precedent works. Defendants cannot skip over the Eleventh Circuit to avoid a decision they don't like. This is because, "[w]ithout a *clearly contrary* opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court," let alone the entire court sitting en banc. *Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1292 (11th Cir. 2003) (quoting *NLRB v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. Unit A Apr. 1981) (italics in original)). "Even if the reasoning of an intervening high court decision is

at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision," let alone the trial court with a basis for overruling the appellate court. *United States v. Vega-Castillo*, 540 F.3d 1235, 1237 (11th Cir. 2008).

The Eleventh Circuit's en banc rejection of Defendants' "speech is professional conduct" argument in *Wollschlaeger* **mandates** a rejection of that same argument by this Court. Plaintiffs' speech is speech.

C. The *NIFLA*, *Reed*, and *Wollschlaeger* Triumvirate Mandate the Application of Strict Scrutiny Which the Ordinances Cannot Survive.

1. Defendants' Continued Reliance on *King* and *Pickup* Is Utterly Misplaced Because the Supreme Court Has Abrogated Both of Those Authorities.

Defendants maintain their steadfast reliance on *King* and *Pickup* for the notion that a content-based restriction on the speech of licensed mental health professionals need only satisfy minimal or intermediate constitutional scrutiny. (City Opp'n, DE 83, at 5–10; Cnty. Opp'n, DE 85, at 7–8.) Fatally for Defendants, the relevant portions of *King* and *Pickup* were abrogated by the Supreme Court in *NIFLA*. And, even if *NIFLA* had not put the final nail in the constitutional coffin of *King* and *Pickup*, which it did, *Reed* and *Wollschlaeger* alone would suffice to entomb any remnants of their unconstitutional underpinnings.

The first nail in the *King–Pickup* coffin was hammered by *Reed*. There, the Supreme Court handed down the firm rule: **all content-based restrictions of speech must survive strict scrutiny**. *Reed*, 135 S. Ct. at 2227. Indeed, "a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus towards the ideas contained in the regulated speech." *Id.* In handing down that firm rule, the Supreme Court unequivocally stated that it applied equally to **any** content-based regulation of the speech of licensed professionals. *Id.* at 2229 ("it is no answer to say that the purpose of these regulations was merely to insure high professional standards"). This post-*King* and post-*Pickup* precedent from the Supreme Court eviscerated any notion that a content-based restriction on the speech of licensed professionals needed only satisfy lesser constitutional scrutiny. Fatally for Defendants' contentions, that is precisely the constitutional error *King* made in applying intermediate scrutiny. *See King*, 767 F.3d at 236 ("although we agree with Plaintiffs that A3371 discriminates on the basis of content, it does so in a way that does not trigger strict scrutiny.").

Defendants continue to cite this proposition as though it remains good law. (City Opp'n, DE 83, at 7; Cnty. Opp'n, DE 85, at 7 n.36). **It is not**. A finding that a law is content-based on its face – which is of "little doubt" with ordinances banning SOCE counseling, *see King*, 767 F.3d at 236 n. 20 – is dispositive and mandates the application of strict scrutiny post-*Reed*.

Following *Reed*'s firm rule, the Eleventh Circuit secured the *King–Pickup* constitutional coffin even further by declaring that regulations of the speech of licensed professionals is not subject to lesser scrutiny simply by deploying a labeling scheme. *See* § I.B.3, *supra*. Indeed, try as they have, Defendants cannot retreat to the principle that the Ordinance regulates only "professional conduct" and thereby evade scrutiny. *See Wollschlaeger*, 848 F.3d at 1309 ("**characterizing speech as conduct is a dubious constitutional enterprise**." (emphasis added)).

Lastly, the stake through the heart of Defendants' no-strict-scrutiny argument was driven by *NIFLA*. In *NIFLA*, the Supreme Court affirmed *Reed*'s firm rule mandating strict scrutiny for all content-based restrictions of speech, expressly abrogated *King*'s and *Pickup*'s erroneous conclusions that content-based regulations of so-called "professional speech" do not receive strict scrutiny, and condemned the invidious discrimination inherent in bans on the speech of licensed professionals. *NIFLA*, 138 S. Ct. at 2371 (all content-based restrictions on speech receive strict scrutiny). Indeed, gutting *King* and *Pickup* **by name**, *NIFLA* stated that "[s]o defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny . . . . **But, this Court has not recognized professional speech as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals**." *Id.* at 2371-72 (emphasis added). And, confirming that content-based restrictions on the speech of licensed professionals receive strict scrutiny, *NIFLA* held that "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose invidious discrimination of disfavored subjects," such as any counseling that seeks to help a minor reduce or eliminate their unwanted same-sex attractions, behaviors, and identity. *Id.* at 2375.

Thus, in the aftermath of the *Reed*, *Wollschlaeger*, and *NIFLA* triumvirate, there is **nothing** left of the unconstitutional regime established in *King* and *Pickup*. Defendants' continued reliance on *King* and *Pickup* is woefully misplaced. What the Supreme Court and the en banc Eleventh Circuit have permanently interred, Defendants cannot now resurrect.

2. Under Strict Scrutiny, It Is Each Defendants' Burden to Demonstrate That Its Ordinance Is Supported by a Compelling Interest and That It Is the Least Restrictive Means to Achieve That Interest.

Even on a motion for preliminary injunction, Defendants unquestionably bear the burden of demonstrating that the Ordinance is narrowly tailored. As the Supreme Court has held: "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). As such, on a preliminary injunction motion, **the government**—not the movant—bears the burden of proof on narrow tailoring, because **the government** bears that burden at trial. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (on preliminary injunction motion, "**the burden is on the government** to prove that the proposed alternatives will not be as effective as the challenged statute." (emphasis added)).

Defendants indisputably bear the burden of proving narrow tailoring at trial. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *id.* at 2540 ("To meet the requirement of narrow tailoring, **the government must demonstrate** that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier" (emphasis added)). Thus, Defendants also bear—and fall woefully short of meeting—the burden of proving narrow tailoring here. *Gonzales*, 546 U.S. at 429; *Ashcroft*, 542 U.S. at 665.

D. The Ordinances' Prohibition on Voluntary SOCE Counseling Cannot Satisfy Strict Scrutiny Because They Are Not Supported by Any Compelling Interest.

1. Defendants' Litanies of Recitals Are Not Entitled to Deference.

In the First Amendment context, the government is not entitled to deference in making speech-restrictive determinations. When "[a] speech-restrictive law with widespread impact" is at issue, "**the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights**." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (emphasis added). Here, because the Ordinances infringe upon the free speech rights of licensed medical professionals, the government "must do more than simply posit the existence of the disease sought to be cured. **It must demonstrate that the recited**

harms are real, not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *see also Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (regulation of professional speech must still demonstrate that the alleged harm is not "mere speculation or conjecture"); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (same). This is so because "[d]eference to legislative findings cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns*, 435 U.S. 843.

The studies and position statements of the APA and others recited by Defendants in their Ordinances (City Ord., DE 1-4, at 1–5; Cnty. Ord., DE 1-5, at ECF 9–12) do **not** provide any empirical judgments as to **voluntary** SOCE counseling which minors request and wish to receive. Indeed, the APA Report—the primary basis for Defendants' assertion that SOCE counseling is harmful—unequivocally states that there is **no empirical evidence** of harm and that the studies were woefully inadequate to support any findings as to minors. (DE 85-5 at 73 ("**We found no empirical research on adolescents who request SOCE**." (emphasis added)); *id.* at 91 ("sexual orientation issues in children are virtually unexamined"); *id.* at 72 ("there is a lack of published research on SOCE among children").)

Courts have not hesitated to invalidate ordinances that impose restrictions on speech based on supposition and conjecture, rather than empirical evidence. In *Edenfield*, where the government sought to restrict the speech of licensed accountants, the government "presented no studies" and relied upon a record that "contain[ed] nothing more than a series of conclusory statements that add little if anything" to the government's effort to regulate certain speech. 507 U.S. at 771. Also, the government relied upon a report of an independent organization to bolster its claims of harm, but – exactly as the APA Report does in this case – the report there admitted that it was "**unaware of the existence of any empirical data supporting the theories**" of alleged harm. *Id.* at 772 (emphasis added). Because of the lack of evidence of harm, the Supreme Court invalidated the restriction as a violation of the accountants' First Amendment rights.

In *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), the Supreme Court again confronted a record (like here) where there was nothing more than anecdote and suspicion of harm behind a total prohibition on the targeted speech. 492 U.S. at 129. There was no record evidence "aside from conclusory statements during the debates by proponents of the bill" and the record "contain[ed] no evidence" concerning the alleged effectiveness of other alternatives. *Id.* Because of that failure, the Supreme Court invalidated the ban. *Id*.

The Eleventh Circuit, too, has invalidated laws regulating professional speech when the alleged harm purportedly being addressed was unsupported by **concrete evidence**. In *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000), the government attempted to regulate the speech of attorneys, but "presented no studies, nor **empirical evidence** of any sort to suggest" that the harm they were positing was real, rather than merely conjectural. *Id.* at 957 (emphasis added). The Eleventh Circuit held that, to survive scrutiny, the government "has the burden . . . of producing **concrete evidence**" of the alleged harm prior to restricting the protected speech of licensed professionals. *Id.* at 958 (emphasis added). Indeed, it held that when there are "glaring omissions in the record of identifiable harm," the government has not satisfied "its burden to identify a **genuine threat of danger**." *Id.* (emphasis added).

2. Defendants Cannot Meet Their Burden of Producing Concrete Evidence of Actual Harm from Voluntary SOCE Counseling.

There is no evidence that anyone was ever harmed in Defendants' respective jurisdictions by **any** SOCE counseling, let alone voluntary SOCE counseling that minors request and want to receive. Furthermore, there is **no evidence of any actual complaints of harm,** let alone actual harm, occurring to anyone from any of the voluntary SOCE counseling Defendants have indiscriminately banned. Thus, Defendants cannot satisfy strict scrutiny by pointing to concrete evidence of harm justifying their ordinances.

The County began considering a "conversion therapy" ban on June 20, 2016, at the prompting of Rand Hoch, the President and Co-Founder of the Palm Beach County Human Rights Council (PBCHRC). (Hvizd, 21:22–23:19, 94:9–98:9; Pls.' Ex. 6.) Hoch represented in an e-mailed memorandum that "'[c]onversion therapy' (also known as 'reparative therapy,') is counseling based on the erroneous assumption that gay, lesbian, bisexual and transgender (LGBT) identities are mental disorders that can be cured through aversion treatment." (Pls.' Ex. 6 at PBC 007643.) Hoch also represented that "conversion therapy . . . **is most often forced upon minors** by their parents or guardians [and] is extremely harmful." (Pls.' Ex. 6 at PBC 007644 (emphasis added).) Upon receiving Hoch's request, however, the County did not direct any investigation as to whether anyone in the County had been harmed by conversion therapy, voluntary or otherwise. (Hvizd, 26:21–27:19.) Nonetheless, Attorney Hvizd was assigned the task of drafting the ordinance requested by Hoch, and she undertook her own informal investigation in connection with her drafting assignment. (Hvizd, 27:20–28:3, 31:1–33:25.) Hvizd found no reports of any

person harmed by conversion therapy in Palm Beach County, or in Florida. (*Id.*; Ginsburg, 12:5–25.)

At the December 5, 2017 County Commission meeting at which the County Ordinance was considered, Hoch represented to the Board, "we've heard from two individuals, minors who have been required to go to conversion therapy by their parents." (Hvizd, 34:1–13, 36:9–37:18; Pls.' Ex. 2, 65:10–17.) Hoch did not describe what the "conversion therapy" consisted of, including whether it was aversive or non-aversive, or voluntary or forced. (*Id.*) No Commissioner asked Hoch what kind of therapy was involved, or what kind of harm was claimed. (Hvizd, 50:5–51:20.) At the second Commission meeting where the County Ordinance was considered, on December 19, 2017, Hoch clarified that the complaints were "from the mothers of gay people because their friends, the gay children's friends who also identified as gay, were being subjected to conversion therapy." (Hvizd, 55:2–58:21; Pls.' Ex. 3, 80:10–13.) And, according to Hoch, the friends of the complainants' children were being forced to go. (Hvizd, 61:20–62:12; Pls.' Ex. 3, 80:15–18.) But the Commissioners did not undertake to find out, from Hoch or anyone else, the type of therapy or the nature of harm allegedly experienced by the unnamed friends of the children of the mothers who complained to Hoch. (Hvizd, 65:2–66:7.)

The County may or may not have considered an additional complaint e-mailed to the Commissioners by Nick Sofoul on December 18 at 10:16 PM, the night before the second and final Commission Meeting where the County Ordinance was considered and ultimately voted on. (Hvizd, 73:2–78:20; Pls.' Ex. 4 at PBC 002849.) The Sofoul e-mail represented that Sofoul "[had] personally heard and been moved by the horrific stories of friends that have been subject [sic] to these cruel and inhumane methods." (Hvizd, 78:21–79:2.; Pls.' Ex. 4 at PBC 002849.) Even if the Commissioners were aware of the e-mail prior to voting on the County Ordinance, however, they did not undertake to determine what "friends" Sofoul was writing about, whether they were minors, whether they were residents of Palm Beach County (or Florida), what "methods" Sofoul heard about, and whether the "friends" were forced. (Hvizd, 79:3–82:4.)

In sum, the County received no evidence of harm suffered by any minor in its jurisdiction as a result of voluntary SOCE or GICE. (Ginsburg, 15:11–22.) The only "evidence" of harm attributed to SOCE was the anecdotal, multi-layered hearsay communicated by Hoch, the Ordinances' activist champion, which he in turn claims to have heard from the mothers of friends

of the supposed victims, and possibly the hearsay e-mail of Sofoul, regarding unnamed "friends" subjected to unidentified "methods" in unidentified jurisdictions. (Ginsburg, 10:9–12:4.)

Hoch was also the originator of the City Ordinance, and he made the same unsubstantiated representations of harm to the City Council. (Woika, 12:24–14:10.) Prior to enacting its Ordinance, the City had never received a complaint about harm from conversion therapy, and the City never investigated whether any of its citizens had been harmed by conversion therapy. (Woika, 16:19–18:9.) The City based its determination of need for the Ordinance entirely on Hoch's request. (Woika, 16:19–20:11; Pls.' Ex. 23.) Thus, the City likewise considered no evidence of harm in its jurisdiction before enacting its Ordinance, and considered no empirical evidence of harm from conversion therapy elsewhere. (Woika, 26:13–28:13.)

3. The Authority on Which Defendants Primarily Rely to Justify the Ordinances Definitively Refutes Defendants' Recitation of "Overwhelming Research" Showing Harm from Voluntary SOCE Counseling.

The "overwhelming research" language contained in both Ordinances, following their respective litanies of recitals pointing to various literature, was not original to either of the Ordinances, having been copied from Hoch's model ordinance. (Hvizd, 247:14–249:23.) As adopted by both the City and the County, the "overwhelming research" recital refers only to the documents cited in the Ordinances themselves. (Hvizd, 253:16–254:21; Woika, 146:12–24.) None of the cited documents justify the Ordinances.

Justification for the Ordinances rises and falls on only one document listed in Defendants' recitals—the APA Report—which unequivocally demonstrates quite the opposite of what Defendants are required to show under the Constitution: "**We found no empirical research on adolescents who request SOCE**." (APA Rep., DE 85-5, at 72–73, 91 (emphasis added)). Thus, like in *Mason* and *Edenfield*, Defendants have conducted no independent inquiry into the alleged harm and have proffered no substantial or concrete evidence demonstrating that the actual harm exists. Because of their failures, the Ordinances fail strict scrutiny. *See, e.g., Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty.*, 124 F. Supp. 2d 685, 697-98 (S.D. Fla. 2000) (providing where government's alleged harm "appears to be non-existent," where government "conducted no inquiry" and "proffered no substantial evidence demonstrating that actual harm exists," government fails its burden and regulation of speech cannot survive First Amendment scrutiny).

Defendants' reliance on one empirical study that found no empirical evidence of harm to minors from voluntary counseling does not and cannot serve as a compelling interest.

Besides the APA Report, **not a single one** of the other statements, reports, or position papers cited in the Ordinances ever discussed, much less reached a conclusion on, whether voluntary SOCE counseling which minors request and wish to receive is harmful. Indeed, Defendants' "overwhelming research" **is not research at all, but represents mere policy and political statements of organizations opposed to SOCE counseling**.

Astoundingly silent in all of these political, ideological, and opinion statements is any discussion whatsoever of **concrete evidence** of actual harm or **empirical research** discussing anything related to voluntary SOCE counseling that is not forced upon unwilling minors. That silence is deafening. Indeed, as the Supreme Court condemned in *Edenfield*, these represent "nothing more than a series of conclusory statements that add little if anything" to Defendants' effort to outlaw Plaintiffs' speech. 507 U.S. at 771. Position statements and policy preference of ideological opponents of SOCE counseling, that provide no empirical research on voluntary SOCE counseling, do not and cannot support a complete prohibition on such counseling. The First Amendment demands more.

The City's perfunctory attempt to justify its Ordinance with cherry-picked quotes from the APA Report (City Opp'n, DE 83, at 9) is unpersuasive, and intellectually dishonest. Taking into account the APA Report's review of available research and literature, its ethical observations, and its recommendations for more research and affirmative, client-directed approaches to therapy, its Ordinance is opposed by the Report, not supported by it. Moreover, the City feigns that Plaintiffs expect the City to conduct its own SOCE research to determine its efficacy and harm, and then attacks this straw man argument. (DE 83 at 9.) Quite the contrary, Plaintiffs maintain Defendants' officials have no competence to enforce their therapy bans, let alone conduct scientific research to justify them. (*See infra*, § I.F.4.)

The County also cherry-picks a single quote from the APA Report, but then tries to bolster its Ordinance by citing to the other literature listed in the Ordinances. (Cnty. Opp'n, DE 85, at 9–11.) But, as shown above, all of the other authorities listed either rely heavily on the APA Report, or cite to nothing at all. To be sure, none of the other papers cited adds anything to the professional literature or scientific record that compelled the APA to disclose that there is no empirical evidence showing voluntary SOCE by minors is harmful. The County admitted this at its deposition, through

its witness Dr. Shayna Ginsburg, who testified that the County can identify no empirical study since the 2009 APA Report pointing to a causal connection between SOCE and harm. (Ginsburg, 40:11-21.) The City likewise admitted that it considered no empirical evidence to justify its Ordinance. (Woika, 26:13–28:13.)

The County also misrepresented, by omission, the full position of the AAMFT, which sets ethical standards for marriage and family therapists such as Plaintiffs. (Cnty. Opp'n, DE 85, at 13.) After giving only part of the AAMFT's position, the County improperly ascribes to Dr. Hamilton ignorance of the AAMFT's position **as misrepresented by the County**, and disingenuously suggests that this is an ethical lapse on the part of Dr. Hamilton. (*Id.*) But the County did not quote the actual directives to AAMFT constituents: "AAMFT expects its members to practice based on the best research and clinical evidence available," and, "We do recognize that treatment of those clients who present feeling confused about or wanting to change their sexual orientation should be undertaken with great care, knowledge, and openness." (DE 86-1 at 3, 5.) These directives are nowhere close to an ethical prohibition on voluntary, client-directed SOCE counseling as practiced by Dr. Hamilton.

4. Defendants' Primary Authority—the APA Report—Expressly Excludes from Consideration the Possibility of Harm from Voluntary Gender Identity Change Efforts.

The APA Report addresses only sexual orientation: "Due to our charge, we limited our review to sexual orientation and **did not address gender identity** . . . ." (APA Rep., DE 85-5, at 9 (emphasis added).) Thus, although the Ordinances prohibit gender identity change efforts, the APA Report does not even deal with the subject, let alone offer any support.

To be sure, the APA itself recently and expressly sanctioned as **imperative** allowing a minor who has selected a gender identity different from his or her biological sex to choose to return:

> Emphasizing to parents the importance of allowing their child the freedom **to return to a gender identity that aligns with sex assigned at birth** or another gender identity at any point **cannot be overstated**, particularly given the research that suggests that not all young gender nonconforming children will ultimately express a gender identity different from that assigned at birth.

Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70(9) Am. Psychologist, 832, 843 (2015), https://www.apa.org/practice/guidelines/

transgender.pdf. Thus, with respect to gender identity, the Ordinances prohibit therapists from assisting minors with change decisions the APA expressly endorses. Given this express endorsement of voluntary gender identity change efforts, and the exclusion of gender identity considerations in the APA Report, Defendants can point to no compelling interest justifying the Ordinances with respect to voluntary gender identity change efforts.

E. The Ordinances Cannot Satisfy Strict Scrutiny Because They Are Not Narrowly Tailored.

1. Defendants Cannot Meet Their Burden of Proving Narrow Tailoring Because They Cannot Show That Their Respective Ordinances Are the Least Restrictive Means.

Under strict scrutiny, Defendants are absolutely required to demonstrate that the Ordinances are the least restrictive means available. *See Boos v. Berry*, 485 U.S. 312, 329 (1988) (when content-based restrictions on speech are analyzed under strict scrutiny, an ordinance "is not narrowly tailored [where] a less restrictive alternative is readily available"); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (noting that under "the most exacting scrutiny" applicable to content-based restrictions on speech, the government must employ the least restrictive alternative to pass narrow tailoring). Plaintiffs "must be deemed likely to prevail unless the government has shown that [Plaintiffs'] proposed less restrictive alternatives are less effective than enforcing the act." *Ashcroft*, 542 U.S. at 666 (emphasis added). Defendants cannot do so.

Defendants cannot show that the Ordinances are narrowly tailored as the least restrictive alternatives to meet their purported interests. For example, if Defendants were genuinely concerned about the purported harms of subjecting unwilling minors to involuntary SOCE counseling—forcing them to participate against their will—they could have banned **that** practice. Plaintiffs would not have needed to file this lawsuit, since they only provide voluntary SOCE counseling that minors request and wish to receive. (VC, ¶¶ 75–77, 79, 81, 131, 144.)

Yet another less restrictive means would have been to ban only aversive techniques or other **conduct**, in the genuine sense—not Defendants' contrived definition—of that word. If Defendants were genuinely concerned about the harms of electroshock therapy, or beatings, or induced vomiting, or any other bizarre and imagined "therapy" carried out through conduct, as opposed to pure speech, Defendants could have banned **those** practices. Plaintiffs would not have needed to file this lawsuit, since they engage in speech-only talk therapy. (VC, ¶¶ 75–77, 79, 81, 131, 144.)

Still another less restrictive alternative Defendants could have employed was to require informed consent from minors and their parents who seek voluntary SOCE counseling. While the County contends that informed consent provisions were rejected as less restrictive alternatives in *King* (Cnty. Opp'n, DE 85, at 14), *King*'s analysis is inapposite given *Reed* and *NIFLA*. Furthermore, The APA Report itself counsels, "**It is now recognized that adolescents are cognitively able to participate in some health care treatment decisions**." (APA Rep., DE 85-5, at 130 (emphasis added).) Indeed, when similar legislation was considered in California, numerous mental health organizations wrote to the legislature arguing that informed consent was a better and less restrictive approach. (VC, ¶ 191, Ex. G.) Defendants ignored this alternative, along with all of the others. Defendants cannot seriously contend that an alternative that has been considered effective and less restrictive of speech by large mental health professional organizations is somehow ineffective to achieve their purported purposes.

Florida statutory law expressly permits minors to consent to mental health counseling. Minors over the age of thirteen have the right to request, consent to, and receive mental health counseling when necessary. *See* Fla. Stat. § 394.4784(2) (minors over the age of 13 "**shall have the right to request, consent to, and receive outpatient crisis intervention services including individual psychotherapy, group therapy, counseling, or other forms of verbal therapy provided by a licensed mental health professional**" (emphasis added)); *see also* Fla. Stat. § 397.501(7)(e)(1) ("a minor **acting alone** has the legal capacity to voluntarily apply for and obtain substance abuse treatment" (emphasis added)). Florida law also permits a minor to request, consent to, and obtain medical services related to pregnancy. *See* Fla. Stat. § 743.065 ("An unwed pregnant minor may consent to the performance of medical or surgical care relating to her pregnancy."). Thus, Defendants' contentions that a minor is somehow wholly unable to provide consent to any medical or mental health counseling because of their tender age defies State law. Abundant precedent from the Supreme Court, the Eleventh Circuit, and the Florida Supreme Court also evidences the ability of minors to give informed consent to medical treatment. *See, e.g.*, *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52, 75 (1976) (holding that constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority, and noting that minors can consent to certain medical procedures); *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995) (noting that minors are able to give consent for purposes of the Fourth Amendment); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612,

622 (Fla. 2003) (noting that a minor is fully capable and statutorily permitted to give informed consent to medical services); *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989) (noting that Florida law permits minors to give informed consent for significant medical decisions, even when such decisions have "dire possible consequence").

In sum, there are no barriers, legal or otherwise, to the informed consent or other alternatives that Defendants never considered and failed to adopt. Even without, but especially with, their parents, minors can consent to voluntary SOCE counseling that they request and wish to receive. Defendants' failure to consider informed consent as an alternative means that they flunk the narrow tailoring test.

2. Defendants Have Not Shown That They Seriously Considered Less Speech-Restrictive Alternatives and Ruled Them out for Good Reason.

Defendants also flunk the narrow tailoring strict scrutiny test for yet another, even more compelling reason. In connection with their narrow tailoring burden, Defendants must show that they "**seriously** undertook to address the problem with less intrusive tools readily available to [them]," meaning that they "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540. Thus, Defendants "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added). Defendants have done neither.

There is no evidence that the County seriously considered any alternative to the outright therapy ban in its Ordinance. For example, there is no evidence that the County considered banning only the "aversion treatment" or "therapy . . . forced upon minors" complained of by Hoch in his memorandum to the County Commissioners setting the Ordinance in motion. (Pls.' Ex. 6 at PBC 007643–44.) There is no evidence that, for example, Hamilton's suggested revision to the draft County Ordinance to prohibit only "coercive counseling . . . against the individual's will" ever made it to the Commissioners for consideration. (Hvizd, 273:2–279:23; Pls.' Ex. 21 at PBC 006034–35.) And, while the Board received public comment asking it to consider alternatives,

such as banning shock therapy, there is no evidence that the Board gave the requests any consideration whatsoever. (Hvizd, 39:20–30:11.)

Though it could have, the City did not consider any alternative to the blanket ban contained in its Ordinance. (Woika, 28:16–32:10 ("I think the Council had really the option of passing the ordinance, which is a total ban. And the only other alternate they considered was no ban.").) Thus, the City never considered banning only aversive therapy, or only coercive or forced therapy. (*Id.*) In fact, during the three City Council meetings covering the Ordinance's conception, introduction, and enactment, the Council spent **less than five minutes** considering it. (Woika, 52:12–63:20; Pls.' Ex. 24.)

Because Defendants failed to discuss, consider, or try less restrictive alternatives, they cannot satisfy the demanding burden placed upon them by the Supreme Court in *McCullen*. The Ordinances therefore fail strict scrutiny at every level and must be enjoined.

3. Defendants Knew Their Ordinances Were Practically Unenforceable Before Enactment, but Enacted Them Anyway.

Defendants also fail narrow tailoring because their ordinances cannot, as a practical matter, be enforced to remedy the purported harms they claim to have in view. This is admitted by both City and County officials.

In her September 7 "definite-no-to-maybe" e-mail to Commissioners (Pls.' Ex. 16), Nieman expressed her legal reservations about tailoring the proposed Ordinance to the supposed problems to be remedied, namely conversion therapies by religious organizations that the Ordinance would not touch, and the inability of the County to enforce the Ordinance against licensed therapists in any event:

> In addition to the legal issues, after researching the history of conversion therapy, I felt it important to bring to your attention some general observations, as well as some practical concerns. **Most of the universal complaints seem to be about religious organizations that the ordinance would not legally be able to address.** Further, all of the six therapists who have been identified to us as practicing conversion therapy in PBC are located in the incorporated areas of the County, which I suppose is a plus because **one of the main concerns is enforcement. It's difficult to imagine how a County Code Enforcement Officer would be able to issue a citation for a violation. How would an officer determine if a violation occurred?** The ordinances play more of a deterrent role.

(Pls.' Ex. 16 at PBC 00800 (emphasis added).) Plaintiffs can scarcely make the argument better.

Prior to enactment of the City Ordinance, Deputy City Manager George Brown, who was the direct supervisor of code compliance at the time, cautioned the City Attorney Diana Grub Frieser about enforcement in a July 18, 2017 e-mail:

> While I find so-called "conversion therapy" inherently wrong and totally abhorrent, **a local ordinance banning such practice would be extremely difficult, if not impossible, to enforce**. Proving a violation (before the special magistrate) would necessarily require public disclosure by a patient or credible witness that the "treatment" had been administered in violation of the ordinance. **The City has not adopted ordinances limiting or regulating professions otherwise regulated by the state**.[3]

(Woika, 104:7–107:16, Pls.' Ex. 25 (emphasis added).)

Brown's concerns about enforceability caused him to inquire with city managers of other cities where similar therapy ban ordinances had been adopted in a July 21, 2017 e-mail:

> Each of your cities has adopted a conversion therapy prohibition ordinance . . . . Have any of you established specific enforcement procedures? What methods of investigation are utilized to determine if a violation is occurring/has occurred? Have any cases been prosecuted?

(Woika, 112:17–114:18; Pls.' Ex. 26 at City - 00993.) A response from Boynton Beach City Manager Lori LaVerriere prompted this follow-up from Brown:

> I have recommended we adopt a resolution stating our position against it, rather than an ordinance making it an offense, because we would not want to get between a family and its child based on a complaint from the child or a third party. We are in the early stages of considering the matter. **I consider it a more or less unenforceable ordinance and a matter that is not something our local government should take up.**

(Woika, 119:5–21; Pls.' Ex. 26 at City - 00992 (emphasis added).) There is no evidence that either Brown's recommendation that a resolution be passed instead of an ordinance, or his concern that an ordinance would be unenforceable, was ever communicated to the City Council before enactment. (Woika, 120:15–121:5, 122:8–123:3.) A likely explanation for the City Council's

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[3] This concern for the City's competence to enforce a therapy ban no doubt informed the City Attorney's preemption concerns in her communication to the City Council. (*See infra* § II.A; Pls.' Ex. 23 at City - 00870.)

disregard of the enforcement (and preemption) concerns raised by the City Attorney and staff is revealed in the subsequent exchange between LaVerriere and Brown, wherein LaVierriere wrote, "**Agreed. Electeds received a lot of pressure from Rand Hoch**," to which Brown replied, "**As are ours**." (Pls.' Ex. 26 at City - 00992 (emphasis added).)

The Village Manager of the Village of Wellington, Paul Schofield, also commiserated with Brown regarding unenforceability:

> [W]e do not have a specific enforcement mechanism and **I don't have any clear idea how we could train either our Code Enforcement staff of [sic] law enforcement staff to actually enforce it.** If we receive a complaint will deal with it individually and **most likely referee [sic] it to one for the state governing bodies. The M.D.'s, D.O.'s and clinicians all have their own state boards.**

(Pls.' Ex. 26 at City - 00991 (emphasis added).) Neither LaVerriere's nor Schofield's concurrences with Brown's enforcement doubts were shared with the Boca Raton City Council. (Woika, 135:5–9.)

Council Member Rodgers also had doubts about enforcement, which he raised with the Council and City staff at the meeting where the Ordinance was enacted, prompting responses from both Deputy City Manager Brown and City Attorney Frieser:

> MR. RODGERS: Madam Chair?
>
> MAYOR HAYNIE: Mr. Rodgers.
>
> MR. RODGERS: Question for our City Manager. How -- and I've looked through this, and I have some concerns of language licensed practice versus unlicensed. **How would we enforce this?** Would this be like a code violation that we'd bring it forward or...
>
> DEPUTY CITY MANAGER BROWN: It would be. **I'm not sure how we would enforce it.** But it would be in the code-related area.
>
> [MR. RODGERS:] Any other thoughts from the attorney? I don't...
>
> MAYOR HAYNIE: Ms. Frieser?
>
> MS. FRIESER: That was a -- it's a Code Enforcement process. **I concede that it's -- there may be difficulties in actual practical enforcement issue.** But it is a Code Enforcement process.

(Woika, 59:12–18, 61:5–21, 62:23–63:3.) Suffice it to say, at the time of enactment, enforcement of the City Ordinance had not been clearly delineated or even thought out. (Woika, 65:5–16.)

As with other ordinances, complaints of violations of the therapy ban Ordinances would be investigated by code enforcement officials and decided by special masters, neither of whom would be required to be licensed mental health professionals, or trained to interpret scientific literature such as the APA Report, or otherwise knowledgeable about ethical or recommended therapeutic practices. (Hvizd, 208:3–15, 214:18–215:8; Woika 67:10–69:12.) In each case, an untrained code official would make an initial determination as to whether a complained of therapy violates the applicable Ordinance, and then issue a notice of violation if so. (Woika, 90:12–91:1.) In any case prosecuted before a special master, the special master acts as the finder of fact, and would be allowed or required to question witnesses, including children seeking mental health therapy and their licensed mental health professionals. (Hvizd, 264:13–266:13.)

According to an unwritten, internal policy, the County's Ordinance will be enforced by any of five senior code enforcement officers. (Hvizd, 219:20–221:18.) The only educational requirement for senior code enforcement officers is a high school diploma or equivalent, and there is no evidence that any of the County's current five have more, or hold any professional licenses. (Hvizd, 223:21–225:14; Pls.' Ex. 18.) None of the code officials has been trained on enforcing the Ordinance in the ten months since enactment; no training materials have been developed, and there is no plan to develop any. (Hvizd, 225:15–228:9.) These code officials would not only determine whether to issue notice of a violation of the County Ordinance but would also prosecute any noticed violations in front of the special master. (Pls.' Ex. 18.) There is no evidence that any of the five senior code officials has any experience enforcing regulations of licensed mental health professionals. (Hvizd, 232:3–233:11.)

City Code officials likewise only need a high school diploma or equivalent. (Woika, 72:3–73:4.) And like the County, the City has no written policies or procedures for enforcing its Ordinance, and no plans for any. (Woika, 74:19–75:9, 78:2–5.) No current City code compliance officials have experience enforcing ordinances against licensed professionals concerning their professional standards. (Woika, 110:5–111:8.)

In light of the foregoing, The City's and the County's senior officials had good reason to be concerned about enforceability. Code officials are grossly ill-equipped to investigate and make determinations about appropriate mental health therapeutic practices, as are the special masters who would be required to rule on violations. Such a fatally flawed process could never satisfy narrow tailoring.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR PREEMPTION CLAIMS.

A. Defendants Knew The Regulation of Therapists Imposed by the Ordinances Was Preempted to the State When the Ordinances Were Enacted, but Enacted Them Anyway.

As shown below, Defendants' most senior in-house lawyers sounded the alarm on preemption to their respective legislative bodies prior to their enactment of the Ordinances. Defendants' attempts to walk back these arguments now are unpersuasive. (City Opp'n, DE 83, at 12–14; Cnty. Opp'n, DE 85, at 16.)

Palm Beach County Attorney, Denise Marie Nieman, stated unequivocally to the Ordinance originator Hoch in an August 26, 2016 e-mail that the State of Florida had preempted the entire field of therapy regulation. (Hvizd, 111:25–115:6; Pls.' Ex. 9 at PBC 014666 ("On a very basic level, how can we say [conversion therapy] is a local issue?") ("This is a classic non-localized issue in my view.").) In a subsequent e-mail to Hoch from Hvizd on August 29, 2016, Hvizd endorsed Nieman's preemption position with a more formal analysis:

> In follow-up to your email of Friday, I offer the following synopsis of legal research conducted on the question of whether a County may enact a conversion therapy ban. The dual considerations a local government must address when determining whether it is able to enact legislation in a particular area are preemption and conflict. **The Florida Legislature's scheme of licensing and regulating businesses and professions is pervasive . . . evidencing an intent that this area be preserved to the Legislature. Neither county nor municipal governments license counselors, and there is no support in the law for a conclusion that regulating counselors is a "local issue" as addressed in *Browning*. To the contrary, every indication is that regulation of businesses and professions, including counselors, is a state issue.**
>
> **As to conflict, a local ordinance regulating the treatment available to patients would conflict with Florida's broad Patients' Bill of Rights**, section 38 I .026(4)(d), and section 456.41 of the Florida Statutes. Counties are prohibited from enacting an ordinance that conflicts with general law.
>
> The Federal Courts addressing conversion therapy bans in California and New Jersey have examined state statutes, and upheld them, in part, on the basis that those laws were rationally related to a legitimate state interest. **The state is charged with regulating and licensing businesses and professions, including counselors**,

> thus they are more readily able to satisfy this test than the County would be. **The County plays no part in regulating counselors.**

(Hvizd, 126:4–127:12; Pls.' Ex. 11 at PBC 014677 (emphasis added).) Nieman adopted Hvizd's analysis without reservation: "Rand, that sums it up." (Pls.' Ex. 11 at PBC 014677.)

Anticipating issuing an adverse legal opinion against the proposed County Ordinance, based on preemption, Nieman advised Hoch in a March 5, 2017 e-mail, "We'll keep it in 'still researching' mode, but know that **nothing will change just because more cities enact ordinances, unless one is tested and upheld on issues of concern to us**." (Hvizd, 147:5–15, 156:22–157:19; Pls.' Ex. 13 at PBC 014706 (emphasis added).) Nieman repeated this point emphatically in an April 12, 2017 e-mail to Hoch: "Let me know when you want [the opinion] to go, keeping in mind that **nothing that happens with cities holds much persuasive value unless a court rules on the exact issues I'm concerned about**." (Hvizd, 158:21–159:6, 163:3–9; Pls.' Ex. 14 at PBC 007914 (emphasis added).)

In an August 28, 2017 e-mail, Hoch asked Nieman to proceed with issuing a legal opinion to the County Commissioners on the proposed County Ordinance. (Hvizd, 164:25–165:12; Pls.' Ex. 15 at PBC 008017.) On September 7, 2017, Nieman sent her definite-no-to-maybe e-mail to the County Commissioners expressing several legal concerns with enacting a County therapy ban, specifically highlighting the preemption and conflict issues: "**We strongly believe that this area should be regulated by the state since it is the state who licenses and otherwise governs therapists**." (Hvizd, 177:16–178:19; Pls.' Ex. 16 at PBC 008000 (emphasis added) "[W]e still have legal concerns including, but not limited to, **implied preemption, the Florida Patients' Bill of Rights** . . . ." (*Id.*)

Despite the County Attorney's steadfast opinion that the field of therapist regulation is preempted to the state, and repeated admonitions that the passage of ordinances by other cities would not change that opinion, the only thing that changed legally between her last such admonition to Hoch on April 12, 2017, and her definite-no-to-maybe e-mail to the Commissioners on September 7, 2017, was the passage of ordinances in other cities. (Pls.' Ex. 16 at PBC 008000 ("As Mr. Hoch pointed out in his recent email, a number of cities did adopt ordinances.").) Without any change in the law that could have changed Nieman's opinion (Hvizd, 185:17–196:6)—the one condition Nieman had imposed—only a change in the political calculus can account for the change of opinion, apparently prompted by Hoch's August 28 e-mail. (Pls.' Ex. 15 at PBC 008017 ("On

behalf of . . . PBCHRC, I want to thank you for delaying moving forward . . . . At this time, PBCHRC would like you to move forward with providing your office's opinion . . . .").)

Like the Palm Beach County Attorney, Boca Raton's City Attorney raised the preemption issue in her first communication to the City Council introducing the draft City Ordinance on August 17, 2017:

> It is worth noting that although regulation of health professions occurs through licensure at the state level, there is no express statutory preemption regarding the state's regulation of licensed health professions . . . . However, **given the extensive regulation of health professions by the state, it is possible a court may, in the future, find the regulatory field has been impliedly preempted to the state (thereby prohibiting local regulation)**.

(Pls.' Ex. 23 at City - 00871 (emphasis added).)

B. Florida Has Enacted a Pervasive Regulatory Scheme Concerning the Entire Subject Area of Mental Health Professionals, Not Simply Defendants Erroneous Circumscription to Individual Issues.

In determining whether the State's regulation impliedly preempts local governments from regulating mental health professionals licensed by the State, the court must look at the provisions of the policy as a whole, the nature of power exercised by the legislature, the object sought to be attained by the statute, and the character of the obligations imposed by the statute. *Classy Cycles, Inc. v. Bay Cnty.*, 201 So.3d 779, 784 (Fla. 2016). Defendants' attempt to limit the analysis to whether the State has enacted a specific statute prohibiting a locality from enacting a ban on SOCE counseling for minors ignores the proper question at issue under Article VIII, § 2(b). The proper inquiry is whether the State has "preempted **a particular subject area**," not one individual form of counseling. *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010) (emphasis added). The subject area in this matter is regulation of mental health professionals, not the narrow view Defendants urge, *i.e.*, one subset of an entire course of counseling for one subset of a particular issue relating to that course of counseling. Under Defendants' logic, a municipality would be empowered to enact any regulation it desires if the State has not passed discrete legislation prohibiting a specific act, regardless of whether the statutory scheme regulating a particular **area** is overwhelmingly pervasive. This is not the law.

Since time immemorial it has been recognized that the regulation of licensed professionals, including medical and mental health professionals, has always been a matter of **state concern**.

See, e.g., *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the **states** extends to the regulation of certain trades and callings, particularly those which closely concern the public health." (emphasis added)); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("it has been the practice of different **states**, from time immemorial, to exact in many pursuits a certain degree of skill and learning" to practice a profession (emphasis added)); *McNaughton v. Johnson*, 242 U.S. 344, 348-49 (1917) ("It is established that **a state** may regulate the practice of medicine." (emphasis added); *see also Betancur v. Fla. Dep't of Health*, 296 F. App'x 761, 763 (11th Cir. 2008) ("**States** retain the police power to regulate professions, such as the practice of medicine." (emphasis added)). Thus, Defendants' contention that the regulation of mental health professionals is primarily a local concern is historically, legally, and logically incorrect. The State of Florida's regulatory scheme, which covers all licensed medical and mental health professionals in the State, is pervasive and evinces an intent to maintain sole control of licensed professionals in the State.[4]

Defendants' arguments that Fla. Stat. § 456.003(2)(b) indicates permission from the Florida Legislature for local governments to legislate in the field of professional regulation is not persuasive. (City Opp'n, DE 83, at 14; Cnty. Opp'n, DE 85, at 16.) The statute, when read in its full context, clearly recognizes that professionals are **not** regulated by local ordinances, which is why the legislature authorized the **State** Department of Health to establish boards and regulatory bodies to ensure that such professions are regulated to protect the health, safety and welfare of the public. *See* Fla. Stat. § 456.003 ("The Legislature further believes that such professions shall be regulated only for the preservation of the health, safety, and welfare of the public **under the police powers of the state**." (emphasis added).)

III. PLAINTIFFS HAVE DEMONSTRATED THAT THEY ARE SUFFERING IRREPARABLE INJURY.

As a matter of settled law, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373

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[4] As shown in note 1, *supra*, Boca Raton admits all of Plaintiffs' allegation as true for preliminary injunction purposes. Plaintiffs have plainly alleged that the State has enacted a pervasive scheme regulating mental health professionals. (VC ¶¶ 274–75.) Indeed, Plaintiffs have alleged that the State is the only entity that licenses professionals in the State, and that the State licenses mental health counselors, regulates their conduct, and solely controls the disciplinary proceedings against such professionals. (VC ¶¶ 274–75, 278.)

(1976). Indeed, First Amendment violations are **presumed** to impose irreparable injury. *See, e.g.*, *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012); *see also* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* §2948.1 (2d ed. 1995) ("When an alleged constitutional right is involved, most courts hold that **no further showing of irreparable injury is necessary**." (emphasis added)).

Defendants cannot avoid Plaintiffs' irreparable harm by asserting that Plaintiffs also assert claims for monetary relief. (City Opp'n, DE 83, at 17; Cnty. Opp'n, DE 85, at 18.) Plaintiffs have no burden to demonstrate the absence of reparable or compensable harm that may accompany their presumed irreparable harm from the deprivation of their First Amendment rights. Moreover, Defendants cannot negate the presence of irreparable harm by proving the existence of reparable or compensable harm.

IV. PLAINTIFFS HAVE DEMONSTRATED THAT DEFENDANTS SUFFER NO HARM FROM INJUNCTIVE RELIEF AND THAT THE PUBLIC INTEREST FAVORS AN INJUNCTION.

This being a First Amendment case, the likelihood of success on the merits is dispositive of the issuance of injunctive relief. *See e.g.*, *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010). This is because a law that is likely to be unconstitutional *ipso facto* imposes irreparable harm and is not in the public interest. *See id*. Indeed, the inability to punish Plaintiffs and other licensed counselors for engaging in a form of counseling that has benefitted thousands of people and is desired by their clients "does not outweigh the serious loss of first amendment freedoms." *ACLU of Fla., Inc. v. The Florida Bar*, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990).

Defendants suffer no harm by being forced to comply with the dictates of the First Amendment. Importantly, Defendants have **never identified a single person being harmed** within their jurisdictions by any SOCE counseling, let alone voluntary SOCE counseling that the person requests and is willing to receive. Defendants have never received any complaints of any SOCE-related harm to their citizens. Accordingly, Defendants will not suffer any harm if their unconstitutional Ordinances are enjoined. Their citizens were not being harmed prior to the enactment of the Ordinances, and they will not be harmed while a preliminary injunction is in effect. Moreover, the Ordinances are not enforceable in any event. (*See supra*, § I.E.3.)

Finally, protection of First Amendment rights is always in the public interest, while violating First Amendment rights at the whim of ideological opponents does not serve the public. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

CONCLUSION

For the foregoing reasons, and those detailed in Plaintiffs' Motion for Preliminary Injunction, the Court should grant the injunctive relief requested by Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this October 10, 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
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Attorney for Plaintiffs