

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO, LMFT, individually)	
and on behalf of his patients,)	
DAVID H. PICKUP, LMFT, individually)	
and on behalf of his patients, and)	Case No. 8:17-cv-2896-T-02AAS
SOLI DEO GLORIA INTERNATIONAL,)	
INC. d/b/a NEW HEARTS OUTREACH)	
TAMPA BAY, individually and on behalf of)	
its members, constituents and clients,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CITY OF TAMPA, FLORIDA,)	
)	
Defendant.)	
)	

**PLAINTIFFS' PARTIALLY UNOPPOSED MOTION
TO ALTER EXPERT DISCLOSURE SCHEDULE OR
TO EXTEND EXPERT REPORT DEADLINES**

AND REQUEST FOR EXPEDITED CONSIDERATION

Pursuant to Fed. R. Civ. P. 6(b)(1)(A) and M.D. Fla. L.R. 3.01, Plaintiffs respectfully move the Court to alter the expert disclosure schedule such that Defendant City of Tampa (“City”) is required to make its disclosure first. As stated more fully herein, the grounds for this motion are that the City bears the burden of proof on all issues upon which expert testimony may be proffered. In the alternative, Plaintiffs respectfully request a thirty-day extension of time, to and including May 6, 2019, to provide their expert disclosure, as well as an opportunity to provide rebuttal expert reports following the City’s expert disclosure (if any).

In further support of this Motion, Plaintiffs show the Court as follows:

1. Pursuant to the Case Management and Scheduling Order entered by the Court (dkt. 63), Plaintiffs' current expert disclosure deadline is on April 5, 2019, followed by the City's expert disclosure deadline on May 10, 2019.

A. The City Should Be Required To Provide Its Expert Disclosure First, Because It Bears The Burden Of Proof On All Issues Upon Which Expert Testimony May Be Proffered.

2. It is axiomatic, as a matter of both hornbook and case law in this district and elsewhere, that **“the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make disclosures** with respect to that issue.” Advisory Comm. Notes, 1993 Amd., Fed. R. Civ. P. 26 (emphasis added). *See also, Estate of Duckett by & through Calvert v. Cable News Network LLLP*, No. 5:06-CV-444-OC-10GRJ, 2009 WL 10671268, *4 (M.D. Fla. Oct. 20, 2009) (Rule 26 “is intended to **ensure** that the party bearing the burden of proof on an issue provides their expert disclosures **before** other parties are required to make disclosures as to that issue” (emphasis added)) (citing *Reese v. Herbert*, 527 F.3d 1253 (11th Cir. 2008); *Bonutti Skeletal Innovations LLC v. Linvatec Corp.*, No. 6:12-CV-1379-ORL-22, 2014 WL 186123, *1 (M.D. Fla. Jan. 16, 2014) (noting that “[t]he party bearing the burden of proof on an issue” was required to make its expert disclosure first, prior to the other parties); *Williams v. Taser Int'l, Inc.*, No. CIVA 106CV-0051-RWS, 2007 WL 1630875, *8 (N.D. Ga. June 4, 2007) (“[T]he party or parties bearing the burden of persuasion on any claim shall prepare and serve the expert disclosure(s) and report(s) The opposing party or parties shall then prepare and serve any expert disclosure(s) and report(s), for purposes of rebuttal or otherwise”).

3. Although in the typical case the plaintiff bears the burden of proof on most issues and thus “it is customary for plaintiff to designate experts first,” where, as here, the defendants bear the burden of proof on an issue, **“the experts should be designated in accordance with the burden of proof requirement.”** *United States of Am. Upon Relation & for Use of the Tennessee*

Valley Auth. v. Tree-Removal Rights with Respect to Land in Marshall Cty., Mississippi, No. 3:17CV128-DMB-RP, 2018 WL 6975138, *1 (N.D. Miss. Nov. 2, 2018) (emphasis added). In *Tree-Removal Rights*, the court had previously set plaintiff’s expert disclosure to occur first, as happened here. *See id.* Then, “[p]laintiff filed a motion to amend the case management order to require defendant to designate experts prior to plaintiff,” because “the sequencing of experts should coincide with the burden of proof,” and “because defendant has the burden of proof on the contested issue.” *Id.* The court, citing the same advisory committee note to Civil Rule 26 quoted above, agreed and granted the motion. *Id.*

4. The same outcome should obtain here. Plaintiffs do not intend to provide any expert testimony on any issues as to which **Plaintiffs** bear the burden of proof, such as damages.

5. The only conceivable issues upon which expert testimony might be appropriate or relevant in this case, and as to which expert testimony may be provided by any party, are the City’s asserted interest (compelling, significant, legitimate or otherwise) in banning voluntary, speech-only SOCE counseling that minor clients request and willingly receive, and the City’s ability, efforts and purported success (or lack thereof) in narrow tailoring the challenged Ordinance to meet its asserted interest.¹ As to these issues, **the government** – here **the City** – indisputably bears the burden of proof. *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.**” (emphasis added)); *id.* at 2540 (“To meet the requirement of narrow tailoring, **the government must demonstrate** that alternative measures that burden

¹ Plaintiffs do not concede that expert testimony is relevant or necessary to the question of what the City considered at the time of enacting the Ordinance, and whether the information considered by the City was sufficient to satisfy its burden of proof. This issue, however, will be addressed by future motion at the appropriate time.

substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier" (emphasis added)); *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (explaining **the government must demonstrate** that it "seriously undertook" efforts to address the problem "with less intrusive tools available to it." (emphasis added)); *id.* at 1240 ("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)).

6. Accordingly, it is not Plaintiffs' burden to prove that the speech they wish to engage in, and the speech-only counseling they wish to provide, is effective and safe, but rather it is the **City's** burden to prove that its ban on Plaintiffs' speech is supported by the requisite interest (compelling, as argued by Plaintiffs), and that the City narrowly tailored its ban to meet its asserted interest. *See e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (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."); *Mason v. Florida Bar*, 208 F.3d 952, 958 (11th Cir. 2000) (**the government "has the burden . . . of producing concrete evidence"** of the alleged harm prior to restricting the protected speech of licensed professionals (emphasis added)); *id.* at 957 (government did not meet its burden of proof when it "presented no studies, nor empirical evidence of any sort to suggest" that the posited harm was real, rather than merely conjectural).

7. The City cannot foist its First Amendment burden of proof on Plaintiffs by continuing its borderline frivolous argument that the challenged Ordinance does not implicate or trigger any First Amendment obligations or scrutiny because it only regulates "conduct," not speech. This argument is entirely foreclosed by: (A) the City's unequivocal admissions, both in

the Ordinance itself (dkt. 24-1, PageID 347 (“**counseling is professional speech**”) (emphasis added)) and in its training materials (dkt. 134-2, PageID 2485) that “**Conversion therapy is a form of ‘professional speech.’**” (*Id.* (emphasis added)); (B) the un rebutted sworn testimony of Plaintiffs in the First Amended Verified Complaint that “[s]peech is the only tool that Vazzo and Pickup use in their counseling with minors,” and that “[t]he only thing that happens in their counseling sessions is speech.” (Dkt. 78 ¶ 63 (emphasis added)); (C) the clear holding of the principal authority upon which the Ordinance was based and upon which the City continues to rely, *i.e.*, *King v. Governor*, 767 F.3d 216 (3d Cir. 2014), *abrogated by Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018), which rejected “the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are ‘conduct,’” *id.* at 225, and held that “**these communications are ‘speech’ for purposes of the First Amendment,**” *id.* at 224-25 (emphasis added)²; (D) the unequivocal, binding precedent from the en banc Eleventh Circuit in *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017), wherein the court held that “characterizing speech as conduct is a dubious constitutional enterprise,” *id.* at 1308-09; and (E) the unequivocal, binding precedent from the United States Supreme Court in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (rejecting argument that professional verbal or written communications can be characterized as “conduct” based on the function these communications serve), and *Nat’l Inst. of Family & Life Advocates v. Becerra* (“*NIFLA*”), 138 S. Ct. 2361, 2371–72 (2018) (rejecting argument that speech of professionals to their clients is deserving of lower constitutional protection).

² See also *id.* at 228-29 (“**we conclude that the verbal communications that occur during SOCE counseling are not ‘conduct,’ but rather ‘speech’ for purposes of the First Amendment.**” (emphasis added)).

8. Moreover, in her Report and Recommendation denying, in part, the City's motion to dismiss (dkt. 148), Magistrate Judge Sansone rejected the City's argument that "the plaintiffs have no free-speech claim under the First Amendment" (dkt. 148 at 12), and concluded that: (A) "*King* holds mental health counselors' speech during SOCE counseling **is speech** under the First Amendment," (B) "*Wollschlaeger* ... hold[s] [that] doctor-patient communications ... **are speech** under the First Amendment", and (C) "*NIFLA* holds traditional constitutional analyses, including **strict-scrutiny analysis, applies to content-based regulations on professional speech.**" (*Id.* at 16 (emphasis added)). These holdings and conclusions became the law of this case when Judge Sansone's Report and Recommendation was adopted *in toto* by this Court. (Dkt. 162).

9. Therefore, pursuant to the foregoing authorities, the City should be required to provide its expert disclosure first, because the City bears the burden of proof upon all issues as to which expert testimony might be adduced in this case.

10. The City will not be prejudiced in any way by granting this relief. The City's expert disclosure deadline has been May 10, 2019, **seven weeks** away, and can remain the same. As noted in the numerous authorities above, it is customary and routine for the party with the burden of proof to make its expert disclosures first, and thus the City cannot be prejudiced by being required to do what others do in similar circumstances.

11. Granting the relief requested herein will also alleviate the serious scheduling issues and difficulties currently faced by Plaintiffs' counsel, which are detailed in Section B, below.

12. Lastly, granting the relief sought herein will not unduly delay the progress of this case. It is true that granting Plaintiffs leave to make their expert disclosure thirty days **after** the

City's expert disclosure, to and including June 10, 2019,³ will also necessitate extending the discovery cut-off and dispositive motions deadlines by thirty days each, to July 8, 2019 and August 5, 2019, respectively, so that the parties have sufficient time to take expert depositions. However, this case is not set for trial until December 2019, and thus even with this modest extension dispositive motions will be fully briefed several months in advance of trial. Therefore, **the relief requested herein will not require the delay of trial.**

B. Alternatively, The Court Should Grant Plaintiffs A Thirty-Day Extension Of Time, To And Including May 6, 2019, To Provide Their Expert Disclosure, As Well As An Opportunity To Provide Rebuttal Expert Reports Following The City's Expert Disclosure On Issues As To Which The City Bears The Burden Of Proof.

13. In the event the Court is disinclined to alter the sequence of expert disclosures, Plaintiffs nonetheless respectfully request a thirty-day extension of time, to and including May 6, 2019, to provide their expert disclosure.

14. In the months of March and April 2019, Plaintiffs' counsel are facing a "perfect storm" of competing deadlines in multiple cases, including:

- a. the defense of a complex federal civil RICO lawsuit in California, involving over two dozen parties, where discovery closes on April 30, 2019, and where the parties are having to take or defend over 40 full-day depositions coast-to-coast in less than 60 calendar days, requiring around-the-clock attendance at depositions virtually every business day between March 11 and April 15, 2019;

³ Plaintiffs may, and therefore wish to have the ability to, provide an expert disclosure even in the event that the City chooses not to provide any expert disclosure, if Plaintiffs determine that such a disclosure would further support their argument that the City has not met, and cannot meet, its burden of proof as to the City's asserted interest and narrow tailoring.

- b. the defense of a criminal matter, also in California, scheduled for a two-week evidentiary hearing in San Francisco April 22 to May 3, 2015, which has required numerous trips to California for preliminary hearings and extensive briefing both in the trial court and in three separate interlocutory appeals;
- c. the preparation of four extensive appellate briefs in separate appeals pending at the First, Third, and Eleventh Circuits, filed or due in the months of March and early April;
- d. the preparation of two certiorari petitions at the Supreme Court filed in the month of March; and
- e. multiple depositions in Boston and Maryland in two separate federal cases that have consumed another two weeks of counsel's time, the latter of which is scheduled for a two-day evidentiary hearing in early April.

15. The foregoing obligations have consumed all available time of Plaintiffs' counsel since they were last before this Court in early March, and, despite their best and diligent efforts, they have not had, and do not have, sufficient time to seek and retain experts and to work with potential experts to bring them up to speed on the complex facts and issues in this case. Indeed, Plaintiffs' counsel intended to file the instant motion a week or so earlier, but have had a very difficult time finding the time even to prepare it.

16. If the Court maintains the current order of expert disclosures and grants the requested extension of time, the Court should also extend the City's expert disclosure deadline by thirty days, to and including June 10, 2019.

17. In addition, if the Court maintains the current order of expert disclosures, Plaintiffs also respectfully request the opportunity to provide rebuttal expert reports within three weeks of the City's expert disclosure (if any), as to any issues upon which the City bears the burden of proof. This would lessen the prejudice of Plaintiffs having to anticipate the expert testimony they are rebutting, although it would not eliminate it completely. *See e.g., Theoharis v. Rongen*, No. C13-1345RAJ, 2014 WL 3563386, *4 (W.D. Wash. July 18, 2014) ("If, however, the party with the burden of proof offers a compelling expert disclosure, the opposing party can still designate a rebuttal expert in compliance with the rules."). The Court should therefore set Plaintiffs' rebuttal report deadline to July 1, 2019.

18. Finally, to ensure the parties have sufficient time to depose experts, as with the relief requested in Section A, above, the Court should extend the discovery cut-off and dispositive motions deadlines by thirty days each, to July 8, 2019 and August 5, 2019, respectively.

19. For the same reasons discussed in Section A, above, granting the relief requested herein would not unduly delay the progress of this case, because it would not require the delay of trial, scheduled for December 2019.

20. And, as indicated in the Certificate of Conferral, below, the City does not oppose this portion of the relief requested by Plaintiffs, so long as the City's expert disclosure deadline is extended by an equal amount (thirty day), as requested above. Thus, the relief requested herein **unopposed** and will not prejudice the City.

REQUEST FOR EXPEDITED CONSIDERATION

Plaintiffs respectfully request the Court's expedited consideration of this motion because, as noted above, Plaintiffs' expert disclosure deadline is currently on April 5, 2019. Plaintiffs regret and apologize that they were unable to file this motion earlier, because their time has been consumed with the professional activities detailed in Section B, above.

CERTIFICATE OF CONFERRAL

Prior to filing the instant Motion, the undersigned counsel for Plaintiffs conferred with counsel for Defendant City of Tampa, who advised that the City: (A) opposes Plaintiffs' motion insofar as it seeks to alter the sequence of expert disclosures, but (B) does not oppose Plaintiffs' motion insofar as it seeks a thirty day extension of time to file expert reports for Plaintiffs, so long as the City's expert disclosure deadline is also extended by an equal amount.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for good cause shown, Plaintiffs respectfully request that this motion be granted, and that the Court:

- A) alter the expert disclosure schedule such that:
 - i) Defendant City of Tampa ("City") is required to make its disclosure first, on its current deadline of May 10, 2019;
 - ii) followed by Plaintiffs' expert disclosure thirty days later on June 10, 2019; and
 - iii) move the discovery cut-off and dispositive motions deadlines by thirty days, to July 8, 2019 and August 5, 2019, respectively; or
- B) in the alternative:

- i) grant Plaintiffs a thirty-day extension, to and including May 6, 2019, to provide their expert disclosure;
- ii) grant the City a thirty-day extension, to and including June 10, 2019, to provide its expert disclosure;
- iii) grant Plaintiffs an opportunity to provide rebuttal expert reports to the City's experts, on or before July 1, 2019, if the City proffers any expert reports on matters upon which the City bears the burden of proof; and
- iv) move the discovery cut-off and dispositive motions deadlines by thirty days, to July 8, 2019 and August 5, 2019, respectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this March 25, 2019, 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/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Plaintiffs