No. 19-10604

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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,
Plaintiffs–Appellants
v.
CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA
Defendants–Appellees

On Appeal from the United States District Court
for the Southern District of Florida
In Case No. 9:18-cv-80771-RLR before the Honorable Robin L. Rosenberg

PLAINTIFFS-APPELLANTS' APPENDIX

VOLUME IX

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126-41

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

CASE NO. 9:18-cv-80771-RLR

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

Plaintiffs,

vs.

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

Defendants.
_____/

* * * * * * * *

DEPOSITION OF MICHAEL WOIKA
TAKEN AT THE INSTANCE OF THE PLAINTIFFS

* * * * * * * *

DATE: September 21, 2018
PLACE: 201 West Palmetto Park Road
Boca Raton, Florida 33432
TIME: 10:02 - 4:02 o'clock p.m.

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Julie H. Hamilton, Ph.D., LMFT

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The deposition of MICHAEL WOIKA, witness, was taken before me, Rachele Cibula, Notary Public, State of Florida at large, at 201 West Palmetto Park Road, in the City of Boca Raton, County of Palm Beach, State of Florida, pursuant to notice in said cause for the purpose of taking said deposition at the instance of the Plaintiffs in the above-styled action pending in the above-styled court.

THE COURT REPORTER: Raise your right hand, Please, sir.

THEREUPON,

MICHAEL WOIKA,

being by me first duly sworn to testify the whole truth as is hereinafter certified, testifies as follows:

THE WITNESS: Yes.

* * * * * * * *

DIRECT EXAMINATION

BY MR. MIHET:

Q. Good morning, Mr. Woika.

A. Good morning.

Q. We've already met. And you know that we're here to take your deposition this morning -- actually, the City of Boca Raton's deposition through you, its designee. Just a couple of ground rules that you heard yesterday to make sure we're on the same page.

Everything that you or I say today is being transcribed by the nice reporter sitting here next to us. So it's important for us to speak one at a time. Okay?

A. Yes.

Q. It's important for you to verbalize your answers because the reporter cannot accurately transcribe nonverbal communications. Is that okay?

A. Yes.

Q. I very much doubt this is going to happen today; but, if I do happen to ask you an inarticulate question --

A. Okay.

Q. -- that you don't understand, will you ask me to rephrase it?

A. Of course.

Q. If you answer my question, I'm going to understand that you understood it; and you intended to provide the response that you did. Is that fair?

A. Yes.

Q. I'm hoping we won't be here nearly as long as we were together yesterday, but we probably will spend a little time together. So, if you should need a break at any time, please ask; and we will accommodate you so long as a question is not pending. Is that good?

A. Sounds great.

Q. Excellent.

Throughout the day today, I may refer for short to the City. Will you know I'm talking about the City of Boca Raton?

A. Yes.

Q. And, if I refer for short to the ordinance, you'll know I'm referring to the Conversion Therapy Ban Ordinance that the City of Boca Raton has enacted which is the subject of this lawsuit?

A. Yes.

Q. I'm going to show you what we marked yesterday as Plaintiffs' Exhibit 1. You've seen this document before?

A. Yes.

Q. This is a copy of Plaintiffs' Second Amended Notice of Taking Depositions of Defendants, right?

A. Yes, it is.

Q. And you'll notice, on pages two and three, there are thirteen matters for examination that are identified?

A. Yes.

Q. Now, it's my understanding that you have been designated by the City of Boca Raton to provide testimony as to each one of those matters except for

matter number thirteen; is that accurate?

A. Yes, noting that ten and eleven are deleted, as well.

Q. Sure. I suspect your testimony on topics ten and eleven is going to be very brief or maybe nonexistent today.

A. Sure.

Q. And so you understand that, as to the topics on which you are designated, you will be providing the City's knowledge and the City's position?

A. Yes.

Q. What did you do to prepare for today's deposition?

A. Did a number of things. I spoke to a number of individuals. I looked at -- and I'm sure you're going to ask me whose those are. I looked at the documents, including the ordinance, all of the backup material, e-mails that were produced. I looked at the videos of the public hearing for the ordinance. Individuals I talked with include the attorneys who framed and -- not framed but drafted the document. I talked with George Brown who is the Deputy City Manager. I spoke with Doug Sheedy who is our code compliance manager. I believe that's the -- the main -- the main parts of it.

Q. Okay. Which of the attorneys that drafted the

ordinance did you speak with?

A. Chris Fernandez.

Q. I believe he's with us today?

A. He is.

Q. Anyone else?

A. Our City Attorney.

Q. Who is that?

A. Diana Grub Frieser.

Q. Anyone else?

A. Outside counsel.

Q. That would be Mr. Abbott or his colleagues?

A. Correct.

Q. When did you begin your preparation for the deposition?

A. Several weeks ago. Two, three weeks ago.

Q. Can you give me a rough idea of how much total time you spent preparing? Is it a couple hours? Is it ten hours? Is it five minutes?

A. It's more than a couple hours. And, not including yesterday's deposition at the County, probably ten hours. Eight, ten, twelve hours.

Q. You would consider attending yesterday's deposition as preparation for today?

A. Perhaps. It was instructive.

Q. You said you reviewed a number of documents. I

believe you referred to the ordinance, and you referred to materials, and you referred to e-mails. Do you know if those documents have all been provided to the Plaintiffs in this case?

A. I believe, yes.

Q. Okay. And did you review any documents that have not been provided to the Plaintiffs in this case?

A. No. I believe everything that I looked at was -- had been provided.

Q. Okay. Did you speak with anyone who is not an attorney or not employed by the City of Boca Raton to prepare for today's deposition?

A. No.

Q. Did you speak with Mr. Hoch?

A. No.

Q. Have you ever spoken with Mr. Hoch?

A. Perhaps as a greeting but nothing substantial.

Q. Ever spoken with Mr. Hoch about conversion therapy ban?

A. No.

Q. Ever spoke with Mr. Hoch about this litigation?

A. No.

Q. Have you had a chance to give deposition testimony before?

A. Yes.

Q. Several times?
A. Yes.
Q. About how many?
A. A dozen.
Q. Okay.
A. Maybe not quite that many. It seems like a lot more.
Q. That was in the course of your employment for the City of Boca Raton?
A. Yes.
Q. And what position do you hold with the City?
A. I'm the Assistant City Manager.
Q. And how long have you held that position?
A. Since 2004. So almost fourteen years.
Q. Are you the only Assistant City Manager?
A. Yes.
Q. What is Mr. Brown's position?
A. He's the Deputy City Manager.
Q. So, in the hierarchy of things, are you lateral colleagues; or is one a little higher than the other?
A. We're more or less lateral. He has a little bit more seniority, so he's technically a bit more senior.
Q. What is the difference between an Assistant City Manager and a Deputy City Manager?
A. We each have a group of departments that we

liaison with. And so, if you look at the hierarchy, we have a City Manager; and then there are our levels, assistant and the deputy. And then the different departments and divisions are categorized kind of split between the two.

Q. And who is the City Manager?

A. Leif Ahnell, A-h-n-e-l-l.

Q. And so, if I understand what you just told me correctly, you have Leif Ahnell sitting at the top; and then we have you and Mr. Brown underneath him, more or less lateral?

A. That's correct.

Q. And what departments would be under your leadership?

A. I'll go through them. There's a number of departments, number of divisions. The departments are recreation services, municipal services, utility services. And then the divisions: Information technology; management services, which is risk and HR; community relations; communications; economic development. I think that's all.

Q. Okay. And what about under Mr. Brown's supervision?

A. He has the city clerk. I should start with departments, again. Development services, police, fire

and then the city clerk as a division. Oh, and finance. I'm sorry, financial services.

Q. Okay. I know we're not here to talk about you a whole lot today. But, just so I have a better understanding of who I'm talking to, briefly tell me what your educational background is.

A. I've got a bachelor's and master's degree from Penn State University in environmental engineering. And I have an MBA from University of Phoenix at Denver.

Q. And do you happen to know what Mr. Brown's educational background is? If you know.

A. He went to -- he went to Georgetown. I don't know -- I believe he has a bachelor's in something from Georgetown.

Q. Okay. Do you hold any professional licenses?

A. Yes.

Q. What are those?

A. I'm a professional engineer.

Q. Any others?

A. No.

Q. Do you know if Mr. Brown holds any professional licenses?

A. I don't.

Q. Okay. When did the City of Boca Raton first begin to consider a ban on conversion therapy?

A. There was correspondence, an e-mail from Rand Hoch, Palm Beach County Human Rights Council approximately July of 2017.

Q. And so is that how the issue of conversion therapy first came about within the City of Boca Raton was through this e-mail from Mr. Hoch?

A. To my understanding, yes. There may have -- that was the first that the Council was -- as a whole was brought into that subject.

Q. Was this e-mail sent to the Council as a whole or to individual Council members?

A. Individual Council members were all addressed, but it was the same e-mail.

Q. Okay. What was the need for the conversion therapy ban that was being asserted by Mr. Hoch in this communication?

A. In his e-mail correspondence, he had two attachments. And his e-mail was rather terse, as I recall. It just said, please see attached. One was a memo from the Human Rights Council talking about the -- the -- I guess you could call it the need or his -- his understanding of the need for conversion therapy within Boca Raton. And the other was a -- a model ordinance that he suggested that the City emulate and pass.

Q. Okay. Did Mr. Hoch claim that any citizens of

Boca Raton had been harmed or were being harmed by conversion therapy?

A. Directly? No.

Q. Directly, no.

Had the City ever received --

A. By, "directly," I mean, he didn't mention particular instances.

Q. He didn't mention anyone within the City that had ever been harmed by conversion therapy?

A. That's correct.

Q. Did he mention any conversion therapy practitioners in the City of Boca Raton?

A. In that e-mail, he did not.

Q. Okay. Did he subsequently mention any practitioners in the City of Boca Raton?

A. I think there was an e-mail provided by Mr. Hoch subsequent to this that did list a practitioner.

Q. Subsequent to the ordinance being enacted or subsequent to the first communication?

A. Subsequent to the first communication.

Q. How many practitioners did he identify in that e-mail?

A. One.

Q. And who was that partitioner?

A. I believe the last name was Gray. But, subject

to check, I believe that's the practitioner.

Q. It certainly was not Dr. Otto?

A. It was not.

Q. Or Dr. Hamilton?

A. It was not.

Q. And what did he say about Mister or Dr. Gray in this e-mail?

A. I believe it was Gray. I don't know. But I believe that that e-mail from -- from Rand Hoch suggested that there was a practitioner who listed as one of their services something to the effect of unwanted or undesired sexual attractions or something. It listed as one of the areas of behavior.

Q. Okay. It didn't say that they listed conversion therapy as a service that they provided?

A. I think that's correct. They did not.

Q. Okay. You said that this practitioner advertised that they could provide help for unwanted same-sex attractions. And he considered that as a need for the City to enact a conversion therapy ban? Is that the gist?

A. No.

MR. ABBOTT: Object to the form.

MR. MIHET:

Q. No?

A. No. I think, as you asked a question, he did not identify any specific individuals or situations in that original e-mail. In the subsequent one, I believe there was -- a Council had asked for some clarification. And he provided that to the council person but did not -- I don't believe tried to characterize what that -- other than to say, this is what the person listed on their -- on their -- as an area of practice.

Q. Do you know if those e-mails were provided to the Plaintiffs in this case?

A. They were.

Q. They were? I don't recall seeing them. Maybe, if you are able to refer us to a Bates number at some point today.

MR. ABBOTT: When we take a break, I'll take a peek and see if I can find it for you, sure.

MR. MIHET: Thank you.

BY MR. MIHET:

Q. Had the City of Boca Raton ever received any complaints from -- let me strike that and try again.

Prior to enacting the ordinance, had the City of Boca Raton ever received complaints that one of its citizens had been or was being harmed by conversion therapy?

A. No.

Q. Prior to enacting the ban, had the City of Boca Raton attempted to determine whether any of its citizens had been or were being harmed by conversion therapy?

A. No, not to my knowledge.

Q. So that would include the time after Mr. Hoch raised the issue of conversion therapy in or around July 2017, correct?

A. Correct.

Q. Okay. Did the City of Boca Raton ever consider or discuss whether it should attempt to determine if conversion therapy was harming its own citizens?

MR. ABBOTT: Object to the form.

THE WITNESS: No.

BY MR. MIHET:

Q. How did the City's -- let me try that again.

How did the fact that no one within the City complained about conversion therapy harm factor into the City's decision on whether or not an ordinance was necessary?

MR. ABBOTT: Object to the form.

THE WITNESS: If I understand your question correctly, the City -- as part of the correspondence from Rand Hoch, there were a number of reports that were cited and a number of findings in those different reports and statements. And that was used as the basis

for the need of the ordinance.

MR. MIHET: Okay.

THE WITNESS: So is that what you asked?

MR. MIHET: No. I guess that's one answer to my question.

BY MR. MIHET:

Q. Did the City rely on anything other than what you just mentioned?

A. No. That was the basis for the ordinance.

Q. Okay.

(Plaintiffs' Exhibit No. 23 marked for identification)

BY MR. MIHET:

Q. So, Mr. Woika, I have handed you an exhibit that we have marked as No. 23. And, having looked at this document, do you recognize it?

A. Yes.

Q. Is this one of the documents you reviewed in preparation for today's deposition?

A. Yes, it is.

Q. What is this document?

A. This document -- there's really two pieces to it. The first is a memorandum from the City Attorney to members of the City Council regarding the conversion therapy -- proposed draft conversion therapy ordinance. And then the second part is that draft ordinance.

Q. Okay. Now, this is dated August 17, 2017?
A. That is correct.
Q. And this is to the Mayor and the City Council of Boca Raton?
A. That's correct.
And I should say that, when I say, "City Council," it includes the Mayor. I consider the Mayor to be part of the City Council.
Q. Sure. I guess I was just referring to the "to" line that says Mayor and City Council.
So --
A. I just wanted to make sure, when I said, "City Council," the Mayor was certainly included. And I consider the Mayor to be part of the City Council. I wasn't trying to exclude the Mayor.
Q. Excellent clarification. Thank you.
So this came in time chronologically after the July 2017 e-mails from Mr. Hoch, right?
A. That's correct.
Q. And so was this memorandum occasioned by Mr. Hoch's request to the Council to consider a conversion therapy ban?
A. Yes. And if -- if I can elaborate further?
Q. Sure.
A. There was an earlier City Council meeting in

July --

Q. Okay.

A. -- by which the Mayor, during her opportunity, said that she had received some e-mail from Rand Hoch and -- and acknowledged the other Council members, as well. And asked the City Attorney to take a look at the draft ordinance and to review it and to prepare something. And I believe this was in response to the Mayor's request.

Q. "This," meaning, Exhibit 23?

A. Exhibit 23, yes.

Q. Okay. All right. I'm going to ask you some questions about some things that are mentioned in this memorandum. Looking at the second paragraph on the first page, it says: Conversion therapy, also known by various other names such as treatment for unwanted same-sex attraction, is the practice of attempting to change a person's sexual orientation through psychological counseling.

Did I read that correctly?

A. Yes.

Q. Now, the ordinance that was eventually enacted by the City Council banned, not only Sexual Orientation Change Efforts, but also Gender Identity Change Efforts, correct?

A. That's correct.

Q. And yet, in this memorandum, the City Attorney defines conversion therapy solely with respect to sexual orientation. Am I reading that correctly?

A. I think, yes, that would be a way of reading and reviewing that.

Q. Okay. Well, do you know why the conversion therapy in this memorandum to the City Council was not defined more broadly to include Gender Identity Change Efforts?

A. No. To answer the question, I don't know what the City Attorney was -- was thinking. Although, I think, if you read it in its totality, it includes other definitions or other -- other things that might be included in conversion therapy.

Q. Okay. Continuing on in that same paragraph, it says: The PBCHRC -- I don't know if we've already established that's the Palm Beach County Human Rights Commission, correct?

A. I believe so. Council.

Q. Council.

A. And I think it's in the first paragraph it defines what that is.

Q. There it is.

And that is the organization that Mr. Hoch

represented or represents?

A. That's correct.

Q. Okay. So starting that sentence, again: The PBCHRC and the model ordinance rely on and cite to numerous scientific articles and studies that conclude conversion therapy and other Sexual Orientation Change Efforts, SOCE, are ineffective, erroneously presume that homosexuality and gender nonconformity are mental diseases or defects and may, in fact, cause psychological harm particularly to children.

Did I read that correctly?

A. Yes, you did.

Q. And is that claim that Sexual Orientation Change Efforts may, in fact, cause psychological harm, particularly in children, a claim that the City Council accepted and relied upon in enacting the ordinance?

A. I think the City Council, when they considered this ordinance, looked, not only to this memo, but other things. This was, I believe, something that they had received and was part of their decision making process.

Q. Okay. But the claim that Sexual Orientation Change Efforts may, in fact, cause psychological harm, particularly in children, is that a claim that the City Council accepted and relied upon in enacting the ordinance?

A. I think that that was not a conclusion of the City Attorney. I believe she says that the reference materials indicate that. But I'm not sure that was your question. I think your question is: Did they rely upon this memo in that sentence to make their decision? I think that was clearly something that they -- was part of their information available to them as they considered this ordinance.

Q. Well, I guess I'm not really asking you whether they relied on this particular memo as much as I'm asking you whether they relied on this proposition. So let me try another way.

A. Okay.

Q. Does the City of Boca Raton believe that Sexual Orientation Change Efforts may, in fact, cause psychological harm, particularly to children?

A. I believe that, as the memo said, the reports that were attached -- the reports that were cited down below, that is the indication from a number of these reports that that is the case.

Q. I understand that that's what Mr. Hoch or others claim that that's what the reports show.

A. Sure.

Q. My question is, not what the reports show, but what the City of Boca Raton believes or contends or what

its position is. And so let me try that one more time.

Does the City of Boca Raton believe that Sexual Orientation Change Efforts may, in fact, cause psychological harm, particularly to children?

A. Sure. And I understand what you're saying. And I'm not trying to -- to avoid your question. But I don't think it's quite as simple as that. I think that there were information. There were studies presented. There was facts and information presented as part of the backup to the ordinance that the City Council reviewed when they made their -- their decision to pass the ordinance.

As a whole, I can't tell you what the City Council believes the -- what each individual City Council member believes is true or not true based on those reports.

Q. And, just so we're clear, I'm not asking you what an individual City Council member believes or doesn't believe.

A. Uh-huh.

Q. I'm asking you what the position is of the City of Boca Raton whose designee you are here today.

A. Sure.

Q. And so what I want to know is: Does the City of Boca Raton take the position that Sexual Orientation

Change Efforts may, in fact, cause psychological harm, particularly to children?

MR. ABBOTT: Objection. Asked and answered.

THE WITNESS: Maybe I wasn't explaining it very well. But I think that, as the City Council reviewed the information and passed the ordinance, they believed that the information that was presented was strong enough to move forward with the passing of the ordinance.

BY MR. MIHET:

Q. I think we're getting closer.

So what I'm hearing you say is that the City Council believes that Sexual Orientation Change Efforts may, in fact, cause psychological harm, particularly in children?

A. Based on the fact that they passed the ordinance, based on the -- on these reports which had that as part of their conclusions -- I don't think we're getting that close. But -- as you say. But I think, if the idea is that they reviewed these, those reports had that as one of their conclusions and the City Council used that conclusion as evidence to pass their -- the ordinance, then I think that what you're saying is correct.

Q. As you sit here today, are you not able to tell me yes or no in response to my question as to whether or

not the City of Boca Raton believes that Sexual Orientation Change Efforts may, in fact, cause psychological harm, particularly in children? Are you able to answer that question with a yes or no today?

MR. ABBOTT: Object to the form.

Asked and answered.

THE WITNESS: I don't think a yes and no is the proper response to that question.

MR MIHET: Okay.

BY MR. MIHET:

Q. You can't say yes or no?

A. I cannot say yes or no.

Q. Okay. How much more likely is an LGBT minor who undergoes Sexual Orientation or Gender Identity Change Efforts to experience depression versus an LGBT minor who does not undergo those kinds of efforts?

A. I don't -- I don't think that I can give you a good answer on that.

Q. Okay. The City --

A. I don't know.

Q. The City doesn't know?

A. No.

Q. The City doesn't know whether it's five percent more likely, one percent more likely or zero point zero one percent more likely?

A. That's correct.

Q. How much more likely is an LGBT minor who undergoes Sexual Orientation Change Efforts or Gender Identity Change Efforts to experience feelings of fear or loneliness versus an LGBT minor who does not undergo those kinds of efforts?

A. I don't know, and the City does not know.

Q. And, if I ask you that same question for rejection, the answer would be the same? The City doesn't know?

A. That's correct.

Q. And, if I ask you the same question with respect to feelings of anger, the answer would be the same? The City doesn't know?

A. That's correct.

Q. And, if I ask you the same question as to suicidal thoughts, your answer would be the same? The City doesn't know?

A. That's correct.

Q. And is it fair to say that the reason the City doesn't know this is because no study has ever found a causal connection between Sexual Orientation or Gender Identity Change Efforts and any harm?

A. The reports and information that was -- that was attached to this ordinance, the ones that was relied

upon for the ordinance, did not have any of those. Whether one exists or not, I don't think we've done any independent review of the literature or studies.

Q. And so --

A. So we do not know of any.

Q. Okay. And so the City doesn't know the answer to the questions I just posed. And, because the City doesn't know of any study, the City would be unable to determine an answer to the question that I just posed, correct?

MR. ABBOTT: Object to the form.

THE WITNESS: If you're asking are we relying on any empirical studies, the answer is no.

MR. MIHET: Okay.

BY MR. MIHET:

Q. Continuing in the same memorandum to the next paragraph, it says: The model ordinance is aimed at protecting minors from being exposed to conversion therapy. It contains a blanket prohibition on the practice of conversion therapy on minors by state licensed professionals, physicians, psychotherapists, et cetera.

Did I read that correctly?

A. Yes.

Q. What does the term "blanket prohibition" mean in

that context?

A. While I have not spoke to the City Attorney on her usage of that term, it appears, from the sentence -- just from the -- the sentence structure, it is an umbrella, if you will, a total covering of the practice of conversion therapy.

Q. A total ban?

A. A total ban.

Q. Did the City Council ever consider anything other than a blanket prohibition or a total ban on Sexual Orientation Change Efforts or Gender Identity Change Efforts?

A. Are you referring to a ban on certain practices or -- as opposed to a total ban? Is that the question?

Q. Yes.

A. 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.

Q. Okay. So the answer to my question is, no, the City has never considered anything other than a total ban?

A. That's correct.

Q. Now, you said -- so, just to be clear, then, the City never considered, for example, banning only aversive therapy as opposed to non-aversive therapy?

A. That's correct.

Q. The City never considered banning only forced involuntary therapy while allowing therapy that a minor seeks out and voluntarily assents to?

A. That's correct.

Q. Now, you said in your earlier response that the City's only option was to enact the ban that was proposed or to reject it entirely. Did I understand that correctly?

A. That wasn't their only. But that was the decision that the Council was -- was deliberating in the October 2017 meeting.

Q. Okay. Now, the Council could have requested information on whether or not a ban that was short of a total ban would still address the perceived problem, correct?

A. They could have, yes.

Q. The Council could have requested information, for example, on whether or not prohibiting only aversive or forced therapy would still address the asserted harms of conversion therapy?

A. They could have.

Q. But they never made that request, correct?

A. That's correct. They did not.

Q. The City Attorney received a model ordinance from

Mr. Hoch, correct?

A. That's correct.

Q. The City Attorney did make a couple of modifications to that model ordinance, correct?

A. That's correct. The City Attorney's office.

Q. Right.

A. Yes.

Q. But the City Attorney's office didn't modify the model ordinance that it received to make it less than a total ban?

A. That's correct.

Q. Could they have done that if they had been instructed to or if they wanted to?

A. Yes. The City Council certainly has the ability to ask for modifications.

Q. Why didn't the City Council consider anything other than a blanket prohibition or total ban?

A. Sure. Well, I can't speak to the Council or the individuals. However --

Q. Did you say you cannot speak for the Council?

A. The individual Council members.

Q. And I'm not asking you --

A. Yes.

Q. I'm asking you --

A. Sure.

Q. -- for the Council as a whole, the City of Boca Raton.

A. Sure. I believe that the City Council reviewed the documents that were provided as part of the ordinance and felt that the documents supported the intent and the ordinance.

Q. Okay. But they never investigated whether or not anything short of a total ban would still address the problems that were being asserted?

A. That's correct.

Q. Okay. Speaking of the materials that were presented, have you had a chance to review the stack of studies and statements and position papers?

A. I have.

Q. Did you read them from cover to cover?

A. I did not.

Q. Okay. There may be a couple three hundred pages or thereabouts?

A. Sure. I think one's a hundred and eighty. One's sixty, seventy. Yes. So three hundred pages is probably a fair estimate.

Q. Okay. How much time did you take to read them?

A. Probably -- probably the better part of an hour.

Q. Okay. And --

A. Little more, little less because I was referring

to other things during that.

Q. Sure. Now, I don't know whether you're a speed reader or not. And, in an hour or so, I can probably read about twenty pages or so. Do you have any idea about how many pages of information you can read in an hour?

A. I don't.

Q. Okay. Fair to say it's twenty, thirty, forty pages, thereabouts?

A. Well, don't know. I really have never timed myself. I don't know what I read per minute.

Q. Okay. Is it fair to say that, in the hour that you spent reviewing that stack of three hundred pages, you were not able to read all of it?

A. Clearly.

Q. Okay. How much --

A. And -- I'm sorry.

Q. Go ahead.

A. But, of course, there are some sections that perhaps weren't as pertinent to the issue; and I didn't look at those at all. I tried to focus on the areas that -- that appeared to be pertinent to the ordinance and to this matter.

Q. When did you read those materials?

A. First time was probably about a week ago, ten

days ago; and then I've looked at them periodically throughout --

Q. Okay.

A. -- including yesterday.

Q. Okay. We spent a little bit of time on one of those yesterday.

Now, with respect to the City Council, including the Mayor, how much time did they spend reviewing the actual studies and position papers themselves?

A. Again, they were provided that information. How much each of them looked at those documents and studied them, I don't know.

Q. Okay.

A. I'm unable to tell you.

Q. So that means the City doesn't know whether or not the individual Councilmen read any of them?

A. The information was provided to them.

Q. Undoubtedly.

The question is: Does the City know whether the members of the City Council actually read any of the studies themselves?

A. I'm not sure how we would know that. But the information was -- was presented to the City Council. And, with all ordinances, with all actions they take, they're provided with all information. The level of

their review is not something that we would know.

Q. So the answer to my question is no?

A. The answer to your question is I don't know.

Q. Okay. Continuing in the same memorandum we've been discussing, Exhibit 23, the next sentence says: A proposed ordinance would only apply to minors.

Did I read that correctly?

A. Yes.

Q. Why would the City exclude adults from the coverage of the ordinance?

A. My understanding is that non-minors, adults, have the -- can both legally consent and have the cognitive ability to assent to that type of treatment.

Q. Okay. Is the City's position that a seventeen-year-old cannot voluntarily assent to therapy to assist that seventeen-year-old in changing their gender identity?

A. I think --

MR. ABBOTT: Object to the form.

Go ahead.

THE WITNESS: I think the ordinance says that anybody under eighteen, which would be a seventeen-year-old. There would be a ban on conversion therapy for that seventeen-year-old, yes.

BY MR. MIHET:

Q. Is it the City's position that a seventeen-year-old cannot voluntarily assent to therapy that would assist that seventeen-year-old with his or her desire in changing their gender identity?

A. I think -- again, if you read the ordinance, it -- seventeen is less than eighteen, obviously. So, as a minor, they wouldn't -- there would be a ban from that assent.

Q. Sure. I'm agreeing with you a hundred percent that the ordinance would prohibit that minor from seeking or engaging in that therapy. My question is quite different, actually.

Separate and apart from what the ordinance allows or prohibits --

A. Uh-huh.

Q. Okay?

-- is it the City's position that a seventeen-year-old cannot voluntarily assent to therapy that would assist that individual with their desire to change gender identity?

A. Uh-huh. I understand --

MR. ABBOTT: Object to the form.

THE WITNESS: I'm sorry.

BY MR. MIHET:

Q. Go ahead.

A. I think the -- the studies that were cited in the responses say that a number of the organizations note that minors, children under eighteen, do not have the requisite cognitive ability to make those kind of decisions. So, whether there is an individual at seventeen who has those cognitive or a seventeen-year-old who does not, I don't know that there couldn't be cases on either side. But, in general, I believe that the -- that the reports believe -- or suggest that minors, children/minors are unable to make such assents.

Q. Okay. Now, if a minor seeks to change their gender identity -- say you have a seventeen-year-old boy who decides that he is going to identify as a girl. Are you with me?

A. Uh-huh.

Q. If this minor seeks therapy to affirm him in this decision, the ordinance would permit that kind of therapy, would it not?

A. If it's not a change of gender identification, then the ban -- as a minor, there is a ban on people trying to -- therapists trying to change gender identity.

Q. Okay.

A. If the therapist is not trying to change, then,

of course, there would be no violation of the ordinance.

Q. But, if the minor wishes for that change to take place and is looking for affirmation therapy to assist the minor with that change, would the ordinance allow that?

MR. ABBOTT: Objection. Asked and answered.

THE WITNESS: The ban is for a conversion of gender identity.

MR. MIHET: Okay.

THE WITNESS: And so, in your example, I think you had said that this seventeen-year-old individual born as a boy now wants to identify as a girl; so their gender identity is female. So I'm not sure what you're asking. If the therapist is affirming their gender identity as a female, then they're not converting the gender identity. So that would not be a ban under this ordinance.

Q. This ordinance?

A. This ordinance.

Q. So --

A. If I understood you correctly.

Q. Right. So, if the minor has already adopted the identity in their mind and comes to a therapist to receive affirmation for that new identity, what I'm hearing you say is that the ordinance would allow that?

A. As presented, I believe that's the case, yes.
Q. Okay. And, in that case, that particular seventeen-year-old -- let's assume we're still talking about that person --
A. Uh-huh.
Q. -- would, in the City's view, be able to voluntarily assent to that kind of therapy, correct?
A. Yes.
Q. Okay. But, if the minor has not yet adopted the new identity, they're maybe on the fence, they're thinking about it, maybe exploring the options, testing the waters and they come to the therapist seeking help with the change that is not yet achieved but in progress, what I'm hearing you say is that the ordinance would prohibit that kind of therapy?
MR. ABBOTT: Object to the form.
Misstates the prior testimony.
And object to the hypothetical.
THE WITNESS: The situation that you're talking about -- as I understand the ordinance and -- it is a ban on conversion therapy, changing -- trying to change someone's gender identity. The situation hypothetically presented, I was unable to tell whether or not they're changing their identity or not.
MR. MIHET: They're seeking to change. The

seventeen-year-old is seeking to change, but they haven't changed yet.

THE WITNESS: Then a conversion would be a ban. If someone who is looking to change or looking -- if a therapist actively treats to convert their gender identity, then I think that would be a ban of the ordinance.

BY MR. MIHET:

Q. So if you -- okay.

Getting back to the memo that is Exhibit 23 and focusing still on that same sentence that says that a proposed ordinance would only apply to minors, leaving adults -- meaning, adults are free to seek out such therapy if they so choose. Putting aside the issue of an adult's ability to consent, if the conversion therapy is harmful, why would adults be allowed to seek out such harm and to undergo that harm?

A. Uh-huh. Well, I think for both of those reasons that we talked about earlier. Someone who is not a minor can both assent and consent to -- to a treatment in this case or to therapy. But that's not -- is that your question?

Q. Well, I mean, I know that you can -- as an adult, you can assent and consent to things that harm you, right?

A. That's correct.

Q. So, for example, if I wanted to go out and shoot heroin up my veins, I can consent and assent to that; but that doesn't make that legal. The state isn't going to allow me to do it just because I can. The state says it's harmful; and so, even though you're a consenting adult, we're going to ban you from doing that, correct?

A. Sure.

Q. Why doesn't the same logic apply to conversion therapy with respect to adults?

A. Well, you brought up the example of heroin. Let's look at smoking, for example. Smoking is something that people generally believe is not healthy. Yet adults can, not only consent, but they can assent; and they can smoke. It's a matter of, even though it might be harmful, there are things that adults can do with their own decisions.

Q. Okay. And so are you attempting to say by that example that conversion therapy, in the scheme of things, is perhaps not as harmful as -- as heroin but, you know, as harmful as smoking? I mean, are you -- are you --

A. No, not at all.

Q. Okay.

A. It had nothing to do with trying to equate

heroin, smoking and conversion therapy.

Q. No.

A. That was not -- you had brought up an example of heroin. I just thought of the idea of smoking, some of the same things where adults can consent and assent; but it may not be -- it may be harmful to them and to others.

Q. Okay. But some things that are harmful to adults they can't legally do, correct?

A. You brought up heroin as an example.

Q. Okay. So why -- if conversion therapy is harmful, why not prohibit adults from doing it?

A. I think your question is perhaps -- under the ordinance, it talks about minors. It talks about trying to protect minors for the reasons we just talked about, consent and assent. In the case of adults, those -- those same conditions do not exist. And so I don't know that -- if your question is how -- why doesn't the ordinance cover adults as well as minors, it's for those reasons.

Q. Okay. Just so we're on the same page, the City of Boca Raton has the ability to prohibit adults from engaging in harmful behavior even though they are able to consent or assent to that behavior, correct?

A. That's correct.

Q. And so the City of Boca Raton has the ability to prohibit adults, then, from engaging in conversion therapy even if they have the ability to consent or assent to it?

A. Within -- yes. I would think that's generally the case.

Q. Okay. That being the case, if conversion therapy is harmful, why not extend the ban to cover adults, as well?

MR. ABBOTT: Objection.

I think that's the fourth time you asked him that question.

THE WITNESS: I think, again, is the -- the ordinance was looking at protecting children, minors under eighteen, who don't have either the consent or assent ability. And that's -- this is a protection for minors.

BY MR. MIHET:

Q. Does the City of Boca Raton take the position that conversion therapy is harmful enough to ban for minors but not harmful enough to ban for adults?

MR. ABBOTT: Object to the form.

THE WITNESS: The documents that were reviewed and included as part of the ordinance for the most part deal with children, with minors, not with

adults. And that's what the focus of the ordinance was was looking at minors, not adults.

MR. MIHET: Okay.

THE WITNESS: In the future, could there be ordinances? Could there be legislation with adults? Certainly. But that was not the focus of this ordinance.

MR. MIHET: Okay.

BY MR. MIHET:

Q. Back to the memo that is Exhibit 23 and continuing with the next sentence, it says: It would not apply to clergy or other religious leaders who are acting in their roles as clergy or pastoral counselors or are providing religious instruction to congregants so long as they do not hold themselves out as operating pursuant to a state-issued license.

Have I read that correctly?

A. Yes.

Q. What was the reason for excluding religious practitioners, if you will, from the total ban?

A. Sure. The -- as you know, the model ordinance, the one that was presented to the City back in July of 2017, included an exclusion for clergy, as well.

Q. Okay.

A. And that was not something that the City

developed on their own. That was something that was adopted by other cities, as you well know.

Q. Okay. The City could have --

A. Yes.

Q. -- amended the model ordinance as it did in other respects to make it apply to religious practitioners, as well?

A. Perhaps. But that was not something that was considered as part of the ordinance to take that out. And I believe, in talking with the people who prepared the ordinance, there was a clarification, as you saw, from the model ordinance that tried to clarify who was covered by this, not just clergy, but other members of the congregation who are involved with the religious institutions. But it is something that was included, I believe, originally in the model ordinance as, like, a freedom of religion and not trying to infringe on that. However, I don't know why the original model ordinance was included with that. But that appears to be the case.

Q. The model ordinance included already an exemption for clergy, correct?

A. That's correct.

Q. And the City Attorney actually expanded that exemption to make it clear that it's, not just clergy

that are exempted, but any religious --

A. Not just ordained because there could be some question about someone who is working as a Sunday school teacher, for example.

Q. Right.

A. They're not ordained. But are they a member of the -- of the body of the organization.

Q. Sure. Fair to say that the City actually broadened the religious exemption in the model ordinance?

A. I'd like to say clarified. But perhaps included other individuals than the model ordinance. That's correct.

Q. Okay. It didn't remove the exemption altogether?

A. It did not.

Q. Okay. I believe you said the reason for that is because they wanted to observe First Amendment protections?

MR. ABBOTT: Object to the form.

THE WITNESS: I did not say that. I believe that is the case. That's my understanding. I don't believe that was clear in the -- in the model ordinance. It didn't specifically say that.

MR. MIHET: Okay.

THE WITNESS: That's my understanding.

BY MR. MIHET:

Q. Is conversion therapy any less harmful to a minor when it is provided by an unlicensed member of the clergy as opposed to when it is provided by a licensed therapist?

A. I don't know the answer.

Q. Does the City know the answer?

A. No. There has not -- my understanding, the City has not reviewed any -- any information or any studies on it.

Q. Okay. The City believes that, when practiced by a licensed therapist, conversion therapy, including Sexual Orientation Change Efforts and Gender Identity Change Efforts, is harmful to minors, correct?

A. They follow the lead of these different -- of these different organizations, yes.

Q. So they believe that to be the case?

A. That's correct.

Q. The City has no reason to believe that, when the same kind of therapy is provided by an unlicensed person such as a pastor, that it's any less harmful, correct?

A. There's no independ -- no studies that I know of that the City has looked at that have addressed that.

Q. Did the City ever consider that a consequence of banning Sexual Orientation or Gender Identity Change

Efforts by licensed therapists would be for those who are seeking that kind of therapy to end up in the hands, so to speak, of unlicensed practitioners?

A. I don't believe that was discussed.

Q. Okay. The City didn't consider -- well, let me withdraw that.

Does the City of Boca Raton have the ability to prohibit members of religious organizations from harming children?

MR. ABBOTT: Object to the form.

Exceeds the scope of the notice.

Calls for a legal conclusion.

THE WITNESS: I guess I'd need to know a little bit more about your example, what we're talking about. But...

BY MR. MIHET:

Q. Well, you know, I'd give you the example of sexual abuse; but I'm not sure whether or not the City passes any laws with respect to that. But, you know, things along those lines. Assuming the City has authority to stop other adults in the City from harming children, would the City have the authority to stop religious entities and their members from harming children in the same way?

MR. ABBOTT: Same objection.

THE WITNESS: I think the City has -- certainly has authority to make rules, regulations, policies that protect children or any citizen, any resident or visitor, yes.

BY MR. MIHET:

Q. From harm whether or not that harm is caused by an adult or by a member of a religious institution?

A. Yes.

Q. Okay. Going to the second page of Exhibit 23, the memorandum starts at the top by saying: 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 states regulation of licensed health professions nor any case law finding an implied preemption. 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.

Did I read that correctly?

A. Yes, you did.

Q. And, if you would look down at the footnote four, the last couple of sentences starting with "also the PBCHRC." Do you see that?

A. No. Oh, I see, yes.

Q. Do you see that?
A. Yes.
Q. So follow along with me there.
A. Yes.
Q. Also the PBCHRC has recommended inclusion of the following in a proposed ordinance. The ordinance shall be automatically repealed should the Florida legislature and/or any court determine that a regulation of conversion therapy is preempted by the State of Florida. We believe this language would be superfluous since the establishment or finding of a preemption would render the ordinance unenforceable by operation of law without the need for an express provision in the draft ordinance.
Did I read that correctly?
A. Yeah.
Q. So is it fair to say that, in looking at the proposed ordinance, the City was concerned about the issue of preemption?
A. The City -- preemption was something that the City looked at during the drafting of the ordinance, yes.
Q. Okay. Was the City concerned that the regulation of mental health professionals was something that was a state issue for the State of Florida to do as opposed to

the City of Boca Raton?

A. I think the answer to your question is no. I think -- as phrased. I think that, when this came, as with other jurisdictions, the City had some concerns whether or not the regulation of a state licensed profession was something that was preempted by the state or not and did some research to see whether or not that was the case.

As you can see from the memo that the -- neither the case law nor -- there is no express preemption nor did case law support that. And so I believe the City Attorney said that this ordinance makes sense. However, recognizing that in case future there was some implied preemption by the state, that that would render this ordinance pretty much unenforceable.

Q. Okay. This paragraph that I read back up in the main text --

A. Yes.

Q. -- in the first -- in the first paragraph where it says: However, given the extensive regulation of health professions by the state.

A. Uh-huh.

Q. Does the City of Boca Raton take the position that the State of Florida extensively regulates health professions?

MR. ABBOTT: Object to the form.

THE WITNESS: I believe that's what it says, and I believe the answer is yes.

MR. MIHET: Okay. I know I told you to feel free to ask for breaks. Can I ask for a break?

THE WITNESS: Apparently, it's your depo. You can do whatever you want.

MR. MIHET: Let's take a quick comfort break.

(Recess)

BY MR. MIHET:

Q. Mr. Woika, I believe you said that the conversion therapy ordinance came up at City Council meetings, at one of them in particular where the -- was it the Mayor asked for additional information to be provided?

A. No.

Q. Okay. I'm sorry.

A. I think the one you're talking about was in July of 2017.

Q. Okay.

A. And the Mayor, during her portion of the -- of the Council meeting, said that she had received some information from Rand Hoch, from PBC Human Rights Council, and asked the City Attorney to look into it and to take a look at the -- really take a look at the

ordinance --

Q. Okay.

A. -- the draft ordinance.

Q. So that was the first Council meeting when the conversion therapy ban came up?

A. That's correct.

Q. And then, after that, it came up at how many additional council meetings?

A. Two.

Q. Two.

One where they had the first reading or the introduction?

A. That's correct.

Q. And one where they had the final vote?

A. That's correct. September and October respectively for the two meetings --

Q. Okay.

A. -- of 2017.

Q. So, altogether then, I'm counting three City Council meetings where the ordinance was discussed?

A. Well, the concept was discussed. The ordinance wasn't really --

Q. Right. The ordinance wasn't really the ordinance --

A. That's right.

Q. -- at the first meeting?
A. That's correct.
Q. But the conversion therapy ban was discussed at three City Council meetings?
A. That's correct.
Q. Were there any workshops or sessions other than full blown City Council meetings where the conversion therapy ban was discussed?
A. No.
Q. Any executive sessions or shade meetings?
A. No.
Q. Okay. Okay. We're going to have some video time here and look at the videos. They're very short.
A. Sure.
Q. We're going to look at the video from the first City Council meeting, which is July 25, 2017. And, just for the record --
A. Are you going to use this, or do you --
Q. We're just going to flip one of these laptops around so you can see it.
Just for the record, we're going to play from a file that is titled CCR170725.MP4.
MR. GANNAM: And, just for the record, this file was originally produced by the City with the file name Boca Raton underscore CFCA and then a lot of other

letters and numbers. We are using a different file name just for simplicity.

MR. MIHET: And we're going to provide the thumb drive to the court reporter so that these videos can be appended as exhibits to the deposition.

So this first meeting, I've already mentioned the file name, we're going to play from the point in time on this video that is at hour two, minute six, second fifty-nine. Can you see the --

THE WITNESS: Yes.

(Videotape starts)

MAYOR HAYNIE: Thank you very much, Mr. Weinroth.

And I'll be very brief. I know many of us have received e-mails and some suggested ordinances regard -- regarding the prohibition of conversion therapy on minors. And I just wanted to pass these on to the City Attorney and just ask that she review our code and see if -- if, perhaps, we already do this and, if not, you know, perhaps some suggestions as to protect the children in our community.

COUNCIL PERSON WEINROTH: And I would second that. You know, we've been speaking individually with the proponent of that. And, certainly, this is something that I would like to hear more about and see

if it's something that the City should be weighing in on.

COUNCIL PERSON: And I also would like to hear more.

MAYOR HAYNIE: Yeah. Thank you, Mister (inaudible). I think we all do if it comes to the safety of our children.

COUNCIL PERSON WEINROTH: Thank you.

MAYOR HAYNIE: Thank you.

And, if there's no further --

COUNCIL PERSON O'ROURKE: Madam Mayor --

(Videotape stopped)

BY MR. MIHET:

Q. Okay. Is that portion of the video that we watched representative -- let me try that, again.

Does that portion of the video that we watched fairly and accurately represent what transpired at the July 25, 2017, City Council meeting with respect to consideration of the ban on conversion therapy?

A. Yes.

Q. Now, by my count, that discussion spanned from hour two, minute six, second fifty-nine to hour two, minute seven, second forty-nine. So I'm counting about fifty seconds; is that fair?

A. Your numbers -- I think that's approximate time,

about a minute, yeah.

Q. All right. And was there any other discussion at that meeting regarding the subject of conversion therapy?

A. No.

Q. Okay. And, if I heard correctly, the discussion centered on a couple of the members saying that they wanted more information about the subject?

A. Yes. I think that the Mayor is pretty clear that they had received this information, wanted to know if that was part of our existing code or if there should be something that should be done with this ordinance. And I think that's what Councilman Weinroth said, as well.

Q. Said, we would like to hear more? Yes?

A. Yes.

Q. All right. So next we are going to play the video of the second City Council meeting. This is from the September 26, 2017. And this is a video file that, for the record, is titled CCR170926.MOV. And we're going to play from hour one, minute seven, second two, and on.

A. I think that's actually one hour -- is that what you said? One hour and four minutes?

Q. Hour one --

A. Yeah. Okay.

Q. -- minute seven, second two.

A. Uh-huh.

(Videotape starts)

MAYOR HAYNIE: We'll move to introduction of ordinances; and we have a lot, which means we're going to have a very busy meeting next time.

So we will begin with Ordinance 5407.

Ms. Saxton, will you please read the title.

MS. SAXTON: Ordinance 5407, an Ordinance of the City of Boca Raton amending Chapter 9, Code of Ordinances, to create a new Article 6, Prohibition of Conversion Therapy on Minors, prohibiting the practice of conversion therapy on patients who are minors, providing for severability, providing for repealer, providing an effective date.

MAYOR HAYNIE: And who would like to introduce Ordinance 5407?

COUNCIL PERSON WEINROTH: Madam Mayor, I'll move 5407.

MAYOR HAYNIE: Thank you very much, Mr. Weinroth. We'll now take up.

(Videotape stopped)

BY MR. MIHET:

Q. Okay. Was that video a fair and accurate representation of what transpired at the second Council

meeting with respect to the ban on conversion therapy?

A. Yes. It's the introduction of ordinance.

Q. Okay. Was there any other discussion of conversion therapy at this meeting besides what we just watched?

A. No, I don't believe so.

Q. Now, by my count, that started at hour one, minute seven, second two; and it went on to hour one, minute seven, second thirty-six. So that's about thirty-four seconds; is that about right?

A. It seems about right.

Q. Okay. So now we're going to watch the third and final meeting where the subject of conversion therapy was discussed. This is from the October 10, 2017, City Council meeting. And, for the record, this is a video that is labeled CCR171010. And we are going to play beginning with minute three, second eleven.

(Videotape starts)

MAYOR HAYNIE: Or related public hearings. So we will move directly to regular public hearings. At this time, I'd like to ask the city clerk to please read the title of Ordinance 5407.

CITY CLERK: Ordinance 5407, an ordinance of the City of Boca Raton amending Chapter 9, Code of Ordinances, to create a new Article 6, Prohibition of

Conversion Therapy on Minors, prohibiting the practice of conversion therapy on patients who are minors, providing for severability, providing for repealer, providing for codification, providing an effective date.

MAYOR HAYNIE: Thank you very much. And, as you can see, on behalf of the Palm Beach County Human Rights Council who reached out to me, they had asked that we consider this ordinance. We're following in the footsteps of many other Palm Beach County municipalities that have passed a similar ordinance. They being Wellington, Lake Worth, Delray Beach, Palm Beach Gardens, West Palm Beach, Boynton Beach and Greenacres. And, basically, it's protecting the youth of our community from a rather serious possibility of harm.

So, Members, any questions? No? No one has any questions? At this time, I'll open the public hearing. Is there anyone present who would like to come forward and address the City Council on this matter? Seeing no one come forward, I'll close the public hearing.

And, if there's no further discussion, at this time, I'll entertain a motion.

COUNCIL PERSON WEINROTH: Madam Mayor, I'll move Ordinance 5407.

MAYOR HAYNIE: Is there a second?

COUNCIL PERSON O'ROURKE: I'll second.

MAYOR HAYNIE: Okay. So we have a motion by Mr. Weinroth and a second by Ms. O'Rourke. Is there any further discussion?

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.

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.

MAYOR HAYNIE: Okay. Any further discussion?

DEPUTY MAYOR RODGERS: Madam Chair?

MAYOR HAYNIE: Mr. Rodgers.

DEPUTY MAYOR RODGERS: Full disclosure. I mean, I certainly won't argue health and high standard. I see this as really a state issue. And I'm not going to support it because of that.

MAYOR HAYNIE: Okay. Any further discussion?

Seeing none, Ms. Saxton, will you please call the roll on Ordinance 5407.

MS. SAXTON: Weinroth?

COUNCIL PERSON WEINROTH: Yes.

MS. SAXTON: Haynie?

MAYOR HAYNIE: Yes.

MS. SAXTON: O'Rourke?

COUNCIL PERSON O'ROURKE: Yes.

MS. SAXTON: Singer?

COUNCIL PERSON SINGER: Yes.

MS. SAXTON: Rodgers?

DEPUTY MAYOR RODGERS: No.

MS. SAXTON: The motion passes four votes to one.

MAYOR HAYNIE: Very good. Thank you very much. We'll --

(Videotape stops)

BY MR. MIHET:

Q. Was that video a fair and accurate representation

of what transpired at the third City Council meeting on the subject of this ordinance?

A. Yes.

Q. By my count, that started at minute three, second eleven; and it went to minute six, second zero. So I'm counting about two minutes and forty-nine seconds. Does that sound about right?

A. Numbers seem about right.

Q. Was there any other discussion at this City Council meeting on the subject of conversion therapy other than the portion that we just watched?

A. No.

Q. So, when I'm adding my numbers together, I'm -- my math shows me that, between the three meetings combined, there was approximately four minutes and fifty seconds of total consideration that was given to the issue of conversion therapy by the City Council at these meetings. Does that sound about right?

A. During the active portion of the meeting, yes, about thirty seconds -- yeah, about five minutes.

Q. Okay. And, at this last meeting, it seemed like there were no questions from the members of the Council. Was that -- was that what you saw, as well?

A. Well, I think Chair -- or Councilman Rodgers voiced his opinion and said he had some -- some thoughts

or some questions on the appropriateness. But, during that other portion -- he was the only one that had raised questions.

Q. I should have been a little more clear. By my count, there were three portions of the meeting. There were -- there was first a portion where there were questions by members. Then there was a section for public discussion, and then there was a section for deliberation.

A. That's correct.

Q. In the first section with respect to questions by members, there were none?

A. That's correct.

Q. And the public discussion there was none?

A. That's correct.

Q. In the deliberation section, there was a question from one of the members regarding how this ordinance would be enforced?

A. That was one of them, enforcement. Then I think he had some thoughts about whether it should be a local issue or a state issue.

Q. With respect to enforcement, he asked the City Manager how this would be enforced. What I heard the City Manager say is, I'm not sure how we would enforce it.

A. Uh-huh.

Q. But it's a -- it's a code-related area. Does that sound about what he -- right?

A. That seems about right, yes.

Q. Okay. Why was the City Manager not sure about how this ordinance that was being enacted would be enforced?

A. Well, I think, as you well recognize, this is a little bit different than some of the other code enforcement matters that the City handles. And so I think the -- while he recognized it as clearly a Code Enforcement matter, how it would be done wasn't something that wasn't clear.

Q. It wasn't something that had been thought out and clearly delineated by that point?

A. That's correct.

Q. And the -- I think he turns to someone and asked somebody else if they had any thoughts on enforcement. And I'm not sure if that was another City Council member or someone else that responded.

A. City Attorney.

Q. City Attorney. Is that Ms. Frieser?

A. It is.

Q. Now, the City Attorney, Miss Frieser says --

A. Ms. is probably a better term.

Q. Ms.?
A. Uh-huh.
Q. Ms. Frieser.
A. Uh-huh.
Q. Isn't that what I said?
A. Ms. as opposed to miss.
Q. Oh, okay.
A. I'm sorry.
Q. That's all right.
Attorney Frieser.
A. Perfect.
Q. I believe I heard her say that she also thought that there would be difficulties in the practical enforcement issues?
A. Uh-huh.
Q. Yes?
A. She did.
Q. And so what do you think she was referring to?
A. Well, again, it is -- a lot of our code enforcement has to do with something that is very visual, easily determined. This is a little bit different; and so there's going to be some different approaches, some different ways of addressing. But it's still a Code Enforcement issue, which I believe is what she had concluded, as well.

Q. Okay. When you say that a lot of our Code Enforcement has to do with things that are easily determined, give me an example of what you're talking about.

A. Going by a property and seeing that the grass is too tall. It hasn't been cut properly.

Q. Okay. That's something that a code enforcement officer can see and can issue a citation on the spot?

A. A notice of violation, yeah.

Q. In order for a notice of violation to be issued, what does the code enforcement officer have to conclude?

A. It doesn't really have to -- it just has to believe that there is a violation of the -- of the City code.

Q. Okay. He has to believe that a violation has occurred?

A. That's correct.

Q. And so he issues a citation?

A. Notice --

Q. Notice of violation?

A. -- of violation, that's correct.

Q. And what happens next in the code enforcement process?

A. There is an opportunity for the property owner to correct the -- the notice. And, if it's not, then it

goes to a special magistrate.

Q. And what happens at the special magistrate?

A. The special magistrate hears the testimony, hears whatever evidence -- evidence that's presented and makes a determination on the violation and what the remedies could and should be --

Q. Okay.

A. -- and gives the property owner the opportunity to correct before other penalties accrue.

Q. And how many special magistrates does the City of Boca Raton have to deal with code enforcement violations?

A. Several. It's a part-time job. And we -- there's a number that are rotated through. And there's hearings that are monthly -- bimonthly and monthly.

Q. Okay. Now, the special magistrate, is that something that's an elected position; or is it appointed or hired or how is that --

A. It's appointed by City Council.

Q. And who can be a special magistrate for the City of Boca Raton?

A. There is a -- there is a -- a process, an application process and a selection process. I don't know the -- the qualifications of the special magistrates. But there is -- the process is one of

application and appointment.

Q. Okay. And that is a paid position?

A. It is.

Q. You said it's part-time, though?

A. Yes.

Q. About how many hours does a special magistrate work?

A. A few hours a month.

Q. Okay. Does a special magistrate have to have a minimum level of education?

A. I believe -- to check -- that they are required to be attorneys.

Q. They are required to be attorneys?

A. Uh-huh.

Q. Are they required to be attorneys in any particular --

A. I think that's the case. But, again, I have not reviewed that as part of this.

Q. Okay. Are they required to be attorneys in a particular area of law?

A. No, I don't believe so.

Q. Okay. So they could be a trust and estates attorney or a property tax attorney or a divorce attorney?

A. Again, I don't know the qualifications off the

top of my head. However, there is a -- most of the people who are selected are special magistrates in other communities, as well. And they look, not only at their experience professionally, but also as experience in other communities.

Q. Okay. How many code enforcement officials are there in the City of Boca Raton?

A. By, "officials," you mean, all code officers?

Q. Yes.

A. I believe there are twenty-one, and there are a couple different categories. There's code -- code compliance officer 1's and 2's. And I think there's about seventeen. There are seventeen of those. I think there are three senior code compliance officers and then a code compliance manager.

Q. So that's twenty-one. And is there someone that's sitting at the top of that department?

A. That's the code compliance manager is responsible for -- for that group. The code compliance manager reports to the chief building official which reports to development services director.

Q. Okay. So who is the code compliance manager currently?

A. His name is Doug Sheedy, S-h-e-e-d-y.

Q. And you said he reports to the?

A. Chief building official.
Q. And who is that?
A. His name is John Cosmo.
Q. Okay.
A. C-o-s-m-o-s -- excuse me -- C-o-s-m-o.
Q. And he reports to the?
A. Development services director.
Q. Who is?
A. His name is s-h-a-d -- S-c-h-a-a-d, Brandon Schaad.
Q. And then Mr. Schaad reports to Mr. Brown?
A. That's correct.
Q. And Mr. Brown reports to Mr. Ahnell?
A. That's correct.
Q. What is the difference between the three senior code enforcement officials and the seventeen level 1 or 2 officials?
A. The level 1 or 2 -- and that's based on certifications. You start out as a 1. You get certified. Then you go to the 2 level. So there could be -- of the seventeen positions, there could be seventeen 1's or seventeen 2's. It's just really based on their own progression and their own certifications. The three seniors are positions that are set. There's only three. So it's not part of progression. But they

have more responsibility, and they have some supervisory lead-worker type responsibilities.

Q. Okay. Is there a difference in the educational requirements that apply to the level 1 and 2 officials versus the senior officials?

A. I don't believe so, no.

Q. The same requirements apply to all --

A. The same educational requirements?

Q. Yes.

A. Yes.

Q. And what are those educational requirements?

A. I believe it's high school required, associate's recommended or suggested.

Q. Okay. So, if you have a high school diploma, you could be eligible to be a code enforcement official in the City of Boca Raton, including a senior enforcement official?

A. That's correct.

The manager requires more. The manager requires at least an associate's. In this case, Doug Sheedy has a bachelor's degree.

Q. Okay.

A. From Iowa, if that matters.

Q. But an AA degree is required?

A. That's correct.

Q. Okay. Would a -- a GED certificate be sufficient, or you have to have an actual high school diploma?

A. No. A GED would be fine.

Q. Would be fine. Okay.

A. Again, that's the minimum level.

Q. Right.

A. But there are some who have other college -- of our existing, there are people who have associate's and other college grads.

Q. But they're not required to?

A. They're not required to. That's correct.

Q. Is there -- is there a distinction in the type of code enforcement cases that an official can handle that is based upon their educational experience?

A. No.

Q. So all code enforcement officers can handle all code enforcement matters?

A. I think we call them code compliance officers. But, yes, your basic premise is correct.

Q. Okay. And are there any written policies or -- or guidelines that the City of Boca Raton has with respect to which code enforcement matters are assigned to which code compliance officers?

A. No.

Q. Okay.

A. And a lot of times, it's geographical. They're assigned geographical areas for the -- a lot of -- especially the 1's and the 2's.

Q. Okay. So they go out to a particular area, and they're responsible for -- for violations that are occurring in that --

A. That occur within that area. That's correct.

Q. Okay. With respect to --

A. The seniors are not, by the way. The seniors -- and some of the 1's and 2's are not geographical. But that's generally how they're organized.

Q. Okay. With respect to the enforcement of code violations, is there any custom or practice within Code Enforcement that says these types of violations will be assigned to these code enforcement officers other than the geographical distinction that we just discussed?

A. No.

Q. Okay. And I take it that's the same, then, for the conversion therapy ordinance? There is not any policy or custom of assigning future alleged violations of the ordinance to a particular code official?

A. There's no policies or procedures. But part of my conversation -- I think we had talked earlier -- with Doug Sheedy, who is the code compliance manager, we

talked about the conversion therapy ordinance in particular and how he believed it would be handled from a -- if he did receive a complaint, how would it be handled.

Q. Okay.

A. But there's no written policies or procedures.

Q. Okay. Is there any plan to issue any written policies or procedures?

A. No.

Q. Okay. And I think I know the answer, but so we're clear. Prior to today, have there been any alleged violations of the ordinance?

A. No.

Q. Have there been any opportunity to have Code Enforcement go through the process yet?

A. What do you mean? What process?

Q. Of enforcing the ordinance banning conversion therapy.

A. No.

Q. Have there been any enforcement guidelines or procedures promulgated specifically with respect to enforcement of the ordinance?

A. Of the code -- of the conversion therapy ordinance?

Q. Yes.

A. No.
Q. Is there any plan to issue such guidelines or policies?
A. No. Although, that's not unique. There's -- for many many of the ordinances, there are not specific plans and procedures for them.
Q. But are there some ordinances for which there are specific plans or procedures or guidelines in place?
A. There are -- I think, generally, no.
Q. Okay.
A. Now, there are -- in cases of clarifications, there are some memos that are out defining how you measure grass height, for example.
Q. That was exactly the example I was thinking about.
A. Okay. And, since I brought that up, so, while there's not a policy/procedure, there is a memo that says, okay, when you -- when you are looking at height, here's some things to consider --
Q. Okay.
A. -- in doing so.
Q. Okay. And these are written memos that any code compliance officer can go and consult?
A. Sure. And there aren't very many of those.
Q. Okay. But there are some?

A. Yeah.
Q. Do others come to mind besides the tallness of the grass?
A. No.
Q. Okay.
A. I can't think of anything.
Q. That's fine. So -- and I think you drew a distinction between -- you said there are no formal guidelines, but there are these memos. Is there a distinction in your mind between -- between formal guidelines and these -- these memos? Or...
A. Well, when you say, "formal guidelines," I'm thinking that is there a laid-out procedure? Is there a here's what you do should this happen? This is the first step. This is the second step. This is the third step. So, no, I don't believe there's any of those exist. Some of those things I talked about are really more clarifications of things that have come up where there has been some question about the height. Where should you measure that? What does that really mean? And I think that there was some memos put out on those. So I don't consider those to be procedures. They're really more --
Q. Guidance?
A. -- guidance -- sure, guidance documents or

clarification documents.

Q. Okay. And, with respect to the conversion therapy ordinance, there are no formal guidelines or these -- these less formal guidance documents or memos?

A. That's correct.

Q. Okay. Now, earlier, you said that this ordinance is -- I think you said a little bit different than other matters because other matters are easily determinable --

A. Uh-huh.

Q. -- determined. Do you remember that?

A. I do.

Q. And what did you mean by that?

A. Well, as we briefly discussed, there are some code matters that are easily discernable. A simple drive-by observation can produce a notice of violation. It's very easy to engage. It's very easy to determine if it is in violation of the code. Of course, there's others that are more difficult. And the conversion therapy, it will be one that will be more difficult than driving by and looking at the height of grass.

Q. Okay. With the driving by and looking at the height of grass, the City has no concerns that that's something that someone with a GED or a high school diploma can do accurately and fairly?

A. I think someone who is trained, yes, can

certainly be a code compliance officer.

Q. Okay. In order for a code compliance officer to issue a notice of violation --

A. Uh-huh.

Q. -- does a compliance officer have to witness the violation occurring?

A. No.

Q. Okay. So, if, for example, a neighbor complains that the yard next door has grass that's really tall, hasn't been cut in months --

A. Uh-huh.

Q. -- makes that complaint by telephone to the compliance officer --

A. Uh-huh.

Q. -- right, can the compliance officer issue a notice of violation without first going to investigate and confirm that, in fact, the grass is as tall as is being reported?

A. Yes.

Q. He can?

A. Uh-huh.

Q. Does that actually happen in practice?

A. I think it depends a little on the infraction. In the case of grass, which is, as we talked about, very easily discernible, I would think the code officer would

go out and see if that's -- and do some investigation to see what he can observe, to see if that is -- the complaint is something worth issuing a notice of violation for.

Q. So, in that example at least, the enforcement officer would not issue a notice of violation without visually confirming the violation?

A. They could. I would think, in that case, they probably would verify.

Q. Okay. In what instances would they issue the notice of compliance -- sorry -- the notice of violation without first confirming the existence of the violation?

A. There could be instances where it is not -- you talked about whether or not they witnessed. Here's an example -- and it may not be a great example. Someone reports an illegal dumping on a lot next to them --

Q. Okay.

A. -- and they see what the -- what the truck name is and the company name. We don't see them do it. We see -- and we get a complaint. That may be something that we don't have the visual for, but we could issue the NOV.

Q. Okay. Now, would you have to go out and see the evidence of the dumping to confirm that a dumping actually took place?

A. In that case, would you have to? No. In this case, would they probably? Yes.

Q. Okay.

A. But it would not be a requirement.

Q. In practice, the code compliance officer would not issue a citation to the company alleged to have dumped without at least confirming that the -- that there's a pile of stuff that's been dumped?

A. Sure.

Q. Okay.

A. And, again, that was my off-the-top example. But could there be other cases in which there wasn't something visual to check? Of course. And they could issue without having the opportunity to look at something.

Q. Okay.

A. Yes.

Q. What -- can you give me an example?

A. I knew you were going to ask that. Give me a sec to think about it. But, clearly, there are things in the code that violate the code that do not require a visual.

Q. Okay.

A. I'm blank right now.

Q. Can't think of any. If you think of any --

A. Sure.
Q. -- before we finish our time today --
A. Of course.
Q. -- would you remember to tell me? Thank you.
A. I'll just say, I'm a little focused on what you're saying. I'm not really thinking about other things. But perhaps, during lunch, I'll give it some thought.
Q. Are you able to understand what I'm asking today?
A. Yes. You're fine so far.
Q. Good. My confidence was suffering a little bit.
What happens in a situation where -- for example, a neighbor complains about the grass and the code enforcement officer is busy today. He can't go out there until tomorrow. He goes out there tomorrow, and the grass has been cut.
A. Uh-huh.
Q. What would happen in that case when he gets there and the grass is code compliant?
A. Uh-huh.
Q. What would happen?
A. In that case, there would not be a notice of violation. In most cases, notices of violation are to enforce code, to try to have people follow the code. It's not really a punitive process as much as it is just

preventing people from violating code. So, in the case of a grass or a sidewalk or something issued, the code violation is corrected, then the code compliance officer has -- has no need to issue a notice of violation.

Q. Okay. And, with the dumping example, if the code officer is busy today and goes out tomorrow and the matter that was dumped was already cleaned up, would he have reason to issue a notice of violation in that case?

A. I think they could depending on the situation. If the neighbor said, you know what, I'm going to suck it up and just throw away the stuff myself, there could still be a violation. Depends who picked it up. I'm not sure if that's the greatest example that I picked. If the answer is does the material still have to be there for them to issue a notice? No, it wouldn't necessarily have to be that way.

Q. Okay.

A. Now, I think that the -- before a matter is brought to the special magistrate, I think that they try to have some kind of backup to it; but it's not a requirement.

Q. Okay. Now, you said that the ordinance with respect to the conversion therapy ban is a little bit different than these other matters we discussed --

A. Yes.

Q. -- right?

And it's different how?

A. Well, as we just eluded to, it's easy to -- something that is very physically, very easily discernible. The grass as you're driving by, that's something that's very visual; and it's easily documented. It's easily determined if it's a violation or not. Something that is part of the conversion therapy, there would have to be a complaint, which is not unusual. A good portion of our code cases stem from initial complaint. But the -- the manner of proceeding next is a little bit different than some of the easily discernible visual things.

Q. Okay. And what is that matter of proceeding next in the context of the conversion therapy ordinance?

A. Sure. Well, the code compliance officer -- and I think earlier as I talked to our manager --

Q. Mr. Sheedy?

A. Mr. Sheedy.

I had asked, if there were to be a complaint, would the code person -- code compliance person handle it; or what would be the process? He thought that, because we have not had any yet, that at least the initial would go to him for his review and management. But what would happen I think would still be very

similar is that the code compliance officer or the manager, whomever was handling it, would take the complaint, do whatever investigation or not as they felt appropriate before it went to the special magistrate. In the meantime, if there was enough to go to the magistrate, then they would issue a notice of violation to address the issue.

Q. Okay. So a complaint regarding a potential violation of the conversion therapy ordinance could go either to a code compliance officer or perhaps to the manager?

A. Yeah. I would think that it would initially go to the code compliance officers. That's typically the case. But, when it came to them, they may choose -- and I think they've been instructed to -- to -- on cases where it's outside their normal operation, to ask for the assistance of the code compliance manager.

Q. Okay. So take an example. Code compliance officer receives a telephone call from someone --

A. Uh-huh.

Q. -- who heard it from a friend who heard it from a friend who heard it from another that Dr. Otto has been messing around with conversion therapy.

A. Uh-huh.

Q. Would that compliance officer believe it?

A. I think that that's a pretty tough hypothetical to opine on. I think, for any violation, the code -- the code compliance officer has to look at their -- their belief if there is a violation that has occurred. And that could happen from visual concurrence or corroboration from others or -- but they would have to believe that the code was violated.

Now, if a friend of a friend of a friend of a friend reported it, they may not take that as being something -- taking it forward without some further information, corroboration.

Q. Okay.

MR. MIHET: Can we go off the record for a sec.

(Recess)

MR. MIHET: We're back on the record.

And, for the record, the jump drive with the three videos that we discussed earlier in the testimony is going to be marked as Plaintiffs' Exhibit 24.

(Plaintiffs' Exhibit No. 24 marked for identification)

BY MR. MIHET:

Q. All right. So you said that the -- the example or the hypothetical I gave you last time was a little -- a tough one. Let me try another one and see if it's a little easier.

You have a minor calling a code enforcement officer; and, he says, hey, you know, I'm -- I'm a boy and -- but I like to do things that girls like to do. I like to play with dolls and do other things. And I went to Dr. Hamilton, and she told me that I really should focus on being a boy and that I should be proud of my boyhood and that I should do boy things. And, you know, I told her that I wanted to do girl things. And it just -- the whole thing made me feel really sad and depressed. Okay? That's the information that's relayed to the code enforcement officer.

A. Uh-huh.

Q. Does the code enforcement officer -- well, what does he do?

MR. ABBOTT: Object to the hypothetical.

THE WITNESS: How old of a person are we talking?

MR. MIHET: Well, let's say this is a nine-year-old boy.

THE WITNESS: Okay. I'm not sure I can answer directly. I know generally what would happen. The -- in answer to your earlier question could the code enforcement officer write a notice of violation based on the complaint, the answer is, if he felt that it violated this ordinance -- or that ordinance, the answer

is he could -- he or she could do so at that point.

Having that lack of details, they may chose, in conjunction with the manager, to do some additional work; whether to talk to the therapist, whether to talk to the parents or something else to determine if that violation occurred.

MR. MIHET: Okay.

BY MR. MIHET:

Q. So, in this particular case, the code enforcement officer calls the parents and the parents say, oh, we didn't know he made that call. We prefer not to speak with you.

A. Uh-huh.

Q. And then he calls Dr. Hamilton. And, she says, I can't speak with you about this. This is covered by my patient/client privilege.

A. Sure.

Q. What would the code enforcement officer do in that case?

A. I think --

MR. ABBOTT: Object to the hypothetical.

THE WITNESS: Again, the hypothetical that -- not knowing all the facts, they could chose to do one of a couple things. They --

MR. MIHET: Let me just interrupt you for a

second.

BY MR. MIHET:

Q. Those are the facts that he has available, the ones that I've just described.

A. Sure. But he didn't -- we don't know the conversation with the parents. We don't know the conversation with Dr. Hamilton. We don't know the specifics of what was said, what was asked in order to make that determination. I know that those are the general facts.

Q. Okay.

A. But, obviously, there are more things that are going to be included in their deliberation.

Q. Except, in this particular case, they weren't able to get anything from the parents or --

A. So the parents have hung up on them?

Q. Right.

A. And Hamilton hung up on them?

Q. Right.

But the only thing they have now is what the nine-year-old boy reported about his interaction -- alleged interaction --

A. Sure.

Q. -- with Dr. Hamilton.

A. So, based on the hang up of everybody else and

the terse conversation that the nine-year-old had, the code officer would have to make the call on whether or not that he believed that the code was violated. And, if so, then he'd write a notice of violation to Dr. Hamilton. And, if not -- and I'm guessing, as part of that, he would also talk with the manager and try to get some kind of a collaborative decision on what the next steps would be.

Q. Okay.

A. But if they -- but if they felt there was a violation, then they could certainly right up the NOV.

Q. So the code compliance officer would have to make a determination on whether or not the therapist encouraging the boy to do boy things and discouraging the boy from doing girl things amounts to what the ordinance defines and prohibits as conversion therapy?

A. Yeah. They would not be the final arbitrator. But they would be someone who would determine in their judgment if it violated and, if so, write the NOV and deliver the NOV. The magistrate would be the person who would be, if you will, the -- the arbitrator of whether or not that violation really was a violation and what needs to be done to remedy if it is or if it gets tossed.

Q. As in all other cases?

A. As in all other cases, exactly.

Q. Sure. But, in terms of initiating the process of the -- the state, so to speak -- not the state. That's the wrong word. In terms of initiating the process of the government --

A. Yes.

Q. -- it's the code compliance officer that would have to make the determination as to whether or not a violation took place?

A. Sure. Now, there's always resources available if -- in this case, if they -- if there was a question, they could certainly call the City Attorney's office. They could certainly call others in the City for some guidance on that matter.

Q. Okay.

A. But, yeah, I don't want to portray that this person -- that this code enforcement officer, that she's out there or he's out there by himself doing this. There are other resources available. So it's not necessarily their call.

Q. Okay.

A. But, ultimately, it's the code compliance section that would issue the NOV.

Q. Okay. Now, with respect to other violations like the grass or the dumping example, the code compliance

officer handles that on his own?

A. Absolutely.

Q. Okay.

A. Because it's something that happens on a relatively frequent basis. They're comfortable with it. They know what code to cite. They're familiar with the -- because it happens on a relatively frequent basis. This would be -- as we talked about, this is not a frequent occurrence.

Q. Okay. Nevertheless, because the ordinance is on the books, the City has to be prepared to enforce it?

A. That's correct.

Q. Is there any policy by the City as to whether or not it would enforce a violation of the ordinance?

A. There's been nothing that said that they wouldn't.

Q. Okay.

A. Because it passed and is now codified, it is part of the code; and it's to be enforced.

Q. Okay. And so does it give the City any pause that a code compliance officer with a high school diploma or the GED equivalent would be called upon to determine whether or not a professional therapist licensed by the state and subject to the state's guidelines violated an ordinance of the City through the

professional speech and advice of that therapist?

MR. ABBOTT: Object to the form.

THE WITNESS: I think -- I'm not sure giving pause. But, clearly, there are things in our code that are not something that they do on a regular basis that would be -- for example, there is a -- a fertilizer ordinance that we have. And so people who apply fertilizer have to be certified. They all have to do it in a certain way. Our code people with -- you're saying your -- with our GED requirement, even though I think a lot of them are more knowledgeable than just their just high school diploma, would now have to understand fertilizer, fertilizer application, which might be outside their background, as well.

So there are certainly instances or certainly code provisions that don't come up very frequently that are going to be -- might be difficult for them to come to some kind of a notice. But that's why we have the managers. That's why we have other resources available to help them when they go through that.

BY MR. MIHET:

Q. Now, in the fertilizer example that you gave, the ordinance that you are referring to requires that certain fertilizer be applied by licensed applicators --

A. Uh-huh.

Q. -- for lack of a better term?

A. Yes.

Q. And, in order for a licensed -- I'm sorry. If someone applies that fertilizer without the proper license, they would be in violation of the ordinance?

A. That's correct.

Q. So, in that particular example, the code compliance officer would have to determine whether or not the person applying the fertilizer has the requisite license?

A. Or whether they believe they have it or not, that's correct.

Q. Right. So --

A. Whether they believe that the code was violated.

Q. Right.

A. Yes.

Q. So, to determine whether or not the alleged violator is properly licensed, they would consult a City roll or some other database of licensed fertilizer applicators?

A. If one existed, yes, they could; or they could ask for that certification. But, if the person wasn't around, they could issue the notice of violation without knowing, without being able to determine. And then the

magistrate could then sort it out at that point.

Q. And the alleged violator could come in and say, hey, here's my license; and the whole thing goes away?

A. That's correct.

Q. Now, that doesn't strike me like a very difficult enforcement decision for the GED-trained code compliance officer to make. He can simply determine whether or not an applicator has the requisite license or not?

A. Sure. And I wasn't really talking about the application but the types of fertilizer they have to go down. They have to be a certain phosphorous/nitrogen ratios that can go down at certain times and under certain conditions. And knowing whether something is an 11-to-1 or 20-to-5 ratio is not something that might be easily discernible by a code enforcement officer.

Q. Well, he can look at the ingredient list for the particular fertilizer, right?

A. If he had the bag, if he had the fertilizer.

If he gets a complaint from a neighboring property saying, hey, some guy was just here; and he put down fertilizer that I think is not appropriate for the fertilizer ordinance --

Q. Okay.

A. -- how would he go about making that -- if he goes there and the applicator is there, they can talk.

They can evaluate whether or not -- if there is the bag in the trash, they can look at it to evaluate. But, if they don't, then they certainly are able to write the NOV based on what they know, what they've heard and then let the magistrate determine whether or not that fertilizer was applied properly. That's the point I was trying to make. And, again, it's probably not -- not the best analogy. But it's one that we've recently passed, that discussion.

MR. ABBOTT: Is that a good spot?

MR. MIHET: I think that's a good spot to stop for lunch.

(Recess)

BY MR. MIHET:

Q. Mr. Woika, are you ready to proceed?

A. I am.

Q. Just a reminder that you're still under oath. And we will try to see if we can wrap up before too long here.

A. Great.

Q. Is there a particular standard that applies with respect to when a code compliance officer can issue a notice of violation? I'm thinking probable cause or something along those lines.

A. There is not. I think that there is -- for the

notice to go to the magistrate, they obviously want to have enough information, enough of a case to be able to prove up. But I don't know that there's a -- a threshold of probable cause like you might have on the criminal side. I don't think that there's anything that's been established for the code.

Q. But, at a minimum, the code compliance officer has to believe that a violation has occurred and that he has enough evidence to prove the violation so that he's not wasting the special master's time?

A. I think that's fair.

Q. There's not a policy or even a practice where the code compliance officer can just say, well, I'm not too sure about this; but let me just write it up and we'll let the master sort it out?

A. No. That -- I mean, I think they could do that; but that would not be encouraged and --

Q. That's not what they do in practice?

A. That's correct.

Q. Okay. And we're in agreement that, for a code compliance officer to determine whether or not a violation of the conversion therapy ordinance has taken place, he would have to make some type of a judgment call? It's not as simple as going to measure the height of the grass or to check the County rolls to see if a

license is in place, correct?

A. That's correct.

Q. Okay. At the beginning of the deposition, you listed a number of departments and divisions that are under your supervision.

A. Uh-huh.

Q. What kind of supervisory authority, if you will, do you exercise over those departments and divisions?

A. It depends.

Q. Okay.

A. Some divisions I have direct supervisory. Others I'm more of a coordinating -- a liaison, if you will.

Q. Okay. And, over the divisions -- let me strike that and try again.

Over the ones that you are more of a coordinating liaison, is there somebody else at your level that has supervisory authority; or is it still you that's the supervisor?

A. It's still me. For example, utility services. Utility services is a separate department. And the department director for utility services reports to the City Manager. However, they report to the City Manager through me. Even though I'm not their direct supervisor, we still talk. We still -- the documents would come to me before they went to the City Manager.

We have discussions on projects and things. So I'm kind of the filter between the utilities and the City Manager. There's not another report -- technically, I'm not Chris Helfrich's supervisor. But I am the person from the City Manager's office who is assigned to his department.

Q. Got it.

Which of the departments and divisions that you identified are ones that you do have direct supervisory --

A. It would be easier to say the ones that I don't.

Q. Okay.

A. The ones that I don't are utility services, recreational services and municipal services. Those are the ones that have department directors. They have their own operation. They report supervisory to the City Manager. However, they go kind of through me as liaison, as coordinator.

Q. Okay.

A. All the ones that -- other ones there is, I am their department director.

Q. Okay. Over on Mr. Brown's side of the equation, does the same structure apply? There are some divisions or departments that he has direct supervisory authority over and some where he is more of a liaison?

A. Yes.
Q. And which ones would be the ones where he does not have direct supervisory?
A. Police, fire. And we're currently transitioning, so development won't be. We -- for a while, he was the department director for development services.
Q. Okay.
A. But we now have a development services director. And so we're phasing out of him being department head and having our development services director be that entity.
Q. When did that start -- that process start?
A. About six, eight months ago.
Q. Okay. So, up until six or eight months ago, he was the direct supervisor of development services?
A. That's correct.
Q. Is he still to a certain extent but gradually less so or --
A. Yes.
Q. So we said police and fire he is not the direct supervisor. Development services he is kind of releasing the reins?
A. That's correct.
Q. Are there any others where he is not the direct supervisor?

A. No.
Q. Does the code enforcement division fall under development services?
A. It does.
Q. It does.
So, up until six or eight months ago, he was the direct supervisor of Code Enforcement?
A. That's correct.
Q. Okay. Today, is -- is Code Enforcement still under his direct supervision; or has that already been transitioned off?
A. Been transitioned off.
Q. When was that transition?
A. Started, like, I want to say six, seven -- five, six, seven, eight months ago.
Q. Okay. And who has been sort of placed under him or -- or in charge of the development services?
A. Just a bit of explanation. We hired a new chief building official --
Q. Okay.
A. -- who had some code experience. And the same -- at or about the same time, we hired a new development services director about maybe a year -- maybe six months before that. And so, with those two new people, the new structure is that the Code Enforcement, who used to work

directly for George Brown, now works for Cosmo, John Cosmo, as the chief building official --

Q. Okay.

A. -- who then reports through development to George. So it's -- there's another few intermediary levels between Code Enforcement and George Brown.

Q. Got it.

Getting back to the departments and divisions over which you have direct supervisory capacity --

A. Uh-huh.

Q. -- what kind of supervision do you exercise?

A. Not -- in what way?

Q. I guess I'm wanting to get a general idea of how you exercise supervision over them.

A. We meet. We go over things. I sign leave slips, valuations for those different groups.

Q. Okay. How familiar do you have to be with the departments and divisions that you directly supervise in order for you to be able to adequately fulfill your responsibilities as supervisor?

A. I think, certainly, the more knowledgeable the -- that probably the easier it is. I don't know if you need to be an expert but certainly have an idea of what the functions are and how it works. It certainly helps to be a manager, of course.

Q. Okay. And do you feel like you have pretty good command of what happens in the departments and divisions that you directly supervise?

A. I'd like to think so, yes.

Q. As between you and your counterpart, Mr. Brown, which one of you two do you think would have a better understanding and knowledge of the inner workings of the departments and divisions that you directly supervise?

A. It's a little bit different because George has been here a long time, and he has supervised a lot of the departments that I have currently liaison with. And I've had some of the ones that he has. So I think, if your question is who, for example, knows municipal services, the functions, better? I have done it for the last couple of years. But I think that both of us are familiar with a lot of the operations of the City.

Q. Okay. With respect to the departments and divisions that Mr. Brown directly supervises or supervised, as between you and him, who would have a better understanding and knowledge of the inner workings of those departments?

A. Again, because I used to supervise the financial services -- he has it currently now. So they're -- they're -- I don't know if either one has a little better idea. The police/fire I've never supervised. So

he probably has a little better idea of functions, even though, of course, as -- in both of our roles, it would be nice if we were able to say this is siloed and we never do the other. But, in our organization, fortunately or unfortunately, we end up being part of projects across all departments.

Q. Okay. With respect to Code Enforcement, as between you and Mr. Brown, who has a better understanding of the inner workings of that department?

A. Probably George.

Q. Okay.

(Plaintiffs' Exhibit No. 25 marked for identification)

BY MR. MIHET:

Q. Mr. Woika, I've handed you a document that we have marked as Exhibit 25. You can take a minute to familiarize yourself with it. I'll be asking you some specific questions about its contents.

A. Yes. I've seen this.

Q. Okay. When is the last time you saw this document before just now?

A. This morning.

Q. Okay. This is a chain of e-mail communications between it looks like yourself and Mr. Brown and the City Attorney and perhaps the City Manager, correct --

A. That's correct.

Q. -- dated July 18, 2017?

Now, in the first e-mail in the chain, which is in the bottom half of the document, it appears that Mr. Hoch is transmitting some materials wherein he says, please see attached.

A. Uh-huh.

Q. And --

A. Right. I think we talked about that e-mail. That was the first e-mail under which there were two attachments. One was the -- his memo from the Human Rights Council. The other one was that draft ordinance.

Q. Got it.

This is the e-mail that started it all?

A. It is.

Q. Okay.

A. Maybe not started it all. But, yes, that was that e-mail we talked about.

Q. Okay. And so, on -- on the top of this page, we see Mr. Brown's response, correct?

A. Yes.

Q. All right. And so he says: 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.

Did I read that correctly?

A. Yes.

Q. What was Mr. Brown saying or referring to in that statement?

A. I think his -- that statement is not much different than the statement we talked about earlier from Council Person Rodgers and City Attorney and City Manager at the council meeting that we looked at talking about enforcement and difficulties with enforcement of this ordinance.

Q. Like you said, you don't think it's much different. Would you agree with me that it is different in degree? I mean, as I recall, the City Manager said something to the effect of I'm not sure how we would enforce it, right?

A. That's correct.

Q. The City Attorney said something to the effect of that there may be difficulties in practical enforcement issues?

A. That's correct.

Q. Mr. Brown, the direct supervisor of the Code Compliance Department at that time, right?

A. Uh-huh, yes.

Q. He seems to go a lot further to say it would be extremely difficult, if not impossible, to enforce.

Would you agree with me that that is different than the statements that the others made?

A. Yes. That's what it says. And I think you -- you've identified the quotes --

Q. Okay.

A. -- close -- closely.

I guess my point, not to say that they were the same quote, to say that they all recognized the difficulty in enforcement of this ordinance for the reasons that we talked about earlier.

Q. Sure. I understand.

I guess the reason I felt it necessary to follow up with you is it seemed to me like you were stating or perhaps implying that they were not much different in degree. And I think we've established that they are?

A. Yes.

Q. Okay. Now, he goes on to say: 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.

Do you see that?

A. Yes.

Q. What do you think he is attempting to convey there?

A. I think the same things we've been talking about, that, when you get before a special magistrate, in order to prove your case, in order to be successful in your case, you'd have to have enough evidence to weigh in your favor in front of a special magistrate. And I believe what he is saying -- what it says is that it would require some disclosure by the patient or patient's family or therapist in order to prove the case up before the magistrate.

Q. Or some credible witness?

A. Or credible witness.

Q. Okay.

A. Some kind of firsthand evidence I believe is what he is saying.

Q. Right. And that particularly as to whether the treatment had been administered in violation of the ordinance, right?

A. Yes. That's what it says.

Q. Okay. Now, he goes on to say: The City has not adopted ordinances limiting or regulating professions otherwise regulated by the state.

Do you see that?

A. I do.

Q. What do you think he was trying to say there?

MR. ABBOTT: Counsel, we can cover this

briefly. But I think this is the category that the judge has limited discovery on.

But why don't you answer that question, and I assume we're going to move on pretty quickly.

MR. MIHET: Yes.

THE WITNESS: I think it has to do with the preemption that we talked about earlier. I think it has to do with local regulation of professions that are also regulated by the state.

BY MR. MIHET:

Q. Was Mr. Brown on -- on July 18, 2017, in a position to know whether or not the City had adopted ordinances limiting or regulating professions otherwise regulated by the state?

MR. ABBOTT: Objection.

Exceeds the proper scope of the deposition.

THE WITNESS: Mr. Brown had the same position he is now. He is Deputy Manager. And he has -- he's familiar with the -- the code then as he is now.

MR. MIHET: Okay.

BY MR. MIHET:

Q. After Mr. Brown sent this communication, was there additional discussion between him and you and/or others with respect to whether or not this proposed

local ordinance would be extremely difficult, if not impossible, to enforce? And, by that, I mean, discussion that is not reflected on this Exhibit 25.

A. I don't know of any.

Q. Okay. In terms of the experience or expertise of the code compliance officers, do they have any experience or expertise in enforcing ordinances against licensed professionals?

A. I don't know that -- that there is -- let me ask you a question. Are you wondering if there's policies or procedures against code, against -- no, there's not --

Q. Okay.

A. -- against licensed professionals. However, if licensed professionals violate the code, there's no reason why they can't enforce.

Q. If a licensed professional has grass that's too tall at his house or at his place of business, there's no reason why a code enforcement --

A. Sure, that too.

Q. Okay.

A. But, if there was a provision in the code that dealt with professional standards or that they felt was being violated, they could certainly do so. I can't think of anything top of head. It wouldn't necessarily

have to be just limited to their property. It could be their practice. It could be their --

Q. But, in terms of the experience or expertise that they already have --

A. Uh-huh.

Q. -- in enforcing regulations against licensed professionals, I understood you to say that they don't.

A. They don't have specific ones. This is not exactly on point. But, if there is a requirement for medical offices to have some kind of something and they don't have that, they can certainly come in and -- as I'm explaining it, that doesn't even sound close to being what you say. But they do have the authority to be able to do that.

Q. Sure. And, just so we're clear, I'm not asking about authority. I'm asking about practical --

A. Sure.

Q. -- experience or expertise. And I understand you to say that they don't have that.

A. They don't have procedures. I'm not sure that they don't have experience. But they don't have procedures or practical guides, if you will, written guidelines.

Q. Okay. Well, you say you're not sure whether they have experience.

A. Sure.

Q. Do they have experience or expertise? I mean, have they been doing this a lot or enough to develop experience and expertise?

A. Besides having the certifications through whatever professional organization, others -- they have worked at other -- other communities. They have worked at other professions. So I don't know what their level -- and it's individual what their level of experience working with professional licensed professions are.

But, from a City standpoint, we do not -- we have not provided training specifically to professional --

Q. Regulations.

A. Thank you.

(Plaintiffs' Exhibit No. 26 marked for identification)

BY MR. MIHET:

Q. So now I'm showing you a document that we have marked as Exhibit 26. Take just a minute to familiarize yourself with it. I'll ask you a few questions about this one. And we're going to go through it sort of step by step. So if you just want to --

A. Sure. Yes, I've seen it.

Q. Okay. When is the last time you saw this document?

A. This morning.

Q. Okay. Starting with the -- and, just for the record, this is a chain of e-mail communications spanning from July 21, 2017, to July 21, 2017, so same date. And there's the Bates number City 991 through 993. Starting with the last page, City 993, and with the bottom e-mail which is the first e-mail in this chain of communications. Are you there?

A. I am.

Q. This is an e-mail from Mr. Brown to it looks like three individuals; a Lori LaVerriere, an M. Bornstein and a P. Schofield. Do you see that?

A. Yes.

Q. Do you know who those three individuals are?

A. I do.

Q. Who are they?

A. Lori is the City Manager of Boynton Beach. Mike Bornstein is the City Manager of Lake Worth, and Paul is the City Manager of Wellington.

Q. Okay. So Mr. Brown is communicating with them. And, he says, colleagues: Each of your cities has adopted a conversion therapy prohibition ordinance according to information we have been provided. 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? Please let me know when you have time. Thanks.

Did I read that correctly?

A. Uh-huh, yes.

Q. Why did Mr. Brown send this inquiry to his colleagues at these other cities?

A. There was an e-mail that came out just before this -- it might have been the day before. I think it was the day before -- from Rand Hoch to the same group that was sent, the first one, a couple days earlier.

Q. Okay.

A. And it had a listing of the ordinances that had been passed by other cities in Palm Beach County including Wellington, Lake Worth and Boynton Beach. And I believe what George was asking, because of his earlier questions -- earlier thoughts about enforcement, was finding out what others were doing regarding enforcement of the ordinances that they had already passed.

Q. Okay. Do you know whether anyone had asked Mr. Brown to make this inquiry or whether he did so on his own initiative?

A. I think there's an e-mail that came out before this one that said I will check with the other municipalities or something along those lines. I don't remember what the exact wording was. But it was

follow-up to one of these e-mails. There's one that said he would do so.

Q. Do you recall who he sent that e-mail to?

A. I think it was to Frieser, Leif and I. I think it was part of that chain. I think it was follow-up after -- after this one.

Q. Okay. Do you know if that particular e-mail was produced to the Plaintiffs in this case?

A. That's why I looked at it this morning. So I believe it was. And it might be on the tail end of another e-mail. But I remember seeing something that he would contact other jurisdictions.

Q. Okay. That's a document that -- well, let me ask your attorney.

MR. MIHET: Do you know if that document has been produced?

MR. ABBOTT: I'm virtually sure it has. What I candidly asked the witness to review was -- was a subset of the material that has been produced. But let me know if you can't find it or if I've made an error. But we'll certainly get you a copy.

MR. MIHET: All right. I don't recall seeing it. So...

THE WITNESS: It was a one-line e-mail. And it was I believe at the end of this chain or as part of

this one.

MR. MIHET: Okay.

BY MR. MIHET:

Q. Do you recall if somebody was asking him, hey, what are other people doing; and he responds saying, I'll check? Or whether he volunteered to say, I'll check to see what others were doing?

A. I don't believe it was a response. I believe he just said, I will check what other jurisdictions are doing.

Q. Okay.

A. It might be after the one -- there was an e-mail that came to -- and it's probably there. There was an e-mail that came from Rand Hoch that listed six or seven different ordinances from the different municipalities that had -- and it went to the City Council and Attorney and City Manager. And I believe it got forwarded to George and I. And I believe the next one from George said -- or from George said, I'll check other -- these other jurisdictions.

Q. Okay. And that's an e-mail that you looked at this morning in preparation for this deposition?

A. Yes, I believe so.

Q. Okay. And --

A. I think that was on the production e-mail one.

Q. Okay. And looking at that e-mail refreshed your recollection or informed your recollection about the matters you're testifying here today?

A. What's that?

Q. Looking at that e-mail --

A. Yes. Yes, exactly.

MR. MIHET: Okay. Well, we'll look in the production again to double check. But, if we don't have it, we would ask that we receive that, as well.

MR. ABBOTT: Sure. In fact, do you think we could find -- if you wanted to take a break, we might be able to find another copy.

MR. MIHET: Maybe on the next --

THE WITNESS: I'm sure I can.

MR. MIHET: Yeah, on the next break. Let's keep going, and we'll look for it.

MR. ABBOTT: Okay.

BY MR. MIHET:

Q. All right. So he sends out this communication. The first response appears to be the one that is immediately above that, still on page 993. And it's from Lori LaVerriere. I'm probably butchering that pronunciation. But it looks like it comes back three minutes or so after he sent his response. Do you see that?

A. Uh-huh, yes.

Q. And, she says, Hi George, we have not established any enforcement procedures or methods of investigation. I'm thinking we will more likely be responding to a specific complaint.

Do you see that?

A. Yes.

Q. Now, Mr. Brown responds immediately to that, looks like two minutes later. It begins -- the header is on the bottom of the previous page, 992.

A. Uh-huh.

Q. But the substance is at the very top of 993. He says, thanks Lori, that is what I expected to hear.

Do you see that?

A. Uh-huh, yes.

Q. What is he saying when he says, "that is what I expected to hear"?

A. I think, again, speaking -- I don't -- I can't say exactly what George -- but my interpretation, after reading this, would be is that George has already expressed his -- his belief that it would be a difficult thing to enforce. And so, when she said that she will be -- she'll be looking at complaint-based violations, I think he would agree -- he agreed that that would probably be the only way that you could reasonably

expect to enforce this. You're not going to be sitting in on sessions. We're not going to do some kind of a sweep or break-in on somebody. It's really just going to be based on complaints.

Q. Okay. So then it looks like Lori LaVerriere responds back same minute. And that's at the bottom of 992. And, she says, are you contemplating procedures, enforcement, et cetera? Do you see that?

A. Yes.

Q. And then he writes back about six minutes later right above that. And, he says: 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 a 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.

Did I read that correctly?

A. Yes.

Q. So what was he talking about when he said, I've recommended we adopt a resolution instead of the ordinance?

A. I think just what he said is --

Q. Okay.

A. I think, at this point, he believed, for the reasons you had talked about earlier, that he thought a -- a better alternative to this would be to have a resolution as opposed to an ordinance with enforcement.

Q. And the reason for that -- or one of the reasons for that is because he, as the supervisor of the Code Compliance Department, believed that the ordinance as proposed would be more or less unenforceable, correct?

A. He considered it to be more or less unenforceable. That's what he wrote, yes.

Q. Okay. And the "he" here is the direct supervisor of the Code Compliance Department at that time?

A. That's correct.

Q. Okay. Now, what -- who did he make the recommendation to with respect to a resolution being the better approach rather than the ordinance?

A. I think really the only people that he could talk to -- reasonably talk to -- and I don't recall him talking to me about it. He may have -- would probably be the City Attorney's Office and the City Manager.

Q. Okay. And was his recommendation ever considered by the City Council?

A. No, not that I know of.

Q. Why not?

A. That was never presented to them. They were presented the -- the ordinance as -- as suggested or as passed on by the Mayor to the City Attorney's Office who prepared the ordinance. And the Mayor elected to go forward with that ordinance.

Q. Why was Mr. Brown's recommendation not presented to the City Council?

A. In this case or in general?

Q. In this case.

I mean, he -- I believe you said that he made a recommendation perhaps to the City Manager or the City Attorney?

A. Sure.

Q. Why did either one of those two people not take that recommendation and make it to the City Council?

A. Sure. Well, as I'm sure you're aware from how the organization, the two people that work for City Council are the City Manager and the City Attorney. Almost everything we do funnels through one of those two individuals. It is not unusual -- it's not common but it's not unusual for people who are involved with new ordinances, new resolutions, new developments, new actions not to like all or part of a resolution. And they make recommendations.

I make recommendations all the time to the

Manager. He may or may not like them. If he doesn't, I don't say, "and stop doing whatever." I go with what he thinks is the right approach, and I work hard to make sure that happens. So to have someone not agree with a draft ordinance, draft resolution, development project, work order doesn't necessarily mean that -- that that -- that disagreement is manifested in a change.

Q. Okay. Now, did Mr. Brown's statement or opinion, if you will, that the ordinance as proposed would be more or less unenforceable, did that make it to the City Council as part of its deliberation of the ordinance?

A. I'm looking. I thought I saw it in this earlier memo. No. If the question is did this e-mail chain get to -- or the content of this e-mail chain get to the City Council, I think the answer is no.

Q. Well, that covers part of my question. My question was a little broader than this particular e-mail to ask whether the opinion of Mr. Brown that this proposed ordinance was more or less an unenforceable one, did that make it to the Commission for its consideration, whether as expressed in this e-mail or some other document or testimony or statement?

A. I want to say, no, because I think the --

Q. And I think I said Commission; but I meant Council, City Council.

A. Thank you. I took it as that.
Q. Okay.
A. I don't know that it was.
Q. Okay. Certainly, it was not covered or discussed during any of the three meetings that we watched video of today?
A. Yes, it was. It was certainly mentioned when we were -- when they were talking. And I think we talked about it earlier when the City Manager said, I'm not sure how we would enforce. And the City Attorney said she concedes that there -- it might be difficult to enforce. So that clearly was talked about at that meeting.
Q. Right. The issue of enforceability was discussed?
A. Yes.
Q. What I meant to say -- and I apologize if I wasn't clear -- that, certainly, Mr. Brown's opinion that this was more or less an unenforceable ordinance, that wasn't presented to the City Council in any of the three meetings, correct?
A. I think that's correct.
Q. Okay. Would it have been important -- and strike that just for clarity.
A. At least not in the public meetings as you -- as

you have framed it, yes.

Q. Okay. We've already covered the other alternatives earlier when I asked you if -- if the -- the opinion that he expressed here, if that had made it to the Council. And I believe you said that you did not believe that it did.

A. I did not believe that it did.

Now, I'll caveat that slightly in that there may have been conversations between the City Attorney and individuals --

Q. Okay.

A. -- but I don't know of those. But, as a Council as a whole, I don't believe anything was transmitted.

Q. Okay. Now, at the third meeting of the City Council at which the ordinance was discussed and where the final vote ultimately occurred, we've already established that at least two people there were -- were expressing some concerns or doubts -- I don't want to get hung up on the terminology -- but some concerns about the enforceability of the ordinance through the Code Compliance division.

A. Sure. I would suggest actually three because the question came from a Council member and then answered by the two staff members. So, yes, two that -- two staff members talked about it, yes.

Q. Correct.

Wasn't it important for them -- as they were considering whether or not or how the Code Compliance division could enforce this ordinance, wasn't it important for them to hear from the direct supervisor of that division and to get his thoughts or input on the enforceability of the ordinance?

A. No. And I say the -- it is unusual -- it would be very unusual if anybody -- people who were in the organization to address the Council, to have internal memos or e-mails being presented as part of a package to City Council.

Q. Okay.

A. That's not the way the procedure generally works. Everything's worked out through the staff, through the Attorney's office, through the City Manager's side. And that is presented to Council for their review, for their decision to go forward, not to go forward or to modify.

Q. Sure. But we saw an example where, at the first Commission meeting -- Commission. I keep saying Commission. At the first Council meeting, the City Council decided that it wanted more information; and it asked for more information, right?

A. Uh-huh. Yes, I heard that.

Q. So, if the City Council was having concerns or

doubts about whether or not the enforcement -- the Code Enforcement division could enforce this ordinance, they could have asked for additional or more information from the direct supervisor of that department, correct?

A. No. They would have asked for the City Manager and asked for more information. And, if the City Manager felt that he needed to talk to George or to Doug or to someone else, he could certainly do so. But the Council only works through, as we talked about, the Attorney and the Manager.

MR. MIHET: Okay. It looks like we found that e-mail. So --

MR. ABBOTT: Okay. Good.

MR. MIHET: -- we'll call off the search party.

MR. ABBOTT: Okay.

BY MR. MIHET:

Q. All right. In the same exhibits, same page, looking at the e-mail right above the one we just discussed, we see about seventeen minutes later Lori LaVerriere responds back to Mr. George; and, she says, agreed. Do you see that? It's difficult --

A. Yes, yes.

Q. -- to see but --

A. Yes.

Q. -- it's there.
So the first sentence is agreed, period, right?
A. Uh-huh.
Q. She is agreeing with Mr. George --
A. Mr. Brown.
Q. I'm sorry, Mr. Brown.
-- that, among other things, ordinances like this are more or less unenforceable?
A. I don't think that's what -- if you look at the previous e-mail, I'm not sure what she's agreeing with is that he has recommended a resolution.
Q. Okay.
A. Then their early stages of considering this matter.
Q. Okay.
A. So I'm not sure what she's agreed with.
Q. Well, the reason he wrote to Ms. LaVerriere is that --
A. Yes.
Q. -- her city had already passed the resolution, right?
A. Sure.
Q. So --
A. But there's also --
MR. ABBOTT: Excuse me. I'm sorry.

Objection.

Did you mean to say a resolution?

MR. MIHET: No, an ordinance.

BY MR. MIHET:

Q. Right?

A. Yes. I think you're -- I'm sorry, I interrupted you; and I shouldn't have.

Q. I guess my question was: She wouldn't be agreeing with him that they're in the early stages of the process. Her jurisdiction had already passed the ordinance, right?

A. It did.

Q. Okay. So I guess we can't really get into her mind then. We don't know whether she agreed with only a sentence or all of it. But she agreed?

A. In concept. I don't know if she agreed that the matter is not something that our local government should take up, that it's unenforceable, that it is --

Q. Okay.

A. I'm not sure what she's agreeing to.

Q. She certainly didn't write back and say, oh, the enforcement is a breeze here, this is what we're doing; and you'll have no problems?

A. Clearly.

Q. Okay. Now, she continues to say: Elected

received a lot of pressure from Rand Hoch. Do you see that?

A. I do.

Q. When she says, "elected," is she talking about the City Commissioners in her jurisdiction?

A. I believe she's talking about elected officials.

Q. Is elected sort of a -- a usual way to refer to them?

A. It can be, yes.

Q. Okay. So then Mr. Brown responds about three minutes later right above that message at the very top of 992. Do you see that?

A. I do.

Q. And, he says: As are ours. Do you see that?

A. Yes.

Q. What do you think he's saying there?

A. I believe he is agreeing that the elected officials in Boca Raton are getting --

Q. A lot of pressure from Rand Hoch?

A. I'm not sure pressure. But, certainly, Rand Hoch is communicating with them, as well.

Q. Well, now --

A. Okay. You could certainly --

Q. -- she said to him that the electeds are getting a lot of pressure, right?

A. Yes, it does.
Q. And so he doesn't respond back and say ours are getting some communications too?
A. You're right.
Q. He says, "as are ours"?
A. Yes, it does.
Q. So what he's saying to her is our elected officials are also getting a lot of pressure from Rand Hoch, essentially?
A. That's what it -- appears that it says, yes.
Q. What pressure were the Boca Raton elected officials getting from Rand Hoch?
A. Well, I think he's talking the e-mails -- they had gotten a number of e-mails from him the previous. And I believe that there were evidence of phone calls, individual meetings with the Council members and Rand Hoch.
Q. Okay. And what was the general nature of those meetings and -- of the pressure that was being applied?
A. I was not present at the meetings. I don't know. Or the phone calls. I think there were more phone calls than meetings.
Q. Okay.
A. I do not know what the discussion was during those phone calls.

Q. Okay. Would Mr. Brown presumably because he's representing that a lot of pressure has been applied?

A. No. Generally, when outside people call the Council, there's no one from staff. It's a one-on-one conversation.

Q. Okay. So, understanding that you weren't privy to those particular communications, have you had any discussions since then to familiarize or to inform you as to what the particulars were of the pressure that was being applied? And what I'm asking is, you know -- I wasn't there either; so I'm just hypothesizing. But, you know, was Mr. Hoch talking about, you know, mounting an election campaign to replace an elected official with someone else that would be more, you know, friendly to what he was proposing? Or was he proposing to have telephone calls coming in? What sort of pressure was being applied?

A. Yeah, I understand the question. I don't. Haven't talked to anybody, the Council or otherwise, that has relayed any of the discussion that happened with Rand Hoch.

Q. Okay. And so if I wanted --

A. Which, by the way, is not unusual for third parties who are -- have a suggestion for an ordinance or a resolution or a development to talk to Council

directly.

Q. Right. Or to apply a lot of pressure?

A. To apply -- yes.

Q. Okay. So, if I wanted to find out what the particular -- what the particulars are of the pressure that Mr. Hoch was applying, who would I talk to other than Mr. Hoch, of course?

MR. ABBOTT: Object to the form.

THE WITNESS: I think Mr. Hoch is probably the best.

MR. MIHET: Right. He may not want to tell me.

BY MR. MIHET:

Q. So in terms of the City of Boca Raton?

A. I think he would be the better person. I don't know of anybody else staff-wise who could --

Q. All right. The Council members, themselves?

A. They're the ones who spoke with him, yes.

Q. Okay. All right. At the top of the first page of this Exhibit 26, which is 991, you'll see that another of the three recipients also responded to Mr. Brown's same e-mail. Do you see that?

A. Yes.

Q. And this is a Paul Schofield?

A. Uh-huh.

Q. And, I'm sorry, I forget. Which municipality was he with?

A. Wellington.

Q. Wellington.

A. Village of Wellington, not the City of Wellington.

Q. Yeah. Actually, it says right there in his signature line, doesn't it? It does.

A. Oh, yes. Yes, it does.

Q. All right. And he writes back and he says: Good morning, George. I would prefer to discuss that ordinance in person, period. What do you think -- why do you think that he would have preferred to discuss it in person?

A. I don't know.

Q. Okay. Having said that, we do have a specific enforcement mechanism. And I don't have any clear idea how we could train either our code enforcement staff or law enforcement staff to actually enforce it.

Did I read that correctly?

A. Yes.

Q. So we had Ms. LaVerriere writing back. Now we have Mr. Schofield writing back. And it appears that he also is having a hard time imaging how this type of ordinance would be enforced by Code Enforcement?

A. Uh-huh.
Q. Yes?
A. Yes.
Q. She goes on to -- he goes on to say: If we receive a complaint, we'll deal with it individually and most likely referee it to one of the state governing bodies. The MD's, DO's and clinicians all have their own State Boards.
Do you see that?
A. Yes.
Q. What was Mr. Schofield conveying to Mr. Brown there?
A. I'll give it my best interpretation. And I think the word referee is probably refer.
Q. Yes.
A. And I believe what he is suggesting is that -- from Wellington that, if they receive a complaint, they will -- instead of prosecuting it through their Code Enforcement or law enforcement, that they would refer it to one of the state regulating Boards.
Q. So he's saying, we don't think we could train our Code Enforcement staff to enforce this kind of ordinance. So we will send it --
A. Code Enforcement or law enforcement.
Q. Or law enforcement.

So we'll send it up to Tallahassee and see if they can deal with it?

A. Essentially. Those are the words. But, yes, that concept.

Q. Okay. Now, did either Ms. LaVerriere or Mr. Schofield's opinions with respect to the enforceability of these kinds of ordinances make it to the Boca Raton City Council for its consideration?

A. Not that I know of, no.

Q. Okay. So, when they voted on the particular ordinance banning conversion therapy, they didn't -- they were not aware that Mr. Brown had solicited and received this input from the neighboring municipalities?

A. That's correct.

Q. Has the City of Boca Raton considered an option whereby complaints would be referred to the state governing bodies in Tallahassee?

A. No, not that I know of. Not yet.

Q. Okay. Is there a reason for that?

A. No. I think -- I think the ordinance, as it was enacted, as it was passed, empowered -- authorized Code Enforcement. There really wasn't another mechanism outlined in that ordinance.

Q. Right. To your knowledge or the City's knowledge, if you know, does -- do the state Governing

Boards in Tallahassee get involved in enforcing local city ordinances in Florida?

A. Generally, no.

Q. Okay. You said --

A. You're talking about, like, not just licensing? You're talking about DEP, DOH, all state agencies?

Q. Yeah.

A. Or licensing groups?

Q. Well, I mean, I guess I'm wondering. I don't --

A. I think -- I think I can answer the question probably more clearly --

Q. Okay.

A. -- that they -- the state agencies and regulatory bodies do not enforce local ordinances.

Q. That's what I was trying to determine. Thank you.

A. Uh-huh.

Q. And so the option that Mr. Schofield was considering for Wellington would not appear to be a viable option for that reason?

A. Unless he felt that the infraction violated some other tenets of their -- of their licensure, then, certainly, they could pass it on.

Q. Okay.

A. But, yes, to -- and try to have them enforce a

local ordinance is probably not going to be very successful.

Q. Okay.

(Plaintiffs' Exhibit No. 27 marked for identification)

BY MR. MIHET:

Q. So I've handed you now a document that we have marked as Exhibit 27. And do you recognize this one?

A. Yes. This is Ordinance 5407.

Q. This is the conversion therapy ordinance that was enacted by the City of Boca Raton and that we've been discussing throughout the day today?

A. That's correct.

Obviously, the stamp on the top is not part of that document. But --

Q. Okay.

A. -- I'm not sure what that is.

Q. Right. By, "the stamp on the top," you mean, the one that says case --

A. Yeah. Yeah, yeah, yeah.

Q. Okay. That's from a filing in the case that we're --

A. Yes.

Q. -- we're in right now.

A. Yes.

Q. But the City of Boca Raton insignia at the top --

A. Of course.
Q. -- that's part of the document?
A. Of course.
Q. Okay. Now, this document -- this ordinance, according to the information on the last page, was passed and adopted by the City Council on October the 10th of 2017?
A. That's correct.
Q. And we see here that we have the four -- or rather three Commissioners and the Mayor who -- three Council people and the Mayor who voted in favor. And we have the Deputy Mayor, Jeremy Rodgers, voting against?
A. That's correct.
Q. And that's what we saw reflected in the video that we watched, as well?
A. Exactly. I mean, yes.
Q. If you'll flip over to page five of the ordinance. And, when I say, "page five," I mean, page five at the bottom of the ordinance.
And, if you'll look over at -- beginning on line three, it says: Whereas, City of Boca Raton has a compelling interest in protecting the physical and psychological wellbeing of minors, including, but not limited to, lesbian, gay, bisexual, transgender and questioning youth, and in protecting its minors against

exposure to serious harms caused by sexual orientation and gender identity efforts.

Did I read that --

A. Change efforts.

Q. Change efforts.

Did I read that correctly with that modification?

A. Yes.

Q. Okay. Why does this recitation of the City of Boca Raton's interest appear in the ordinance?

A. Well, there are two reasons; one minor one, one more important. The first is that I believe this recital or one similar to it was part of the model ordinance that was the basis for this ordinance.

Q. Is that the minor reason?

A. Yes.

Q. Okay. And what's the major reason?

A. I think the major reason is anytime that we have an ordinance or a resolution, the reasons for promulgating such ordinance or resolution are tried to be laid out in the recitals. And so the reasons for the background are all part of the whereas clauses before you get to the substantive what's -- what now is going to be the action of the ordinance or resolution.

Q. Okay. And so, with respect to stating what the interest is of the City in enacting a particular

ordinance, is that important to have in there for subsequent purposes like enforcement or litigation or -- or -- or why?

A. Or just -- yes. Those, plus just explaining why -- you know, this is what the Council feels. This is why they're acting the way that they do by passing this ordinance.

Q. Okay.

A. This sets the stage for the reasoning, the thought process, why the Council is voting to do what's in the -- in the action portion of the ordinance or resolution.

Q. How important is it for the listing of the City's interest to be complete. That is, to include all of the asserted interests of the City in passing the ordinance?

A. I'm not sure you can have all. But I think the primary ones, the ones that are most important -- while I did not draft this one, I do draft a lot of ordinances and resolutions. And we try to tell the stories so that the Council can follow along and see if this makes sense as they review the resolution, as they review the ordinance, to see the thought process, to see the reasoning, to see why the actions follow the -- to make sure that the actions follow the reasons.

Q. Okay. Now, this particular ordinance says that

the interest that's being asserted by the City is to protect its minors against exposure to serious harms caused by Sexual Orientation and Gender Identity Change Efforts?

A. It does say that.

Q. Were there other interests that the City was asserting besides the one that's mentioned here?

A. Other -- ones that aren't mentioned in the ordinance?

Q. Right.

A. Other compelling reasons?

Q. Compelling or otherwise or not compelling, I guess, is what I'm asking. Were there other things that the -- other interests that the City was trying to address or vindicate with this ordinance that are not listed in this outlining of the compelling interest?

MR. ABBOTT: I'm sorry. Just so I'm clear, you're asking if there are any interests outside of this single whereas clause or any interest outside of the language contained in the ordinance as a whole?

BY MR. MIHET:

Q. Well, I guess, since this clause deals with the asserted interest specifically -- and, just for clarity, if there are other interests that the City was trying to address that are not listed in this clause, I'd like to

identify those.

A. I think this is the stated interest for this ordinance.

Q. Okay. So the answer to my question is that there were not other ones?

A. This is the only one listed in the ordinance, yes.

Q. Okay. Are you aware of any other ones besides the one that's listed in the ordinance?

A. No.

Q. Okay.

A. There may be. But I can't think of -- I think, if there was other -- I can't think of any other interests, I guess.

Q. Okay. Well, just for clarity in the record, the first of the deposition topics on which you were designated to testify is Defendant's -- that's the City of Boca Raton -- purported interest in banning SOCE counseling for minors. So, when you say you can't think of any, I guess I'd like to -- to try to --

A. Sure.

Q. -- exhaust you a little bit. If you can tell me that, you know, having prepared for that topic, you -- there are no others, I'll accept that. But --

A. I think the ordinance does speak for itself. It

lists the rationale for why this ordinance is being enacted. And that is listed as the compelling. I believe that's the only one listed in the ordinance.

Q. Okay. I guess what I'm trying to avoid is a situation where we've addressed this one in litigation. And then the City of Boca Raton comes back and says, oh, yeah, but we've got six other ones here that we also were trying to vindicate that we forgot or for whatever reason we didn't put in there.

A. Understood.

Q. Okay? So, as you sit here today as the designee on the City of Boca Raton on the subject of its interest being vindicated by this ordinance, this is the only one that you're aware of?

A. Yes, as described by the document, itself, between studies and the following whereas clause which kind of equates the two.

Q. Okay. Now, the clause that we just read says that the compelling interest is in protecting its minors. Do you see that?

A. Yes.

Q. So what does the "its" modify or mean there?

A. I believe it refers to within the City of Boca Raton --

Q. Okay.

A. -- which is where the ban is. It's only the jurisdictional boundaries of the City.

Q. Okay. So the City of Boca Raton doesn't have an interest in protecting the minors of Broward County?

A. An interest. Perhaps the ability to legislate, the ability to govern the actions of Broward County not so much. I believe this -- what it refers to is the just jurisdictional opportunities that are available to the City.

Q. Okay. So protecting the minors that are residents of Boca Raton?

A. That is correct.

Q. And, in fact, the ordinance does not purport to prohibit any therapist that resides or works in the City of Boca Raton from traveling to another municipality and providing what the order defines as conversion therapy in that other locality?

A. I believe the -- I know I'm sure you've read the prohibition. It's for treatment within the City boundaries.

Q. Okay.

A. I don't believe, as we just talked, the City has the wherewithal to govern the operations of another jurisdiction.

Q. Okay. Now, does the City have an interest in

protecting minors from another County like Broward County who wish to come in and visit a therapist whose office is in the City of Boca Raton?

A. I think, if your question is: Can a therapist who resides in the City treat someone from outside the City under -- under this ordinance? Is that your question?

Q. Well, let's start with that.

A. I think the answer is this ban's treatment of anybody -- any minor within City boundaries.

Q. Okay. So the ordinance then would prohibit a minor from Broward County from coming into Boca Raton and receiving therapy services here?

A. I believe so, yes.

Q. Okay. And so then the question is: What interest does the City have in protecting that minor who does not reside in the City of Boca Raton? I mean, does "that minor" refer to when it says protecting its minors?

A. I understand your question. You're trying to determine whether "its" is limiting to only residents of the City. And I don't think that the ban is limited to just residents of the City. The ban is of conversion therapy practices within the City. And it doesn't specify only for City residents or only for visitors and

residents. It's a ban of the -- so I'm not sure those two are on -- are -- you can equate the two.

Q. Uh-huh. Does Code Enforcement enforce -- well, strike that.

The whereas clause that's immediately under the one we just discussed which begins on line seven of this page five, it says: Whereas, the City Council hereby finds the overwhelming research demonstrating that Sexual Orientation and Gender Identity Change Efforts can pose critical health risks. Do you see that?

A. I do.

Q. Okay. The overwhelming research that's being referred to here and that the City Council was referring to is the research that is described in the preceding whereas clauses of this ordinance?

A. That's correct.

Q. There is not some other research that the City Council was considering and that it found to also demonstrate the -- the things that are being asserted here that was not included in the previous whereas clauses?

A. As a body, the research that was included as part of the ordinance is the -- the documentation that they used to determine if this ordinance should be passed.

Q. All right. So the overwhelming research that's

being referred to on line seven refers to the previous whereas clauses?

A. That's correct.

Q. Okay. Now, this ordinance bans both Sexual Orientation Change Efforts as well as Gender Identity Change Efforts?

A. It does.

Q. And we see that in the definition of conversion therapy which is on page six beginning with line ten, correct?

A. That's correct.

Q. That definition says: Conversion therapy or reparative therapy means interchangeably any counseling, practice -- I'm sorry. I think I misread that with a comma. So let me try again.

Conversion therapy or reparative therapy means interchangeably any counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including but not limited to efforts to change behaviors, gender identity or gender expression or to eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same gender or sex.

Did I read that correctly?

A. Yes.

Q. The terms counseling, practice or treatment, are they intended to all mean the same thing; or is there a distinction between the three?

A. There probably is a similarity, but there probably are distinctions between each of those terms.

Q. And what is that distinction, in general?

A. I'm not sure I'm the best person to define that.

However, to me, just by the look of those, I think treatment probably has a different -- different definition than counseling.

Q. Okay.

A. I think they all have probably different -- they're probably very similar in definitions. But there's probably aspects of one that don't fall into the other.

Q. Okay. Now, you mentioned that you may not be the best person to ask. For the record, you have been designated by the City to provide us its position with respect to the interpretation of the ordinance, correct?

A. Yes.

Q. Okay. And you feel capable of providing that position?

A. Best I can.

Q. Okay. That's all we can ask for.

A. Uh-huh.

Q. So does the City then see a difference between treatment and counseling?

A. I think, as I mentioned, those words are similar. But, the exact definition, they're -- I'm sure is different. And so they're related, but there may be activities that fall under one or not under the other.

Q. Okay. Now, those -- can you think of some activities that might fall under one but not the other?

A. No.

Q. Okay. Now, those words are not defined in the ordinance, correct?

A. Uh-huh. No, they're not.

Q. Okay. In order for one of the City's code enforcement officers to determine whether or not he or she believes that a violation of the ordinance has occurred, they would first have to determine whether or not something that is described to them that took place in the confines of a therapist's office amounts to counseling, practice or treatment, correct?

A. To determine if the conversion therapy is happening, yes, that is part of the definition, yes.

Q. Okay. And, without a definition of those terms being provided to them and without any enforcement memorandum or guidelines being provided to them, how would you expect someone with a GED equivalent to

determine whether or not a course of communication between Dr. Hamilton and one of her patients is counseling or is practice or is treatment or is none of those three?

A. I think the -- as you well know, in a lot of documents, that because the -- it's hard to sometimes capture in a definition what an activity might be. I think these three together form a -- a pretty good handle on the types of activities that a therapist or licensed therapist might do in their office or outside their office.

So to know whether a -- a code -- a compliance officer to determine whether something is counseling or practice or treatment I'm not sure is necessary, if that's your question. But I think it gives a fairly good idea of the types of things that would -- would be something that they could hang their hat on when they're -- when they're looking to see whether something would be conversion therapy. And I realize that's a bit of a rambling answer; so let me try it, again.

The -- these three concepts together I think are meant to give a little bit of latitude. If someone says, well, I wasn't counseling, I was -- I was providing treatment and -- or I wasn't doing treatment. I was counseling. But, together, those three seem to

represent the type of activities that might be going on in a therapist's or licensed office.

Q. Okay. But you would recognize that it is possible for a therapist and a minor to interact, whether in the office or at the ice cream parlor or at the basketball court or at the city park without being engaged in counseling, practice or treatment, correct?

A. Of course.

Q. And so, you know, if the two of them have a conversation, you know, it could be talking about -- for example, you know, with a minor client that's interested in basketball --

A. Uh-huh.

Q. -- they could be talking about the basketball game that took place last night on TV, right?

A. Sure.

Q. And it's possible that that could just be a conversation about basketball without any counseling or therapeutic component?

A. Of course.

Q. But it's also possible that that conversation may have been brought up by the therapist for a therapeutic purpose. For example, to point out how masculine those guys are who are, you know, running around the court --

A. Uh-huh.

Q. -- correct?

A. Sure.

Q. And so, in order for a code enforcement officer to decide whether or not a violation of the ordinance has likely taken place such that a notice of violation can or should be issued, he or she would have to determine whether or not that conversation about basketball was merely a conversation or whether it constituted counseling, practice or treatment?

A. Sure. I think you might be coming at it in the wrong direction.

Q. Okay.

A. And -- or maybe not. You certainly have thought longer and harder than I have. But the -- as I understand this ordinance, it bans conversion therapy. So, if you were having a conversation, whether or not that was considered to be counseling or a conversation, as long as it didn't cross that threshold of trying to change a gender identity or -- or -- then that would be fine.

And even counseling that doesn't change -- obviously, the key things are gender. What are the -- changing an individual's sexual orientation or gender identity. That's kind of the key. So you start with that, I would think. And then, if that becomes an

issue, then you look to see how was that done. So the counseling, practice or treatment is really just the delivery mechanism to this change behaviors, change identity, change gender expression.

Q. So the code enforcement officer would or would not have to decide whether or not a particular statement or statements that are alleged to have been made in violation of the ordinance constitutes counseling, practice or treatment?

A. I think --

MR. ABBOTT: Objection. Asked and answered.

THE WITNESS: I think they would. But the first step would be to say: Was there gender identity? Was there sexual orientation? An attempt to change the individual's sexual identity, gender -- sexual orientation, gender identity? And, if that's the case, could you -- would that be considered a counseling, practice or treatment performed?

MR. MIHET: Okay.

THE WITNESS: And I would suggest that, if that were the -- if there was an attempt to change sexual orientation/gender identity, then it would be fairly easy to say that falls into the counseling, practice or treatment category.

BY MR. MIHET:

Q. And --
A. So -- go ahead. I'm sorry.
Q. And so what would you have to know whether or not the discussion about basketball that we just referenced --
A. Uh-huh.
Q. -- is part of -- you know, is counseling, practice or treatment to change gender identity or is it not?
A. So, again, I think what I've said is that the determination initially has to be about trying to change gender identity or sexual orientation.
Q. Okay.
A. So, if that decision -- if that judgment is that that was not the case, then it doesn't really matter what that -- what that interaction was.
Q. Okay.
A. If it was something that judgment-wise was intended to be a change in gender identity or sexual orientation, then I think it is likely that you could determine whether that happened as counseling, practice or treatment.
Q. Okay. So, if a minor is interested in changing sexual orientation or gender identity and is looking to receive some assistance in that area and goes to

Dr. Otto's office and Dr. Otto decides that, on this particular session, what they should do is watch a basketball game so that he can point out to this particular minor client how men can be comfortable with their masculinity and try to provide strong, you know, male role models and examples of, you know, males -- you know, guys doing what guys like to do on a basketball court --

A. Uh-huh.

Q. -- how would a code enforcement officer who received a -- who receives that complaint decide whether or not that interaction constitutes counseling, practice or treatment for the purpose of changing gender identity or sexual orientation?

A. I think you've asked the same question a couple of times now, so I guess I'm not being clear. So let me try one more time -- although, I think it's going to be repetitious -- is that, as with any complaint, the code officer I think will look to first see not if it's a practice, a counseling or a treatment being performed. I think they're going to look to see if that threshold of conversion therapy was reached. And I think that is the operative part of this, not whether it was done counseling, practice or treatment.

So, in your instance of your hypothetical, if

they've got a complaint from a third party, from the minor, from the family that the -- that Dr. Otto was practicing conversion therapy and it involved watching basketball, I don't think that basketball is the operative. I don't know that treatment, counseling -- it's that conversion therapy that would be the key. And I think the code compliance officer or the code compliance manager, once receiving that complaint, would look to see best they could if this complaint was something that was worth -- not was worth -- something that was due additional investigation and an NOV.

Q. So I guess this is what I'm trying to get at. And it wasn't the same question I was asking because I had added to it the fact that the minor in this case wasn't just there to kill time but was there with the actual intent to try to change that minor's sexual orientation or gender identity. I had added that to --

A. I don't think -- I don't think that changes the response.

Q. Okay. Why not?

A. I think that, no matter what the activity is; watching basketball, getting zapped on the wrist with a band or electrical or therapy, whatever that might be, if the goal of that is to change gender identity, then that would be covered by this ban.

Q. Okay. And, when you say, "the goal," whose goal are we talking about?

A. I'm sorry. I don't know what I said.

Q. You said, if the goal of that activity is --

A. Oh, the intent. If the intent of the activity is to change sexual identity -- or gender identity/sexual orientation, then --

Q. It's prohibited?

A. -- then it's prohibited.

Q. And so my question is: Whose intent does the code enforcement officer have to look at? The minor's or the therapist's or both?

A. I think it's a ban on therapists. It's not -- it's not governing the youth. It's governing the therapist's activities.

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.

Q. Okay. Now, the ordinance says -- when it defines conversion therapy, it says: Counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity including but not limited to efforts to change behaviors, gender identity or gender expression.

Do you see that?

A. I do.

Q. So, within the context of gender identity, what types of efforts to change behaviors or -- or feelings would be prohibited by the ordinance?

MR. ABBOTT: Object to the form.

THE WITNESS: I'm not -- it seems rather straightforward --

MR. MIHET: Okay.

THE WITNESS: -- that a child identifies with a particular orientation. The efforts to convince, to treat, to change that would be something that would be prohibited under the ordinance.

BY MR. MIHET:

Q. Okay. Now, you heard a couple of these examples yesterday; and we heard what the County's position was as to them. And I'm interested in hearing the City's position, as well.

A. I can't guarantee I was paying close attention. You may have to repeat them.

Q. I will do just that.

If a prepubertal child, say a ten-year-old, was born as a boy --

A. Uh-huh.

Q. -- but has now expressed a female gender identity --

A. Uh-huh.

Q. -- would the ordinance prohibit a therapist from encouraging that child to embrace his given male body and to align with his assigned gender role, that is, his boyhood?

A. If the child identifies as a female and the goal of the therapy is to change their identity back to a male, then, yes, I think that would be prohibited by the ordinance --

Q. Okay.

A. -- which I believe is what your example was.

Q. So that's part of the example. And, you know, you added, if the goal is to change the identity back to male, that would be prohibited. But if -- let's take it this way.

A. Uh-huh.

Q. There's a complaint made to code enforcement by either the child or the child's parent and they say, this is a ten-year-old prepubertal child born as a boy, identifies as a female. He has visited Dr. Hamilton, and Dr. Hamilton encouraged this child to embrace his given male body and to align with his assigned gender role.

A. So in that -- in doing that, is Dr. Hamilton trying to change the identification of that individual from female, which they're currently identifying with, to identifying as a male?

Q. Let's say, in the first example or in option A, yes, she is.

A. Then I think that that would be a clear --

clearly a violation of the ordinance.

Q. Okay. And another variant, let's say that that information is not provided to the code enforcement officer.

A. Which information?

Q. Whether or not Dr. Hamilton, what her intent was. All that is provided to the code enforcement officer is that this particular prepubertal ten-year-old child, born as a boy, identifies as a female, visited Dr. Hamilton; and she encouraged the child to embrace his given male body and to align with his assigned gender role.

A. Uh-huh.

Q. We don't know why she did it. Is that a violation of the ordinance?

A. I'm assuming you're kind of going back to your statement of this morning, your hypothetical of this morning where that's the only information the code officer has. The parents have hung up. Dr. Hamilton has hung up on. And so that's the only information they have.

Q. Yes.

A. So, as I think we talked before, they could make the determination based on the facts they know and decide whether or not that covered or not.

Q. Okay.

A. I think, with a nine- or ten-year-old -- what did you say?

Q. Ten-year-old.

A. Ten-year-old.

That might be a difficult thing to go forward. Now, when they talk with the ten-year-old, maybe the ten-year-old is someone who they feel is a -- can present a good case, it -- has a clear idea; and they can go with that. But I would suggest, as we talked earlier, trying to make that case, trying to present something to the special magistrate without the corroboration of the therapist or the parents or another party, another witness, that would be a tough thing to do on its own. But, yes, they could as a code -- as a code compliance person.

Q. Okay.

A. If nothing else, it could be the start of -- of an investigation.

Q. Okay.

A. But they have to look at other factors, as well.

Q. If the -- if the child or the parent were to say to the code enforcement officer that the child was looking for help to change back to, you know, a male gender identity and that that information was shared

with Dr. Hamilton, how would that impact the analysis?

A. I think you're trying to give different examples. But I think the ordinance pretty much speaks for itself. No matter what the consent, no matter what the assent is by the child or the parents, this prohibits Dr. Hamilton from performing conversion therapy within the City.

Q. Okay. Now, for that same child, would the ordinance prohibit a therapist from verbally endorsing or supporting behaviors and attitudes that align with the child's sex assigned at birth?

A. Is the goal to make them feel better? Is the goal to change their sexual -- I mean, if the goal is to change --

Q. Uh-huh.

A. -- if the goal is conversion therapy, then it would be a -- it would violate.

Q. So you have a ten-year-old prepubertal child --

A. Uh-huh.

Q. -- and he was born as a boy; and he presents to Dr. Otto and says, you know, that he is really interested in girls, wants to play with dolls, wants to hang out with friends that are girls, wants to dress up as a girl, wants to do things that girls want to do and he has no interest in things that boys want to do and is experiencing distress as a result of the fact that he

wants to do all these things that girls want to do and yet, you know, he has a male anatomy. When he shows up --

A. So, to me -- and, clearly, I'm not a clinician in any event. But what you just explained to me sounds like someone who is identifying with -- as a female. But, again, I am not the best person to make that call. Perhaps someone, you know, who's a therapist could do so.

Q. Okay.

A. And, if that were the case and the goal of Dr. Otto -- I think was your example of this case -- tried to change that identity, the gender identity to a male, then, yes, that would be a violation of this ordinance.

Q. Okay. So what if the ten-year-old prepubertal child hasn't progressed far enough into the exploration of gender identity to say clearly I now identify as a girl --

A. Uh-huh.

Q. -- but still, nonetheless, experiences all of the inclinations that I've just talked about in terms of wanting to do --

A. I would --

Q. Let me just finish for the record.

-- wanting to do all the things that girls want to do and not wanting to do things that boys want to do. So, without a clear declaration that I identify as a girl, is it still a violation of the ordinance for Dr. Otto to do the things that we talked about, that is, to verbally endorse and support behaviors and attitudes that align with the male biology of the child while to verbally discourage behaviors and attitudes that align with the female identity?

A. I would guess that, whether or not the child declares that they have a different -- or are identifying as one or the other, their actions would really put them in the category of one or the other or both or -- and so, whether they declare it or not, I think it's -- that gender identity as presented is one that this ordinance would prohibit the attempt to convert through therapy, counseling -- or counseling, practice or treatment.

Q. Okay. So, if the child doesn't declare it, you know, I identify as a girl --

A. And not being a counselor, but I don't suspect that is an uncommon event.

Q. Right. That happens a lot.

A. Could happen.

Q. So the child doesn't declare it. The therapist

doesn't declare it. Is a code enforcement officer able to make that determination that this child has progressed far enough along in the gender identity exploration process to where this child now identifies as a girl, notwithstanding the failure to so declare; and so, therefore, the efforts that have been engaged in amount to conversion therapy?

A. I understand the question. Now, in that case, as we've talked about, this is going to be a complaint-based process.

Q. Okay.

A. So, if the child is -- has not come forward, if the therapist hasn't come forward, if the parents haven't come forward, it is unlikely that we would know what's going on as a City, as a code. So until -- unless and until there is a complaint, which means someone believes that there is a -- an attempt, a goal of trying to change gender identity, that would be the trigger for someone to take a look at. And, at that point, then what you're talking about would have to be part of that judgment.

Q. Now, I probably wasn't as clear as I should have been with the example. I wasn't suggesting that the child hadn't declared to a code enforcement officer that, you know, these things took place. I was

suggesting that, in discussing with a code enforcement officer what took place in the therapy sessions with the therapist, the child doesn't declare that -- that he now identifies as a girl. The child hasn't reached that level in the exploration of gender identity yet.

A. Uh-huh.

Q. How is the code enforcement officer able to determine whether the child was far enough along in the gender identity exploration such that the efforts of the therapist are conversion therapy or that the child was still male in both biological sex and identity and yet was merely exploring these things but no actual conversion took place?

A. Sure. I think I understood. That was a long question, but I think I got the gist of it. I think that kind of goes back to the question that we had gone over a few times this morning and this afternoon. Let's say that that child talks to a code officer and describes just what you're saying --

Q. Okay.

A. -- and that code officer evaluates it and says, you know, I'm not clear. I'm going to talk to the parents. I'm going to -- and they hang up. Talk to -- I'm not sure who to use as an example. The professional hangs up. So they're only looking at that description.

Q. Yes.

A. Could they write an NOV? The answer is they probably could, but they probably would look for more corroboration. They're not going to take this nine, eight, ten-year-old, whatever, and use that unless, for some reason, that nine, ten-year-old was very -- was able to describe, was able to put into words their feelings, the treatment and how it -- and, as they described it, if the code compliance officer felt that that covered this, then they could go over. But I think that would be unlikely, as we talked before, without some other information or evidence.

Q. And you have no concerns about entrusting a code enforcement officer with a high school diploma with making that judgment call?

A. You know, you keep talking about high school diplomas as -- I mean, that's certainly a level of education. But I would suggest that there are people of high school educations who are very astute and very -- and -- and --

Q. And I did not mean to use that in a derogatory sense at all.

A. And I would suggest that there are PhD's who don't.

Q. Right.

A. But I think, if your question is, are code officers the people who are entrusted to make that call? Yes.

Q. And you don't have any concerns about whether or not they are capable of making that call rightly?

A. I am concerned about every call they make rightly, whether it has to do with grass or whether it has to do with -- certainly, the concerns of children are paramount. That's the reasons that we passed the ordinance in the first place is to try to have protections against -- for the children in the City.

But, to answer your question, anytime anybody's making those kind of judgments, it's a concern. Do I feel that they are able to make that? Yes.

Q. So, again, when I was using high school diploma, I was not using that in a derogatory sense. I want to contrast that with someone who has both a BS degree or a BA degree and professional licensure from the state as a licensed mental health therapist. Would not a licensed mental health therapist be much better equipped to make these types of judgment calls as to, for example, whether or not a minor patient had sufficiently progressed in the gender identity exploration such that the efforts we've been talking about amount to conversion therapy or not?

A. Sure.

MR. ABBOTT: Objection. Asked and answered.

THE WITNESS: And I think that someone who is trained in a field, no matter what that field is, certainly has some advantages. Now, I would also suggest that, in an investigation, I think it is doubtful that Dr. Hamilton or Dr. Otto will hang up on our code officer, would provide the information that would allow them to make a better call. Maybe not. But I'm hoping that's the case. And I'm hoping the parents don't hang up, as well.

So there would not be -- I think all the instances that we're talking about where you're wondering whether a code officer, based on one set of facts, another set of facts from a nine-year-old child is going to know whether we're going to have a NOV or a special magistrate is very hypothetical and I think maybe not as realistic as some other examples.

BY MR. MIHET:

Q. Well, you don't think it would be realistic for the City to expect a therapist to cooperate with the City in investigating that therapist for possible code violations, do you?

A. I think, if they knew about the ban and they were doing something that was well within their practice,

they would be willing to talk about it, maybe not divulging the specifics -- the HIPAA, the other things that might be going on. But, yes, I would expect that professionals would cooperate with the City.

Q. And the code enforcement officers, they don't receive training in issues of child development or exploration or gender identity or things along those lines, do they?

A. No, not formally.

Q. Okay.

A. No. Not by the City, I should say.

Q. Okay. And it's not a requirement of their job that they receive that kind of training from anywhere else, is it?

A. No, it's not.

Q. Okay. So would the answer be any different to the -- the question if, instead of using a prepubertal child, a ten-year-old, we would use a six-year-old who was born as a boy, identifies as a girl, likes to dress as a girl and likes to do things that girls do, doesn't show any interest in things that boys do, would the ordinance allow a therapist to seek to help this six-year-old boy embrace his boyhood and feel good about being a boy through talk therapy that encourages masculine activities, increased relationships with male

role models, play dates with other boys, et cetera, and discourages cross gender behavior?

MR. ABBOTT: Object to the form.

THE WITNESS: I think the question is very similar to the one you asked before, and I think the answer would be very similar. If the goal was to try to change gender identity, then it would be prohibited by this ordinance.

BY MR. MIHET: Okay.

BY MR. MIHET:

Q. What about an adolescent -- so now we're talking about someone, you know, between thirteen and eighteen.

A. Uh-huh.

Q. Born as a female but has been identifying as a male for some time. Okay?

A. Uh-huh.

Q. If that minor seeks therapeutic help in changing gender identity behaviors and expressions back to match her biological body, would the ordinance prohibit a therapist from providing talk therapy to assist with that identity change back?

A. I think that the same process we've talked about with the ten, the six and now the thirteen, fifteen, it's the same -- same ordinance; and it covers minors the same way.

Q. Okay. So the answer to the question is: Yes, the example I just gave would be conversion therapy prohibited by the ordinance?

A. Yes, I believe.

Q. You say you believe?

A. Yes.

Q. The City believes?

A. Yes.

Q. Okay.

MR. MIHET: Take another quick break.

THE WITNESS: Of course.

(Recess)

BY MR. MIHET:

Q. Okay. Mr. Woika, I've got one more example that I want to run by you.

A. Sure.

Q. We have a sixteen-year-old boy who comes to see Dr. Otto because he's having difficulty at school with schoolwork and friends and just feels a lot of stress and distress that he wants help with. In the process of talking with this minor, Dr. Otto determines -- or learns that the minor is spending an inordinate amount of time on technology, you know, surfing the web and video games and doing things other than homework and, you know, more productive things. He shares that

concern with the minor's parents. And, as a result, the parents take away the Xbox and the telephone and the other things that the sixteen-year-old enjoys using. Are you with me?

A. So far.

Q. So now we have a very angry sixteen-year-old. And he calls Code Enforcement; and, he says, I was with Dr. Otto in therapy sessions. I told him that I was gay, and he proceeded to engage in therapy with me to try to convert me back to being straight. Are you with me?

A. Uh-huh.

Q. How is Dr. Otto able to defend himself now in the code enforcement process that ensues?

A. Sure. I think we've gone through this a couple times that that call comes to the code officer, the code compliance officer.

Q. Okay.

A. As we've talked about, the code person is going to take the complaint, evaluate it and try to do things like talk to the parents. And I'm guessing, in this case, the parents would not just hang up but would say, no, that's not the case. This is what happened. And that would go into the investigation. Similarly, I think, if the code person called -- I'm sorry. This is

Dr. Otto?

Q. Dr. Otto, yes.

A. Otto.

And called Dr. Otto and said, we have this complaint. Do you care to talk about it? Now, they -- he may or may not be able to based on the privacy.

Q. HIPAA?

A. What's that?

Q. The privacy laws, you mean?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. Okay.

A. But if both Otto and parents hang up and we're left with just the complaint of the --

Q. Sixteen-year-old.

A. -- sixteen-year-old, then the code enforcement person would have to decide whether or not that, by itself, warrants having a notice of violation or not.

Q. So, in this particular case, the parents would say, well, we weren't part of the sessions --

A. Uh-huh.

Q. -- with Dr. Otto, so we can't say what actually took place in those sessions. And Dr. Otto says, I'd love to tell you something; but I can't because of HIPAA

and other, you know, state laws.

A. Sure.

Q. So now the code enforcement officer has only what the sixteen-year-old tells him. Does he issue a --

A. I'm guessing that -- I'm sorry.

Q. Does he issue a notice of violation or no?

MR. ABBOTT: Object to the hypothetical.

THE WITNESS: In that case, as we just talked about, the parents I would say would -- even though they would say they weren't part of the session say, as a result of all of this, yes, he has no more Xbox. We've taken away the cell phone and whatever. I think that would go into the weight of the decision of the code compliance officer and/or the manager to take a look at that.

But, absent all that, I think we're back where we were this morning, which is it's really up to the code compliance officer to determine if that -- if that complaint by itself was valid enough to issue the NOV.

Q. Sure. And I understand it would be up to his discretion.

I guess my question is: What would he do? Would he issue the citation or not?

A. I don't know the answer. I mean, I don't think

you can make that based on that hypothetical. Without having a discussion with the sixteen-year-old, without having the benefit of talking -- what the parents said and without talking to what the treatment professional said, I think it would be hard to know what that answer is.

Q. Okay. And you believe that a level 1 or 2 code compliance officer has the requisite skill and training to be able to interview that minor, to interview the minor's parents, to assess the facts that we've just discussed and to make a judgment call as to whether or not this minor is telling the truth with respect to conversion therapy actually has been attempted on him or whether he is merely acting out of revenge?

A. Sure. I understand that question.

And one of the things that you keep saying is that this code compliance officer is going to make decisions almost like they're in a vacuum, and they're not. We've talked a little bit about the manager that's available. We've talked about the City Attorney that's available. We talked about other professionals. We have the ability to go through any one of our departments and -- and offer assistance if that were to be the case. If it's this touchy, perhaps we need to have one of our other professionals get involved with

it. It's not just that person's decision on some of these cases where this is a fair amount of judgment in it.

Q. Ultimately, it's the compliance officer that decides whether or not a notice of violation has to be issued?

A. Through the manager, yes.

Q. And the City Attorney that you mentioned I believe two or three times as being an available resource, would it be the same City Attorney that we heard on the video say that she didn't know exactly how this -- this ordinance would be enforced in practice?

MR. ABBOTT: Object to the form.

THE WITNESS: Yeah. I think, something along those lines. I'm not sure what were her exact words. But, yes, her office. That is the City Attorney. We only have one.

BY MR. MIHET:

Q. Okay. As you might appreciate, Mr. Woika, this subject matter that we've been discussing today creates a lot of strong emotions and feelings on both sides of -- of the issue. Would you agree with me?

A. By whom? By --

Q. Well, by people who think that conversion therapy is harmful and should be prohibited versus those who

feel that, you know, talk therapy should be permitted for individuals who seek and request it.

A. The reason I ask that is we had a public hearing. No one showed either side. It didn't look like it was very hotly contested. And, until this lawsuit, we really haven't heard much about it. So I'm not sure that I would agree that it's a hotly-contested dividing subject.

Q. Okay. Are you aware of whether or not this issue was hotly contested at the county level when it occurred there?

A. Peripherally.

Q. Okay. What are you aware of?

A. Just the fact that their ordinance, there was a lot more discussion regarding their passing of the ordinance than happened here or other communities.

(Plaintiffs' Exhibit No. 28 marked for identification)

BY MR. MIHET:

Q. Okay. I've shown you a document that we have marked as Exhibit 28. You've had a chance to peruse it. Do you recognize this document?

A. Yes.

Q. When is the last time that you've seen this prior to just now?

A. This morning.

Q. Okay. Seems like you looked at a lot of documents this morning.

A. I was up early.

Q. Looking at the message that starts on the bottom of page one, which is Tuesday, June 19, 2018, message from Diana Frieser -- am I saying that right, by the way?

A. It's Diana --

Q. Oh.

A. -- Diana Frieser, as in, like, the bottom half of a refrigerator.

Q. Got it. Diana Frieser, that's the City Attorney, right?

A. Yes, it is.

Q. She writes to Rand Hoch. We know it's Rand Hoch because, if you look at the message that follows it beginning on the middle of the next page, you'll see that she was responding to something that Mr. Hoch had written her. Do you see that?

A. Yes.

Q. And, for the record, this is City 492, 493 and 494 that comprises Exhibit 28.

So she writes to Mr. Hoch. And, evidently, this is after this particular lawsuit has been filed, correct?

A. Yes.

Q. Okay. First line on the -- I'm sorry. Last line on the bottom of the first page, she says: We appreciate the interest from you and the Palm Beach County Human Rights Council regarding this newly-filed litigation.

Do you see that?

A. Yes.

Q. She goes on and says: We recall the assurances and support pledged by the PBCHRC during the City's consideration of the ordinance prohibiting conversion therapy with respect to minors, which is the focus of the complaint, and believe those resources will be valuable.

Did I read that correctly?

A. You did.

Q. What assurances and support pledged was Ms. Frieser referring to?

A. There was correspondence from Rand Hoch and the PBC Human Rights Council sometime back when the ordinance was being considered. And I don't remember the -- which correspondence there was. But there was a pledge that, hey, we're in this with you as the Council. If things happen, we're here to -- to help you fight off anybody who's trying to take down the ordinance. And

that may not have been a great paraphrase, but it's something along those lines. And I think that the City Attorney was saying, hey, remember those correspondence? What do you -- what are you willing to bring to the table?

Q. You said you'd take care of us. Now here's your chance?

A. Something along those lines, yes.

Q. Did the assurances and support that was pledged by Mr. Hoch's organization play any part in the City Council's decision as to whether or not to enact the ordinance?

A. It was something that they had. I don't know to the extent that that played into their decision making.

Q. Okay. How often does the City of Boca Raton get sued for civil rights or, you know, Constitutional First Amendment violations, if you know? Is that a very rare thing, or is it a common occurrence?

MR. ABBOTT: Object to the form.

THE WITNESS: I don't believe it's common.

MR. MIHET: Okay.

THE WITNESS: We have had some.

MR. MIHET: Okay.

BY MR. MIHET:

Q. Ms. Frieser goes on in the next sentence to say:

I believe it would be appropriate for us to touch base regarding the defense of the ordinance once the City is served; and, at that time, we can discuss coordination of the financial and legal resources PBCHRC is prepared to provide the City to supplement the City's efforts.

Do you see that?

A. I do.

Q. What financial or legal resources is PBCHRC providing for the City's defense of the ordinance?

MR. ABBOTT: Objection.

This exceeds the scope of any topic that was identified for the deposition. But go ahead and answer.

MR. MIHET: For the record, I disagree. I think there is a topic that does seek the City's -- the extent of the City's coordination with advocacy groups with respect to the ordinance. And I think this is fairly covered. Go ahead.

THE WITNESS: The Human Rights Council is not contributing any financial contributions to the defense.

MR. MIHET: Okay.

BY MR. MIHET:

Q. How about legal resources?

A. I think they've identified attorneys in other jurisdictions that are either being sued or have been

served. And I think they may have sent a position paper or two.

Q. Okay. Are those attorneys involved actively in defending the City of Boca Raton?

A. No.

Q. They're just providing their input or knowledge?

A. Not even that. They've just been identified.

Q. Okay. The statement you made earlier where you say they're not providing any financial resources, can I understand that to mean that they -- they're not paying for attorney's fees; and they're not paying for any fees by consultants or experts or otherwise?

A. I don't believe that they are -- have paid for any of our legal or other fees.

Q. To include experts or consultants?

A. That's correct.

Q. Okay. Is there any expectation of future payment from Mr. Hoch's organization with respect to the defense of the ordinance?

A. No. I think, if it turns out that he does, I don't believe the City will turn the money away. But there's -- at this point, I don't believe anybody expects that they will take over defense or paying for defense.

Q. There's not any kind of indemnification agreement

or promises or anything along those lines whether formally in writing or verbally?

A. No.

Q. And is there any understanding with Mr. Hoch whether or not his organization would either be responsible or help with any damages or attorney's fee judgments that the City might incur as a result of this litigation?

A. I have not seen anything to that.

Q. Okay. Now, if we look at the message that's just above the one we discussed which begins at the top of the first page of this Exhibit 28, this appears to be the response from Ms. Frieser back to -- well --

A. I'm sorry. Which one are you on?

Q. I take that back. This appears to be Mr. Hoch's response to Ms. Frieser.

MR. ABBOTT: He's at the top of page one.

MR. MIHET: Yeah. At the top of page one.

THE WITNESS: Okay. Front page?

MR. MIHET: Yeah.

THE WITNESS: Okay.

BY MR. MIHET:

Q. Message from Ms. Frieser to Rand Hoch on June 19, 2018, at eight-oh-seven p.m. Do you see that?

A. Yes, I do.

Q. And she's responding to the message that we just read?

A. Yes.

Q. So she -- he says in the second full paragraph that: I have asked Denise if the County was interested in seeing if we could secure outside counsel on a pro bono basis. They declined.

Do you see that?

A. I do.

Q. Do you know who is -- who he is referring to there?

A. I believe the County Attorney, Denise Nieman.

Q. "County," meaning Palm Beach County?

A. Yes. Denise Marie Nieman, as I believe we clarified yesterday.

Q. Yes. Then he goes on and says: We also reminded them that we can pay for experts' expenses, et cetera; and they took us up on that one.

Do you see that?

A. I do.

Q. Are you familiar with any of those arrangements?

A. I am not.

Q. Okay. Then he continues to say: We'll do the same for Boca, but I trust you'll be coordinating with the County.

A. It says that, yes.
Q. Okay. Then skipping down to the PS, do you see that underneath his name?
A. Yes.
Q. It says: PS, we were fortunate to get Judge Robin Rosenberg on the case.
Do you see that?
A. I do.
Q. Do you know why he considers himself fortunate to get Judge Robin Rosenberg?
A. I don't.
Q. Okay. You don't know what he's referring to?
A. I don't.
Q. However, he continues, PBCHRC Voters Alliance has endorsed her husband, Michael McAuliffe, in his campaign for Circuit Court Judge. So PBCHRC will be working behind the scenes with the parties on the case so that Judge Rosenberg does not get recused.
Do you see that?
A. I do.
Q. Do you know what he was referring to when he said that PBCHRC would be working behind the scenes?
A. No. And, as you can see from Diana's -- I don't think that was anything that she asked or wanted to know. I think that was something that he volunteered.

And I'm not sure that we know what the ramifications of Judge Rosenberg slash Michael McAuliffe, how that works or how they're going to be working behind the scenes.

Q. Okay. What work behind the scenes is PBCHRC providing?

A. I don't know. I don't think -- the City does not know what he's doing.

Q. Okay. Because it's behind the scenes?

A. Apparently so.

Q. So I think you may have answered this question. I was going to ask: Does the City share Mr. Hoch's concern that PBCHRC's open involvement would lead to Judge Rosenberg's recusal? And I think kind of addressed this --

A. We're not working with them and certainly don't know -- not working to get Rosenberg not recused.

Q. Not working to get her not recused. I'm trying to work through --

A. Yeah. We're not -- we're not -- I was trying to read that. We are not working for or against Rosenberg to get her on or off the case.

Q. Okay. You're not cooperating with Mr. Hoch's effort to stay behind the scenes so as to avoid recusal?

A. That's correct.

Q. Okay. Has anyone from the City communicated with

Mr. Hoch to -- to tell him that he should keep his involvement out in the open and not behind the scenes?

A. I don't believe so.

Q. Okay. Does the City have any plans to -- to bring Mr. Hoch's involvement, whether behind the scenes or in the open, to the attention of Judge Rosenberg?

A. No.

Q. Okay. Is there any other questions that you'd like for me to ask?

A. Where's the quickest exit?

MR. MIHET: I think those are all the questions that I have. You've been very helpful. Thank you.

MR. ABBOTT: Rachel, anything from you?

MS. FAHEY: No.

MR. ABBOTT: And no questions from the City. We'll read.

(Proceedings concluded at 4:02 o'clock p.m.)

CERTIFICATE OF OATH

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, Rachele L. Cibula, the undersigned authority, certify that MICHAEL WOIKA personally appeared before me and was duly sworn.

Witness my hand and official seal this 30th day of September, 2018.

RACHELE L. CIBULA
Notary Public, State of Florida
My Commission #FF 936928
Expires: December 14, 2019

C E R T I F I C A T E

THE STATE OF FLORIDA)

COUNTY OF PALM BEACH)

I, Rachele Lynn Cibula, Notary Public, State of Florida at Large,

DO HEREBY CERTIFY that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true and correct transcription of the testimony given by the witness.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 30th day of September, 2018.

Rachele L Cibula

RACHELE LYNN CIBULA, NOTARY PUBLIC

No. 19-10604

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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,
Plaintiffs–Appellants
v.
CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA
Defendants–Appellees

On Appeal from the United States District Court
for the Southern District of Florida
In Case No. 9:18-cv-80771-RLR before the Honorable Robin L. Rosenberg

PLAINTIFFS-APPELLANTS' APPENDIX

VOLUME X

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 18-CV-80771-ROSENBERG

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

Plaintiffs,

vs.

CITY of BOCA RATON, FLORIDA COUNTY of PALM BEACH, FLORIDA,

Defendants.

West Palm Beach, FL
October 18, 2018

PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Official Court Reporter:	Pauline A. Stipes Fort Pierce/West Palm Beach 772-467-2337 Official Federal Reporter HON. ROBIN L. ROSENBERG

THE COURT: Good morning, you may be seated. Okay, good morning, everyone.

We are here in the matter of 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, versus the City of Boca Raton, Florida and the County of Palm Beach, Florida, and the case number is 18-CV-80771.

We are here today for a hearing on Plaintiff's motion for preliminary injunction. The filings related to the preliminary injunction motion include the motion itself at Docket Entry 8, Boca Raton's response to the motion for preliminary injunction, Docket Entry 83, Palm Beach County's response at Docket Entry 85, the Plaintiff's reply to the responses on the preliminary injunction motion, Docket Entry 95.

The Court has received and reviewed the Amicus Brief from The Trevor Project at Docket Entry 90, and the Amicus Brief from Equality Florida Institute at Docket Entry 91, and the Amicus brief from Alliance. At the Plaintiff's request, Plaintiff submitted proposed findings of fact and conclusions of law pre-hearing, and I will be asking for those following the hearing as well. That is something we want to take up at a date that everyone agrees is acceptable to submit post hearing findings of fact and conclusions of law.

The Court has received Boca Raton's findings of fact

and conclusions of law, Palm Beach County's findings of fact and conclusions of law, the exhibit list from Boca Raton and Palm Beach County.

There are other things not being taken up today, notably, Boca Raton's motion to dismiss at Docket Entry 34, Palm Beach County's motion to dismiss, Docket Entry 39, the Plaintiffs' consolidated response at Docket Entry 62, and the Defendant's replies on the motion to dismiss, Boca Raton's reply, Docket Entry 84, and Palm Beach County's reply, Docket Entry 82. And there is the Plaintiff's verified Complaint, Docket Entry 1, with the exhibits.

So, with that background of why we are here today, let's see who is here today.

If we could have appearances by counsel and anyone at counsels' table.

MR. MIHET: Good morning, Horatio Mihet on behalf of the Plaintiffs, and with me is Roger Gannam, and seated at the table themselves are Dr. Robert Otto and Dr. Julie Hamilton.

THE COURT: Good morning.

MS. FAHEY: On behalf of Palm Beach County, Rachel Fahey, with Kim Phan, and seated at the table supporting us with our exhibits is our paralegal, Melanie Cullen.

MR. ABBOTT: Good morning, Dan Abbott and Anne Flanigan for the City of Boca Raton.

THE COURT: Good morning, everyone.

With the exhibit lists, I know you submitted them, shall I rely upon those or did you bring extra copies? If not, I have them. They are on the appropriate AO Form, so I thank you for that, and I think they were submitted at Docket Entry 105 and 106, but presumably --

MR. MIHET: And 104, your Honor.

THE COURT: And 104. Is that the Plaintiffs' 104?

MR. GANNAM: Plaintiffs' are 105, your Honor.

THE COURT: What I have right here, maybe somebody has an extra -- no, I have it, I have 104, 105, and 106.

So, I suppose, just so I am clear whose is whose, you said the Plaintiffs' is --

MR. MIHET: 105. The city's is 104.

THE COURT: The city's is 104.

MR. MIHET: And the County's is 106.

THE COURT: All right. And you have all of your exhibits premarked?

MR. MIHET: Yes, your Honor.

THE COURT: Okay.

MR. MIHET: We have them on the thumb drive if the Court would like those now or later.

THE COURT: Does everyone have them on the thumb drive?

Let's talk about what makes sense in terms of an orderly presentation. I assume, because the technology is

already set up, PowerPoints ready to go, you have certain agendas on how you want to present. I have an agenda as well, I am sure they can be compatible agendas.

Let me hear first from counsel how you envisioned making your presentation, and maybe you conferred with Defense. And in addition to explaining the manner of making your presentation, have you accounted for what amount of time you think it will take to make your presentation?

It is my understanding nobody is seeking -- I won't say it is not an evidentiary hearing, I suppose it is in the sense that presumably there will be exhibits admitted, but I haven't understood there to be witnesses being called to testify, correct me if I am wrong, but rather more an emphasis on legal argument.

From the Plaintiff?

MR. MIHET: Yes, your Honor. We have foregone the option to bring forth live evidence for the Court this morning, however, we do need and intend to walk the Court through the relevant parts of the voluminous record the parties have established during the PI discovery phase of this case.

With the Court's indulgence, my colleague, Mr. Gannam, and I would take approximately two hours to walk the Court through the Plaintiff's case for a preliminary injunction, that is the evidence and the law, and we propose to do that first this morning and have a brief time for rebuttal at the end of

the day after our colleagues have an opportunity to state their cases.

We have attempted, and believe succeeded, to streamline the proceeding and save a lot of the Court's time. I think the Court initially reserved two days for the hearing.

THE COURT: Well, that was just to be nice, letting you know there was an overflow day. I fully anticipate, and it sounds like you agree, this should be done in a day.

MR. MIHET: We certainly do, only to say it would take some time for us to walk through the record, but we will be efficient and speedy.

THE COURT: You believe two hours is what you need for your presentation?

MR. MIHET: Approximately.

THE COURT: That would encompass perhaps questions I may have, so you will weave in those answers as part of your presentation.

MR. MIHET: Yes, your Honor.

We'll certainly answer any questions the Court may have, but we do have a PowerPoint. In my mind I have an idea how I want the proceeding to go, but your Honor is in charge.

THE COURT: As I am sure it is very compatible, we all know what the key issues are, although I know there are nuances, but there are key legal issues that comprise the nature of this case and, of course, there are the facts that

the Court must ensure it understands.

And from the Defense, first from the county.

MS. FAHEY: The county similarly has a lengthy presentation, I imagine the same time, 90 minutes to two hours to get through that presentation. Ms. Phan and I will be splitting that presentation.

THE COURT: From the city.

MS. ABEL: Good morning. We do not have a PowerPoint presentation, we had planned to answer any questions the Court has and plan to rebut the presentations before us. Whatever time allocations work for the Court, we will work with them.

THE COURT: Is there anybody here on behalf of the entities that filed the Amicus Brief, the three Amicus Briefs? Maybe state your appearance for the record at a minimum.

MS. DUNLAP: Erin Dunlap and Jennifer Yasko. We just wanted to submit the briefs, we will not make any presentation.

THE COURT: Okay, I did receive them. Thank you for that.

Well, let's see, I have gone over a lot of what I wanted to say initially. As I indicated, I do have an outline of topics I want to make sure we cover. I have no doubt that in two hours the two sides indicated they want you have covered the topics, maybe not answer the questions I may have. I may jump in when you get to a topic that I want to talk about and let it flow that way so you can proceed with the PowerPoint

presentations rather than start off with a series of questions I have.

I do think that each counsel should come to the podium when you give your presentation, and I understand we are working on technology issues with Defense. Hopefully when Ricardo gets here we can resolve that. You have a couple of hours to work that out if the Plaintiff is going to go first, which the Plaintiff will.

And, let's see, I think that that is it. Given you have your presentations, I am not going to jump in yet with my series of questions. Don't be surprised when you get to topics, or I see you haven't gotten to a topic that I want you to address, I might politely interrupt and let you know what I would like to hear more about in the course of your presentation.

So, with that, let's turn it over to the Plaintiff.

Now, you said two hours, I am going to put a clock on.

Do you want any kind of a notice of how your time is? Kind of like a real trial and examination or closing argument or opening statement.

MR. MIHET: Your Honor, if I had known the Court would clock us, I would have said two hours and 15 minutes.

THE COURT: The clocking means I will let you know. I will not tell you that you need to sit down, it becomes a way of managing and controlling the day.

MR. MIHET: My goal is to go about 90 or a hundred minutes myself and allow my colleague 20 or 30 minutes to cover a couple of distinct topics for the Court.

THE COURT: All right. Why don't I maybe give you a warning at 60, so you know when an hour has gone by, and you will know where you stand.

MR. MIHET: Thank you.

THE COURT: I will let you come to the podium. I won't start the clock until you are there, and making sure your technology works, and tell me when you are ready.

Now, when I am looking down at my computer and iPad, don't think I am not listening, I take notes and do research and do a lot of things here. If my eyes are not always looking at you, please know it is not that I am not paying attention.

You may proceed.

MR. MIHET: May it please the Court.

We are here this morning because the City of Boca Raton and County of Palm Beach have figuratively invaded the offices of Dr. Hamilton and Dr. Otto and banned what they are saying to their Defendants -- clients who have sought them out and gone there voluntarily and want to hear what the doctors have to say to them.

The Government and Defendants lack the constitutionally required impelling interest for their profound intrusion on Plaintiff's speech, and they have failed to

narrowly tailor it through outright bans. Because they cannot prove the ordinance is strict scrutiny, we would ask the Court to enjoin these ordinances and liberty to provide the counseling that Plaintiffs wish to provide and the kind that the ordinances ban.

THE COURT: You are going to start with the factual context rather than the law?

MR. MIHET: Correct. The law bans all SOCE related behaviors and expressions. Be that as it may, it is critical for the Court to understand at the outset there are in fact two fundamental differences and distinctions among the types of sexual orientation and gender identity change efforts which the Government and the Defendants never even considered before they enacted their bans.

What we have first, your Honor, is aversive and non-aversive change efforts.

Aversive therapy is conduct based therapy where aversive or negative stimuli or stimulus is paired with undesirable behavior in an attempt to reduce or eliminate that behavior.

Now, the APA, American Psychological Association, in its 2009 task force report on appropriate therapeutic responses to sexual orientation -- and we are going to hear a lot about the APA report today. I will refer to it as the APA report, it is Exhibit 14 out of the County's exhibits, your Honor.

On page 22, the APA report provides some examples of aversive therapy referring back to the 1960's. The APA says on page 22, "Behavior therapists tried a variety of aversion treatments such as inducing nausea, vomiting, or paralysis; providing electric shocks, or having the individual snap an elastic band around the wrist."

Your Honor, those are aversive techniques.

On the other hand, we have non-aversive therapy, which is talk therapy, which is carried out entirely and exclusively through speech. Clients talk, therapists listen and empathize and ask questions, and they talk the clients through whatever goals the clients have set for themselves.

The evidence in this case is undisputed that Dr. Otto and Dr. Hamilton do not provide aversive therapy, do not wish to provide aversive therapy, and do not know of anyone who provides aversive therapy in the entire world, let alone Palm Beach County.

If the Defendants had banned only aversive therapy, your Honor, we wouldn't be here this morning.

The second fundamental distinction the ordinances ignore is between voluntary and forced or coerced therapy.

The APA report on page 71 talks about involuntary and coercive treatments in which minors are or might be forced to undergo treatment against their will. Page 71, especially in the footnotes, APA provides definitions of what involuntary and

coercive treatments are.

The APA contrasts this with voluntary counseling where a patients seeks, requests, and willingly receives the therapy, and the APA encourages counselors and therapists to respect and observe the autonomy of the clients, even minor clients, to direct their own counseling. That is pages 74 through 77 of the APA report.

Once again, in this case, the evidence is undisputed that Dr. Hamilton and Dr. Otto only provide voluntary therapy which their clients seek, request, and willingly receive. They would never force any therapy, including SOCE therapy, on any patient who does not wish to be engaged and participate voluntarily in the process.

If the Plaintiffs banned only involuntary coerced therapy where parents or somebody else forces minors to undergo therapy against their will, we wouldn't be here this morning, your Honor.

Now, since we know and we are clear about what Plaintiffs do not want to do, what is it that they do want to do, but are prohibited from doing by the ordinance?

We look at the verified Complaint. I point out that for purposes of the preliminary injunction, the city has admitted all of the factual allegations in the verified Complaint, we know that from footnote 5 in the city's opposition, Docket Entry 3. The county has not admitted the

facts, but have not introduced any evidence to controvert the facts. Paragraphs 71 through 82, and 1.2 through 161 lists out what it is that Plaintiffs want to provide.

They want to provide only non-aversive talk therapy exclusively through speech. They want to provide counseling to minor clients who seek, request, and voluntarily assent to talking with the Plaintiffs. They don't impose their own pre-conceived goals and desires on any client. They conduct only client centered, client directed counseling, and only seek to assist their clients with the client's own goals that they set for themselves.

Now, for some clients those goals do include wishing to change unwanted same-sex attractions or gender identity confusion, or to conform their behavior through a true concept of themselves or moral and religious convictions.

Now, with respect to the ordinances, as already indicated, they do not draw any distinction between voluntary or coerced counseling or between aversive and non-aversive therapy. They indiscriminately impose a total ban on all sexual orientation and gender attached counseling. More importantly, whose goal it is to discuss sex change or gender identity.

SOCE is the short term that is used in the critical language. It is illegal if the intent to change is on the part of the counselor, the Plaintiffs, but -- and this is

critical -- it is also illegal if the intent to change is on the part of the client, the patient, and the counselor is merely seeking to assist and facilitate with the client's own goal to change.

In the black letter of the two ordinances they talk about the goal to change and do not differentiate whose goal it is, but we also know that because we asked the Defendants at their 30(b)(6) depositions. They designated someone to tell us how the Defendants themselves interpret and apply these ordinances, and we asked them about this.

I want to show the Court, this is from the city's 30(b)(6) deposition. The city's 30(b)(6) deposition, this is starting at page 157, line ten, and going through 158, 13.

"Question: Whose intent does the code enforcement officer have to look at; the minor's, or the therapist's or both?"

THE COURT: Let me stop you. From a procedural standpoint, you're showing experts from the deposition. Has the deposition been filed or are you intending to file the deposition as evidence?

MR. MIHET: It has been filed, all depositions and deposition exhibits are in the docket.

THE COURT: You contemplate that would be part of the record as part of the preliminary injunction?

MR. MIHET: Yes.

THE COURT: Does the Government have the same understanding?

MS. FAHEY: Yes.

MR. ABBOTT: We do.

THE COURT: All right.

MR. MIHET: "Answer: I think it's a ban on therapists. It's not governing the youth. It's governing the therapist's activities.

"Question: Okay. So if a minor shows up and the minor has the intent of changing their sexual orientation or gender identity, 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?

"Answer: 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 therapists, by the child themselves, that is banned by the ordinance.

"Question: Okay.

"Answer" That's my understanding.

"Question: Okay. And just so we are clear then, if the minor wishes to receive this type of counseling and the therapist wishes to provide the minor with that the minor -- I am sorry -- 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?

"Answer: That's my understanding, yes."

That is the city's testimony. I would like to show the County's similar testimony. This is from the Hvizd deposition, page 268, line 14, going to page 269, line five.

THE COURT: What name?

MR. MIHET: Hvizd, H-V-I-Z-D. This is the county's representative on the topic of how the county interprets and applies the ordinance.

THE COURT: The page and line?

MR. MIHET: 268, line 14 to 269, line 25.

"Question: What about an adolescent who was born female, but has been identifying as a male for a time? If that minor seeks therapeutic help in changing gender identity behaviors and expressions back to match her biological body, would the ordinance prohibit a therapist from providing talk therapy to assist with that identity change?

"Answer: If the practice seeks to change the individual's gender identity, that would be conversion therapy, and that would be prohibited."

Moving on to page 269.

"Question: If the adolescent's intent is to change the gender identity back to female and the therapist assists the adolescent with that goal, that would be prohibited

by the ordinance?

"Answer: Yes. If the practice does seek to change the adolescent's gender identity, that is within the definition of conversion therapy."

Question, line 12: "And it doesn't matter who seeks to change the gender identity if -- whether it is the child or the therapist, correct?

"Answer: I don't know that I would say it doesn't matter.

"Question: Well, if the child seeks to change the gender identity or sexual orientation, for that matter, and the therapist engages in talk therapy to assist with that goal, that would be a violation of the ordinance?

"Answer: I think the question would then -- yes, that would be a violation of the ordinance."

Your Honor, the Defendants, especially the city, seek to make much of the fact that Dr. Otto has testified that he, himself, cannot change anyone and that he, himself, doesn't try to change someone, so they conclude disingenuously that he is not affected by the ordinance.

However, both Dr. Otto and Dr. Hamilton have clearly testified in the verified complaint and at their depositions that they want to help their clients with the clients' own goals, and sometimes those goals include changing gender identity or sexual orientation or change related behaviors or

expressions.

Quite clearly by the letter of the ordinances themselves and the testimony of the Defendants' witnesses as to how they interpret the ordinances they ban change counseling even when intended and initiated by the clients themselves and assisted by the Plaintiffs.

Now, a few words on the relative burdens in this case, burdens of proof.

In our briefs and in the proposed order at paragraph 72, we show that a pair of Supreme Court cases, Gonzalez and Ashcroft, dictate that the burden of proof at the preliminary injunction stage tracks the burden of proof at trial, and so, it is the Government Defendants, not Plaintiffs, who bear the burden today of proving compelling interests and narrow tailoring, among other First Amendment elements, because it is the Government Defendants who bear those burdens at trial.

So, your Honor, this is critical, it isn't Plaintiff's burden to demonstrate that voluntary SOCE counseling is effective, and not their burden to demonstrate that SOCE counseling is not harmful. Instead, it is the Defendants who bear the burden to prove that actual, not conjectural or hypothetical, harm is caused by voluntary SOCE counseling.

THE COURT: Let me inject, then, as long as we are talking about burdens of proof, this is related to the topic, not squarely on the issues you have addressed, which is the

Governmental interest and the way the Governmental action is tailored or arguably, in your point of view, not tailored.

There is a standard of the Plaintiff having to prove four prongs, one of which is substantial likelihood of success on the merits. It is well established that a party seeking a preliminary injunction must first establish a substantial likelihood of success on the merits. However, from the briefing, the Court did not discern any direct arguments regarding the meaning of the standard "substantial likelihood of success on the merits."

Maybe we take this for granted because we see the language used in preliminary injunctions, but that is one of the four prongs, an important prong, and one that the Plaintiff, the movant, bears the burden of establishing.

So, the Court is interested in learning in this case now the parties' understanding of this standard.

From the Court's own research, the Eleventh Circuit has stated that "in our opinion the word substantial does not add to the quantum of proof required to show a likelihood of success sees on the merits and the word likelihood is synonymous with probability. Citing to Shatel Corporation versus Mao Ta Lumber and Yacht Corporation, 697 F.2d 1352, at 1355, Footnote 2, Eleventh Circuit, 1983.

The Court concluded in that case that even though the District Court had not included the word "substantial" in its

conclusions of law, such an omission, even if an error, was harmless.

Based on this Eleventh Circuit precedent, what level of likelihood or proof does the Court need to find to grant or deny preliminary injunction? Put another way, can the Plaintiff analogize this standard to another legal standard, such as preponderance of the evidence or clear and convincing? On the spectrum of legal certainty, where does "substantial likelihood" fall?

MR. MIHET: I would be in agreement with the case you read from. Substantial does not add to the quantum of proof for the Plaintiff to succeed at the preliminary injunction stage. If the burden at trial is preponderance of evidence, which it is, the same burden would apply at the preliminary injunction stage, particularly in a First Amendment context, I am in agreement with the standard the Court read, preponderance of the evidence, more likely than not.

I would emphasize that even though the Plaintiffs have the burden of proving likelihood of ultimate success on the merits, within that analysis, where the Court has to engage on the First Amendment inquiries, it is the Defendants who bear the burden of showing compelling interests and narrow tailoring.

The burden shifts back and forth. I hope the two Supreme Court cases make that clear to the Court.

Now, in our briefs and proposed order, paragraphs 73 to 75, we pointed to five Supreme Court cases, Janus, Turner Broadcasting, Edenfield, Landmark and Sable Communications, and one Eleventh Circuit case, Mason, which together established that the Defendants must discharge their burden with concrete evidence or studies that demonstrate that the seek to ban causes the purported harms they fear.

They need to establish much more than hypothetical conjecture that there might be some harm relationship between the banned speech and the feared harm.

In other words, because this is a First Amendment case and we are dealing with a restriction on speech, the Defendants cannot discharge their burden by pleading for legislative deference or claiming that SOCE is harmful, or stating that other organizations have found or concluded that SOCE is harmful.

Instead, what the cases teach is the Defendants must bring forth concrete evidence or studies that demonstrate that voluntary non-aversive SOCE counseling, the counseling that they banned these Plaintiffs from doing, causes sufficiently great harm to justify their complete and outright ban.

Now, before we show the Court how Defendants have utterly failed to meet their burden of proof on compelling interest and narrow tailoring, I want to spend a few minutes on the Defendants' attempt to avoid strict scrutiny or any

scrutiny by arguing the only thing the ordinance is prohibiting is professional conduct, not speech.

To dispose of the Defendant's principal argument, this is their principal defense, your Honor, their ordinances regulate professional conduct and are therefore not subject to scrutiny, the Court need look no further than the Defendant's own authority, King versus New Jersey.

King involved a SOCE ban that is virtually identical to the ones before this Court, and Defendants, as your Honor has seen in their briefs, are quite fond of King. They cited it as their principal justification in their ordinances, and they rely on it and also use it as the chief legal authority in this case, and yet King spends a great deal of time picking apart and eviscerating the Defendants' argument that the ordinances ban only conduct.

I have a few excerpts from King. This one is from page 224.

"The parties agree that modern day SOCE therapy, and that practiced by Plaintiffs in this case, is talk therapy that is administered wholly through verbal communication." That is true in King, and that is true here, your Honor.

Going back in, "Though verbal communication is the quintessential form of speech as that term is commonly understood, Defendants argue that these particular communications are conduct and not speech for purposes of the

First Amendment because they are merely the tool employed by therapists to administer treatment. Thus, the question we confront is whether verbal communications become conduct when they are used as a vehicle for mental health treatment."

If that argument sounds familiar, it is the exact same argument that the Defendants are bringing to this Court today.

The Third Circuit said, this is page 224 and 225, "We hold that these communications are speech for purposes of the First Amendment. Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized the verbal or written communications as conduct based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in Holder versus Humanitarian Law Project."

Also on page 225, the Third Circuit says, "Given the Supreme Court had no difficulty characterizing legal counseling as speech, we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are conduct.

The SOCE counseling they were looking at in King is virtually the same as what we have here.

And then pages 228 and 229, the Third Circuit provides conclusions: "To classify some communications as speech and others as conduct is to engage in nothing more than a labeling game." They go on and say, "Simply put, speech is speech, and

it must be analyzed as such for the purpose of the First Amendment."

And then they say, "We conclude that the verbal communications that occur during SOCE counseling are not conduct, but rather speech for purposes of the First Amendment.

Your Honor, I spent some time here only because King is their case, your Honor, they rely on it so heavily, and yet king --

THE COURT: The outcome ultimately was favorable to their position, so maybe their reliance upon that is perhaps in part -- mainly on the outcome, but I recognize that the argument that has been put forth by the Defendants in part relating to conduct versus speech has been addressed by King. I am familiar with King and I am further reminded of the principle.

MR. MIHET: That leaves the Defendant with no authority to support their contention. They have Pickup, and the Eleventh Circuit in Wollschlaeger avowed that Pickup -- I will get to that.

Now, before I get into what King got wrong or veered off the path, the thing they got right is to conclude that the SOCE ban there, and therefore here with the nearly identical ordinances, discriminates on the basis of content. That is on page 236 of the King opinion.

The Third Circuit says, "We agree with Plaintiffs that

A3371" -- that was the SOCE ban -- "discriminates on the basis of content. They don't even say it was a close call. They say, "We have little doubt in this conclusion." They say the law there, as here, bans what Plaintiffs want to say based on the content of what it is that they are saying.

THE COURT: So, let me pick up there. There was one line of questioning I had. It relates to a determination that this Court will need to make presumably, whether the ordinances at issue are viewpoint neutral or not.

It is my understanding that the Plaintiff is arguing that the ordinances are viewpoint discriminatory.

MR. MIHET: Yep.

THE COURT: But the Court wants clarity about precisely what aspects of the law are not viewpoint neutral.

If we take the Boca Raton ordinance for starters -- let me pull that up -- and we go to Section 9-105, definitions, in the very first sentence, quoting definitions, "Conversion therapy or reparative therapy means, interchangeably, any counseling, practice, or treatment performed with the goal of changing an individual's sexual orientation or gender identity.

Is there anything in that first sentence that you are arguing on behalf of your clients is viewpoint discriminatory.

MR. MIHET: Yes, your Honor.

THE COURT: What is that?

MR. MIHET: The whole lot.

THE COURT: I will have the same question -- well, we will go on to the second part, but I would like to start with that section.

MR. MIHET: Sure. If I can explain, when a client walks into the Plaintiff's office and wishes to pursue a change, let's say for example gender identity, an adolescent female has been identifying as a male for some time and wishes to change back to her female identity to match her biological body, we know from the literature this happens all the time, she comes in for assistance with this process from the Plaintiffs.

This ordinance which you just read allows only one viewpoint to be shared with this client, and that is change is not desirable, that there is nothing improper or wrong with the current state of affairs, and the client should not seek the change.

That viewpoint is sanctioned and allowed by the ordinance, however --

THE COURT: The fact that it applies to anyone, it could be any person who -- whether one identifies in both or either gender and wants to consider identifying --

MR. MIHET: Sure --

THE COURT: -- as any gender. How is it specifically viewpoint discriminatory towards persons when there is no delineation as to a particular type of person who is affected

by this sentence?

MR. MIHET: The prohibition is not on the person, but the message, the viewpoint, that is, the viewpoint that change is not desirable and not possible, that is not allowable.

THE COURT: Just change in general, that is the discrimination, that anyone who seeks change at all, any type of change?

MR. MIHET: Change of gender identity or sexual orientation in this case or related expression.

If somebody seeks those changes, the only viewpoint they are allowed to present is that those changes are not necessary, they are not achievable, they are not good, and they ought to continue and persist in the state they are in. They should not pursue change.

The viewpoint that is banned is that change is possible, it is not certain, but may be achieved, and that the client, if that client wishes to pursue change, then the client should be allowed and permitted to pursue change.

So, what the makes the viewpoint discriminatory is not that it prohibits equally change in either direction, from heterosexual to homosexual, that is not discriminatory; what is discriminatory is the viewpoint that they share is one that affirms the current state of affairs and disaffirms or disavows any kind of change, your Honor.

So, Defendants' own principal authority concludes --

THE COURT: Let me make sure that you covered -- so, it seems like you just acknowledged that the law would apply equally to changes to homosexual behavior as well as changes to heterosexual behavior. You acknowledge that and concede that. That is not what your argument is as to viewpoint discriminatory, just the notion of change; is that right?

MR. MIHET: Your Honor, actually what the definition goes on to say is that counselors can affirm change and can affirm somebody who is seeking to change their gender identity or going through, for example, you know, hormone therapy or surgical interventions, those kinds of things the ordinances say can be affirmed and assisted and helped, but the opposite is not true.

If the therapist believes surgical intervention is not the right course of action, not in the patient's interest, they are not permitted to provide that viewpoint.

And so, I don't think I would quite agree with the Court's proposition that the ordinances are completely neutral in terms of the directional change. I do think --

THE COURT: No. It was a question. I haven't stated a position, it was a question. I thought -- I haven't gotten to the second part of that, the ordinance, but the first part in that one sentence, I understood you to say that even though that -- that even though it does apply equally in the first sentence to changes to homosexual behavior as well as changes

to heterosexual behavior, the fact that a therapist can engage in change therapy, therapy seeking the goal of change, whether it is the parent or the child, the therapist, that makes that viewpoint discriminatory.

MR. MIHET: Sure, that is a viewpoint and that is banned by the ordinance.

THE COURT: In addition, are you saying -- so, the second part of the sentence is "including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex."

That is all part of the first sentence, so, is it still the same position?

MR. MIHET: Your Honor, it says toward individuals of the same gender or sex, that would indicate it only goes one way.

THE COURT: It says "including, but not limited to." I am just asking you. I want to understand your position as to whether the first sentence is discriminatory or not, and if it is discriminatory, why. That is what I want to know.

MR. MIHET: It is discriminatory because now we add this clause here, because it goes one way in what it specifies what is prohibited.

THE COURT: In the including language, including but

not limited to?

MR. MIHET: Yes.

THE COURT: The second sentence goes on to say, "Conversion therapy does not include counseling that provides support and assistance to a person undergoing gender transition or counseling that provides support and assistance to a person undergoing gender transition," and goes on from there.

MR. MIHET: Yes.

THE COURT: So, what is your position, then, with respect to this exclusion; how does that fit into the gender discriminatory analysis from your perspective?

MR. MIHET: It is an exemption that says only one viewpoint is permitted, the one that affirms the change, and the opposite viewpoint, one that would seek, perhaps, to provide other alternatives, is not permitted in that case.

THE COURT: Okay. So you have then pointed to two different things within the first sentence, just the notion of viewpoint discriminatory because it relates to change, and now a second proposition or argument, which is viewpoint discriminatory because -- not allowing change, but allowing support and assistance.

MR. MIHET: Yes, allowing affirmation of the change process when that change is to change gender identity from a biological sense to another identity.

THE COURT: Do you see the exclusion in any way

distinguishable from the first sentence in the ordinance based on the verbs used in the section? For example, the ordinance prohibits therapy seeking to change some aspect of the minor's identity, while the law allows support and assistance if the child is already in the process of changing some part of their identity through gender transition. Do you see any --

MR. MIHET: Based on the county and city, they do not differentiate whose intent it is to change. I don't see a difference, your Honor.

THE COURT: Okay. One more question to followup on the discussion of the viewpoint.

In your filings, you rely on the Supreme Court precedent from Sorrell, 564 U.S. 552, 2011.

Can you walk me through exactly how that case is analogous to this case? And are there any other cases you rely on for the proposition that a viewpoint discriminatory regulation would automatically be unconstitutional?

I have taken a leap now. First of all, the analogy that you draw to Sorrel as to the viewpoint discrimination in the message, in the content of the ordinance; and secondarily, any other cases you rely upon, because you have made the point that if this is a viewpoint discriminatory regulation it is automatically unconstitutional.

MR. MIHET: I don't think we were citing Sorrel for a factual scenario, but once the conclusion concludes that it is

discriminatory, there is no next step, it is an automatic invalidation. That comes from Sorrel and other cases. We are not aware of a single case out there that espoused that a viewpoint discriminatory ordinance is redeemable or salvageable.

THE COURT: Is there any case you cited to that you think is the strongest case you have that you are relying upon for -- since you are not relying upon Sorrel for a factual analogy, just for the legal principle, is there any factually analogous case whereby you draw upon that case to argue other than just -- I guess right now it would seem the plain meaning of the ordinance, coupled with the deposition testimony, that this language in this ordinance is viewpoint discriminatory? I know you draw upon King.

MR. MIHET: Not in the contention of the ordinance that we have here, but in a general sense, when you have an ordinance that allows one viewpoint, but not the other, that is the definition of viewpoint discrimination.

So, I am thinking of Lamb's Chapel, a lot of Supreme Court cases that basically say the Government cannot decide whose viewpoint ought to be able to prevail in the marketplace. In a free marketplace of ideas, the free flow of exchange, the Government has no interest in regulating viewpoints.

While the Government may dictate particular subject matter at times, or at a reasonable time, place, and manner,

restrictions, when it comes to viewpoint, the Government has no interest and no business deciding which viewpoints are permissible and which are not.

THE COURT: Okay.

MR. MIHET: So, your Honor, getting back to content discrimination and King, you know, a finding of content discrimination also yields -- or triggers, rather, strict scrutiny, and that is where King veered off course.

It was in its next conclusion, even though King found that the SOCE ordinance regulated speech and did so based on its content, King concluded that because it was the speech of professionals, it did not have to apply strict scrutiny.

The Supreme Court has corrected this aspect of King twice, first in the Reed case, where the Supreme Court held unequivocally that all content based restrictions must survive strict scrutiny without exception, and then recently, at the end of this last term in June, in the NIFLA case where the Supreme Court called out King and Pickup by name and abrogated them, holding that there is no such thing as lesser strict -- lesser First Amendment scrutiny for content base restrictions on the speech of professionals.

In NIFLA, we have -- on page 2371, the Supreme Court kind of sets out what happened in King and Pickup. It says, "Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that

the notice regulates professional speech.

That is what the Defendants are asking you to do here as well.

Then it says, "Some Courts of Appeals have recognized professional speech as a separate category of speech that is subject to different rules," citing specifically King and Pickup, and going through the rationale of the Courts citing to them.

The tag line comes on the same page where the Supreme Court says, "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.

THE COURT: Now, let me ask you a little bit about this. Let me walk through it. The issue we talked about was viewpoint discrimination, and now we are talking about content and whether something is content neutral or not.

Can I assume the argument you made about why the ordinances are viewpoint discriminatory are the same arguments you would make as to why they are content based?

MR. MIHET: Yes, your Honor.

As the Third Circuit said in King, it is not even a close call, because what they may say to their clients depends on the content.

THE COURT: Assuming the Court finds the ordinances are not content neutral, is it your position that strict

scrutiny is automatically included?

MR. MIHET: Absolutely.

THE COURT: Actually, this is the Ninth Circuit, let me walk through the different cases. What is your response to the Ninth Circuit's statement that "The First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it? That is Pickup versus Brown, 740 F.3d 1208, Ninth Circuit, 2014.

MR. MIHET: I can't say it any better than the Supreme Court majority said it on pages 2371 and 72, where they say in the same breath, after saying what the Ninth Circuit did in Pickup and the Tenth Circuit did in King, in the same breath it says, "but this Court" -- the Supreme Court -- "has not recognized professional speech as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals."

Pickup and King are no longer good law following NIFLA.

THE COURT: What about Justice Breyer's opinion in Reed versus Town of Gilbert that "there are a plethora of widely accepted forms of content regulation, such as in securities regulations or the HIV status exception to patient confidentiality?" That is Reed, 135 Supreme Court 2218, at 2235. Justice Breyer concurring, and Judge Tjoflat raised

similar issues in his dissent in Wollschlaeger.

MR. MIHET: There is a reason why Justice Breyer was writing a concurring opinion, the majority disagreed and said, once you conclude the restriction is content based, there is no review, you go to strict scrutiny in every instance. Justice Breyer had a different view, the same way Justice Tjoflat was in dissent in his view.

The finding of content based regulational discrimination must be strict scrutiny.

THE COURT: Is there not some lower standard that would be appropriate in the doctor/patient or child/caregiver context?

MR. MIHET: No, there isn't, and let me show you why.

The Defendants articulate that even after NIFLA, it is still possible to regulate professional conduct with something other than strict scrutiny.

On page 2372 of NIFLA, this is the operative language where they seek refuge, where they hang their hat. "This Court's precedents do not recognize such a traditional for a category called professional speech. This Court has afforded less protection for professional speech in two circumstances, neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their commercial

speech."

That is not what we have here. I don't think they are contending we have commercial speech. We don't have the first scenario.

"Second" -- the Supreme Court says -- "under our precedents, states may regulate professional conduct even though that conduct incidentally involves speech."

So, to answer your Honor's question, this is the argument that the Defendants make, yes, it is true that professional conduct may be regulated with something other than strict scrutiny, but professional speech cannot.

In the NIFLA case, the Supreme Court said, if you have conduct that only incidentally involves speech, then you don't need strict scrutiny. The example is Planned Parenthood versus Casey where abortion was the professional conduct, and there was a First Amendment challenge to some disclosures that accompanied the conduct of performing an abortion, and the Court said, look, we are looking at a regulation of abortion conduct with an incidental effect on speech, the informed concept or disclosure, and they said something less than strict scrutiny was appropriate.

So, in analogizing this case, your Honor, if the Defendants' ban had aversive techniques only, shock therapy, where you have someone hooking up a patient to a machine, and in the process saying I am now hooking you up to a machine, how

do you feel, I am administering shots, how do you feel, there is speech involved there, but clearly there is conduct, which is the electroshock therapy.

That, under NIFLA, could be regulated with something other than strict scrutiny even though it may incidentally involve some speech.

THE COURT: The conversion therapy definition in the ordinances doesn't -- correct me if I am wrong -- prohibit speech by the therapist to the patient about the therapist's view on conversion therapy. In fact, is my understanding correct that the therapist can actually speak not only to the patient about his or her views on conversion therapy, but can speak to the patient's parents, can speak publicly, can refer the patient to a non-licensed person to actually receive therapy, but what the therapist is not allowed to do is to engage in the counseling practice or treatment?

Now, understanding that speech may go along with counseling practice and treatment, is my understanding correct the ordinance doesn't prohibit, doesn't prohibit a therapist from speaking his or her views on conversion therapy? Yes or no, am I correct or not?

MR. MIHET: The answer is, your Honor, I don't know. That is the vagueness problem of the ordinance because the only thing that happens is speech back and forth. We don't know at what point does a counselor discussing his or her views about

something become therapy that is prohibited.

THE COURT: Let's assume for a moment, putting the vagueness argument aside, that it is clear that in this definition the therapist can express his or her views, cannot engage in therapy, that is counseling practice or treatment, but can express his or her views to the patient, to the parent, to the public, publish, locally, nationally, and can refer to someone not prohibited under the ordinance.

What do you say about the content aspect of it at that point?

MR. MIHET: Public speaking is not relevant, we are concerned with what happens in the office between the doctor and the therapist.

I am having a hard time conceptualizing that. It simply is not clear. My clients don't know, and I have asked them. They don't know. When they are responding to questions from a client that is seeking to change, and the client says, well, what do you think about this, doc, they don't know at that point is what I am about to say next going to be therapy or is it going to be only my opinion?

They don't know that. How is the code enforcer with the high school diploma going to know that as well?

THE COURT: I appreciate that. Let's put that vagueness aspect aside for a moment and assume for argument's sake and clarity's sake that it does not prohibit a licensed

therapist, the Plaintiffs in this case, from when the patient says what do you think doc, and the doc says, well, this is what I think, but doesn't go any further in terms of engaging in counseling practice or treatment, and is permitted to do all the other things I have just said, how does the Court look at that analysis? Is it conduct, is it speech --

MR. MIHET: It is clearly all speech, whether the doctor is sharing a personal opinion or whether it is engaged in speech with the client. There is no --

THE COURT: If the doctor is allowed to make the speech is what I am saying, yes, that is speech.

If the therapist is allowed to engage in speech, allowed to give his or her viewpoint on the therapy, but not allowed to engage in counseling practice or treatment.

MR. MIHET: That is content discrimination. It is the counseling, your Honor, that also takes place in speech. The counseling is not conduct, we know that from King and we know that from NIFLA.

The counseling here, it is indisputable, takes place exclusively through speech. There is not some modality where they are engaged in conduct simply because they are discussing one particular thing versus a personal opinion.

THE COURT: Okay. That hypothetical -- maybe it is not a hypothetical, but that line of questioning wouldn't make a difference in your analysis because you would nevertheless

look at counseling, even if you put viewpoints aside, that the counseling involves speech, and therefore it is speech, not conduct, and automatically subject to strict scrutiny, and that is your position.

MR. MIHET: Absolutely, your Honor, there is no part of their therapy that takes place other than speech.

Speech is the only thing, not like in NIFLA, where you have some conduct with an incidental impact on speech, here we have speech, we don't have conduct through which the speech is incidental. In the Wollschlaeger case the Eleventh Circuit en banc said when you are dealing with a doctor speaking to a patient, trying to argue that is merely incidental to speech, it is like trying to argue that walking or running is incidental to ambulation, it simply doesn't work, it is speech.

THE COURT: Let's talk about scrutinize. We have been talking about strict scrutiny. Let's talk about intermediate scrutiny. Why should the speech inherent to conversion therapy not be subject to some kind of diminished scrutiny, such as the standard articulated in Ocheesee Creamery, LLC versus Putnam, 851 F.3d 1228, Eleventh Circuit, 2017, which was cited by the Defendants for the proposition that intermediate scrutiny applies to content based restrictions of commercial and lesser protected forms of speech? Could the following categories not apply here?

MR. MIHET: No. First of all, we don't have

commercial speech here, this is not speech that proposes a commercial transaction.

THE COURT: Is the speech not made for economic gain?

MR. MIHET: Not necessarily. The ordinance banned speech whether it is paid or not. Commercial speech is speech which solicits, seeks a commercial transaction.

By the time the patient is talking to Dr. Otto or Dr. Hamilton, the transaction is no longer being proposed, they are there for actual speech. That is no longer commercial at that point, whether or not money is changing hands.

THE COURT: What do you rely upon for whether it is or is not commercial speech? Is there a particular case you think most strongly supports your position that in no way, shape, or form is this to be viewed in the lens of commercial speech?

MR. MIHET: Yes, the Supreme Court in NIFLA talked about the -- the name escapes me. One second.

THE COURT: That is okay, when you get that, you can bring that to my attention. We are coming up on 60 minutes, I want to give you that notice.

I also wanted to ask you, the Court does understand that the Supreme Court struck down the Ninth Circuit's reliance on professional speech as a category in NIFLA, but did not the Supreme Court leave open the door that a separate category of speech might be appropriate in another case? Do you agree with that? If so, why, or why is this not that case?

MR. MIHET: The Supreme Court said the state may regulate professional conduct which may merely have an incidental effect on speech.

It did not say that states, or municipalities in this case, can reclassify conduct -- rather speech as conduct to avoid constitutional scrutiny. If the Court concludes this is speech, which is what King says, then the Court has no room, under NIFLA, to apply anything other than strict scrutiny if in fact a content-based restriction is found to exist.

THE COURT: What about time/place/manner restrictions?

MR. MIHET: Content based restriction is not a time, place or manner.

In this case, the ordinances don't say you can engage in conversion therapy or SOCE counseling after 6:00 o'clock p.m. and only in a particular place, it is a total and complete ban county wide. There is no place in the county where these Plaintiffs can go at any time to conduct this First Amendment protected activity.

THE COURT: Well, looking at it in a different lens, would one not be able to look at it as a time/place/manner restriction insofar as this type of therapy can't take place with a child until he or she reaches the age of 18? So, kind of when manner, it can't take place if a child is less than 18 years by this type of person, a licensed therapist, but it can take place by other people who don't fall within the

restriction, maybe a clergy member or other persons, and it can take place in a different place, that is, not in the confines of a therapy session at the offices of the Plaintiffs.

Why is that not akin to time/place/manner?

MR. MIHET: Number one, you can can't have a content-based restriction that is also a time/place/manner. Two, if it were a time/place/manner it would be unreasonable for a number of reasons.

When somebody at the age of 13, your Honor, is dealing with a confusion or a crisis of identity where they want to return back to an identity that matches with their biological body, for example, the literature tells us -- I hope to get to it today. The American Psychological Association, which the Defendants themselves respect, says it is imperative to allow them to do that at the time they are experiencing it. Telling someone at 13 they must wait until they're 18 for the kind of help these doctors are able and willing to provide is not reasonable in this instance, your Honor.

And then again, with respect to clergy, sending them to an unlicensed therapist or clergy, that makes this ordinance wildly uninclusive. If SOCE counseling is so abusive and so harmful, your Honor, then why not exclude religious clergy from it? Why allow them to engage in what they deem to be child abuse, you know? If it is as harmful as they claim it is, they should have enacted a total and complete ban. They say,

well -- and they recognize in their communications most of the complaints they got dealt with religious-based counseling which they say we can't touch.

Well, the state can punish members of the clergy if they abuse children, that is not a new proposition. We see it in the media right now in various different subject, that makes this ordinance wildly inconclusive, which it fails a narrow tailoring, your Honor.

THE COURT: I am going to get to those prongs. Regardless of whether the Court applies strict or intermediate -- and I know there is some argument the Defense will make that why even a rational basis review is called upon. Let's talk about strict or immediate scrutiny.

The Court will need to make findings -- you began your presentation with that in the context of it being the Government's burden. I don't think anyone disagrees with that.

In Wollschlaeger the Court stated "heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." The Court went on, "The question is whether the data relied upon by the legislature is sufficient to demonstrate harms that are real and not merely conjectural such that the regulations will in fact alleviate these harms in a direct and material way." Wollschlaeger, 848 F.3d 1312, citing Turner Broad Systems, Inc. versus F.C.C., 512 U.S. 622, 1994.

In light of the case law, what is the Plaintiff's position on the following:

Who defines the Governmental interest and who gets to decide what scientific literature to depend on? What legal standard are you relying upon with respect to that?

MR. MIHET: Thank you, your Honor. The Defendants would have this Court completely defer to their legislative judgment, but the case law we have identified are the five Supreme Court cases, Turner, Landmark, Edenfield, Sable Communication and Janus. They all say that in the First Amendment context Defendants don't get to define for themselves what the First Amendment requires or permits.

This Court's obligation is to review the evidence that the Defendants put forward and to determine whether it is sufficiently concrete, sufficiently firm to allow the kind of ban that they make. Have they drawn a sufficient causal connection between the practice they ban, in this case voluntary SOCE counseling, the non-aversive kind, and the harms that they fear? We believe the answer is clearly no.

But that is a question for this Court, and not a question for the County Commission or the City Council in this case.

THE COURT: So, following up on that, exactly what quantum of proof do Plaintiffs assert the Government would need to pass these ordinances? If the evidence presented was not

enough, what would be enough?

As a hypothetical, if the county and the city were instead presented with evidence from the same number of studies as we have here that a new prescription medicine was harmful, how many studies would the county and city need? Must they wait for scientific unanimity? What more did the city or county need to present here to make their case for a compelling or important Governmental interest?

MR. MIHET: Sure, your Honor, I have a plan to go through what evidence they have, and what I will show the Court is that they have no evidence. What the APA has said, there are no studies, you can make no correlation, no causation, you can make no claim that SOCE causes harm.

So, the answer is going to depend, your Honor, but it certainly has to be, it has to be more than no evidence, which is what they have here.

THE COURT: Okay.

MR. MIHET: Before I get to the actual studies, your Honor, and I am moving into the compelling interest part. What I want to quickly show the Court is that on the subject of compelling interest the Defendants, they cannot demonstrate a compelling need to ban voluntary SOCE counseling that minors seek to request or willingly receive.

They never had -- actually, when Judge husbanding, the chief architect and proponent of the ordinances, when he first

approached the Defendant to enact the SOCE ban he asked for a ban on aversive involuntary therapy. I direct the Court's attention to Plaintiffs' Exhibit 6 which is being displayed right now.

This is the memorandum that he is sending in June 2016 to the county to ask them to enact a S on C event, some 18 months before the ban was enacted.

THE COURT: Are you seeking to admit this or are you presuming it is already in the record?

MR. MIHET: We are seeking to admit this.

THE COURT: This is Plaintiffs' 6, any objection?

MS. FAHEY: No, your Honor.

THE COURT: Admitted without objection.

(Whereupon Plaintiff's Exhibit 6 was marked for evidence.)

MR. MIHET: Here Judge Hoch says to the county "conversion therapy, also known as reparative therapy, is counseling based on the erroneous assumption gay, lesbian, bisexual and transgender identities are mental disorders that can be cured through aversion treatment."

That is what he was after, your Honor, aversive treatment.

On page two of this memorandum he says "the Palm Beach County Human Rights Council recognizes that the practice of conversion therapy, which is most often forced upon minors by their parents or guardians, is extremely harmful."

He was asking for a ban on aversive therapy that is forced upon the minors, your Honor. That is what they could have banned. That is not what they ban, your Honor.

Second, the Defendants never received any complaints of any harms resulting to anyone in their jurisdiction from voluntary non-aversive SOCE counseling.

The city readily admits it received no complaints SOCE caused harm at all, much less the voluntary non-aversive kind, and the city made no effort whatsoever to determine whether anyone was harmed.

We have the Woika deposition, W-O-I-K-A. This is the cities 30(b)(6) designee on compelling interest questions. Page 16, starting with line 21, going to 17, line four.

"Question: Prior to enacting the ordinance, had the City of Boca Raton ever received complaints that one of its citizens had been or was being harmed by conversion therapy?

"Answer: No.

"Question: Prior to enacting the ban, had the City of Boca Raton attempted to determine whether any of its citizens had been or were being harmed by conversion therapy?

"Answer: No, not to my knowledge."

Now, the county defendant on its behalf claims that unlike the city it did at least attempt to investigate whether anyone in the county had been harmed by SOCE counseling, but it wasn't able to find any evidence of harm on its own.

We have Ms. Hvizd's deposition, page 31, she was in charge of drafting the ordinance for the county, and she testified she undertook an investigation, but found no evidence of any SOCE harm within the entire county of Palm Beach. This is page 31, line 13 of the files deposition.

"Question: You found no one within Palm Beach County that was being harmed by conversion therapy?

"Answer: No."

Now, despite the county's failure to find any evidence of SOCE harm, the county claims it was provided with such evidence by two individuals, Judge Hoch, and one other citizen, Nick Sofoul.

Your Honor, with respect to Judge Hoch, at the December 19, 2017 Commission meeting where the ordinance received the final vote of approval, he testified, and this is on exhibit -- this is Exhibit 3, Plaintiff's Exhibit 3, a transcript of that County Commission hearing, your Honor.

On page 80, Judge Hoch tells the County Commissioners he had heard from two mothers, who heard from their two gay children, who heard from their two gay friends that the friends had been forced to undergo conversion therapy against their will.

You see that at line ten he says, "We received complaints from mothers of gay people because their friends, the gay children's friends who also identified as gay, were

being subjected to conversion therapy."

On line 15 he makes it clear the conversion therapy is the forced kind. He says, "There is nothing we can do about that unless you act today. So these kids are still being forced to go to the therapists who are telling them that God does not love them."

Your Honor, that is consistent with what Judge Hoch told the Commission a year and a half earlier, that he was looking to ban aversive forced therapy. Now he says there are two kids who heard from others, who heard from others they were harmed by forced therapy.

Hoch, Judge Hoch, had never mentioned, by the way, these two individuals in the year and a half before. At the County Commission meeting in December of 2017 was the first time that he had mentioned them, and by the time we get to this point the ordinances had been drafted long ago.

It is disingenuous for the county to posit that they used these two allegedly harmed individuals as a rationale since they had already drafted the ordinance prior to this point without even knowing about them.

But even if we grant them that, they base the ordinance on the two individuals, what we have here is a complaint about forced therapy. They could have banned forced therapy. That is not what they banned, that is not the only thing they banned.

With respect to the other person, Nick Sofoul, Plaintiff's Exhibit 4, your Honor --

THE COURT: Now, you are not moving these exhibits in?

MR. MIHET: Your Honor, for ease, could we move the exhibits in at the end?

THE COURT: As long as you all agree to all of them so I don't have to consider any argument while we are talking about the exhibit. You have 41 exhibits on your exhibit list. Are you intending to have all 41 admitted into evidence?

MR. MIHET: I may not move them all in today, but -- yes, your Honor.

THE COURT: Are you confident there is going to be agreement on all exhibits?

MS. FAHEY: The county is prepared to stipulate and I believe the counsel for the city as well, so long as all exhibits are considered for this hearing only, we can stipulate to the admissibility.

THE COURT: The city as well?

MR. ABBOTT: Yes, your Honor.

THE COURT: So I am clear, every exhibit on the Plaintiffs, city's and county's exhibit lists at Docket Entries 104, 105, 106, all parties are stipulating for preliminary injunction only they are admitted.

MR. MIHET: Sure. We may have argument on authenticity.

THE COURT: Admissibility.

MR. MIHET: Yes.

MS. FAHEY: Yes.

MS. ABEL: Yes.

THE COURT: We have all the exhibits on the thumb drive. I will make a note they have all been admitted without objection.

(Whereupon all exhibits were marked for evidence.)

MR. MIHET: With respect to Mr. Sofoul, on Plaintiff's Exhibit 4 we have the -- an email that he sent to the County Commissioners at 10:16 p.m. the night before the final vote. This is 44 minutes shy of the literal 11th hour, your Honor. There is no evidence that the County Commission ever saw or considered this email as a group before they voted upon the ordinance the very next morning.

However -- and also the ordinance, by this point, had long been drafted, so the argument that they based it on what Mr. Sofoul was saying is also, I think, disingenuous.

But even if they could claim they did base the ordinance on what Mr. Sofoul was telling them, it still doesn't help here because Mr. Sofoul also, like Mr. Hoch, is describing aversive forced therapy.

He talks about how he had been moved by the horrific stories of friends that had been subject to these cruel and inhumane methods. What kind of cruel and inhumane methods? He

attaches an article in his email, Plaintiff's Exhibit 5, and this article talks about an individual by the name of Samuel Britton, and on page two of this article, Mr. Britton recounts how he was forced to go through some rather horrific aversive techniques, techniques that my clients have never engaged in, have no business engaging in, have no interest engaging in.

Once again, if the Defendants wish to ban this kind of therapy that Mr. Sofoul was complaining about, they could have done that. That is not what they did.

So, at the end of the day, with respect to the complaints, your Honor, there was no need in Boca Raton or in Palm Beach County to ban non-aversive voluntary therapy.

There were no complaints about it, they were able to find no instances of harm, and what the Supreme Court said in Turner is that a regulation may be perfectly reasonable and appropriate in the face of a given problem, but may be highly capricious if that problem doesn't exist.

What we have here is the classic solution in search of a problem, a problem that did not exist in Palm Beach County or the City of Boca Raton, but a problem the Defendants decided to solve anyways through an outright ban. That is the very antithesis of compelling interest.

Now, moving on, the overwhelming research that the Defendants put forth, overwhelming research, that term was provided to the Defendants by the proponent of the ordinance,

Judge Hoch. The Defendants didn't do any of their own research, they merely accepted what Judge Hoch gave them. And as we have shown in our briefs, and in the proposed orders, and as we will quickly recapitulate today, not a single one of the ten sources cited by the Defendants contains any study showing any SOCE counseling, let alone the non-aversive voluntary kind my clients wish to provide, actually causes any harm.

What the Defendants posit are either studies that find claims of harm to be inconclusive or ideological opinion statements bereft of any backup evidence of harm.

Looking specifically at the gender identity change efforts, your Honor, as a separate and distinct category from sexual orientation change efforts, so we are clear, the ordinance includes gender identity along with sexual orientation efforts as part of this ban, and at their depositions the Defendants' representatives confirm that the Defendants interpret the ordinances to prohibit a counselor from helping a boy who shows interest in typical girl activities and not in boy activities. They prohibit counselors from helping the boy be comfortable with his biological body and be confident as a boy.

They also say the ordinance prohibits counselors from assisting an adolescent girl identifying as a boy for some time, but wishes to change back to her biological body identity, to her biological body. We have seen that testimony,

I will not read it for the Court again. For the city it is at Woika, 171, line 16, through 172, eight.

And also 172, 11 to 173, eight, that is where the city confirms its ordinance bans this kind of gender identity change efforts. And with respect to the county it is Hvizd, 268, line 14 to 269, line nine, and also 260, line 11 to 261, line eight.

There is no dispute that they prohibit these kinds of gender identity counseling.

Here is the problem with these prohibitions: They are not supported by Defendant's so-called overwhelming evidence; instead, they are refuted.

We have the APA report, this is County Exhibit 14, this is the primary document, the magnum opus, if you will, on change counseling. And all of the other evidence that they cite, all of the other nine, either cite and rely heavily on this document or don't cite or rely on any other document or study.

So, this document actually specifically excludes gender identity change efforts. On page nine we see the APA says they never even looked at gender identity because somebody else was looking at that issue.

So, if the APA doesn't draw any conclusions about gender identity in this document, neither can Defendants and neither can the other nine folks that cite to this.

Now, the APA did address the subject of gender

identity change efforts in another publication that came out in 2015. This is Plaintiff's Exhibit 30, it is guidelines for psychological practice with transgender and gender nonconforming people. This is referred to as TGNC, transgender and gender nonconforming.

What we see in this document is the exact opposite of overwhelming research. For example, page 835, this is an introduction here. On page 835, they tell us we cannot conflate gender identity with sexual orientation, cannot be conflated the way the Defendants lumped them here.

On page 842 we see the APA actually recognizes the absence of research on gender identity change in children, which is quite different from overwhelming research.

What they say on page 842 is, "Due to the evidence that not all children persist in a TGNC identity into adolescence or adulthood, and because no approach to working with TGNC children has been adequately, empirically validated, consensus does not exist regarding best practice with prepubertal children."

Your Honor, consensus does not exist, that is the exact opposite of overwhelming research.

There are two distinct approaches to treating prepubertal children that have confusion. In the second approach, children are encouraged to embrace their given bodies and to align with their gender roles, boys are encouraged to do

boy things, and girls are encouraged to be girls and do girl things.

What the APA says, quote, "It is hoped that future research will offer improved guidance in this area of practice."

Your Honor, they are hoping and calling for more research, but the Defendant thinks there is overwhelming research, it is bad and we are going to ban it.

Now, most noteworthy in this report, on page 843, this is what the APA says with respect to adolescents who have adopted a gender identity different from their biological body and wish to turn back. They say, "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 over stated, particularly given the research suggests that not all young gender nonconforming children will ultimately express a gender identity different from that assigned at birth."

What the APA is saying is that people do change back to the gender that is assigned at birth, and you have to allow that change when the minor seeks to do it at 13 or 14, you can't make them wait until 18.

What the Defendants have done here, they banned these Plaintiffs from assisting with this kind of gender identity change even though the APA, the organization they tout and

trust, tells them it is imperative to allow the freedom for that kind of change.

Other things the Defendant cites also confirm lack of empirical research on the outcome of gender identity change.

THE COURT: Let me stop you for a moment.

We have been going for an hour and 27 minutes, an hour and a half -- we have been going since 9:00, we have been going for two hours. Pauline has been working for two hours, but in terms of your argument, an hour and a half.

How are you doing on time? It sounds like you are focusing on the prong of the Government interest --

MR. MIHET: I am going through studies, yes.

THE COURT: Government interest and speaking about how the ordinance is or is not substantially related or narrowly tailored. What additional time do you envision for that area?

MR. MIHET: Those are the only two areas I have left. It is going slower than I anticipated. I might need another 20, 25 minutes myself before I turn things back over to my colleague. I apologize.

THE COURT: You are turning things over to your colleague for what?

MR. MIHET: Unenforceability of the ordinance with respect to having the code enforcers going out and policing what licensed therapists can or cannot do, which ties into the preemption argument.

THE COURT: How long does your colleague anticipate?

MR. MIHET: 25 minutes.

THE COURT: It sounds like you need an hour, and your colleague 20 minutes, that is an hour and 20 minutes. If we come back at 11:15, let us see if we can conclude by 12:30ish, a little after 12:30, the Plaintiff's presentation, and then we'll break for lunch.

MR. MIHET: Thank you, your Honor.

THE COURT: We will be in recess for 15 minutes. You can leave all of your things here and we will be back in 15 minutes, at 11:15.

(Thereupon, a short recess was taken.)

THE COURT: All right. You may be seated.

You may come back to the podium and we'll resume.

MR. MIHET: Thank you, your Honor.

We were talking about the state of the research, particularly with respect to gender identity, and then I'll talk about the sexual orientation change research.

We were talking about another document that is cited by the ordinances as overwhelming research, this is County's Exhibit 7, and it is a report by the American Academy of Child and Adolescent Psychiatry, or AACAP.

Now, in this particular study, what AACAP says on page 968, with respect to children they say, "Different clinical approaches have been advocated for childhood gender

discordance. Proposed goals of treatment include reducing the desire to be the other sex" -- that is banned by the ordinances here and other things. They say there have been no randomized controlled trials of any treatment.

On page 969, AACAP says, "Recent treatment strategies based upon uncontrolled case studies have been described that focus on parent guidance and peer group interaction. One seeks to hasten desistence of gender discordance in boys through eclectic interventions such as behavioral and milieu techniques, parent guidance and school consultation aimed at encouraging positive relationships with the father and male peers, gender-typical skills, and increased maternal support for male role taking and independence." Footnote 100. I will come back.

Basically, they are talking about therapy that says boys will be boys, and not gender identity, something that is banned here.

What they say in the last sentence, "Desistence of gender discordance has been described in both treatment approaches, as it is in untreated children."

Later on page 969, the same page, what AACAP says, "Given the lack of empirical evidence from randomized controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, and longitudinal evidence that gender discordance

persists in only a small minority of untreated cases arising in childhood, further research is needed on predictors of persistence and desistence of childhood gender discordance as well as the long-term risks and benefits of intervention before any treatment to eliminate gender discordance can be endorsed." They stop there and I add, or banned.

Further research is needed. What AACAP says, that is the opposite of we have overwhelming research saying one modality is harmful and must be banned. They don't get anywhere close to that, they say we need more research.

I pointed to footnote 100. That cites to the work of Dr. Bahlburg, a professor at Colombia University. His study is Exhibit 31. I would note, I hope I don't sound facetious, but Columbia University is not a forum university of quackery, and Professor Bahlburg is lauded for the work he does in studying transgender issues. He is certainly no quack either.

In this particular study, Plaintiff's Exhibit 31, he describes the great success that he has had in helping young boys desist from a female gender identity and become comfortable with their biological male bodies by doing the very same things that Defendants have banned here, talk therapy with the boys and with their parents and increasing male influences and male expressions so the boys become comfortable with being boys.

He talks about, on page 372 of his study, how he has

had a 91 percent success rate in one study that employs techniques expressly sanctioned by AACAP in the previous report that we looked at.

Your Honor, it is a good thing that Professor Bahlburg works in New York City and not Boca Raton or Palm Beach County. If he were in Boca the code enforcers would shut him down. This is a mind boggling aspect of the ordinance that my colleague will get into. But if a code enforcer with a GED or high school diploma can come in and look at what Dr. Bahlburg does, he could ban him and we'd have a real enforcement problem here.

Not to get ahead of ourselves, I will move on to the overwhelming research with respect to sexual orientation. Let me wrap this one on gender identity and say the Defendants have mischaracterized the extent of the research. When APA and AACAP concluded that not sufficient research existed and called for additional research on treatment and modalities, Defendants took that and concluded that the research was, quote, "overwhelming" and banned the very practices that these organizations said might have promise, but needed further studies.

Your Honor, this is reason alone to invalidate -- or enjoin, rather, the ordinances at this point.

Now, moving back to the APA report, the magnum opus cited by virtually all the other studies, here, your Honor, the

American Psychological Association makes it clear that it cannot and does not draw any conclusions with respect to harm, claims of harm from any type of SOCE, let alone voluntary non-aversive SOCE counseling.

Page 42 of the report "we conclude that there is a derth of scientifically sound research on the safety of SOCE." A derth of research is quite the opposite of overwhelming research, your Honor.

On the same page, "Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm."

There is no indication of occurrence or frequency of harm, they say, because no study to date of adequate scientific rigor has been explicitly designed to do so.

And they say, "We cannot conclude how likely it is that harm will occur from SOCE." We can't say it is a hundred percent or zero percent or one percent more likely that someone who undergoes SOCE counseling is going to suffer any harm from it.

What they say on page 42 is that "the nature of these studies precludes" -- that means does not allow, prohibits -- "causal attributions for harm or benefit to SOCE."

What that means is, if somebody reports anecdotal

harm, depression, or whatever else Defendants posit, when you hear that being posited, what the APA is telling you with this statement is that we cannot tell whether that alleged harm resulted from an actual SOCE treatment or whether it resulted from an infinite possibility of other factors. Maybe somebody walked under a ladder or stepped in front of a black cat, who knows what else. We cannot tell, according to the APA, whenever we have a report of harm because there is no causation or correlation.

Now, what they say on page nine on of this report is, "We concluded that research on SOCE has not answered basic questions of whether it is safe or effective and for whom."

They talked about the future research and what it should look at and address. That is the opposite of we have overwhelming research, we don't need any more, we must ban this right now because it is harmful. That is the farthest thing from what the APA says in this report.

The Defendants have accused us of cherry picking one or two quotes from the APA report. The truth is, the report is riddled with these kind of disclaimers upon disclaimers about you cannot draw conclusions about benefits or harm. It is not my clients' duty to prove the benefits or efficacy, it is the Defendants' burden to prove the harm which the APA says they cannot at this time.

So we are clear about cherry picking, in paragraph 12

in the proposed findings of fact and conclusions of law we put together a few of the disclaimers, not all, just a few. They are there for the Court, I will not recapitulate them here.

Needless to say, it is the Defendant who is cherry picking anecdotal so-called evidence of harm which the APA says cannot be contributed to SOCE -- caused by SOCE. No doubt they will attempt to do that again today, they will cherry pick some instances in the report when they say somebody reported some kind of harm.

The Court has to remember no attribution or causal relationship can be drawn from that harm and SOCE.

So, essentially what the APA report has concluded, there is no evidence of benefit or harm from SOCE because of the lack of empirical research, they say we need more research on this.

What the Defendants have done is accept the first premise of the APA, they say there is no evidence of benefits, and at the same time reject the second report from the APA, which is to say we have no evidence of harm. They can't have it both ways, if the evidence of benefits is not credible, the same has to be true for the evidence of harm.

Instead of the APA's recommendation for further research to be done, they declare an end to the research and debate, and they have banned one particular kind of counseling.

Now, according to the Supreme Court in NIFLA, that is

not science, your Honor, that is totalitarianism.

Now, one interesting aspect of the APA report, on page 41, they note that the isolated reports of harm which they cannot attribute to SOCE, they were coming from aversive techniques.

Page 41, we have the report where they say, "Early research" -- on the bottom of the page here -- "on efforts to change sexual orientation focused heavily on interventions that include aversion techniques. Many of these studies did not set out to investigate harm. Nonetheless, these studies provide some suggestion that a harm can occur from aversive efforts to change sexual orientation."

Once again the Defendants didn't ban aversive techniques, they banned non-aversive techniques as well.

With respect to my clients, Dr. Hamilton and Dr. Otto's clients, this is what the APA says on page 73 of the same report. "We found no empirical all research on adolescents who request SOCE."

No research is the exact opposite of overwhelming research.

Now, the APA contains a resolution in Appendix A, they make some recommendations based on the documents we have been through, and the Defendants cite the resolution as a separate item in their ten-item list, perhaps to make it seem like there is more. It is part of the same document, Appendix A to the

APA report. It appears separately in the ordinance and in County's Exhibit 15.

I submit to the Court that you can look long and hard through the list of things that are in this resolution from the APA, and you are not going to find anything about the APA recommending that SOCE counseling be banned, legally banned. They simply don't do that, and that is to be expected. They can't call for research on one hand and on the other hand suggest it ought to be banned, as the Defendants have done here. Nowhere in this resolution do we have that.

Now, since the APA itself could not conclude that SOCE counseling causes harm, it necessarily must follow that none of the other nine position papers that cite -- that the Defendants cite in their ordinance and in turn cite to the APA report, they can't draw that conclusion either. Right?

Well, maybe that is not the case. Look at County's Exhibit 20. This is the Professional School Counselor and LGBTQ Youth document by the American School Counselor Association. This is one of the ten items in Defendants' overwhelming research and here is what they say in the bottom paragraph of this document.

They say about halfway through the paragraph "Professional school counselors do not support efforts by licensed mental health professionals to change a student's sexual orientation or gender as these practices have been

proven, proven ineffective and harmful."

What do they cite? The APA report from 2009, the same report that says we cannot make any claims with respect to causation or harm. Now we have a document that the Defendants rely on for overwhelming research that basically entirely accedes to what the APA says. No.

Moreover, it appears the folks here didn't read the disclaimer we showed the Court where the APA said we are not looking at gender changing efforts, because they include that into their sweeping statement where they say the APA proved harm from for both SOCE and identity change. We have an ideological echo chamber wholly detached from the APA report.

I have two more of these. County's Exhibit 19, this is the Pan American Health Organization paper, and it also cites to the APA report on page two of this document, the organization PAHO for short.

The American Psychological Association conducted a review of 83 cases, and they say -- moving on for purposes of time -- they say, "not only was it impossible to demonstrate changes in subjects' sexual orientation, in addition the study found that the intention to change sexual orientation was linked to" -- and a whole list of maladies.

The APA found no such thing, the APA said you could not draw any linkage, any causation, attribution between isolated claims of harm and SOCE.

What PAHO says in the bottom paragraph, "As an aggravating factor, conversion therapies have to be considered threats to the right to personal autonomy and to personal integrity. There are several testimonies from adolescents who have been subject to reparative interventions against their will, many times at the families' initiative."

The problem they are getting at is with coerced therapies, not therapies that my clients wish to engage in and their clients wish to receive.

Last one, your Honor, the 2012 position statement by the American Psychoanalytic Association, another one of the Defendants ten items in their overwhelming research. What these folks say in the first paragraph, they affirm "the right of all people to their sexual orientation, gender identity and gender expression without interference or coercive interventions attempting to change sexual orientation, gender identity or gender expression."

My clients don't seek to coercively intervene or intervene or interfere with any of their clients' identities, they simply wish to provide the help that their clients seek and want and request.

Your Honor, this happens again and again and again. We do not have evidence driven study based conclusions of harm. We have an ideological echo chamber that is directed primarily at coercive, or maybe exclusively at coercive interventions,

the kind that we do not have at issue in this case.

So, I could take the time to go through the other ones, I don't think it is necessary, your Honor, because the Defendants have certainly gone through all of these studies that they posit for the Court and we asked them at their deposition what the state of their overwhelming research was.

Let me conclude this section by showing the Court what the Defendants have told us, these are their witnesses designated on the state of the research. First for the city we have Mr. Woika, his deposition starting with page 26, line 13 to 28, line five.

I ask him "Okay. How much more likely is an LGBT minor who undergoes sexual orientation or gender identity change efforts to experience depression versus an LGBT minor who does not undergo those kinds of efforts?

"Answer: I don't think I can give you a good answer on that.

"Question: Okay, the city --

"Answer: I don't know.

"Question: The city doesn't know?"

Time out. He was the city's designee on this topic.

"Answer: No.

"Question: The city doesn't know whether it's five percent more likely, one percent more likely, or zero point zero one percent more likely?

"Answer: That's correct.

"Question: How much more likely is an LGBT minor who undergoes sexual orientation or gender identity change efforts to experience feelings of fear or loneliness versus an LGBT minor who does not undergone those kind of efforts?

"Answer: I don't know, and the city does not know.

"Question: And if I ask you the same question for rejection, the answer would be the same? The city doesn't know?

"Answer: That is correct."

Moving on to page 27 -- still on page 27, line 12.

"Question: And if I ask you the same question with respect to feelings of anger, the answer would be the same? The city doesn't know?

"Answer: That's correct.

"Question: If I ask you the same question as to suicidal thoughts, your answer would be the same? The city doesn't know?

"Answer: That's correct."

Line 20, "Question: And is it fair to say the reason the city doesn't know this is because no study has ever found a causal connection between sexual orientation or gender identity change efforts and any harm?

"Answer: The reports and information that was attached to this ordinance" --

Time out, these are the list of ten items.

-- "ones that was relied upon for the ordinance, did not have any of those. Whether one exists or not, I don't think we have done any independent review of the literature or studies.

"Question: And so --

"Answer: So we did not know of any."

They cannot point to a single one that there is a causal relationship between a claim of harm and SOCE counseling, let alone voluntary SOCE counseling.

We asked the County's expert, Dr. Ginsburg, a list of similar questions, and at the end of those, in the interest of time, page 40 of Dr. Ginsburg's deposition, line 11:

"Question: Well, as you sit here today, are you able to identify a single empirical study since 2009, since the APA report, based upon a causal attribution could be made between SOCE and harm?

"Answer: I can cite at least -- I could cite a study that shows a lack of efficacy of conversion therapy.

"Question: That's great, but that is not my question.

"Answer: Then no."

Your Honor, that is the state of the research, and you asked me earlier in my presentation today how much research, what is the threshold? Those questions perhaps are still being debated by the Courts, but one answer is certain, it has to be

something more than no research.

It has to be something more when bodies out there say we need more research on this, we don't have enough to draw a correlation between harm and SOCE, we need more research. Counties and Governments can't say we have all we need, this is bad, this is real bad, we are going to outlaw it. That cannot be the standard here.

In the Edenfield case the Supreme Court dealt with a similar situation where the proponent of the ban pointed to the report of the trade association, AICPA. There was a speech restriction there, and they pointed to this report, and that report there, like the APA report here, said the organization, quote, "was unaware of the existence of any empirical data supporting the authorities of harm that had been advanced by the Government."

And the Supreme Court said, well, their own studies, their own proof says there is not enough proof out there, so, therefore, they found that the city had not -- or the Government, rather, had not met its burden in that particular case.

THE COURT: So, the only Circuit Courts that have considered this issue, the Third in King and the Ninth in Pickup, found that the Government's interests were sufficient, in other words?

MR. MIHET: They did so on the irrational basis on

Pickup and lower scrutiny --

THE COURT: Intermediate for King.

MR. MIHET: Intermediate for King. No one found it on a compelling interest. Your Honor, I don't know the level that the particular Courts delved into the studies as this Court has a chance to do today.

What I can tell the Court without any doubt, NIFLA dethroned King and dropped off Pickup, if you pardon the pun. The Court can start with a clean slate.

THE COURT: NIFLA didn't reference King or Pickup?

MR. MIHET: It did.

THE COURT: In terms of abrogating, there is no such language that would suggest those cases and everything they stand for -- was there a petition for cert and it was denied? King and Pickup have not been overturned. NIFLA has spoken to issues that have come up in King and Pickup but --

MR. MIHET: I believe there is no reasonable way to read NIFLA other than an abrogation of King and Pickup. The Court says this is what King and Pickup do, they go through the entire rationale of why professional speech is viewed with lesser scrutiny, and the Court says we have never done that, we have never sanctioned that.

THE COURT: You are saying on a particular issue as relates to professional speech?

MR. MIHET: Yes, just to show the Court for what it is

worth -- one second here. Just for what it is worth, if NIFLA did not abrogate King and Pickup, our friends at WestLaw --

THE COURT: I understand WestLaw indicated that, but that is not binding.

MR. MIHET: I do not suggest that.

THE COURT: I am aware of that.

MR. MIHET: That is the overwhelming research analysis. Now I am going to go into the last section, which is narrow tailoring, your Honor.

Under strict scrutiny, Defendants are required to demonstrate that the ordinances here are the least restrictive means available, goods versus vary I, and worth versus woke -- to say narrow tailoring the Defendants must show they seriously undertook to address the problem with less intrusive tools available to them.

That comes out of the McCullen case in the Supreme Court, 2014.

We show cases where they say basically they have to look at other alternatives and seriously consider them. If they reject them, they have to have a good reason for rejecting them.

THE COURT: Let me ask you, are you arguing that at the time that the regulation was passed, the county and the city had to consider narrow tailoring, that is fully explore all other means to protect minors from conversion therapy,

and/or is it enough for the Court to find today that there are no alternative means?

Where do you point the Court to evaluating no alternative means?

MR. MIHET: McCullen stands for the proposition the Defendants had to consider it in the first instance, and if they did not consider it, which I will show you they most certainly did not, that is reason enough for the Court to invalidate or enjoin the ordinance.

The Court should not accept after the fact excuses as to why certain alternatives might not work because the Defendants had a constitutional duty under McCullen to consider them under passage.

If they come to you now with clever excuses, those are excuses crafted by counsel for purposes of litigation, they are not alternatives that were seriously considered by the Defendants as McCullen quite clearly says they have a constitutional duty to do.

So, here, your Honor, the Defendants failed to meet their burden on narrow tailoring by a wide margin. If Judge Hoch asked the Defendants -- or did ask the Defendants to ban aversive therapy coerced upon minors, then Defendants could have banned aversive therapy being forced on minors while still allowing the Plaintiffs to conduct their non-aversive therapy.

If others are being harmed by forced therapy, the

Defendants could have banned forced therapy and allowing requested therapy.

They have no evidence showing less strict alternatives would have worked. That is one reason to grant the preliminary injunction, and the other one, which is more important, they have no evidence that they even considered such less constrictive alternatives at all, much less seriously considered them as their Constitution requires them to do.

The evidence we have shows us that they never considered this at all.

The city -- there were three City Council meetings on the subject of this ordinance, combined they did not exceed four minutes and 50 seconds in length worth of discussion. The only substantive discussion was the enforcement that my colleague will address, they didn't know how they were going to enforce this ordinance. They had no other alternatives.

Then we have Mr. Woika's deposition, page 29, line nine to page 30, line 24. That starts further down from what I have here for the Court, almost to the bottom of the page.

Question, line nine: "Did the City Council ever consider anything other than a blanket prohibition or a total ban on sexual orientation change efforts or gender identity change efforts?

"Answer: Are you referring to a ban on certain practices or -- as opposed to a total ban? Is that the

question.

Yes.

It goes on, line 16 of page 29:

"Answer: I think the Council had really the option of passing the ordinance, which is a total ban. And the only other alternative they considered was no ban.

"Question: Okay. So the answer to my question is no, the city has never considered anything other than a total ban?

"Answer: That's correct.

"Question: Now, you said -- so, just to be clear, then, the city never considered, for example, banning only aversive therapy as opposed to non-aversive therapy?"

Answer, page 30, line one: "Correct.

"Question: The city never considered banning only forced involuntary therapy while allowing therapy that a minor seeks out and voluntarily assents to?

"Answer: That is correct.

"Question: Now, you said in your earlier response that the city's only option was to enact the ban that is proposed or reject it entirely. Did I understand that correctly?

"Answer: That wasn't their only, but that was the decision that the Council was -- was deliberating in the October 2017 meeting.

"Question: Okay. Now, the Council could have

requested information on whether or not a ban that was short of a total ban would still address the perceived problem, correct?

"Answer: They could have, yes.

"Question: The Council could have requested information, for example, on whether or not prohibiting only aversive or forced therapy would still address the asserted harms of conversion therapy?

"Answer: They could have.

"Question: But they never made that request, correct?

"Answer: That's correct. They did not."

Your Honor, the city may try to come today and have a whole list of reasons why banning only forced therapy, banning aversive therapy would not meet the city's asserted interest. What they cannot get away from, your Honor, they never even considered that before they voted to enact this total ban.

McCullen says that alone is a constitutional violation that should trigger the enjoinment of this ordinance.

No consideration is very different, the exact opposite of serious the consideration required by McCullen.

Your Honor, so we don't leave the county out, let's look at what the county told us with respect to its efforts.

We have Exhibit 21, Plaintiffs Exhibit 21. This is an email that Dr. Hamilton wrote to attorney Hvizd for the city who was drafting this ordinance, and you see at the bottom of this exhibit is her email, and she is pleading with Ms. Hvizd

to limit the definition of conversion therapy to add such things as coercive counseling against the individual's will.

She specifically proposed a narrowing or narrower alternative for the county to consider, your Honor. There is no evidence that this was ever considered, much less seriously considered by the County Commission.

In fact, we've asked Ms. Hvizd -- Attorney Hvizd whether this even made it to the County Commissioners and she was not able to tell us whether they looked at it as a whole.

Also, your Honor, and for the record, I won't take the time to walk through that testimony, that is Hvizd's deposition, page 273, line two to page 279 line 23.

We also know that the County Commission received public comment during the Commission hearings asking it to consider alternatives such as banning shock therapy or banning aversive techniques. Ms. Hvizd testified about that on page 39, line 20 of her deposition. Again, the county has no evidence to show this Court that that was actually seriously considered by the county as an alternative for a total ban.

So, your Honor, for these reasons, the city and county never considered anything other than a total ban. They have no evidence that a total ban would address their concerns, and for that reason they badly flunk the narrow tailoring test.

We talked about the fact that these ordinances are wildly under inclusive. I will not belabor that point, that is

also relevant to the narrow tailoring analysis.

If we are talking about child abuse, your Honor, it doesn't matter whether it is done by a licensed therapist or clergy or any other adult, child abuse is child abuse, and the fact that they only banned it from licensed therapists, your Honor, goes to show they made no effort here to draw some reasonable lines.

And, your Honor, with respect to one thing we talked about earlier, which is the viewpoint discrimination, the Court asked me a question, you know, does the fact that they can recommend this to -- recommend their clients to go elsewhere for this kind of counseling, does that affect the analysis, number one, it is wildly under inclusive.

But number two, your Honor, when recommending this to a client -- imagine the situation where a client comes in and says, look, I would like to change back to being a girl the way I was born, can you help me with that? What would it look like if Dr. Hamilton says, you know what, I really want to help you, but I can't, it would be illegal for me to do it? I can't do it, but somebody else can. You could go to another doctor down the road and they could help you.

The fact that she has to deny a service because it is illegal for her to do it diminishes her viewpoint. Nobody in their right mind would say if you can't do it, I will go somewhere else. The fact that she has to refer somebody else

out under these auspices, under the threat of the full weight of the Government here, is, I think, a profound intrusion on her viewpoint and on her rights.

The Court has been very patient on the issue. If you have no questions, I will turn it over to my colleague at this point.

THE COURT: Thank you.

MR. GANNAM: Good afternoon, your Honor. I am going to deal with two specific issues related to enforcement of the ordinances which is an additional part of the narrow tailoring analysis and the tailoring issue.

Let me begin with enforcement. These ordinances -- the ordinances cannot as a practical matter be enforced to remedy any purported harms Defendants claim to have in view. Defendants' code officials, whose only education requirements are high school diploma or the equivalent, are objectively 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 the violations.

We think this is a flawed practice that would never satisfy narrow tailoring. This inability to enforce ordinances through existing code officials is admitted by the city's and county's senior officials in their unfiltered preordinance correspondence. This correspondence I am about to get into

points several times to the preemption problem that I will point out along the way.

Let me begin with the slide before the Court now. This is a September 7th email. Here, your Honor, we have a September 7th email --

THE COURT: On the screen, it is showing Plaintiff's 16.

MR. GANNAM: That is correct, this is a portion of it for purposes of the slide.

This is an email from the County Attorney Nieman, Denise Marie Nieman, to the Commissioners prior to enactment of the ordinance. I quote the email, I will explain the text of it.

In this email Attorney Nieman expressed reservations about tailoring the ordinance, namely conversion therapies, and it covers the inability of the county to enforce the ordinance against licensed therapists in any event.

"While we still have legal concerns including, but not limited to, preemption -- excuse me -- implied preemption, the Florida Patients Bill of Rights, conflicting Federal Court opinions, and parental rights, there were some arguments that advanced to a point where we were able to move from a definite no to a maybe." I will explain that later.

The second paragraph: "In addition to the legal issues" -- so we are moving into factual and practical issues.

"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 practical concerns. Most of the universal complaints seem to be about religious organizations that the ordinance would not legally be able to address."

Here is the critical part. "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?"

Let me move down to the next slide, which is Plaintiff's Exhibit 25. Here we have, prior to the enactment of the city's ordinance, Deputy City Manager George Brown who was the direct supervisor --

THE COURT: Is this the same exhibit?

MR. GANNAM: No, 25. This is a different author, this is Deputy City Manager George Brown of Boca Raton writing to City Attorney Diana Frieser about enforcement. The text says: "While I find so-called conversion therapy inherently wrong and totally abhorrent" -- he is not in favor of our clients' viewpoint here -- "a local ordinance banning such practice

would be extremely difficult, if not impossible, to enforce. Proving a violation 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."

Here again is a preview of the preemption problem as well as noted by the Deputy City Manager. Moving down to the last sentence for time sake: "To me this is not an area of local governance." Once again a preemption issue.

Here the critical part is that he says it is difficult, if not impossible, to enforce. He was the head of Code Enforcement at the time of this email according to the deposition testimony.

I would also point out, your Honor, all these exhibits I am covering in this section are explained in our proposed findings of fact with the deposition cites as well. I will point out if I get into something already not laid out in the proposed findings of fact.

THE COURT: While you are doing that, I know it is unrelated to what you are talking about, before you stood up, there was mention of the McCullen case. Could you give me the site of that case? There have been a lot of submissions, so I don't forget to ask you -- and I don't mean to interrupt the discussion you are now having.

MR. MIHET: Your Honor, let me provide that during our rebuttal time.

THE COURT: That will be fine. You may proceed.

MR. GANNAM: The next exhibit is Exhibit 26, another email from George Brown, Deputy City Manager for Boca Raton. He reaches out to several colleagues who are his counterparts in municipalities in Palm Beach County.

In this email he poses to them "Colleagues, each of your cities has adopted a conversion therapy prohibition ordinance according to the forms we have been provided. Have any of you established specific enforcement procedures? What methods of investigation are utilized to determine if a violation has occurred? Have any cases been prosecuted? Please let me know when you have time. Thanks, George."

This is not as critical that he asks the question, but the responses are. I will get into those. The first response came from the Boynton Beach City Manager, Lori LaVerriere, my best guess how to pronounce the name. This is Exhibit 26, a different part of the email chain.

Her response is at the bottom -- right in the middle of the exhibit, but lower than Mr. Brown's further response. It says, "Are you contemplating procedures, enforcement? Moving up to Mr. Brown's statement: "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 more or less unenforceable ordinance and a matter that is not something our local Government should take up."

As a practical matter, the head of Code Enforcement says we can't enforce it and states as to a policy issue, this is something our Government should not take up.

So, there is no evidence in the record that either Deputy City Manager Brown's recommendation that a resolution would be passed instead of an ordinance or his concern an ordinance would be unenforceable would be communicated to the City Council before enactment, before they voted on it.

The fact that enforcement procedures raised by the attorney were disregarded, if they were even aware of them, is revealed in the subsequent exchange between LaVerriere and Brown. Moving to the next slide, this is LaVerriere's response to Mr. Browns' statement that they should do a resolution instead of an ordinance, and that it is unenforceable. Mid point of the slide she says, "Agreed. Electives received a lot of pressure from Rand Hoch." Above that, "As are ours."

This may explain why even if the City Council was aware of the concerns of enforcement and preemption, they went ahead and voted anyways. Either way, it is an absence, as my colleague pointed out, of any narrow tailoring or practical

enforcement.

THE COURT: I am sorry, what case or cases do you rely upon to consider the arguments you are making about enforcement difficulties fitting into the prong of the narrow tailoring?

MR. GANNAM: That is a good question. We didn't find a case that specifically addresses this inability to enforce the argument as a problem for narrow tailoring. An ordinance that cannot been enforced will do nothing to justify the ordinance in the first place.

THE COURT: In your research, have you found an example where something was struck down on constitutional grounds because, in whole or in part, there were enforcement difficulties?

What have you uncovered in that?

MR. GANNAM: I don't have anything for the Court at this point. I can't say it is not out there. We make the argument as a matter of reason and logic. If it cannot be enforced, it does nothing to advance the Government interest that is asserted to justify the ordinance in the first place.

Moving on to the next exhibit, which is Plaintiff's Exhibit 26, a new slide, this is where the Village Manager of the Village of Wellington, Paul Schofield, joins in on the conversation, and his agreement for the point being made.

He said, "Good morning, George, I would prefer to discuss that ordinance in person. Having said that, we do not

have a specific enforcement mechanism and I don't have any clear idea how we could train either Code Enforcement staff or law enforcement staff to actually enforce it. If we receive a complaint we will deal with it individually, and most likely refer it to one of the state governing bodies. The M.D.'s, D.O.'s and clinicians all have their own state boards."

Again, inability to even conceive how enforcement could be done by this village manager and the policy that leads into our preemption argument, at the state level there are existing boards to enforce regulations of licensed professionals.

Now, again, there is no evidence in the record that any of these dire enforcement concerns from all of the other city managers who Mr. Brown polled were ever considered by the City Council, but at the final meeting when this ordinance was voted into law by the City of Boca Raton, Council member Rodgers expressed his own doubts which he raised with the Council and city staff at the final meeting prompting responses from the City Manager and City Attorney.

For the record, this transcription we have on this slide comes from the deposition of Assistant City Manager Paul Woika where the video is played and transcribed by the Court Reporter.

We have Mr. Rodgers right before the vote: "Madam Chair?

Mayor Hayne recognizes Mr. Rodgers.

THE COURT: What exhibit are we looking at?

MR. GANNAM: This is from the Woika depo, page 61, lines five to 21.

"Mr. Rodgers: Madam Chair?

"Mayor Hayne: 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 --

"City Manager: It would be. I am not sure how we would enforce it, but it would be in the code related area.

"Mr. Rodgers: Any other thoughts from the attorney?

"Mayor Hayne: 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."

It is clear enough from the transcript the complete inability of the City Manager and City Attorney to answer Mr. Rodgers' question which is: How do we enforce this? The most they come up with is it is a Code Enforcement process.

I want to show the Court a few seconds of that meeting, how they respond in real time, how they answer this

question.

THE COURT: What exhibit does that come from?

MR. GANNAM: 24, a video file, and on a USB drive we gave to the Court Exhibit 24 media, part three of three, the third of the three City Council meetings where this ordinance even came up.

(Thereupon, the video was played.)

MR. GANNAM: I will advance it to minute four, second 44, or second 45. The actual discussion is at 48. I will give you a lead-in to see what is going on.

(Thereupon, the video was played.)

MR. GANNAM: That is it, your Honor. It is clear from the written transcription of the City Manager and attorney how are we going to enforce it. The body language and how they answered the question, they have no clue how it is going to be enforced and they went ahead and passed the ordinance anyways.

It is true by this point, given the correspondence by Deputy Manager Brown and the City Attorney herself, at this meeting the City Manager and City Attorney knew of the enforcement concerns and did not raise those as part of the process.

All this evidence -- all of this is evidence, I submit, compelling evidence that the ordinances cannot be enforced as a factual manner. Cities and counties are objectively unqualified and ill equipped to enforce regulations

of licensed mental health professionals in how they perform therapy and counseling.

The only required education for Code Enforcement officials is a high school diploma or equivalent. There is no city or county board of professional standards or even a single Code Enforcement official with a professional license that would be given the responsibility of enforcing the negotiations like the Plaintiffs.

We have an inability expressed, admitted by the city and county officials themselves, that this cannot be enforced.

I want to point to testimony. This is from the 30(b)(6) representative, Paul Woika, page 163, line 17 through page 165, line 18.

THE COURT: You want to get to preemption. Is this the last part of enforcement?

MR. GANNAM: It is.

THE COURT: How much time do you need for preemption?

MR. GANNAM: I will do it in ten minutes.

THE COURT: Okay, finish up with the enforcement issue and I'll have you go on to preemption.

MR. GANNAM: Thank you, your Honor.

So, here we have the first part of the testimony from Mr. Woika, and this is a hypothetical posed.

"Question: So you have a ten year old prepubertal child --

"Answer: Uh-huh.

"Question: -- and he was born as a boy, and he presents to Dr. Otto and says, you know, that he is really interested in girls, wants to play with dolls, wants to hang out with friends that are girls, wants to dress up as a girl, wants to do things that girls want to do, and he has no interest in things that boys want to do and is experiencing distress as a result of the fact that he wants to do all these things that girls want to do and yet, you know, he has a male anatomy. When he shows up" --

Here Mr. Woika interrupts and he says:

"Answer: So, to me -- and clearly I'm not a clinician in any event. But what you just explain to me sounds like someone who is identifying with -- as a female. But again, I am not the best person to make that call. Perhaps someone, you know, who's a therapist could do so."

Here the 30(b)(6) designee on interpretation of the statute says you need a therapist to know what we are talking about. Here is a change in gender identity or something else going on. As he continues with his answer he says:

"Answer: And if that were the case and the goal of Dr. Otto -- I think was your example of this case -- tried to change the gender identity to a male, then, yes, that would be a violation of this ordinance."

He gives the answer in the hypothetical, it would be a

violation, but the admission right before his answer that is critical here is that I am not able to do this. He has more education and has a professional engineering license. Code officials don't have any of these things, yet they are going to be asked to make a determination whether a child is experiencing confusion or distress about wanting to be or trying to be a gender different than what the child is born as. Even recognizing that child is identifying as the other gender and intending to change, or whether something else is going on, the city officials have no competency, no fault on them. I doubt any Code Enforcement official signed up to police professional therapists. There is no way for the city to adequately enforce this.

THE COURT: Let's move to preemption.

MR. GANNAM: The Defendants' lawyers were correct then to say preemption was a problem, and there is nothing that has changed legally to remove the preemption, therefore Defendants' ordinances are ultra vires and unenforceable .

"Preemption is implied when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preemptive by the legislature."

I will start with the second prong. All the communications we looked at from the various city officials saying we can't enforce this, and cities and counties don't

enforce these things, and there are state level boards to enforce regulations against professionals, all of this is evidence for the strong policies saying this is a job for the state and not cities and counties.

The fact that they don't and can't enforce this is a strong policy against it and they have been willing to concede that area to the state.

Now let's look at what the Sarasota Alliance case said, what the standard requires. That is the other prong of preemption.

The proper inquiry according to Sarasota Alliance is whether the state has preempted a particular subject area. This is important because the relative subject area is health professionals, not as subset of regulation on sexual orientation or gender identity counseling, or even a subset of regulation of SOCE counseling or so-called conversion therapy.

If the rule were otherwise, a municipality would be empowered to enact any regulation they want and say there is not a specific regulation or specific law on the books at the state level right now. They haven't implied or preempted it. We have to look at the field.

The state regulatory scheme, which covers all licensed medical and mental health professionals, we think is pervasive, and it is evidence the state intent to be the sole regulator of these licensed professionals in the state.

In our briefing and proposed conclusions of law we cite numerous authorities for the proposition we think is undisputable that the regulation for mental health professionals has always been a matter of state concern.

The Defendants' contention that it is a local concern is simply incorrect as a matter of history and matter of law and matter of logic. There may be a case or two and maybe a Federal case saying this is a local concern. That is the difference between a Federal and state regulation, not local and state regulation, which we have here. The absence of any regulation of mental health professions and professionals specifically by either Defendant, especially when viewed in light of their compelling interests, confirms both the strong public policy favoring regulation by the state alone, and the Defendants have submitted to the state's "will be the sole regulator" of mental health and similarly situated professionals.

The Defendants' own lawyers make the argument better than we can.

We are going to Plaintiffs Exhibit 9, this is 16 months prior to the enactment of the county ordinance. Neiman states that the State of Florida had preempted the entire field of therapy regulation.

"Hi Rand, Greetings from Detroit's airport. It's fascinating how great lawyers can look at the exact same

language and make completely different opposite conclusions.

"I appreciate that you know much more about the subject than we do, but as you can tell based on our convo yesterday, I made myself very familiar with the issue. On a very basic level, how can we say that CT" -- conversion therapy -- "is a local issue? The entire field of therapy regulation is conducted at the state level."

If I can jump down to the last paragraph to save time, "I truly appreciate your openness and willingness to exchange information and understand where we're coming from. Yesterday's conversation suggested just that. Maybe your team has something at the ready. This is a classic non-localized issue in my view."

Now moving on to Plaintiff's Exhibit 11, which is another email, this time from Assistant County Attorney Hvizd who endorsed County Attorney Nieman's preemption provision.

"Hello Rand, In followup 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."

As i said, the county's attorneys are making the argument better than we could.

Continuing, "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."

Skipping down to the last line in the last paragraph, "The county plays no part in regulating counselors."

And then County Attorney Nieman adopts Hvizd's analysis without reservation, same Exhibit 11, a subsequent response, "Thanks, Helene! Rand, that sums it up."

Then we have another email, this is Plaintiff's Exhibit 13.

"Good morning, Rand." I will skip to the part that is relevant, third paragraph: "As for the other, cities have shared with is" -- I assume with us -- "their concerns about implied preemption and other areas that we have discussed with you. It's not just a county issue. What I said is that cities are willing to take greater risks with ordinances, they're smaller, know their constituents in a different more hometown way, sign off on things we wouldn't, etc. We can discuss further on the phone if you wish, but there's a whole different dynamic at play. Panhandling is a great example. Lots of

cities did what we told the BCC they couldn't.

"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. It would also be helpful to see how they're enforcing the ordinances and the results of their efforts. Any info you cam gather along these lines would be helpful."

In the next exhibit, Plaintiff's 14, Attorney Nieman repeated the point emphatically in the email to Judge Hoch. In this email she says, "Let me know when you want it to go" -- referring to her legal opinion -- "keeping in mind that nothing that happens with cities holds much persuasive value unless the Court rules on the exact issues I'm concerned about."

And then we have another email, August 2017, in which Judge Hoch asks Nieman to proceed with issuing a legal opinion. Here we have this interesting dynamic where we have the Palm Beach County Human Rights Council sort of directing the Palm Beach County's Attorney's Office to release the opinion.

It says, "On behalf of the Board of Directors of PBCHRC, I want to thank you for delaying moving forward with the direction received from the County Commissioners last summer regarding providing information concerning our request that the Commissioners enact a countywide ordinance to ban conversion therapy for minors by licensed professionals."

The next paragraph: "Over the past year, conversion

therapy bans have been enacted in" other Florida municipalities, and talks about laws across the nation.

In the concluding paragraph: "At this time PBCHRC would like you to move forward with providing your office's opinion concerning enacting a countrywide ordinance to ban conversion therapy for minors by licensed professionals. As we have discussed, your staff's legal opinions may well not be in agreement with that of PBCHRC and the twelve municipal attorneys in Florida who have addressed these matters, but be that as it may, we would like to move forward at this time."

Then we go to Exhibit 16. In the same email it says -- sorry, I went to the wrong slide.

All right. Here we have the second paragraph, this is Nieman to Judge Hoch, "We strongly believe that this area should be regulated by the state since it is the state who licenses and otherwise governs therapists."

Last paragraph, "While we still have legal concerns including, but not limited to, implied preemption" -- and goes on from there.

I was corrected by my colleague, this is the email Attorney Nieman sent to the County Commissioners following the email directive from Judge Hoch. "We strongly believe that this area should be regulated by the state since it is the state who licenses and otherwise governs therapists."

So, now, looking at all of this correspondence between

the County Attorney, Judge Hoch, and the Commissioners, despite the county's steadfast opinion 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 admonition to Judge Hoch on April 12, 2017, and then on September 7, 2017, was the passage of ordinances in other cities as pointed out by Judge Hoch in his email.

The one condition Nieman had imposed, show me some change in the law, show me where one of the ordinances have been upheld in addressing our concerns, only a change in the political calculus can account for the change of position, apparently prompted by Judge Hoch's August 28th email thanking the County Attorney for waiting on the PBCHRC Council and stating they would like the County Attorney to go ahead with her legal opinion.

Finally, we have the city also expressing the same issue. This is Plaintiff's Exhibit 23, it is an excerpt of an email with Diana Frieser, the attorney who referred her opinion to the Boca Council.

It says, "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, nor any case law finding an implied preemption. 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."

Both the city and county attorneys recognize the preemptive issue and were concerned about it early on, and for good reason.

The counties have no board of professionals like Florida Statute 49.011 creates to license or regulate therapists working in their jurisdictions. Florida Statute 49.004, the Board of Clinical Social Work and Health Colleges was created to be nine members, six of the members must be licensed professionals in the respective fields.

As soon as the city or county would undertake to create a board to regulate professionals such as these ordinances purport to do there would be no question they would be stepping into the state's territory and stepping into a field preempted by the state. They haven't done that. Even if they did do it, it would add to the preemption argument, certainly wouldn't take away from it. We rely on the briefing and conclusions of law for the rest.

I would make one final point. The Plaintiffs argue Florida Statute 456.003, Subsection 2-B, indicates that the state gives permission for the local government to legislate in the field in creating these various professional boards to

regulate these professionals, the state is giving permission to enact ordinances in this field. We say, looking at the entire statute, that is not a reasonable reading of the statute.

Subsection 2-B says, starting at the beginning of Subsection 2, the legislature further believes that such professions shall be regulated only for the preservation of health, safety, and welfare of the public under the police powers of the state. Such professions shall be regulated when, part B, the public is not effectively protected by other means, including, but not limited to, other state statutes, local ordinances, or Federal legislation.

This is not permission for other counties to regulate in this field. We are entering into this field because no other regulation exists. This Court should find there is no room for counties and cities to regulate licensed professionals as they have in the ordinances and to find preemption.

Thank you, your Honor.

THE COURT: Thank you. All right. That concludes the Plaintiff's presentation?

MR. MIHET: Yes, your Honor. We ask the Court for brief rebuttal time at the end of the day.

THE COURT: Okay. Let's see if we can do that. That was a total of two hours and 45 minutes.

We will take a lunch break and we will come back at 1:30, and then we will be ready to have the County Defendant

present.

MS. FAHEY: Yes, your Honor.

THE COURT: And the courtroom doors are locked over the lunch hour. Feel free to leave things in here, they will be safe. If you need anything, take them with you.

We will see you back at 1:30.

(Thereupon, a short recess was taken.)

THE COURT: All right. Defense may come forward. Did you want me to give you any type of notice of timing?

MS. FAHEY: Yes, your Honor, it would be helpful to have a cue at 60 minutes.

THE COURT: All right. You may proceed.

Maybe I will begin by asking, I started off my questioning of Plaintiff's counsel concerning the substantial likelihood of success and cited an Eleventh Circuit case. Was there anything you disagree with or did you want to add anything to that?

MS. FAHEY: We did, your Honor, do a little bit of research on the issue and found an unreported case, Barnes versus Burger King, 1994 U.S. District, Lexis 21005. The Court case for that is 94-889-CIV, and in that case the Court held -- I believe it was the Southern District, your Honor -- that the standard of substantial likelihood requires more than a mere probability or preponderance of the evidence.

THE COURT: 1994, more recent than the Eleventh

Circuit I cited to, which was the Shatel case.

I will look at that. I use WestLaw, not Lexis. What was the case name?

MS. FAHEY: Barnes, B-A-R-N-E-S, versus Burger King.

THE COURT: All right. Do you want to proceed according to how you have it mapped out? And I will jump in with questions that I have when they fit into your road map.

MS. FAHEY: Yes, please.

The county would like to note for purposes of the preliminary injunction hearing we are here for today it is constrained by the matters raised by the preliminary motion itself, Docket Entry 8. It is not expanded to all claims brought in the verified complaint, Docket Entry 1. The complaint raises free exercise claims and some Florida Statute claims that were not briefed and not raised as a basis for the preliminary injunction motion.

THE COURT: The Plaintiff concedes that?

MR. MIHET: Correct, of course.

THE COURT: It is fair to say that all of the exhibits you have stipulated to for admissibility relate to only those claims as far as -- that are part of the motion for preliminary injunction. I am not going to come across exhibits, because there are many of them, that are unrelated; is that correct?

MS. FAHEY: That is correct. There are portions of the depositions and interrogatories that might be more

expansive than limited to free speech. As a preliminary place to start, I want to advise the Court the primary reason we are here is the freedom of speech claim.

The county's response is that the county's ban on conversion therapy is constitutional. National organizations noted a problem with conversion therapy, the county consumed that information, made its findings about it, and then received public comment on a proposed ordinance to ban conversion therapy, and then the county received information showing conversion therapy was a local issue as well.

The county had the authority to do something about the issue that it was advised about and so it did.

Plaintiffs' professional practices are not expressive. And so, in the context of the fact that the county's position is this is commercial -- pardon me, this is professional conduct, it is important, we believe, for the Court to look at what occurs in the Plaintiff's professional practices.

Next the county will discuss the fact that the county regulates professional conduct and the county will address the argument that even if it did regulate speech, the ordinance would survive the scrutiny.

THE COURT: Are you starting off strong with this is what Pickup did, but King didn't, and didn't NIFLA do away with that notion that it is conduct?

MS. FAHEY: Your Honor, yes, we are starting off

strong that conversion therapy is in fact professional conduct. No, we do not believe that NIFLA did away with the professional conduct. It is a subject I will talk about in detail later.

THE COURT: No, I will let you go through -- we have the slides right here.

It would follow you would start off with the first position, which is that it is conduct and it would be a rational basis review, but you have alternative arguments as well.

MS. FAHEY: The county argues and believes the appropriate standard of review is that professional conduct rational basis review. If the Court finds speech is implicated and the First Amendment comes into play, the county's argument is that the review is intermediate scrutiny. If you disagree with all of the others, the county believes it meets the legislative record.

THE COURT: Let me ask you this: If the Court were to find that it was viewpoint discriminatory, does it necessarily and automatically have to find the ordinance unconstitutional, or is there a place to go with this kind of case in a viewpoint based speech?

MS. FAHEY: Yes, your Honor, the course -- the county does not agree it is viewpoint discriminatory.

THE COURT: I am just asking a question. If the Court were to conclude that, is it automatic as a matter of law that

it becomes unconstitutional or not, and maybe or not, because of the particular nature of this matter?

MS. FAHEY: No, and here is why. R. A. V. versus St. Paul, 505 U.S. 377, 1992, in that case the Court said when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is prescribable, no significant danger or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

That analysis is repeated in the King case, and the county argues that that basis for exempting a certain type of content or viewpoint base discrimination has not been overruled by R. A. V. in the Eleventh Circuit. I believe an unpublished opinion in the county's submission for its proposed findings of fact and conclusions of law, the county cited an Eleventh Circuit case where it discussed the fact that Reed did not do away with a separate analysis of content discrimination, and because Reed did not address that, they did not read Reed as abrogating that in any way.

So, I did not see that Reed addressed the type of content discrimination that R. A. V. did, so we submit it has not been abrogated either.

THE COURT: Okay. And I guess -- and then you will

flesh it out, but if the Court were to find that maybe it is not viewpoint based or viewpoint discriminatory, but it is content based, must the Court subject it to a heightened scrutiny, or would you been arguing that again because of the nature of the speech involved here, it would fall into some other category that wouldn't normally have it be subjected to heighten scrutiny when it is content based?

MS. FAHEY: We believe the type of activity that conversion therapy is determines the next step the Court takes. We believe the first threshold question is, is conversion therapy professional conduct or is it speech.

THE COURT: Can it be both?

MS. FAHEY: Can it be both? I do not know that it can be both.

THE COURT: It can't be a conduct, a procedure, a practice, but it includes speech?

MS. FAHEY: Let me clarify my statement, your Honor, to say when I refer to speech, I refer to it as though it had a capital S, the First Amendment protected speech. Certainly there are words implicated in the process of providing the type of talk therapy that the Plaintiffs describe. However, it does not mean those words are imbued with the sufficient communicative and expressive qualities that would make it qualify for First Amendment protected speech.

I do have a portion of the presentation that I would

like to take you through.

THE COURT: Okay.

MS. FAHEY: To conclude the discussion, your Honor, where content base must be applied --

THE COURT: Must be strict scrutiny.

MS. FAHEY: I would turn to the same argument with R. A. V. and King, when NIFLA discussed Reed, it says, as a general matter, content based speech restrictions, etc., citing to Reed, and so to Wollschlaeger. It said generally, and so I do not agree that the law precludes a finding where you could have something that is content based and it also receives a lesser scrutiny.

THE COURT: As I recall NIFLA, from the very beginning of the opinion, which I don't have in front of me, it sort of carved out maybe two potential exceptions; one was in commercial and one had to do with sort of the Planned Parenthood versus Casey scenario.

Would you say this case is more like commercial or more like whatever the words that NIFLA used in terms of that it sort of, you know, had an impact on speech, but drew upon the Casey case, the Supreme Court case Planned Parenthood versus Casey?

MS. FAHEY: The second portion, under our precedents states may regulate professional conduct even though that conduct incidentally involves speech, and it did cite to

Ohralik and Casey as well.

The county's position is this is more like professional conduct and the county does argue it is conduct. The county has not affirmatively argued it is commercial speech, however, we are aware the Southern District interprets commercial speech more broadly than merely a statement that proposes a commercial transaction, and so we would not foreclose a finding by stating that it certainly wasn't commercial speech.

THE COURT: But you rely more on the second?

MS. FAHEY: Yes, your Honor.

THE COURT: That is speech incidental to the medical procedure.

MS. FAHEY: Professional conduct and speech incidental to professional conduct.

THE COURT: This has to do with notice given if a patient or client was going to be receiving a abortion.

MS. FAHEY: Yes, informed consent, specific compelled speech were the facts of Casey.

THE COURT: If we analogize this case to Casey, would the procedure be the counseling and the therapy?

MS. FAHEY: Yes.

THE COURT: But there is no informed consent requirement in this case, and there --

MS. FAHEY: Sorry to interrupt. We do disagree. Both

Plaintiffs have advised the county and the city that the Code of Ethics, AMFT, which is Exhibit 34, on page three of Exhibit 34, Section 1.2 requires informed consent. There should be no ethical practice of marriage and family therapy whereby there is no informed consent.

As I read the AMFT, I don't have it committed to memory, I recall there needs to be permission by somebody who is illegally incapable, which would be a minor who does not fall into the exemption, where a person under 18 is illegally able to consent.

THE COURT: That is not here, as it was in Casey.

MS. FAHEY: Correct. It has been suggested in one of the documents, I don't recall at this time, that perhaps the county should have only required an informed consent script for certain people before giving this type of therapy. And so, that is the greatest extent to which the -- sorry, not the greatest extent, that is how the -- an informed consent analysis has really been discussed in this case.

NIFLA talks about the fact that the notice requirements in NIFLA, those notice requirements were completely untied to any procedure that the patients walking into the facility may or may not be receiving there.

Here, the county's position is what is banned is the procedure. A licensed provider, defined by both the ordinances as certain individuals licensed under these statutes, is not

allowed to discuss the change of the sexual identity of a minor. It is the practice that is -- it is the procedure that -- so, to answer your question, we aren't talking about the informed consent, but we are not that far removed from the procedure.

Informed consent is conversation about the procedure. Here the county and city have banned the actual procedure.

THE COURT: You are not banning anything leading up to the procedure. It is my understanding, under the ordinance, the therapist could engage in a conversation with the patient about his or her views on conversion therapy, the therapist could do anything and everything short of beginning the procedure, the therapy, counseling, the actual -- we will call it the procedure, but using the words of the ordinance, counseling and therapy.

MS. FAHEY: Neither the county nor city prohibit them from expressing any views to a person, including a minor patient, or recommending conversion therapy to any person, including a minor, that is correct.

The county has taken no position whether it is appropriate to discuss your personal views in the context of providing therapy, however, the county has not entered into deciding that or not. If the words are part of a professional practice and is the therapeutic treatment of that individual, that is what is being regulated.

If the words are I personally believe this, I think this, I recommend that, to analogize it to the Conant case from the Ninth Circuit, in that case what was banned was any recommendation or discussion of the medical use of marijuana.

Certainly the Government was prohibited -- was allowed to prohibit doctors from prescribing marijuana, but they were not constrained from discussing the general proposition, this is a medicine I believe that could assist you in your situation, I would recommend it, I can't write a prescription.

THE COURT: I know I am taking you off script, you are doing fine. I will let you get back to your script.

Jumping ahead, doesn't that arguably undercut, possibly, the Government's interest, whether it having to be a compelling interest or an important interest depending on which scrutiny the Court applies, insofar as by allowing the therapist to even recommend the therapy and speak well of the therapy, maybe even encourage the patient to get the therapy, even going so far as telling the patient where to go, just not here, but the basis of the ordinance is that the therapy is harmful?

How do you reconcile that?

MS. FAHEY: The county has an interest in there being a marketplace of ideas and free expression of the marketplace of ideas. We have not, and cannot constitutionally constrain the Plaintiffs from their First Amendment rights to make those

recommendations, to speak to audiences about it, to tell individuals about it.

The Government is not going to enter into that type of regulation. We don't believe it undercuts our substantial governmental interest in protecting the minors of Palm Beach County from the practices of conversion therapy which have been found to be harmful.

In Palm Beach County, under the ordinance, you may not treat a minor -- you may not give him the treatment of conversion therapy. That is the law as it stands and we believe that is protecting minors from receiving that treatment.

THE COURT: So it was an effort by the county to balance, in the county's view, Plaintiffs obviously disagree, constitutional freedom of speech with protecting children from the therapy unless it was framed that way.

MS. FAHEY: Yes, your Honor, otherwise, I would expect we would hear the argument that the county had the opportunity to ban the therapy and not allowing people to discuss the therapy, like the Government did in Conant where they were trying to ban the prescription of marijuana, and whether that would be appropriate or helpful to anybody, that wasn't allowed.

If we had done that, we would hear the arguments that the less restrictive means of achieving our interest of

actually preventing this practice from being provided by licensed practitioners should have been achieved through actually banning it alone and not discussion of it.

THE COURT: I will ask you a couple more questions and let you move on. Because I began with the Plaintiff on the whole viewpoint -- whether it is neutral viewpoint based, it seems the Plaintiff I understood to make a couple of arguments why it is viewpoint based or viewpoint discriminatory.

I will use the Boca ordinance, conversion therapy, within the first sentence the Plaintiff seems to argue it is viewpoint based because it is not allowing regardless of which way the therapy is seeking to change someone's orientation or behavior, but it is this notion of change. So, there is this idea that the ordinance has expressed a view -- in its ordinance the county or city expressed a view that counseling regarding change -- even though I know you say counseling is conduct, not speech -- but counseling regarding change, that's a viewpoint based regulation.

And then secondly, the Plaintiffs argue that the second sentence that goes into conversion therapy does not include a person undergoing gender transition, and that is not prohibited, and the second sentence, that, too, suggests that it is viewpoint based.

How do you address that?

MS. FAHEY: The county's position is it is not

viewpoint based. It does not matter the viewpoint that the provider or potential patient brings to the table in their desire to seek to change sexual orientation or gender identity, does not matter which direction they are moving in, does not matter whether the basis is I believe this is the most sound practice in my field, does not matter if it is based on Christianity or Judaism, does not matter if it is based on the societal views of a particular community.

The county heard information at the public hearing, and I don't recall at the moment whether it was the first or the second hearing, but we had one speaker advise that there were specific communities that he was referencing of people in those communities -- nationalities he was referring to. I don't want to misstate him, I can provide this supplementally to the Court. Those communities thought it might be more desirable or appropriate to discuss orientation. If it was, for example, homosexual orientation, the county is not identifying whether a person desires that change or provide that change.

That is why that first sentence we are talking about, seek to change minors' sexual orientation or gender identity, that is not viewpoint based.

Then we go to the section of what is excluded and we discuss specifically supporting a minor's efforts to undergo gender transition. That is not at all inconsistent with what

is banning conversion therapy.

In a situation contemplated with the gender transition situation, you have a minor -- I believe Mr. Mihet gave the example of someone undergoing surgery or physically taking hormones to make their gender -- their physical gender presentation match their gender identity. This is not a person with a discordance of I believe I am a boy, will you please help me identify as a girl.

This exception isn't a conception, it is clarifying. If you have a boy who already decided I believe I am a girl, I am going to express my gender as a girl, and I am identifying as a girl, a person undergoing that transition can be supported by therapy, and so it is not the provider who is trying to change that child.

That child has already decided to undergo a change and is undergoing a change and the provider is supporting and counseling that minor.

THE COURT: What if the child already decided that he doesn't want to identify anymore as a girl, or she doesn't want to identify any more as a boy and comes in, and falls under one, the first sentence, because that person is not, at least at that stage, contemplating transition, but just to use that same analogy, why is that different then?

MS. FAHEY: I don't know that it is different.

If you have a child, no matter what the anatomical

sex, and they inform the provider that their gender identity is X, and that provider is not attempting to change X to be Y, Z or the number 3, then it is not conversion therapy.

If you have a minor saying I am X and the provider is performing a practice that seeks to change X to Y, Z or the number 3, we then have conversion therapy.

It is contemplated in the gender transition significant you have a child coming in saying I am anatomically a number 3, I would like to be X. Anatomically and physically those are my gender expressions I am working on, I am undergoing that transition, I identify as X no matter what anatomically I am, the therapist has not been asked to change the child from 3 to X. I know it is strange going from numbers to letters.

It is different because it is not therapists seeking to change the minor. The county has not prohibited or banned any minor from experiencing change in their gender identity, sexual orientation, sexual orientation identity, sexual behaviors. They may change, sexual orientation or gender may not be changed by a provider. That is what is specifically banned.

That is why the second sentence involving gender transition, it is not an exemption, it is not an exception, it is a clarification of what is not included in the definition.

THE COURT: Lastly, I know I keep saying that, much

was said about aversive and non-aversive and coercive and non-coercive. Could you speak to that?

The Plaintiff left the impression had an ordinance been drafted that included, and maybe it was at one point, that if it involved coercive and aversive and nonvoluntary, maybe that wouldn't be challenged or wouldn't even be eligible or subject to be challenged constitutionally.

How do you address that whole discussion?

MS. FAHEY: We first address it to say we believe that argument concedes the fact that that ordinance is not facially constitutional. Because the ordinance is aversive and non-aversive, aversive is conduct and subject to rational basis review, we believe the record supports and upholds review.

What we would discuss is that the aversive techniques certainly were something that were studied, they were more common and mostly studied in the beginning of this type of research, less common in modern day research, but that does not mean that the evidence that the county considered didn't span the gamut. The county received information that discussed conversion therapy, not conversion therapy solely through behavior techniques or aversive techniques, the harming beyond just those types of techniques.

THE COURT: Aversive techniques?

MS. FAHEY: Yes.

THE COURT: You will point that out when you get to

the type of evidence that the Government relied upon, I know it is quite voluminous. There are specific references to the harm of non-aversive and non-coercive therapy.

MS. FAHEY: On the topic of coercive, I would add therapy should not be coercive. Informed consent is required, it should be required by someone who is legally able to give it, and as we understand the Code of Ethics, AMFT 34, permission should be given by the person receiving this therapy.

Coercive techniques are already taken care of, and that is why -- that is why the strict scrutiny argument that Plaintiffs are arguing -- the county doesn't fail for that reason, because the county could have -- sorry, let me start over.

I think it would be a more persuasive argument hypothetically if the county had only banned coercive therapy, that there would be an argument under strict scrutiny that laws already took care of preventing that harm because there are already laws requiring that to be informed consent and permission from the person receiving it.

The county is banning the practice entirely, whether that child says that they want it because they, in their own self, actually want it, or whether they feel pressure from the household that they are living in, or whether they feel pressure from their friends to want it, any religious pressure,

any societal pressure. There could be any reason a minor might actually express a desire to want therapy.

As I will show you in the -- I believe it is the APA report, your Honor, there have been no factors discovered about what types of therapy cause harm and what types of therapies are going to lead to a benefit.

Because we don't know the identifying factors of what about this person makes the therapy beneficial, we don't know.

So, it could be very well the person who wants that therapy ends up in the harmed camp. It could be very well a person who feels societal pressure ends up expressing at the end of the day they perceived a benefit initially. So, the benefits that it was wanted is not something the research reports as a basis for distinguishing between who may have this therapy and who may not.

THE COURT: Okay.

MS. FAHEY: All right. I will -- nothing further from the Court?

THE COURT: Nothing further.

MS. FAHEY: I will proceed with the county's' slides.

This is the whereas clause that Mr. Mihet was citing from the county. The county did find the overwhelming research demonstrating that sexual orientation and gender identity change efforts can pose critical health risks to lesbian, gay, bisexual, transgender or questioning persons.

I divided my presentation into four categories. First, warned against attempting to change sexual orientation; second, attempting to change gender identity, and we'll look at ones especially concerned with minors; and finally, the recommended affirmative approaches when dealing with these types of patients.

The first chronologically is 1993 American Academy of Pediatrics, this is County's Exhibit 12.

Your Honor, for the purpose of time, I plan to read only small excerpts from each one.

"Therapy directed specifically at changing sexual orientation is contraindicated since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." This was not limited to aversive techniques and not limited to coerced therapy.

Secondly, from the American Psychiatric Association, 1998, County's Exhibit 13. "The potential risks of reparative therapy are great and include depression, anxiety, and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self hatred already experienced by the patient."

That is the excerpt I wanted to share with your Honor about that. Note the terms "reparative therapy" and "conversion therapy" are used interchangeably in the city's ordinance and in the literature we find that as well,

conversion therapy and reparative therapy are used interchangeably.

County Exhibit 14, 2009 APA Task Force report, this is Docket Entry 85, this has been filed a couple of times as attachments to the complaint as well as the deposition.

Earlier Mr. Mihet showed the studies, and this is the second page of recent studies.

It stated, "Although the recent studies do not provide valid causal evidence of the efficacy of SOCE" -- I will say SOCE when I come across it, that stands for sexual orientation change efforts -- "or of its harm, some recent studies document that there are people who perceive that they have been harmed through SOCE."

Just as in other studies, there are people who believe they have benefited from it, and it cites studies as well. "Among those studies reporting on the perceptions of harm, the reported negative social emotional consequences include self reports of anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self hatred and sexual dysfunction."

This is a continuation where, as I called out for your Honor, "overall the recent studies do not give an indication of the client characteristics that would lead to perceptions of

harm or benefit. Although the nature of these studies precludes causal attributions for harm or benefit to SOCE, these studies underscore the diversity of and range in participants' perceptions and evaluations of their SOCE experiences."

From this we see there is no evidence for anyone to distinguish whether an individual is likely after receiving conversion therapy to perceive harm or perceive benefit.

Further troubling, the APA report discusses the fact that often people report first perceiving a benefit and later receiving -- perceiving that they have been harmed.

This would -- this would further substantiate the county's basis for seeking to prevent therapy in the first instance rather than, like an allergy test, seeing if the patient quickly reacts negatively and ceasing at that point. It is possible they could first believe they have benefited and later down the road perceive they have been harmed.

THE COURT: So, taking that into account and considering, regardless what level of scrutiny, intermediate or strict, narrowly tailored or substantially related, do you know of any other cases that have relied upon data or information for the important governmental interest or compelling governmental interest where the means are narrowly tailored or substantially related when some of the documentation suggests that it is inconclusive as to whether in this instance it is

harm or benefit?

So it is kind of like we don't want to take a chance, we have some indication that it is harmful, we are still studying it, we don't know whether there are benefits or harm. It sounds like the county wants to be very maybe proactive and careful so as not to let the possibility of harm continue or begin, but some of the very documentation the county relies upon shows we don't really know, it could be beneficial, it could be harmful.

Where would the Court look to draw upon constitutional analysis that would find that that meets narrowly tailored or substantially related in that kind of an instance?

MS. FAHEY: To answer the Court's question, both Pickup and King find that, and both of them acknowledge that the APA task force was relied upon in substantiating those Government's enactment of their SOCE stance, and as you know, Pickup was the rationally related and King was the heightened scrutiny.

Secondly, I would not agree -- I would not agree that it is simply a it could be helpful, it could be harmful analysis, because you have to layer on to that analysis the fact that the research over and over again says we find no evidentiary basis for the effectiveness, that it is effective in actually achieving what it sets out to do.

So there is this therapy that nobody can identify what

specific practices would lead to a change or a perception of harm. So, I believe this next slide addresses that a little bit.

It states in the summary, this is from page 50 of Docket Entry 85-5: "Studies from both periods indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts. The lack of rigorous research on the safety of SOCE represents a serious concern, as do studies that report perceptions of harm."

So we have no evidence supporting that it is safe or it is effective, so we don't see that there would be a rational basis to conclude that it would be appropriate therapy to be provided in the first instance.

THE COURT: Well, if we were just talking about this ordinance in the context of therapy and if it were effective or not, put aside the type of therapy and put aside if there is any discussion of harm or benefit, but just a matter of qualitative effectiveness or lack thereof, wouldn't that be -- and then you balance that with First Amendment rights, assuming we get beyond for discussion purposes it is not necessarily conduct or conduct only, but it is speech, wouldn't you think the Government's interest in effectiveness is far less compelling, far less important than when the Government is talking about doing something to prevent harm? Isn't that a

completely different analysis? Or is effectiveness part of what the Court should be considering as well when it focuses on the Government's interest?

I suppose you are going to say, yes, the Court should consider that. Isn't the harm and effectiveness different when we consider what the Government's interests are when weighing it against First Amendment rights? If we are talking about it in a vacuum maybe not, but we are balancing alleged infringement upon a constitutional right, the First Amendment under the Constitution.

MS. FAHEY: I agree, your Honor, that the type of regulation that might flow from a concern about effectiveness would look different from the type of regulation that would flow from a concern about harm.

Here we have a concern about harm, and I was looking to see if I could find -- I can't recall at this moment whether it is the Wollschlaeger case or NIFLA that discuss the various interests proffered by the Government in those cases, however, I believe that one of those cases addresses whether the effective practice of medicine is a compelling interest, and I think that it answers the question that is a compelling interest.

However, it goes on to analyze whether it could be upheld under that interest, and so, part of your question was whether effectiveness could be a substantial or compelling

Governmental interest. I believe the answer to that question is yes.

However, I do acknowledge, depending on the interest that the Government used to enact whatever restriction we are discussing, that is the interest that would govern, whether it's narrowly tailored or sufficiently tailored, etc.

THE COURT: As long as we are talking about that, there was discussion when Plaintiff was arguing about when you have to make that determination of Governmental interest and whether you have narrowly tailored or substantially related your means of accomplishing your Governmental interest.

Do you concur with the Plaintiff that it must be at the time that the ordinance is drafted and implemented? Can you acquire information on an ongoing basis, and here argue today, for example things you may have learned since the drafting of the ordinance? Can the Court consider that in terms of the governmental interest or whether you explored alternative means or explored ways to ensure it was substantially related?

MS. FAHEY: I understand a couple different parts of that question --

THE COURT: It is timing, the timing issue.

MS. FAHEY: As to the timing issue, we do not agree with Plaintiffs' interpretation of McCullen, the citation --

THE COURT: We got it, thanks.

MS. FAHEY: McCullen stated the Commonwealth has not shown it seriously addressed the problem with less intrusive methods available to it nor did it show different methods that other jurisdictions found effective.

In McCullen, we believe it is distinguishable on its face, and here is why.

It is discussing other jurisdictions having found effective other means having to deal with the problem being presented to that Government, and also talking about the fact that Massachusetts, in this case, had other methods in its laws to constrain the type of harms it was already worried about.

It had the ability to, I believe, issue injunctions, for example, is one thing it could have done. However, it didn't have any record to show that it had tried in the past to use its other laws on the books which theoretically could have addressed the topic, but those laws were ineffective in achieving their means.

It is very different. I did not see McCullen as holding that at the time of this case the PBCC, on December 5, 2017 and December 19, 2017 has to state on the record all of the alternative records that it could have used potentially, or we find none. I don't see that it is constrained to having shown the ineffectiveness of the alternatives at the time of adopting the ordinance.

I think that is the burden that the county and the

city -- if the Court were to find strict scrutiny applied, that is the burden we would bear in this proceeding for the preliminary injunction stage and ultimately whenever our burden was given to us.

You did ask, your Honor, I believe, whether the interest could change. That is something I do believe that the case law addressed when the standard of rational basis applies it is any conceivable legitimate governmental interest whether expressed at the time or not. I do believe there would be a basis, however, if heightened or strict scrutiny were implied, that the Court would be constrained to look at the interest that is articulated.

That is a separate analysis, what is the interest, whether alternative means would have been just as effective in achieving the governmental interest.

THE COURT: Okay, thank you.

MS. FAHEY: We have now the APA Council representative's adoption of an appropriate affirmative response to sexual orientation. That is County Exhibit 15. This is reported by SOCE.

The Pan American Health Organization, Palm Beach County Exhibit 19, stated that "reparative or conversion therapies have no medical indication and represent a severe threat to the health and human rights of affected persons. They constitute unjustifiable practices that should be

denounced and subject to adequate sanctions and penalties.

Exhibit 16 is from the American Psychoanalytical Association. "Psychoanalytic technique does not encompass purposeful attempts to convert, repair, change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes."

In 2015, the Substance Abuse and Mental Health Services Administration -- I will refer to this as SAMHSA. This is County's Exhibit 21.

It stated, "There is limited research on conversion therapy efforts among children and adolescents, however, none of the existing research supports the premise that mental or behavioral health interventions can alter gender identity or sexual orientation.

"Interventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation, including those aimed at changing gender identity, gender expression, and sexual orientation are coercive, can be harmful, and should not be part of the behavioral health treatment."

Here you see the SAMHSA report is not saying it is not harmful, it is saying it is coercive and it is harmful.

The sources cited by the county's ordinance addressed

efforts to change sexually identity. In that report, the SAMHSA reported a consensus on efforts to change gender identity, citing "there is a lack of published research on efforts to change gender identity among children and adolescents; no existing research supports that mental health and behavioral interventions with children and adolescents alter gender identity.

"It is clinically inappropriate for behavioral health professional to have a prescriptive goal related to gender identity, gender expression, or sexual orientation for the ultimate developmental outcome of the child's or adolescent's gender identity or gender expression.

Mental health and behavioral interventions aimed at achieving a fixed outcome, such as gender conformity, including those aimed at changing gender identity or gender expression, are coercive, can be harmful, and should not be part of treatment. Directing the child or adolescent to conform to any particular gender expression or identity, or directing parents and guardians to place pressure on the child or adolescent to conform to specific gender expressions and/or identities is inappropriate and reinforces harmful gender stereotypes.

This is Exhibit 16 we already looked at. I wanted to highlight that it also touched on gender identity.

The American Academy of Child and Adolescent Psychiatry's practice parameter on gay, lesbian or bisexual

sexual orientation, gender nonconformity, and gender discordance in children and adolescents says, "Just as family rejection is associated with problems such as depression, suicidality, and substance abuse in gay youth, the proposed benefits of treatment to eliminate gender discordance in youth must be carefully weighed against such possible dele --

THE COURT: Deleterious.

MS. FAHEY: Thank you, your Honor. -- effects.

Mr. Mihet cited from this paper as well, and he pointed out further research is needed before gender discourse can be endorsed. He said it might as well say it is bad. The county disagrees with that.

There must be more research before it can be endorsed. There is no reason -- according to the research we looked at, there is no reason to provide this therapy, it has not been shown to be effective to -- if there is no sufficient basis for actually providing it, we call into question whether it should even be provided.

Then we add on to that there are negative possible outcomes that are serious, such as self hatred and suicidal ideation. And Ms. Hvizd, in her deposition, I have a citation later, she noted that when she did her independent research when assigned this case on behalf of the county to research the ordinance, one of the things she discovered was a person who had committed suicide after receiving SOCE therapy. It wasn't

brought up because Mr. Mihet was citing harm to local harm. But the harm of suicide is great and grave, and anecdotally it has been linked to conversion therapy.

And so that brings me back to what I was saying about this particular source, was that we do question why would we provide it when there is no basis to provide it and also it carries a grave risk of harm.

The next area that the sources go into are issues specifically related to minors, and so, we have County's Exhibit 20, the American School Counselor Association discussing that "professional school counselors do not support efforts by licensed mental health professionals to change a student's sexual orientation or gender as these practices have been proven ineffective and harmful."

Mr. Mihet made much of the fact that they cite the report, and they do support the APA 2009 report. It is, nonetheless, very instructive for the county to understand how national organizations such as the American School Counselor Association is interpreting the research that is available.

We believe that the APA 2009 report is referring to the task force report and not necessarily the practice parameter, but the practice parameter does discuss the fact that it is associated with harm. And the practice parameter is Exhibit 15.

This is Exhibit 12, which we have looked at before.

The highlighted portion for your Honor is that "psychiatric efforts to alter sexual orientation through reparative therapy in adults have found little or no change in sexual orientation, while causing significant risk of harm to self esteem."

From this same paper: "There is no empirical evidence that adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self esteem, connectedness, and caring, which are important protective factors against suicidal ideations and attempts.

"As bullies typically identify their targets on the basis of adult attitudes and cues, adult efforts to prevent homosexuality by discouraging gender variant traits in pre-homosexual children may risk fomenting bullying. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial, or necessary, and the possibility they carry the risk of significant harm, such interventions are contraindicated."

This is addressing harms relevant to children.

The American College of Pediatrics published Exhibit 22, and from this we see they explain "research done at San Francisco State University on the effect of familial attitudes

and acceptance found that LGBT youth who were rejected by their families because of their identity were more likely than their LGBT peers who were not rejected or only mildly rejected by their families to attempt suicide, report high levels of depression, use illegal drugs, or be at risk for HIV and sexually transmitted illnesses."

Associated with increased rejection, we know rejection to a minor is more detrimental than acception of that minor. The Plaintiff admits that rejection is harmful to minors.

The APA task force report stated specifically with respect to children, "Children and adolescents are often unable to anticipate the future consequences of a course of action and are emotionally and financially dependent on adults. Further, they are in the midst of developmental processes in which the ultimate outcome is unknown. Efforts to alter that developmental path may have unanticipated consequences. Licensed mental health providers should strive to be mindful of these issues, particularly as these concerns affect assent and consent to treatment and goals of treatment."

This is part of the explanation for why this therapy is specifically banned on minors. Minors are often unable to anticipate the future consequences of present decisions. They are emotionally and financially dependent on adults. We are in no disagreement that children look up to adults and can be influenced by them and what they want for the children, and the

effect on children is unknown. So, because of these consequences, we question particularly the assent and consent of minors in particular.

The SAMHSA report says, "Interventions that attempt to change sexual orientation, gender identity, gender expression, or any other form of conversion therapy are also inappropriate and may cause harm. Informed consent cannot be provided for an intervention that does not have a benefit to the client."

The SAMHSA report was addressing conversion therapy and affirming LGBT abuse, which is the subject of the report.

This is an excerpt from Plaintiff's Exhibit 31.

On the topic of Plaintiff's Exhibit 31, this was a study that the county was not -- the county did not review or cite as the basis of its ordinance. It is something that we also received when we were exchanging exhibit lists, and so, this is relatively new to this case. However, it is also irrelevant to this case because this particular study deals with therapy provided to parents. In this particular study, the therapist did not meet with the child.

It states, "To minimize the child's stigmatism only the parents come to the treatment sessions. The boy himself is not included because of the inefficiency of office treatment at this age and in order to minimize stigmatization that may be associated with visits to a mental health facility, especially when gender and sex issues are discussed. This treatment

protocol is not at all suitable for children of pubertal age and older when management of GID through the parents is inappropriate.

This is an approach where the therapist met with the parents and the parents altered their conduct by organizing more play dates with friends of the same sex, having more time with the same sex parents of the child, that sort of actions that were taken by the parent.

The ordinance issued here today prevents therapy for a minor. The therapy cannot be provided to a minor.

We believe the Plaintiffs understood this because in the depositions Dr. Hamilton advised us that she had two clients, potential clients, where the -- she felt comfortable meeting with the parents to discuss with the parents the issues the parents had. However, because of the issues raised in the conversation about the therapy and her understanding of what they wanted to do, she would not meet with the child.

And so, we submit that this study does not have anything to do with what is being banned here.

We also want to draw the Court's attention to Plaintiff's Exhibit 30. This is similarly something that was provided to the county during the exchange of exhibit lists.

Here are some excerpts from this.

Mr. Mihet threw your attention, your Honor, to page 843, where it is emphasized to parents the importance of

allowing gender identity to return. That is not highlighted on the screen at this time. I also don't have a slide for that. But I want to remind your Honor that that statement emphasized to parents. The ordinances regulate providers in their practice of conversion therapy. It does not prohibit parents from allowing their children to express a different gender identity or return to a previously held gender identity.

This paper does say -- Mr. Mihet cited a portion where it talked about there are two approaches, here are the two approaches. "One approach encourages an affirmation and acception of children's expressed gender identity. In the second approach, children are encouraged to embrace their given bodies and to align with their assigned gender roles."

Discussing that second approach still, the APA noted that "when addressing psychological interventions for children and adolescents, the World Professional Association for Transgender Health Standards of Care identify interventions aimed at trying to change gender identity and expression to become more congruent with sex assigned at birth as unethical. It is hoped that future research will offer improved guidance in this area of practice.

"Nonetheless, there is greater consensus that treatment approaches for adolescents affirm an adolescent's gender identity. Because gender nonconformity may be transient for younger children in particular, the psychologist's role may

be to help support children and their families through the process of exploration and self identification."

We will see the county's ordinance does not ban a therapist from exploration or self identification. The ordinance bans the Plaintiffs from attempting to seek to change that minor's sexual identity.

It goes on, "For adolescents who exhibit a long history of gender nonconformity, psychologists may inform parents that the adolescent's self-affirmed gender identity is most likely stable."

THE COURT: It is just over an hour, an hour and nine minutes.

MS. FAHEY: I will, your Honor, go quickly through the slides with respect to the facts that affirmative therapy is the recommended therapy from the APA.

"The affirmative approach is supportive of clients' identity development without an a priori treatment goal."

That is what the county is doing, you may not have a goal to change sexual orientation or gender identity.

The APA addresses the account that providing SOCE increases self determination. The APA was not persuaded by this argument as it encourages LMHP to provide treatment that has not provided evidence of efficacy, has the potential to be harmful, and delegates important professional decisions that should be based on qualified expertise and training, such as

diagnosis and type of therapy. Rather, therapy that increases the client's ability to cope, understand, acknowledge and integrate sexual orientation concerns into a self-chosen life is the measured approach."

That is exactly what the county's ordinance explains what conversion therapy is not. Conversion therapy is not and does not include providing acceptance, support, understanding of a person, identity exploration and development. That is specifically clarified for anyone in doubt about whether the approaches that were recommended by the APA are allowed. They absolutely are allowed.

The only thing you may not do is engage in a practice seeking to change that minor.

I have gone through the portion that we wanted to highlight for your Honor today with respect to the written papers and the research that the county reviewed.

Next I want to show your Honor a few of the bases for concluding that conversion therapy was a local issue.

The county has filed in the record as document 36-1, a transcript recording of the first PBCC agenda where the PBCC considered first reading this ordinance.

(Thereupon, the video was played.)

MS. FAHEY: This slide is some highlights from Dr. Needle's statement where she highlighted for the Commissioners that she was commending them to send a message to our community

and protect the children and adolescents and youth in our community.

(Thereupon, the video was played.)

MS. FAHEY: From Ms. Bessette the County Commissioners learned in her field, mental health field, it is important for the therapist not to be imposing on the client the therapist's political, personal, or religious views.

(Thereupon, the video was played.)

MS. FAHEY: That is an excerpt from -- this can be found at Docket Entry 36-1, it is also Exhibit 2, this transcript. It was suggested during the Plaintiff's remarks that Mr. Hoch never mentioned these two reports of harm at any time to the county prior to this ordinance coming up for first reading.

The record does not reflect that that in fact is true. Certainly the record reflects there were no emails wherein Mr. Hoch referenced those two minors, however, discovery did not encompass all conversations between Mr. Hoch and individual board members, nor should it be permitted to, but we cannot conclude that he never mentioned these other minors.

We also can proffer that Mr. Hoch did mention these other minors to Ms. Hvizd in the discussion of this ordinance in a face-to-face meeting. So, there was no record to produce in discovery, however, that is not in the record for your Honor. I make that proffer to state the record doesn't reflect

that he said that to the commission as a whole body at any time prior to December 5th. That is true. But the fact that it was never mentioned before this date, we cannot conclude that in the record before the Court today.

At the second meeting, Mr. Hoch put -- added some more information to the statement that he made.

(Video played.)

MS. FAHEY: Sorry, I will play that for your Honor.

(Video played.)

MS. FAHEY: On the topic of Mr. Hoch, I want to touch upon briefly the notion was made that Mr. Hoch only requested that aversive techniques be banned and referring to the memo that he attached to an email. When he first emailed the Board of County Commissioners in June 2016, it was not noted, however, that Mr. Hoch -- what was contained in the proposed -- the language of the proposed ordinance. The deposition of Ms. Hvizd reflects that Mr. Hoch also provided a draft proposed from another entity. I believe the City of Miami beach drafted an ordinance at that point. He shared the ordinance with the county, that ordinance was not limited to aversive techniques.

We object to the indication because we were provided with much information, including the resources -- the sources that we have gone through at length looking at the studies, and so we would disagree that the request was to ban specifically

and only aversive techniques.

In the interest of time, I will summarize that the second meeting included a statement from a licensed clinical social worker where he asked the county to protect the minors in Palm Beach County from a practice that was dangerous and unethical. His name is Andres Torres, and I would commend his statement to the Court for your consideration.

Dr. Needle was at the second meeting and she was asked, what is your view as to the prevalence of this among practitioners? She said, "I think that if it is happening at all, that's too much, and it is happening. So you can Google, you can try to find a therapist that does it."

These statements, and additionally the statement of Dr. Hamilton who came to the -- to both meetings, and in the second meeting she asked the board what to do with her current clients if the ban was passed, implying that her current practice would be encompassed by the ordinance.

So, from -- at least from these two statements, and the county submits that the record as a whole reflects that conversion therapy is something that the county absolutely could conclude and have a reasonable basis to conclude was happening in Palm Beach County, and we had multiple people come and ask the county to protect the youth in our community, to protect the youth from the harm of conversion therapy.

Exhibit 6 is the Nick Sofoul email. We looked at the

Nick Sofoul email at length already. The county wants to add its argument that Mr. Sofoul did not state that his friends were subjected to only coercive or only aversive therapy techniques. Yes, he provided a link to an article, however, the county disagrees that that article limits the statements that he was making against the type of therapy which was being considered by the county, and that was conversion therapy on children.

The county also received Exhibit 44, an email from Mr. Curt Carlson, and he sent the same email to all of the Commissioners where he also asked that the Commissioners protect the minors from this type of practice and procedure.

Returning just briefly, your Honor, to Exhibit 6, that is the Nick Sofoul email, there was a suggestion that there is no basis to conclude necessarily that all of the PBCC considered Mr. Sofoul's email.

We do have Exhibit 43, which is an email from Mayor Hayne responding in thanks to Nick Sofoul, a very brief message, however, we do submit that to the Court to show that the email was in fact received. We do not have conclusive proof that every one of the Commissioners read it, nor should we conclude that they shouldn't consider this information that was provided to them prior to their vote.

In light of the issue that has been addressed nationally by various medical professional organizations with

urgency and solidarity, the county decided to -- after hearing the fact that this national issue was in fact an area of local concern as well, the county addressed the issue by passing the ordinance, 2017-46, stating it shall be unlawful for any provider to engage in conversion therapy on any minor regardless of whether the provider receives monetary compensation in exchange for such services.

And I am going to --

THE COURT: Do you want to address the preemption and enforcement issues? You probably are going to get to that at some point, but the Plaintiff ended with that.

MS. FAHEY: Preemption is an argument that my colleague, Ms. Phan, has prepared.

THE COURT: Is she doing enforcement also?

MS. FAHEY: I can handle enforcement.

THE COURT: Where does the Court fit enforcement into the legal analysis first and foremost, if at all? And if it does, how do the Defendants respond to the presentation the Plaintiff made, including relying upon internal memos of the Government and deposition testimony as well by the Defendants themselves?

MS. FAHEY: First, how to address the enforcement issue.

The enforcement section of the reply brief is 23 to 26. There are no legal citations for that argument, we did not

see that argument as negating any narrow tailoring on behalf of the county. If we look at McCullen that the Plaintiffs cited, McCullen says that the Government must demonstrate that alternative measures would fail to achieve the Government's interest, not simply that the chosen route is easier.

I do not see a basis in the law for a conclusion that enforcement is difficult as a basis for finding that there is somehow no narrow tailoring.

What the burden is, is to show that a less restrictive alternative method, that method would not as effectively achieve the interest of the county as the method the county has chosen. So, for instance, if we just take informed consent, the burden is not to show that the county's Code Enforcement officers can, in fact, go enforce the ordinance as it is written, period.

The burden is to show that the informed consent alternative is not as effective as the ban that doesn't involve informed consent. That is the analysis that we are asked to undertake, not how practically effective is the Government going to be in enforcing this ordinance.

I hear the practical concern. I expect there is some question if the ordinance has no effect, then what is the point, how could it achieve an interest? I understand that.

We respond with the fact that this ordinance has already had the effect that the county sought to achieve, and

that is the stopping of the practice of conversion therapy on minors.

We learned from the depositions of Plaintiffs that Dr. Hamilton -- we learned from her deposition that she interpreted the county's ordinance as applying to her, and she stopped a practice that came under the balance of what the ordinance banned, so the county's ordinance was effective in stopping the conversion therapy that it was seeking to stop.

There are -- there are methods of actually enforcing the ordinance. It is not a completely unenforceable ordinance. We concede it would be difficult, this type of regulation would be difficult to enforce. That doesn't make it unenforceable and doesn't make it -- doesn't mean the county hasn't achieved its methods by making it unlawful and creating a mechanism to actually follow through with the designation of this practice as being unlawful.

THE COURT: Okay.

MS. FAHEY: Since we are standing and not at the table, I am going to go past the section that Ms. Phan was going to cover and I am going to pick up -- I am going to pick up on the text of the conversion therapy ban.

I realized that I did not address your Honor's question about the internal memos, and Ms. Phan will be addressing that.

THE COURT: With respect to preemption?

MS. FAHEY: Yes.

As your Honor is aware, conversion therapy means the practice of seeking to change an individual's sexual orientation or gender identity and that was the practice that was banned.

Because we are here dealing with an as applied challenge to individuals who are licensed under Chapter 491 as licensed marriage and family therapists, we offer, your Honor, the term the practice of marriage and family therapy as defined by Florida Statute 491.003, 8, and in the interest of time, I will not read it to your Honor. However, I will note that it is the use of scientific and applied marriage and family theories, methods, and procedures for the purpose of describing, evaluating, and modifying marital, family, and individual behavior within the context of marital and family systems. I said I was not going to read it, I will back away from that.

I did want to note that the definition of practice of marriage and family therapy as defined by Chapter 491 is applied or received, and that matches with the county's ordinance which bans this professional practice regardless of whether money is received.

I wanted to note for your Honor exempted from Chapter 491, the provisions of that chapter, which is a licensing statute for, among other things, licensed marriage and family

therapy. There is a exemption for rabbis, priests, ministers, or member of the clergy. They can use a Christian counselor, Christian clinical counselor, when the activities are within the ministerial duties and excepted are persons for or under the auspices of a sponsorship of an established and legally cognizable church, denomination, or sect.

This provision does not include members of the clergy who are acting in their roles of clergy as long as they do not hold themselves as operating pursuant to any of the licenses under Chapter 491.

I would like to look at the Plaintiff's practices.

Throughout this presentation, the point here is the Plaintiffs' practices are not expressive.

First a couple of general statements about the practice. Drs. Otto and Hamilton both acknowledge that talk therapy is a form of treatment, they do that in Request for Admissions at Docket Entry 78-2 and 79-2. They also both agree in their Request for Admissions that aversion therapy is unethical to perform, and that ties into the county's argument concerning a facial challenge.

They also acknowledge that the DSM, Diagnostic and Statistical Manual, of mental disorders does not include gay, lesbian and bisexual or transgender as a mental condition. They made that admission as to mental illness.

Dr. Hamilton provided us with the testimony that that

was the authority for diagnosing clients, and she wasn't aware of any other authorities that set out definitions of diagnosis than the DSM-I.

She was authorized to treat patients. She explained what she does is talk to them in therapy and help them with their problems. On the topic of disclosure, this is from Dr. Hamilton's deposition, and I don't have the citation on the slide. The previous citation for authorized to treat is page 54, lines seven through ten, and the next slide with respect to self disclosure, page 54, lines 16 through 20. That is wrong, sorry. Self disclosure, page 30, on the screen is lines one through 13.

Dr. Hamilton explained that self disclosing is permissible for the purpose of helping a client, but not permissible for the purpose of benefiting the therapist.

So, she may self disclose, not to make herself feel better or for the client to get her advice or comfort her in any way or meet any of her needs, but self disclosure for the needs of -- meeting the needs of the client and may be appropriate if it is necessary to advise if there is a conflict where the beliefs or opinions of the therapist could interfere with the treatment of the patient.

Next, from the discovery in this case we learned that the Plaintiffs' practices are formalized. In Dr. Otto's deposition, page 97, beginning at line 20, he was explaining

the difference between his professional practice and a conversation that he may have hypothetically with Mr. AB on the on a plane sitting next to him, and he explained that he sees sessions as something where a consent form was signed, he has a payment agreement signed in his office, though he does see clients outside of his office, he explained, but there are consent forms signed and payment agreements signed, and we work on goals together. There is a formal relationship.

Dr. Otto provided to us, Exhibit 33, his informed consent for counseling regarding unwanted same sex attractions and behaviors, and I would like to highlight that from that informed consent form. Dr. Otto advises that "your marriage and family therapist does not take a position on the goals or objectives you have with your counseling."

This I highlight for your Honor to reiterate that the practice of professional counseling is not supposed to be and is not, in fact, an expressive activity for the therapist.

Dr. Hamilton, on page 55 of her deposition, explained the intake process of how she has -- how she provides her therapy. There is first a phone call where they set up to meet or make their arrangements for when the appointment would be. And second, the individuals come into her office and she has an intake process and she has paperwork for them to sign.

She confirmed the paperwork that they have to sign includes Exhibit 32, which is the consent to treat and

financial agreement. And the county would highlight for the Court that included in this consent to treat and financial agreement paperwork the client signed is a hold harmless agreement where any claims for damages of any nature arising out of or allegedly due to therapy or services rendered, the client holds Dr. Hamilton harmless for, and she used the language "receive therapy and services." There is acknowledgment that this is a service that is provided to the clients.

Second, we also see acknowledgment of that, like the cases that acknowledge the professional conduct of professionals is subject to malpractice suits, and that is appropriate regardless of the First Amendment.

I will quickly go through some of the testimony from the Plaintiffs but, your Honor, I will try not to say after every slide -- the purpose of showing your Honor these slides and this testimony is to highlight for the Court that the practices engaged by Dr. Hamilton and Dr. Otto are not expressions by them.

Dr. Hamilton was asked: "Are there any methods or principles that you use in talk therapy?

"Answer: Yes." She uses the power of listening, empathizing, the importance of being nonjudgmental, not shaming go clients, creating a safe space where they can open up and share their heart as well as understand themselves better.

Dr. Otto told us that his practice is client driven, not Dr. Otto driven.

Dr. Hamilton let us know she develops therapy, she asks the family, what brought you here and what would you like to see happen. She also told us she goes with the values of the client.

She told us her personal beliefs do not get imposed on the client. She explicitly stated, I do not have conversations with minor clients telling them what I believe. My personal beliefs do not enter into the therapy session.

Dr. Otto said he is not in the therapy session to give advice. What he does is he talks about pros and cons for telling an individual -- pros and cons for a person taking a specific action, but he doesn't give advice which way that person should go. He provides an opportunity for the person to talk through their issues in a safe context where they are not judged, but he allows that person to make their own decision on what they -- on what they thought would be in their own best interest.

Dr. Hamilton let us know that she is more of a strength based therapist, and similar to Dr. Otto who does not give advice, she very typically doesn't tell clients you should not do that as much as she builds on what is going well for the client.

When she talks about the tools used in therapy, the

things that the client believes are going to be helpful to them. She asks them, what have you tried? What has worked for you in the past? What ideas do you have? What are your resources? What strengths do you have?

She explains there is a lot of research that shows what the clients bring to the table rather than introduce your own advice and your own suggestions, that if you elicit the client's ideas and their strengths and resources it is going to be a lot more effective because it is something they already own and belongs to them instead of to you.

Dr. Otto told us often times his clients are able to come to some resolution on what things they should change or what boundaries they think they should put up or what relationships they think they should modify.

Patients are directed in patient therapy, the ideas of the client control and dictate. The Plaintiffs are not communicating a message or expressing themselves or their own ideas, they are providing a space for their clients to talk through the issues that they have. They are also charged with the responsibility to treat those clients.

That is the responsibility and the purpose of the therapist in that relationship, it is treatment to help with the stress and distress that is being presented by the client who is coming to therapy to address that issue.

Quickly, I want to highlight that both Dr. Hamilton

and Dr. Otto acknowledge that they cannot change attractions, that is not within their power as therapists. Dr. Hamilton and Dr. Otto both stated that in their depositions.

And so, that brings your Honor to the topic of the county's regulation of any ordinance is a regulation of professional conduct.

Much of this has already been discussed in our preliminary conversation, I will quickly go through it. However, I ask your Honor, if I am skipping over any details you are interested in hearing, please let me know.

I want to start with NIFLA, the most recent Supreme Court case that touched on this issue because of what comes later. First, I want to point out the fact that NIFLA -- the facts before the Court in NIFLA involved a licensed notice that was compelled Governmental speech and not tied to a procedure at all. Every person that walked into that office had to be subjected to that compelled Governmental message.

That was language we previously read that NIFLA -- the Supreme Court specifically said, "under our precedents, states may regulate professional conduct even though that conduct incidentally involves speech."

Further in the opinion, the Supreme Court acknowledged that while drawing a line between speech and conduct can be difficult, the Court's precedents have long drawn it.

Now, NIFLA cited two cases, two of itself own cases,

for the proposition that professional conduct is something that receives a different standard of review. One of the case was Ohralik. The Court there stated, "Moreover, it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language" -- or carried out by language is what we have here -- "either spoken, written or printed."

The examples given by Ohralik were numerous, and they talked about the exchange of securities information, corporate proxy statements, exchange of price and production information among competitors, employers' threats of retaliation to employees, and the Court went on to say, "each of the examples illustrates the state does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."

The Court cited Casey, and the discussion is extremely brief, however it says, "to be sure, the First Amendment rights not to speak are implicated, but only as a part of the practice of medicine, subject to the reasonable licensing and regulation by the state."

Here we have the words coming out of the Plaintiffs' mouths not only related to the practice of mental health care that they provide, it is the mental health care they provide, it is the practice of medicine.

NIFLA did not abrogate Pickup on the topic of professional conduct. This was discussed by the Court, the Court went through that analysis and concluded, the Supreme Court has not recognized professional speech as a separate category requiring a different type, this is only professional speech.

The Ninth Circuit laid out here on one end we have public dialogue, and in the middle you have professional speech, and at the very end you have professional conduct, and here is a graph to represent where Pickup concluded each of those categories fell. The public dialogue got the most robust protection from the First Amendment, professional speech, however, it says was diminished, we come down to the intermediate level. Professional conduct it acknowledged, and as it finally held, was entitled to rational basis. Pickup's holding was that the SOCE ban regulated professional conduct and the appropriate analysis was rational basis.

NIFLA called into question the discussion of professional speech, but it did not touch or abrogate the holding of Pickup which was about professional conduct.

I know that I am very limited on time, your Honor, and so, I would like your guidance on whether you would like us to go specifically in depth into Pickup, or if we should move on to other cases that we believe are distinguishable such as Wollschlaeger and other cases.

THE COURT: You have gone an hour and 51 minutes. How much time had you contemplated you needed left to cover your material and then with co-counsel on preemption?

MS. FAHEY: I believe my co-counsel has at least 30 minutes of presentation --

THE COURT: On preemption?

MS. FAHEY: On preemption and other various topics.

MS. PHAN: I am going to go over preemption, standing, and also irreparable harm. That is what I was going to cover.

THE COURT: How much time did you need on your presentation?

MS. FAHEY: I can go through this in 20 minutes.

THE COURT: Okay. It is 3:30. We'll come back at quarter of 4:00, so 3:45. You think you need a total of 50 minutes left, 30 plus 20?

MS. FAHEY: The county had intended to go through the Pickup and Wollschlaeger cases and distinguish cases relied upon by the Plaintiffs.

THE COURT: I don't think you need to go through the cases. I would suggest that you skip those cases and just go right to the point you want to make, rather than go through the presentations about the facts and what the Court has held, and dicta, because I have them, and I have marked them up and I have read them.

Just make your point with the cases, that would be

most helpful. Maybe yours can be shortened as a result of that, and then we will see on the other issues of preemption, whether the full 30 minutes -- if we come back at 3:45, it would be my hope that we'll conclude within the hour, by 4:45. I think that would be ample. We have been going since nine o'clock.

Plaintiff talked about wanting rebuttal. If there is a point or two that can't go unmentioned, I think the Court has a good understanding and even better one after the presentations today. I am giving you an opportunity to give -- you the opportunity to do proposed finding of facts. You can't go outside the boundaries of what is argued and submitted in the briefing, it has to be confined to what is presented and the Court can consider it, but that is one last final opportunity for you to make that final presentation to the Court.

Let's take a 15-minute break and let's aim to conclude by 4:45, have that as a goal.

(Thereupon, a short recess was taken.)

THE COURT: Okay, you may be seated.

Okay, you may come to the podium and pick up where you left off.

MS. FAHEY: Yes, your Honor.

The remaining portion of my presentation was case analysis. We will rely on the written submissions to talk

about the distinguishing cases, and I conclude my portion of the presentation to say the county's argument is the appropriate standard of review is rational basis. This is professional speech.

The county alternatively argued if the intermediate scrutiny is applied, the same law there satisfied heightened scrutiny, and if this Court were to find that strict scrutiny applies, the county argues it -- interest has been found to be a compelling one as a matter of law. As for the protection of health and mental welfare of minors, that is a compelling interest, we have narrowly tailored that to ban only the practice of conversion therapy which is found to be harmful on minors who have diminished, diminished -- they are a vulnerable population where we have reason to believe they require extra protection and -- I am sorry, I am very sorry.

THE COURT: That is all right.

MS. FAHEY: The practice of conversion therapy on minors is narrowly tailored.

I could address any questions the Court has at this time.

THE COURT: You are not going to do a presentation?

MS. FAHEY: The City of Boca did want to make themselves available to answer any questions the Court has. I would alternatively mention that the City of Boca's ordinance is the same as the county's. The arguments I am making would

address them as well. We do not want to deprive their ability, and Ms. Phan will give her presentation on preemption. By any standard of review we pass constitutional scrutiny with a legislative record to show this is a harm that was actual and real, and not speculative.

THE COURT: Let me try to go to some of the questions on -- the legal questions I had for the Plaintiff.

We may have already covered it, let me check my notes. And I may have asked it in the very beginning of your presentation. It has been a long day. I apologize if I asked it.

The Plaintiffs argue that a finding, viewpoint discrimination would be dispositive. Do you agree? We have the case of Sorrell versus IMS, 564 U.S. 552, 2011. Quoting, "In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory."

If I didn't ask you, could you answer the question?

MS. FAHEY: We disagree it is dispositive, and we cited to the principle in R. A. V. about --

THE COURT: Okay, that is what you were talking about, R. A. V.

MS. FAHEY: And as I recall Sorrell's analysis, Sorrell still undertook to evaluate the Government interest that was being proffered, and so, I do not recall Sorrell to

have concluded that it was viewpoint discriminatory and therefore have concluded the analysis with that.

THE COURT: Okay. Let's see, there are more questions. I think you already answered them.

I know we talked about -- you made an argument that the definition of conversion therapy is facially viewpoint neutral, you than explained your reasons why. You explained how the exclusion is not really an exclusion in the second sentence, but you were saying it was a clarifying sentence.

Assuming facial neutrality as to the text of the definition, there is the whereas clause of the ordinance, as well as the Government's stated interest in the passing of these laws, is the prosecution of gay, lesbian, bisexual and transgender minors. I want to come back to how does the goal as well as the whereas clause, how does that fit into the Government's position that it is not viewpoint based, but viewpoint neutral?

MS. FAHEY: I don't have it up here with me, a copy of the ordinance.

I believe the county stated it was to protect the health, safety, and welfare of all minors, and certainly at times it is stated including gay, lesbian and -- I am going to find that --

THE COURT: It may be the last whereas clause on page -- looking at the city, maybe that is not fair to ask you

that.

Let me see if the county is the same. Whereas the Palm Beach County Board of Commissioners desires to prohibit within the -- the practice of sexual orientation or sexual identity change efforts on minors by licensed therapists only, including reparative and/or conversion therapy to be demonstrated to be harmful to the physical and psychological well-being of gay, lesbian, bisexual, transgender and questioning persons.

MS. FAHEY: Yes, if you go to the effects provision, the intent of the ordinance is to protect physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and questioning persons.

What I would offer as an explanation is that the whereas clause demonstrates that the sources that target conversion therapy as a practice that is harmful, those sources by and large deal with patients who are identifying and could be characterized as gay, lesbian, transgender, bisexual or questioning.

We have not seen a source that states that this type of therapy is being provided to heterosexual or normative identifying children to have them change to a different identity such as homosexual.

The statement where the therapists have been demonstrated to be harmful to the class of people, lesbian,

gay, bisexual, transgender and questioning persons, and I use class as a category of people, does not mean the county is not interested in protecting all of the minors, because over and over we see there is no scientific basis for concluding that a therapy can change sexual orientation or gender identity, and we can't find that it would change it in either direction and would be inappropriate to change it in either direction.

I believe that addresses the differences where we have demonstrated it is harmful to those type of people, but we want to protect all children including those that we --

THE COURT: Does it pertain to the law may functionally only apply to therapists like the Plaintiffs who practice homosexual to heterosexual therapy efforts? Following up, can the Defendants credibly say that the law will be enforced against therapists practicing heterosexual to homosexual conversion therapy?

MS. FAHEY: Yes, neither, a therapist who is attempting to change a minor child from homosexual to heterosexual, that professional practice would be unlawful under the ordinance.

THE COURT: So, I understand your position, you are not conceding that the ordinances are content based; is that correct?

MS. FAHEY: Yes.

THE COURT: If the Court nevertheless finds that it is

a content based restriction and does not fall into a special exception, would you agree the law would be subject to strict scrutiny?

MS. FAHEY: I agree that there is much law that finds that content based -- generally, the answer to that question is yes, and NIFLA says, under Reed, generally yes, content based equals strict scrutiny. Wollschlaeger says the same.

I do not believe there is any circumstance under which content based regulations -- I think I missed the part of your Honor's question, whether the determination has already been made that it is not professional conduct. If we are in the world of professional conduct, we do not reach the question of whether it is content based or not. If we are in the world of speech and it is content based, generally, yes, that would be -- that would be what would be applied.

However, the county disagrees that this is content based. The county is not prohibiting Dr. Hamilton -- the example at deposition, complimenting a costume and wearing a dress, that dress looks so pretty on you, specific content, specific words or messages, things like that. Content is not being proscribed, it is the practice of seeking to change.

So, it is entirely possible that a person could say that dress is so pretty and that comment have nothing to do with a practice seeking to change that child.

It is also possible that they are employing a

professional practice of therapy where that is a part of their design based upon their use of methods and theories which is the practice of marriage and therapy we learned from that definition. If they are using that in that context, then it would be regulated, but not because what she said, the dress was pretty, it is what she was doing, seeking to change the child's gender identity.

That conduct of seeking that with the child through the use of scientific method of conversion therapy is what is banned, not any specific content of the words used in therapy.

THE COURT: Okay. So, if we -- if you don't prevail on rational basis, you go to intermediate scrutiny and is it -- what would be triggering intermediate scrutiny, then? And we have touched on some of these issues. Is it the category of commercial speech, professional speech? Does time/place/manner -- although you did not mention that in any of your briefings, does that come into play or are you arguing for one of these categories or something else? If we get to and land on intermediate scrutiny, if that is where the Court goes, how does it get there?

MS. FAHEY: So, if the Court decides it is not applicable, we then analyze whether it is content based or not. Content and also -- content -- if the Court finds, yes, content, yes, viewpoint, we are definitely in the scrutiny situation.

However, if the Court finds it is not content based, and we believe it is not, it is not -- this conduct is not banned because of anything like the Supreme Court said in Reed, and that analysis is in the county's motion to dismiss and also in the proposed conclusions of law about content based.

We believe we are in intermediate scrutiny because it is not content based, and we know that the Court does -- in the Southern District of Florida does have a more liberal view of commercial speech. And as the county listened to the Court's a analysis of the reasonable time and place and manner restriction, the county has not thoroughly explored in its written submission the possibility that those apply, so we would not concede at this juncture they could not apply.

However, I think you see the King Court truly struggling with why it would be appropriate to apply any strict scrutiny to this type of ban, and they landed on professional speech, which NIFLA did not find to be something that they previously recognized.

NIFLA didn't foreclose the possibility of professional speech.

THE COURT: So, they found it was content based. The footnote found viewpoint based, but they didn't want to commit, neither court, the Ninth -- no, the Ninth went with rational, the Third didn't commit, and maybe Wollschlaeger didn't either. They met one and didn't have to reach the other, which isn't

always helpful to the District Courts. But in any event, that was my question to you, if this Court found it to be possibly viewpoint, possibly content based, are you relying upon, maybe like King, the professional speech to get to intermediate, at least?

MS. FAHEY: We would not concede that there is not a situation where -- reluctantly, we would argue every legal basis for -- sorry, reluctantly I would say, yes, professional speech, however, we do heed the Court's analysis in NIFLA about why it is they did not find professional speech regulated.

We would be very concerned with the result that this type of treatment, medical treatment of a child which is designed to do something to that child, is something that would receive strict scrutiny. And so, for that reason, we would be open to the time/place/manner analysis potentially applying and potentially, if this was something that the -- maybe perhaps this is the situation where professional speech would be something that the Supreme Court would analyze as being an appropriate use of that terminology and basis for lesser scrutiny.

I say that reluctantly because we believe that it is much more appropriate to find that it is professional conduct.

THE COURT: I guess, you know, it goes without saying with your rational basis analysis in the face of Wollschlaeger, particularly the statement by the Eleventh Circuit that "we do

not think it is appropriate to subject content based restrictions on speech by those engaged in a certain profession to mere rational basis review. If rationality were the standard, the Government could tell architects that they cannot propose buildings in the style of I. M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on."

Am I to take your response to be you don't look at it as a content based restriction, so what you are asking for is not in conflict with that case and that statement?

MS. FAHEY: Yes. In Wollschlaeger, we have the situation where the Plaintiff doctors were asking questions for the purpose of advising clients about safety risks to the minors in their home and so, there was no claim nor any evidence that routine questions to the patients were harmful or that it was contrary to practice to ask those questions.

So, we have a have different type of words coming out of professionals' mouth situation in Wollschlaeger that is not -- it is not the same as it is here.

Those were questions designed to make sure the doctor was giving the right type of advice and information to the patient.

These are words that are actually the treatment of the patient, so Wollschlaeger is in the situation of proposing a

building or proposing -- talking about this is a cheaper way to do this type of activity. It's discussion.

We don't have discussion here because both of the ordinances specifically state the Plaintiffs may discuss, recommend, express all they please, they may not engage in a practice on minors.

We have argued and state again that Wollschlaeger's discussion of Pickup is classic dicta as they distinguish it and don't find it particularly helpful to their holding, and they actually find and discuss the fact that Pickup had nothing to do with restricting providers from recommending SOCE, for expressing their views on SOCE. They found the case of Conant to be -- that is a case where the doctor could be prohibited from recommending marijuana as a useful treatment.

THE COURT: Sticking with Wollschlaeger, the Court found that the justifications for the act were insufficient because other privacy laws served the same function. Why don't other ethical and legal obligations on Plaintiffs effectively protect children from harmful medical treatments?

MS. FAHEY: As I understand it, there have been generally two worlds of other regulations that have been proffered for -- we are already -- the children are protected. You can't harm minors, that is an ethical code, and there are certainly other statutes that they may be in violation of if they actually harm minors. And then informed consent would be

something that we already have the concept of this is supposed to be something that that minor is at least assenting to.

So, first we start with the harm, you can't harm minors. The problem goes back to the allergy test situation.

This is not a situation where you can quickly discover whether the practice that is being employed on the child in the course of therapy is in fact resulting during that time in harm, or whether it is going to be a harm that is looked back on later.

A lot of the APA task force reports on harm, those were adults retrospectively looking back and realizing that the therapy that they received was harmful to them in the long term. That is why you can't harm a minor is not sufficient in preventing harms to minors from conversion therapy, because we don't know that the harm is going to be immediately appreciable sufficient to stop the harm before it actually occurs.

What we do know is what is likely to cause that harm is the conversion therapy, so the county has banned conversion therapy.

With respect to informed consent, with minors we have lots of different factors that go into whether their consent is truly voluntary. They are dependent on their guardians or parents. They have decreased faculties in their ability to appreciate the long-term consequences of today's decisions and they are developing children who are becoming who they are.

Those are some of the reasons. And I go back to the sources where I cited specific concerns about minors. Informed consent is not sufficient to address the county's interest in protecting minors given all those things, and the Court in King agreed with that analysis.

THE COURT: I know it was filed recently, but the Amicus brief states -- incapable of informed consent, minors over 13 years of age, their capacity to consent to mental health counseling, in reference to Florida Statute 394.4784, Subsection 2. If the state recognizes that minors are capable in one area of managing one area of health care, why are they not capable to manage in the other?

MS. FAHEY: That is a very limited exception to the rule that generally minors cannot consent.

That exception provides for limited therapy to a minor in crisis situations, and so that is when that exception to the consent rule applies.

There are other reasons why a state may acknowledge a basis for a minor to provide their informed consent. Pregnant minors have the ability to provide consent as to their pregnancy without their parents providing informed consent.

Minors' ability, one of the examples by the Amicus or Plaintiffs was the ability to consent in the criminal legal context.

It is a different situation in that situation. We

have -- first of all, we often have some sort of counselor, legal counsel who is advising the client in whether it is in their best interest to actually provide consent, and then we also have analyses that protect minors in the legal context to really go through all of the detailed factual circumstances to decide whether any consent provided for a search and seizure or for a confession were truly in fact voluntary.

That minor's age is very, very relevant when it comes to that Fourth Amendment analysis of whether their consent was voluntary as we would expect a 25 year old's consent to be.

THE COURT: The one I cited to, 394.4784, substance abuse treatment statute, 397.501, subsection 7-E-1, pregnancy related services, 73.65, aren't they all statutes where minors are entitled to give their consent to these services?

MS. FAHEY: It sounds as though these are areas where the state made a decision why the minors may have a reason why they need access to this help, the pregnancy intervention, substance abuse intervention and crisis intervention. There needs to be an exception for minors to timely access this help for substance abuse issues, if they have concerns about a pregnancy where they need to make a decision or a crisis situation, that is a 13 year old distinction.

THE COURT: All right. Before we turn to preemption, anything from the city either factually or legally that has not been addressed through the county that the city wants to bring

forward? Do you want to wait for the completion of the county that relates to preemption and a few other issues?

MR. ABBOTT: I can wait for the county's presentation, and looking at the clock, I'm not desperate to spend a bunch of time here. As the Court pointed out, the exhibits have been admitted, there are no witnesses being called, and given we will be able to put our position, in essence, in the proposed findings of facts and conclusions of law, I am not going to be prejudiced if I am not heard here today.

I do not want to leave this courtroom if you have questions that you want addressed. At this point, I need not ask you for an hour or two hours. I want you to know I am here and I want to answer any questions the Court may have.

THE COURT: The questions would be pretty much along the lines of what I asked of the county. Unless there was a different answer that you wanted to give -- if you want to think about that, I don't have any separate questions that I parceled out for the city versus the county. Maybe that was an oversight on my part. I saw the issues generally being similar relating to the two.

If you want to think about that, I will hear the final presentation by the county on the final issues, and I will let you come to the podium. At this point I have no specific questions for the city. I would merely want to make sure you have been heard, and if anything I have said or the county has

said doesn't accurately reflect your position factually or legally, make sure to let me know.

MR. ABBOTT: I will make a brief presentation after the county is done.

THE COURT: From the county on the final points.

MS. PHAN: As I mentioned, your Honor, I am going to go over the preemption and irreparable harm. Before I do that, I want to add something to Ms. Fahey's statement about the county's intention for enforcement.

It is not the Code Enforcement officers that are going to make the final determination, the County's intention is that the code officer will do the investigation when there is some sort of complaint of conversion therapy being performed and then there will be a hearing where a special magistrate would be the person to oversee the hearing and be making the determination based on the evidence presented by the investigator and violator.

THE COURT: Okay.

MS. PHAN: So, Courts have held that implied preemption is severely restricted and strongly disfavored. Exile v. Miami-Dade County 35 So.3d 118, Florida 3d DCA, 2010 and D'Agastino v. City of Miami, the citation is 220, So.3d 410, Florida, 2017. The Florida Supreme Court has stated that Courts must be careful and mindful in attempting to impute intent to the Legislature to preclude local Government from

exercising home rule powers.

Here is the Florida Constitution which gives the county the authority to self govern and this is where the county's power comes from.

In ordinance number 84-8, this is where the county adopted its charter and that is why Palm Beach County is a charter county.

In Palm Beach Charter Section 3.3, this is where the county states that the county may adopt ordinances to accomplish the purpose to protect the health, safety, and general welfare of all residents.

And here is the Palm Beach County ordinance. What I want to point out here is that the last sentence of the ordinance states that the county is exercising its police power for the benefit of the public health, safety, and welfare, and also the intent of the ordinance is to protect the physical and psychological well-being of minors.

Now, the Plaintiffs stated that historically, the health care regulation belongs to the state. The cases that they actually cite to support their position in their response to the county's' reply, I wanted to go over that because that is misleading in how they are misrepresenting the cases.

Dent versus West Virginia, 129 U.S. 114, 1898, that was based on if the state can require a doctor to get certificate from the State Board of Health, it had to do with

Fourth Amendment right to liberty problem, if the state can hinder his choice of occupation. So, it didn't have to do with whether the state versus local Government had the authority to regulation professions.

That is the same thing with another case the Plaintiffs cite, which is McNaughton v. Johnson, 242 U.S. 344, a 1917 case. There the same thing, California wanted to enact a law where they required a certificate in order to practice optometry, and the State Court there affirmed denial of the Plaintiff's injunction because again the state has the right to license and regulate professions.

We are not saying the state doesn't have to do that, we are saying the state doesn't have to regulate to prevent the county from doing that. I will state why.

Chapter 491 speaks to clinical counseling and psychotherapy services. The state is regulating licenses and continuing education, not regulating the scope of the practice.

Here 491.012, where they speak to violations, again, it is violations related to the licenses.

The next slide has to do with discipline, 491.009, the state is disciplining, but based on the license.

THE COURT: When there is discipline under the statute, what is the procedure for discipline? What body governs whether there is a violation; is it a panel of professionals within that field?

MS. PHAN: It is right there. I want to go over Subsection H in this. They say failing to perform any statutory or legal obligation placed upon a person licensed, registered, or certified under this chapter. I want to point out that the Legislature made a distinction between statutory or legal obligation, meaning that their legal obligation can come from somewhere else, some other source other than statutory.

In Section T it says violating a rule relating to the regulation of the profession or a lawful order of the department or the board previously entered in a disciplinary hearing.

So, in relation to their license, it is the board that disciplines them, but again, I want to point out --

THE COURT: Who is the board comprised of, professionals in the same field as the person who is alleged to have violated the statute?

MS. PHAN: I don't have the information on who the board is comprised of.

THE COURT: Bringing it back to the county, if there is an alleged violation of the ordinance, it dovetails to enforcement, and whether it is difficult to enforce or not, and I think the Defendants themselves have acknowledged the difficulty of enforcement.

Even getting beyond that, what body then determines

whether something constitutes conversion therapy? So they come upon a therapist whom they believe has violated the statute -- whom the county believes has violated the ordinance, and if it is shown to be a violation, there is a fine. Who makes the determination whether there is a violation; is it Code Enforcement persons?

MS. PHAN: Well --

THE COURT: Or professionals who know about the nature of the therapy and know whether it is conversion therapy or not? What level of understanding, education, and training do they have?

I am not sure this is related to the legal analysis, but I was curious about that.

MS. PHAN: At this point we are considering having a special magistrate. In regard to the qualifications, that hasn't been determined yet, that is still in the works, but we have a Youth Services Department where they deal with youths and they provide mental health services as well. We do have another branch that can help with that, we have professionals, psychologists, marriage and family therapists there that can help us in making a determination, whether it is to hire a special magistrate with special skills and seeing their qualifications, the county has resources in order to address this problem.

THE COURT: If it was a magistrate, it would be a

hearing. So someone makes a complaint, maybe the minor makes a complaint, I went to a therapist, the therapist was doing things I think fall within the definition of conversion therapy, I am complaining to you, the county. The county does what?

MS. PHAN: The county will do an investigation, the investigation talks to the minor, talks to the doctor, and makes his findings and brings it to the hearing, and the therapist or licensed professional can defend themselves however they want to, and the minor will be there. That is our intention, the minor will be there or the person complaining will be there to address the complaint that they have.

THE COURT: But you are not sure in front of whom that complaint -- who will hear that. You said maybe a magistrate. Is there not an enforcement in place right now if a complaint would come in tomorrow?

MS. PHAN: There is not a firm procedure in place yet, we are working with our Code Enforcement to have a procedure in place, but it is not -- there is not one that has been officially approved yet.

THE COURT: Okay.

MS. PHAN: So, I wanted to mention to your Honor that in the D'Agastino case, the Florida Supreme Court case, the Court did hold that the test for implied preemption requires the Court to look at the provisions of the law as a whole.

That is why I was pointing out this chapter, 491, if you look at it in the whole, they are just regulating licenses, they are not regulating specific areas of practices.

However, if you look at -- I mean, they do say practice of hypnosis, practice of juvenile sexual offender therapy, however, it is still with regard to the license and qualifications, not with regard to the actual treatment itself.

THE COURT: What practically is the analysis the Court has to undertake to determine whether licensing or -- whether regulating the therapy that is being prohibited under the ordinance has been preempted?

I know you say -- you cite to case law that says it generally shouldn't happen, that it is -- there is a narrow set of cases or instances. What is the road map? What does the Court need to find?

If I were looking at the screen, 491.0141, .0143, .0144, what would I need to see there under your interpretation of preemption that would tell the Court the State Court preempts this area that you have regulated?

MS. PHAN: Based on the statute if the Legislature intended to preempt by the laws they have enacted, and if it is pervasive. Here the laws they have enacted in regards to professional regulation all have to do with licenses. They have not gone into the specific treatment itself.

THE COURT: To become licensed, doesn't that interplay

with treatment?

MS. PHAN: That has to do with your education, CEU's, you are paying your dues and things like that.

But in regards to -- I speak to specific areas of treatment. They don't say that -- I mean, they don't say anything about conversion therapy, for instance.

THE COURT: Is that the inquiry, it stops there? I see juvenile sexual offender therapy and I see sex therapy and hypnosis. I don't see conversion therapy. That ends the inquiry or do I draw from the three statutes you have on the screen -- am I able to draw upon those to conclude certain things, such as the state has shown an interest in how these persons get licenses to practice juvenile sexual offender therapy, what their qualifications must be?

Is it both, one or the other? You are not suggesting that the inquiry ends just because I don't see conversion therapy there.

MS. PHAN: No, this is just an example of what the Legislature is actually regulating.

THE COURT: Who they give a license to based on the qualifications that person has. Once they are deemed qualified and given a license, they are on their own, the state doesn't have any involvement any more?

MS. PHAN: Not necessarily, of course, if there is misconduct of some sort.

THE COURT: If there is misconduct, one form of misconduct could be not exercising therapy properly or doing it in a way that is harmful or negligent.

MS. PHAN: Right.

THE COURT: Then the state would be involved in that.

MS. PHAN: Right, or if there is some sort of trickery going on. It does say that under the section where I listed with the disciplinary action -- I don't have the whole statute there, but from what I recall, it does give a list of things that they do discipline for, and things such as fraud, they discipline for things like that.

THE COURT: You are saying they don't get involved in the scope. Nowhere are they saying this is what sex therapy is, this is what juvenile therapy is, what the scope is, that is where you are drawing the distinction? There is not a statutory scheme that deals with the scope of the licensed therapist, therefore that provides an opening, coupled with the county to give it the power to administer laws, ordinances for the welfare of the community, is that the analysis?

MS. PHAN: Yes, your Honor. They don't talk about the very specific types of sexual therapy, they don't talk about the specific types of hypnoses, they don't talk about things like that. Yes, I am saying that it does leave open for the county to step in because Legislature hasn't stepped in to do that. So there are no inconsistencies with the county's

ordinance and with the law that currently exists.

THE COURT: If somebody went through conversion therapy and felt he or she was harmed, felt he or she had fraud acted upon him or her, was deceived in some way, under the statutory scheme, would the person -- the patient have an avenue of redress with the state?

MS. PHAN: I am not sure if they would, because the state hasn't said anything about conversion therapy being -- they haven't taken a position on conversion therapy.

Right now, we are just talking about the state, not any local bans, but the state hasn't taken a position. So, if a minor complains that he was being harmed by conversion therapy, I don't know if there is really any disciplinary action that could be taken on the therapist because there is nothing that the state says that the therapist can't do this.

THE COURT: Is every type of therapy -- is the statute exhaustive, is every type of therapy that exists within our state -- I guess it is not covered in the state statute because, as you are saying, conversion therapy is not there. But what about other areas of therapy that don't have their own provision in the state statute, such as 491, there is not an ordinance, but somebody feels that he or she has, under that discipline section, been violated, deceived, defrauded; there does the statutory scheme provide an avenue for redress for that instance? No ordinance, what does that person do?

MS. PHAN: What does that person --

THE COURT: If they felt they were misled, deceived, fraud acted upon them, harmed.

MS. PHAN: It would be a case-by-case basis. I am sure there are unhappy clients all the time making complaints to the board or to whatever authority they can, and I would say it would depend on a case-by-case basis.

I don't know specifically what situation you are referring to, other than if it is misconduct, what type of misconduct are we talking about in regards to, you know, inappropriate relations with the client, that would be an ethical violation, so it just depends.

That is my point, though, the Legislature leaves room open because they do discipline for if you have a statutory violation or you violate other legal obligations, so other legal obligations can come from Federal law, local law or from, I would say, their code of ethics, and also the board rules. The board has their own rules, too, that they have.

So, I don't think that the state intends for the only source or place of discipline is to come from the state because, otherwise, they wouldn't have added other obligations, they would say it is statutory.

THE COURT: What other ordinances are most similar to this one, not necessarily conversion therapy ordinances, which I know there are many cities, municipalities, county -- maybe

in the other counties, there are a list of other locations in Florida. Other than conversion therapy ordinances, are you aware of other ordinances in the State of Florida that seek to regulate therapy?

MS. PHAN: I haven't done an exhaustive study on other ordinances within the State of Florida to honestly tell the Court my opinion on that or what research I found on that.

I don't know what the other 67 counties have enacted that may regulate some sort of therapy other than conversion therapy.

THE COURT: I wouldn't expect you to know that other than if it surfaced in a case where the Court spoke to it as being preempted or not preempted.

Maybe I am asking it more from a legal standpoint, have you come across any cases where the Court has spoken and indicated that there is preemption and explained that it is because the state, let's say in the area of therapy, has already enacted statutes that govern qualifications, licensure?

MS. PHAN: Are you speaking just to therapy, though?

I do have case law where it speaks to preemption in -- such as the Florida Code of Ethics, that is the Sarasota case, the Court spoke to preemption there. Are you asking specifically with this?

THE COURT: Starting with that, that would be most analogous; if not, what case do you think is most analogous to

this case for the Court to look for guidance in support of your position?

MS. PHAN: There is a case that supports the County's position, they say that the county shall have all powers of local self government not inconsistent with general law.

The Court states that it generally serves no useful public policy to prohibit local Government from deciding local issues. Again, I stated that case for the proposition where Courts should be careful in imputing intent on behalf of the Legislature.

And I also want to point out, though, to the section that the Plaintiff has referenced and our interpretation of that, 456.0032(b) where there the legislature also seems to be contemplating that regulations can come from local ordinances.

So, we have the slide there, and so you can see there that the legislature says it is the intent of the legislature that persons desiring to engage in any -- hold on, I'm sorry.

Looking at Section 2, the Legislature further believes that such professions shall be regulated only for the preservation of the health, safety, and welfare under the police powers of the state. Such professions shall be regulated when: B, the public is not effectively protected by other means including, but not limited to, other state statutes, local ordinances, or Federal legislation.

The county means that the Legislature contemplates

there will be other regulations. If not, other local statutes or legislation that has the law or whatever it is that they need to preserve the health, safety, and welfare, the legislature can step in to fill that gap.

Here we are reading it that the legislature is saying there is a gap filler if there isn't already something in place that -- relevant to that subject matter that they are trying to regulate.

THE COURT: Why don't we give you a few more minutes.

You are at the time the Plaintiffs were, 2:46. You have one minute on them. I do want to leave the last few minutes for the city. I know I cut your presentation short for my questions.

MS. PHAN: I want to go over the emails that the Plaintiffs showed your Honor in regards to Ms. Nieman's and Ms. Hvizd's emails.

THE COURT: I remember them. Tell me what the argument is. Relating to what?

MS. PHAN: Preemption.

THE COURT: I remember those.

MS. PHAN: Ms. Hvizd's email -- well, actually Ms. Nieman's email where she says that it is fascinating how great lawyers can look at the exact same language and make completely opposite conclusions, there she is stating they are exchanging legal analyses, she hasn't made a determination at

that point. And so, the Plaintiffs are over reaching and mischaracterizing her email, there is the email --

THE COURT: But isn't it really -- it is a legal decision whether Ms. Nieman said one thing or another. Ultimately, I need to decide whether there is preemption. What would her thoughts have to do with this Court's analysis? It is a legal issue, correct?

MS. PHAN: Yes, exactly. I will move on from that.

In regards to the email, they say it becomes no to maybe, and they have labeled it no to maybe. The two September 2017 emails to Ms. Nieman didn't just come out from nowhere, it was not a political issue or anything.

This is in Exhibit 40, Defendant's Exhibit 40. Rand Hoch tells Ms. Hvizd he is going to have Trent Steele send a memo on preemption. On August 25th, this is Exhibit 41, Trent Steele sends a memo in regard to preemption. In Ms. Hvizd's testimony at page 192, lines one to 25, and 193, one through six, she says there was a change because the county recognized in Florida law -- and she was referring to Section 456.0032(b) -- the county does have authority or -- the county can actually regulate in this area.

It is based on the memo that she received from Mr. Trent Steele in regards to preemption and reading it herself, where I showed your Honor the Legislature does contemplate local ordinances when it comes to professional regulation and

preserving the health, safety, and welfare.

So, it wasn't, you know, A through Z. It was A, B, C, D, E that happened through that.

I will go to standing.

THE COURT: Well, Plaintiff didn't address standing.

Now standing has been raised, I know it was raised in the Motion to Dismiss. Is it raised in the Motion for Preliminary Injunction?

MS. PHAN: Not in the motion, but in our response to the motion.

THE COURT: Okay. Well, I have read what the parties have said. Primarily, I read what both parties have said with respect to the Motion to Dismiss. If you raised it also in your response -- I don't think -- if you want to say one minute on standing, that is fine. I don't want to get into a whole legal recitation on that now at this late hour.

I can rely upon the briefing. I am familiar with the different positions that the parties have taken with respect to standing.

MS. PHAN: Okay. Just really standing to Dr. Otto --

THE COURT: About being in the county or not being in the county?

MS. PHAN: Right. There is conflict with the county's ordinance in regard to personal test. The county's ordinance wouldn't apply to him, and in our ordinance there is a

conflict, ours isn't applicable. He wouldn't have standing on that.

And based on his testimony, Request for Admissions number 35, Otto denied that he wished to conduct therapy practices that seek to change sexual orientation. He wished to conduct therapeutic therapy to change a minor's sexual -- he said he did not practice conversion therapy. And standing on behalf of the clients --

THE COURT: You don't need to go over that, I am familiar with that body of law.

I think we'll turn it over to the city now.

MS. PHAN: Thank you, your Honor.

THE COURT: Thank you very much.

What does the city have to say? You have been patient and you have not asked for or will be getting the same amount of time, or else we would really be here into late hours.

MR. ABBOTT: Good afternoon, your Honor. I will not ask for a similar amount of time, thank you for the invitation.

The answer to the question are we in accordance with the County's presentation here today, it is yes.

Is it the Defendants' position the ordinance should be determined under the rational basis, the answer is yes.

Rational basis is a phrase that means different things in different contexts. It is the city's position the Plaintiffs are not engaging in protective speech at all.

Analysis for speech, rational basis, heightened scrutiny or strict scrutiny, none of that applies is our position.

Government's, when they act under police power, which is what we are doing here, we are stopping a dangerous practice, Governments can't do that willy-nilly. A Government can't enact a regulation that is arbitrary, and sometimes you see a Government regulation has to be fairly debatable, sometimes you see the phrase the Government regulation has to have a rational basis. They all mean the same thing, the standard is similar.

We agree the standard is rational basis, again, because everything the Government does under its police power has to have a rational basis, not because we are infringing on speech at all. That is not the sense we are using the phrase rational basis.

Our argument is, as most recently articulated under NIFLA, sometimes words are speech, I believe Ms. Fahey said speech with a capital S, protected expression, and sometimes they are conduct. NIFLA says "while drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it," and let me give you an analogy.

Let's say there is a medical doctor, the Plaintiffs are doctors, educated and called doctors, because they have the --

THE COURT: Speak slowly so we capture everything.

Otherwise it will be problematic.

MR. ABBOTT: All good points.

Let me draw this analogy, let's say there was a surgeon in Boca Raton or a surgeon in the United States or surgeons performing surgery without using anesthesia, or certain medical doctors that are starting to treat blood disorders with leeches; certainly we can pass an ordinance that says don't do that, we find that is dangerous, it causes harm and we are concerned you are going to do that here in Boca Raton.

We can do that under our police power, and if challenged, your Honor wouldn't evaluate that and say is there a sufficient restriction basis to restrict speech? Is it a rational basis or is it mid-level scrutiny or strict scrutiny.

Our contention in this case, it is just the same. We have found that psychologists are performing a practice that is causing danger, and we have enacted under our police powers a regulation that says stop doing that, you are doing something that is causing harm or that would cause harm.

THE COURT: Don't you agree, though, what makes this a little different and trickier is that the procedure is -- you know, does involve speech?

I know you are shaking your head no, but it is not -- it is not like whatever your two examples were of -- you said leeches, but it was something else.

MR. ABBOTT: Surgery without anesthesia.

THE COURT: I am not saying I don't agree or disagree with you, I am saying can't we acknowledge this is a little trickier than that in that the modality, the procedure, if you will, is therapy and therapy by -- and it is referred to as talk therapy, so that would suggest using words, which at least makes lawyers and judges think about speech.

We should be able to acknowledge that, whether you go so far as to argue strict scrutiny or viewpoint or it is just police power, but it is a little different.

MR. ABBOTT: And forgive me for being disagreeable, your Honor, no, that is something I cannot agree with. That is precisely why I used the analogy.

These doctors don't have superior First Amendment rights to these other doctors. Merely because some doctors apply their trade with a scalpel and another with their lips does not mean one is protected by the First Amendment and the other applying their trade is not. That is what the Courts mean.

And NIFLA says while it is sometimes hard to distinguish, sometimes words are speech protected under the First Amendment and some are conduct. Regulating the doctors with leeches and saying words is identical, neither of them are speech within the meaning of the First Amendment. The cases that NIFLA cites support that proposition.

In Planned Parenthood they were allowed to tell a doctor in Pennsylvania if somebody comes to you for an abortion you have to tell them about their baby and what support there might be for a baby. The reason the Court allowed that, not because it passed some level of scrutiny, not because there was a rational basis, or it passed heightened scrutiny or scrutiny, it is because it was not protected speech at all.

THE COURT: Didn't they use the word it was incidental? I don't think they said it was not speech at all.

MR. ABBOTT: I think that was the analysis. I don't think that case turns on how we regulate -- Government regulates speech. Ohralik is the United States Supreme Court case and in Ohio doctors don't solicit clients. Ohralik claimed they wanted to go to somebody's house and solicit a client, they want to knock on the door and speak and persuade and talk about the law and the case, and talk about theories, and the Court said that is not speech.

The reason that regulation was upheld was not because it passed a strict scrutiny or any lesser analysis; the reason it was allowed was because it wasn't deemed speech at all.

Here is a quote they give, and they cite Giboney versus Empire Storage & Ice, another case that the Supreme Court in NIFLA said these are the kind of cases that say we are not regulating speech at all.

It says, "Moreover, it has never been deemed an

abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

So, the regulation of the ordinance regulates a profession, stop doing the profession in a wrong way which causes harm. The fact that these Plaintiffs practice their professions with words rather than a scalpel does not implicate the First Amendment at all.

I can flesh that out in my writing. I didn't want to leave here with the Court's thought that it is our intention that it is a rational speech analysis, that is not our position. They are not engaged in speech at all, and it is a regulation of conduct recognized by the Supreme Court.

The next thing I want to talk about is whether the ordinances are narrowly tailored. I will spare the Court the specific references to the authorities, I can bring them to the Court's attention in the proposed findings.

But let me tell the Court in advance, the reason why the ordinance bans both non-adversive and adversive psychological counseling is because both of them cause harm, and there is scientific support and we will reference the studies where the support is. The reason the ordinances banned voluntary and involuntary counseling of minors is because voluntary counseling of minors also causes harm.

The whole concept of being over inclusive is you accidentally caught somebody you didn't want to catch. It is my representation to the Court, and I will flesh this out in the filings, we didn't catch anything we didn't want to catch. Everything the Plaintiffs say, why do you regulate this, well, it is because that conduct also causes harm, and I will cite those particular provisions when we make our filings.

The reason that the ordinance is not under inclusive, for instance by not including religious counseling or by allowing the Plaintiffs to make recommendations in counseling, which by the way it does -- remember how narrow the ordinances are.

The only thing that is restricted is, don't use your therapeutic skills to try to change somebody's sexual orientation. The reason we allow those doctors to make those recommendations, or don't apply it to non-therapists, is the basis that the studies talk about, the damage caused by therapy. Therapy is delivered by therapists. We would have no basis to ban the sort of counseling one might get from one's religious leaders, or comfort. I might talk to my bartender who is a good listener, that is not the same thing, we can't ban that. That is not what the studies talk about, they talk about therapy delivered by therapists, and that is why there is the scope of the regulation.

The last thing -- I promise to be brief and it's the

last thing I have written notes on.

On the concept of preemption, I want to say a couple of things about this. First of all, the concept of preemption, the concept of the field preempt, what is the field? At most -- I don't agree with this -- actually, I might agree with this, I think there is preemption for the state licensing scheme for psychologists it would preempt the city to even act a differently sensing scheme. If the state says you can practice psychology with as PH ears T degree, but we say in Boca Raton you have to have a P. had did, I think that is preempted by the statute.

If the statute provides, as it does, circumstances under which a license may be revoked, then I think the City of Boca Raton would be preempted from attempting to revoke a license not provided for by the state.

This concept that a licensing scheme preempted all regulations is that what those folks do is simply not supported by the law.

Again, I don't need to spend a lot of time on this, but the most recent Supreme Court discussion on preemption, the D'Agastino versus City of Miami case, that is a case where there was a contention that a citizen review board that might impose discipline on employees is contrary to rights given by police officers in a police officer's Bill of Rights. I don't want to talk about that case and finding so much as to announce

the following: Police officers are licensed as well, not under the police officer's Bill of Rights. There is a licensing scheme comparable to licensing schemes for psychologists and hairdressers, it is in Chapter 943. Nobody is bold enough to contend that the licensing ordinances for police officers preempted the police officer.

Simply having a license is not enough to preempt the field. Everybody finds a statute that clearly regulates more than licenses. To even have a preemption claim, there is no Court that has ever found a simple licensing scheme to preempt licensing of an entire field.

Two more things. You remember when Mr. Mihet came up and said, you know, if the city would have just banned aversive talk -- aversive therapy, we wouldn't be here. Clearly they could have done that. If they had done that, we wouldn't be in your courtroom. What is that if not a admission that the city is allowed to regulate psychologists?

By his very admission, since we can adopt a local regulation, you can't punish a -- you can punish a psychologist that practices. I promised to sit down three times now.

The other thing I will say is, there is no showing on this record or anywhere else in this evidence as to the other elements of preliminary injunction as it pertains to this alleged preemption argument. The Plaintiffs have argued, and I am not going to deal with the arguments here, they said,

listen, if we have a substantial likelihood of success on the merits that the First Amendment was violated, that is damaging enough and we should get a preliminary injunction.

Clearly preemption is not a First Amendment concept, so on this record, if the Court were convinced there is preemption, there is no showing of irreparable injury, no showing that the threat of injury outweighs the damage to the city if an injunction were to issue, no showing an injunction would be adverse to the public interest, and we suggest no such showing is possible.

The Government interest is actual harm to children, and we are not talking about speech. The damage in preemption is they want to engage in a counseling session and make a buck for it. On this record, if I haven't persuaded you ultimately on preemption, certainly there is no reason to enter an injunction on that.

If you need me to answer any questions, I will do that.

THE COURT: It is late.

MR. MIHET: Your Honor, you have been very gracious with your time. Can we use ten minutes?

THE COURT: I promised, but I don't want to do it now. We will have a status conference following the hearing so we can talk about where you stand.

What does everyone's schedule look like for a

telephonic conference, unless you want to come over tomorrow around 2:00 o'clock so we can talk about where you are -- we could put it off for a couple of weeks, but I figure sooner rather than later.

I will be free in the morning as well. Do you want to do that?

MR. MIHET: One suggestion, any chance the Court would put it off until a ruling is made on the motion?

THE COURT: Well, that would mean you would be going along with everything -- if you want to keep adhering to the schedule in place.

MR. MIHET: The Court has stayed all other discovery. If I am incorrect about that, I wouldn't want deadlines to lapse. My understanding is that the Court put everything on hold to a subsequent revisiting until after the P. I.

THE COURT: Is that what the parties want?

MR. MIHET: We would want to do that. The Court's ruling would have significance as to where the case would go after that.

THE COURT: I had forgotten that everything had been stayed pending the hearing. You have done all of your discovery relative to the hearing in a preliminary injunction motion, everything has been stayed.

MR. MIHET: Okay.

THE COURT: I got too involved in substance.

Do the parties want that stay -- I am not guaranteeing -- it seems reasonable. It is late, I want to think about it. I want to know your point of view if that is what all the parties want.

Plaintiff wants that. What about the Defendants, do you need time to think about it or do you want that, too?

MS. FAHEY: The county agrees it would be prudent to reassess at a later point.

MR. ABBOTT: We agree also, your Honor.

THE COURT: All right. I will do an order to confirm that.

I am also going to do an order when your proposed findings of fact and conclusions of law will be done. We know Pauline indicated a week. Today is the 18th, on the 25th you will have a transcript. Did you confer over the break about a proposed date to get your proposed findings and conclusions in?

MR. MIHET: Three weeks from today, two weeks after the transcript is issued. November 9th is a Friday.

THE COURT: Does that work for everybody?

MS. FAHEY: Yes.

MR. ABBOTT: Yes, your Honor.

THE COURT: All right. That is agreeable. I will do an order and set it for the 9th of November. I say five o'clock so everybody simultaneously will submit it. It will be in Word format to the Court's email, and I think we have it

filed, too. In that order I will confirm the Court's view on the issue of staying, but it sounds reasonable. I see no reason why the Court wouldn't go along with it. I wanted to make sure I thought about everything.

MR. MIHET: Your Honor, I'm sorry, would the Court consider allowing the Plaintiffs a very short companion brief to go with our submission to address a couple of things I want to address that I don't have time for?

THE COURT: You will be able to do that in your proposed findings and conclusions, anything that is fair game. Everything raised in the record evidence and in the motions and response, reply, complaint, it is all fair game. I read everything and I have listened carefully. Just because you haven't had a chance to respond to certain points, you can absolutely be assured the Court is going to review it in your proposed findings and conclusions, as it will as it goes back and reads -- I am sure you covered it in your motion and reply.

Don't feel you haven't been heard on issues.

MR. MIHET: There were a couple of comments made about how we admitted and implied. I am not sure how we put those in a proposed finding of fact.

THE COURT: The Plaintiffs have not had --

MR. MIHET: We'll figure it out.

THE COURT: All right. That will conclude it for the day.

I want to thank everyone. You did a very nice job of being very thorough and very professional and very educational for the Court in trying to answer the Court's questions while staying on task with your presentations, which I know isn't always easy. I appreciate it. I will get the order out. Have a nice evening.

MR. MIHET: We have a hard copy of the exhibits.

THE COURT: That will be helpful, thank you.

(Thereupon, the hearing was concluded.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: October 23, 2018

/s/ Pauline A. Stipes, Official Federal Reporter

Signature of Court Reporter

No. 19-10604

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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,
Plaintiffs–Appellants
v.
CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA
Defendants–Appellees

On Appeal from the United States District Court
for the Southern District of Florida
In Case No. 9:18-cv-80771-RLR before the Honorable Robin L. Rosenberg

PLAINTIFFS-APPELLANTS' APPENDIX

VOLUME XI

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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' PROPOSED POST-HEARING]
FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

> **As I will show you in the . . . APA report, your Honor, *there have been no factors discovered about what types of therapy cause harm* and what types of therapies are going to lead to a benefit.**
>
> ***Because we don't know* the identifying factors of what about this person makes the therapy beneficial, *we don't know*.**[1]

Plaintiffs brought this civil action, on behalf of themselves and their minor clients, to challenge the constitutionality of Boca Raton City Ordinance 5407, "Prohibition Of Conversion Therapy On Minors," and Palm Beach County Ordinance 2017-046, "Prohibition Of Conversion Therapy On Minors" (collectively "the Ordinances"). (DE 1 (V. Compl.), ¶ 2.) Plaintiffs bring their constitutional claims under the First and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. §1983.[2]

The case is now before the Court on Plaintiffs' Motion for Preliminary Injunction (DE 8). The Court held a hearing on the motion on October 18, 2018 (DE 129). In retrospect, the hearing could have ended on the above admission by Defendant Palm Beach County, that "we don't know" what kind of "conversion therapy" causes harm. For reasons explained below (*see infra* Part II.H), this order could end with that admission as well. Just as the Court gave the parties a full hearing, however, and to ensure the parties a full opportunity for appellate review, the Court provides herein a complete analysis of Plaintiffs' motion. Having read the motion and heard the argument of counsel, and being otherwise fully advised, the Court makes the following findings of fact and conclusions of law, and grants Plaintiffs' Motion for Preliminary Injunction.

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[1] Hrg. Tr., pg. 124:3–8 (emphasis added) (argument of counsel for Def. Palm Beach County).

[2] Plaintiffs' Verified Complaint also includes claims under Article I, §§ 3 and 4 of the Florida Constitution, the Florida Patient's Bill of Rights and Responsibilities, Fla. Stat. § 381.026, and the Florida Religious Freedom Restoration Act, Fla. Stat. § 761.03.

I. FINDINGS OF FACT.

A. Plaintiffs' and Their Talk Therapy.

1. Plaintiff Robert W. Otto, Ph.D., LMFT Would Practice Voluntary, Non-Aversive SOCE Talk Therapy in Boca Raton and Palm Beach County but for the Ordinances.

1. Plaintiff, Robert W. Otto, Ph.D, LMFT, is a licensed marriage and family therapist. (DE 1 (V. Compl.), ¶ 122.[3]) Dr. Otto maintains a counseling practice in the City of Boca Raton and in other parts of Palm Beach County, including regular appointments in unincorporated Palm Beach County. (DE 121-7 (Otto Dep.), at 19:21–20:5, 143:23-144:2; DE 1 (V. Compl.), ¶¶ 125, 127.)

2. Prior to the Ordinances, Dr. Otto's counseling clients included minors voluntarily seeking counseling to reduce or eliminate unwanted same-sex attractions, behaviors, and identity, which counseling is within a therapeutic category known as sexual orientation change efforts (SOCE). (DE 121-7 (Otto Dep.), at 143:2–15; DE 1 (V. Compl.), ¶¶ 3, 4, 126, 128, 129, 131.) Dr. Otto does not call his SOCE counseling "conversion therapy," and does not know anyone who does. (DE 121-7 (Otto Dep.), 176:4–22, 190:17–191:9; DE 121-28 (Otto Interrog. Resps.), pg. 4.)

3. Dr. Otto also does not believe he can himself change any person's sexual orientation or gender identity or expression, and therefore does not himself seek to change any client in those areas. (DE 121-7 (Otto Dep.), pg. 43, line 25–pg. 44, line 20, pg. 54, lines 21–24, pg. 56, lines 10-18; DE 121-24 (Otto Interrog. Resps.), pg. 5.) Dr. Otto does believe, however, that through talk therapy people can make their own changes to reduce or eliminate unwanted same-sex attractions, behaviors, or identity, or gender confusion, and Dr. Otto assists minor clients with their own goals. (DE 121-7 (Otto Dep.), pg. 43, line 25–pg. 44, line 20 ("And, again, this 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."), pg.51, lines 21–24 ("Again, I can't force that teenager to change. If the teenager wants to change, obviously he or she can. There's lots of examples."), pg.

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

56, lines 10–18 ("Now if that teenager wants to change, even in sexual orientation issues or attractions or behaviors or obedience behaviors or school behaviors or anything else like that, then that teenager can experience change."), pg. 63, line 21–pg. 64, line 10 ("I didn't initiate that. I didn't ask that. And, interestingly enough, over the course of our sessions together she went from identifying herself as a lesbian to identifying herself as a bisexual to saying 'I'm heterosexual. I have a boyfriend.'"); DE 121-28 (Otto Interrog. Resps.), pgs. 2, 5–6 ("Otto notes that he does not engage in therapy where his goal is to change any client's sexual orientation or gender identity, but that he seeks to help clients achieve the goals that the clients themselves determine are appropriate for them.")

4. Dr. Otto practices exclusively talk therapy, consisting only of client-centered and client-directed conversations with his clients, concerning the clients' goals. (DE 121-7 (Otto Dep.), pg. 20, line 23–pg. 21, line 22 ("I want to make a distinction that the therapy I provide is 100 percent speech . . . ."), pg. 22, lines 12–21 ("Well, when my client's [sic] come and they're asking me to work with them, they're sharing discomfort or challenges in their lives, and they want me to help them walk through those issues in the ways that they deem helpful and productive to reduce the stress—the distress in their worlds. And so we do that through speaking about those issues."), pg. 43, line 25–pg. 44, line 20 ("And, again, this is client-centered and client-directed with clients' goals."), pg. 146, lines 8–11 ("It's all talk therapy. It's all counseling speech."); DE 121-28 (Otto Interrog. Resps.), pgs. 4–6 ("Otto's practice focuses on conversations and discussions that address what the clients present with, what the clients wish to explore or address, and the goals and aims that the clients wish to pursue.")

5. Dr. Otto's talk therapy practice does not include any form of aversion treatment, which is treatment involving reprimand, punishment, or shame to turn a person away from certain thoughts or behaviors. (DE 1 (V. Compl.), ¶ 72; DE 121-7 (Otto Dep.), pg. 121, lines 22–23; DE 126–22 (Rep. of APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation ("APA Rep.")), at 22[4] ("Behavior therapists tried a variety of aversion treatments, such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic

[4] Due to multiple filings of the APA Report in this Court, the ECF pagination displayed on the version filed at DE 126-22 (Plaintiffs' Exhibit 22) is obscured. Accordingly, the APA Report is cited by its original page numbering.

band around the wrist when the individual became aroused to same-sex erotic images or thoughts. Other examples of aversive behavioral treatments included . . . shame aversion . . . .").) Dr. Otto's practice also does not include any form of coercive or involuntary treatment. (DE 121-7 (Otto Dep.), pg. 46, line 15–pg. 48, line 3 ("And in this regard, since we're talking about minors, if they don't want to participate in a conversation, they keep their mouths closed, end of story, game's over, let's go home. So I can't coerce somebody to even participate in a conversation, okay."), pg. 52, line 22–pg. 56, line 18 ("[I]f the teenager is not going to talk about what the parents want to talk about, you know, I can't force the teenager to do that. We can talk—'What's interesting to you? Let's talk about what's interesting to you.' And we'll go with whatever the teenager's goals are at that point and talk about that. . . . But I can't—and I don't impose, you know, the parents' goals on that teenager.") ("But when it comes to a teenager, who might have sexual orientation preferences that are different than the parents, I can't force that teenager to do anything. If the teenager wants to talk about something, that's all I can talk about is what they want to talk about. I can't impose change because I can't change that teenager that the parents may want. I can't impose that on them because I can't change that teenager.").)

6. As shown above, Dr. Otto does not—and cannot—engage in SOCE talk therapy with any minor client without the client's assenting to it. In addition, prior to engaging in SOCE counseling with any client, Dr. Otto provides an extensive informed consent form and requires the client to review and sign it prior to commencing SOCE counseling. (DE 1 (V. Compl.), ¶ 128; DE 121-7 (Otto Dep.), pg. 46, line 15–pg. 48, line 3, pg. 139, line 18–pg. 49, line 9; DE 121-33 (Otto Payment and Consent Forms), at 7–8.) Dr. Otto's informed consent form outlines the nature of SOCE counseling, explains the controversial nature of SOCE counseling, including the fact that some therapists do not believe sexual orientation can or should be changed, and informs the client of the potential benefits and risks associated with SOCE counseling. (DE 1 (V. Compl.), ¶ 128).)

7. Approximately 90 percent of Dr. Otto's clients profess to be Christians with sincerely held religious beliefs that the Bible is the source of all truth. (DE 121-28 (Otto Interrog. Resps.), pg. 7.) Dr. Otto shares those beliefs, and therapy sessions sometimes include discussion of Biblical viewpoints, including that God created men and women, that they are distinctly different, and that their design was purposeful. (DE 121-28 (Otto Interrog. Resps.), pg. 7; DE 121-7 (Otto Dep.), pg. 158, line 7–pg. 159, line 8 ("There are a lot of biblical truths that would come out in the counseling . . . .").) Dr. Otto also sometimes shares biological information on the

differences between male and female bodies down to the chromosomal and individual cell levels, and discusses neuro-chemistry and its impact on human sexuality. (DE 121-28 (Otto Interrog. Resps.), pg. 7.)

8. Many of Dr. Otto's clients who desire SOCE counseling profess to be Christians with sincerely held religious beliefs conflicting with homosexuality, and voluntarily seek SOCE counseling in order to live in congruence with their faith and to conform their identity, concept of self, attractions, and behaviors to their sincerely held religious beliefs. (DE 1 (V. Compl.) ¶ 129; DE 121-7 (Otto Dep.), pg. 155, line 9–pg. 156, line 20; DE 121-28 (Otto Interrog. Resps.), pg. 2.)

9. Some of Dr. Otto's minor clients have experienced anxiety, confusion, depression, and even suicidal ideation and attempts as a result unwanted same-sex attractions, behaviors, and identity. (DE 1 (V. Compl.), ¶¶ 132–35.) Those clients seek to engage in SOCE counseling with Dr. Otto but are unable to engage in such counseling because of the Ordinances. (DE 1 (V. Compl.), ¶ 137). Dr. Otto understands the Ordinances to prohibit him from engaging in any SOCE counseling with his minor clients, resulting in his discontinuing any ongoing SOCE counseling despite the clients' and parents' consent and requests to continue, and his declining any new requests for SOCE counseling. (DE 1 (V. Compl.), ¶ 139; DE 121-7 (Otto Dep.), pg. 77, lines 6–18, pg. 78, lines 13–21, pg. 79, line 22–pg. 80, line 14.)

10. Dr. Otto has never received any complaint or report of harm from any of his clients seeking and receiving SOCE counseling, including the many minors whom he has counseled. (DE 1 (V. Compl.), ¶ 130).

11. Because Dr. Otto's talk therapy practice consists of client-centered and client-directed conversations about clients' goals, every therapy session is unique, and Dr. Otto does not perform any set procedure or apply any treatment formula. (DE 121-28 (Otto Interrog. Resps.), pg. 5 ("Otto cannot possibly describe . . . every potential issue or statement that he might like to address in a therapeutic setting because his talk therapy practice is never the same for every client."); DE 121-7 (Otto Dep.), pg. 27, line 23–pg. 28, line 10 (""[E]very client that comes through my door dealing with that particular issue is a different conversation, is a different speech, a different talk back and forth, so there's not a one-size-fits-all to that, okay."), pg. 52, lines 10–21 ("Again, that's not a one-size-fits-all answer."), pg. 66, lines 1–2 ("Of course every situation is different."), pg. 160, lines 2–3 ("[A]gain, every conversation with every client is different . . . .").)

2. Plaintiff Julie H. Hamilton, Ph.D, LMFT Would Practice Voluntary, Non-Aversive SOCE Talk Therapy in Boca Raton and Palm Beach County but for the Ordinances.

12. Plaintiff, Julie H. Hamilton, Ph.D., LMFT, is a licensed marriage and family therapist (DE 1, V. Compl., ¶ 140). Hamilton practices throughout Palm Beach County, including in the City of Boca Raton.[5] (DE 121-8 (Hamilton Dep.), pg. 329, line 3–pg. 335, line 15; DE 96-1 (Hamilton Decl.).) In her current practice, Dr. Hamilton provides individual, marital, and family therapy for a wide variety of issues, including the issues of unwanted same-sex attractions and gender identity confusion. (DE 1, V. Compl., ¶ 142).

13. Dr. Hamilton's practice consists only of talk therapy, which is a conversation that takes place between herself and the client. Hamilton asks the client what his or her goal is and how the client believes Hamilton can be helpful to them during the course of therapy. (DE 121-8 (Hamilton Dep.), pg. 71, lines 2–6; DE 121-24 (Hamilton Interrog. Resps.), pg. 2.) Dr. Hamilton is a client-centered family therapist. She seeks to work from the client's frame of reference, honoring the client's perspective and using the resources that the client presents. Dr. Hamilton explores the client's perspective and does not enter any therapeutic alliance with any preconceived notions of what goals or issues the client may wish to address. Dr. Hamilton also searches for client strengths and builds on those strengths. In addition, Dr. Hamilton works to understand and strengthen family relationships. She helps clients to understand the root causes of their feelings or behaviors, and also helps them to make the changes they are seeking. (DE 121-24 (Hamilton Interrog. Resps.), pg. 7.)

14. Dr. Hamilton believes that she cannot herself change any person's sexual orientation, but that clients can experience a reduction in unwanted same-sex attractions through talk therapy. (DE 121-8 (Hamilton Dep.), pg. 231, lines 1–17.) Dr. Hamilton does not try to eliminate attractions, just as she does not claim she can eliminate any distressing issue that any client presents in therapy. With regard to reducing same-sex attractions, behaviors, or identity, this is sometimes the result of the client better understanding the attractions and addressing underlying

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[5] Dr. Hamilton previously put her Boca Raton practice on hiatus for a period of time while she taught full time, but now is ramping up again. (DE 121-8 (Hamilton Dep.), pg. 341, line 7–pg. 342, line 3; DE 126-29 (Hamilton Decl.) (describing Hamilton's efforts to obtain Boca Raton and Palm Beach County business tax receipts for annual periods ending September 30, 2018 and September 30, 2019).)

issues. Dr. Hamilton's practice deals only with assisting clients achieve their own goals, addressing the issues the clients wish to address, and focusing solely on the clients' needs. (DE 121-24 (Hamilton Interrog. Resps.), pg. 7.)

15. When a client presents with a therapeutic goal of conforming their attractions and behaviors to their sincerely held religious beliefs or desires to reduce or eliminate unwanted same-sex attractions, behaviors, identity, or gender confusion, Dr. Hamilton discusses the reasons why the client desires such counseling. Dr. Hamilton explains that there are no absolute guarantees in mental health counseling. Dr. Hamilton explains that behavior and thoughts are changeable, but that there is no guarantee feelings or attractions will always change. Dr. Hamilton also informs the client that while many clients can and do experience a successful reduction or elimination of their unwanted same-sex attractions, behaviors, or identity or gender confusion, there is no guarantee that such results are always attainable or equal in degree. (DE 121-24 (Hamilton Interrog. Resps.), pg. 3.)

16. Dr. Hamilton does not engage in aversive or coercive techniques, and she is not aware of any practitioner who engages in such practices with clients seeking to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity. (DE 1 (V. Compl.), ¶ 72.) Dr. Hamilton does not coerce her clients into any form of counseling, only engages in SOCE counseling with those clients who desire and consent to it, and always permits her clients to set the goals of any counseling she offers. (DE 1 (V. Compl.), ¶¶ 77, 131, 144.)

17. Dr. Hamilton has had parents who have brought their minor child to therapy to address homosexual attractions or behaviors, and whose minor child did not share the same goal. In such cases where minors have expressed that they are happy identifying as gay, lesbian, or bisexual, and do not want help for changing identity, attractions, or behavior, Dr. Hamilton asks if there is any other goals that the minor is interested in pursuing. In many cases, minors ask for help with social issues, family relationships, parent-child communication, or helping to facilitate the parents' coping with the sexual identity of the child. Dr. Hamilton has helped a number of minors and parents with those goals of the minors, instead of trying to help minors change their attractions, behavior, or identity, when minor clients tell her that they are not seeking change of attractions, behavior, or identity. In other cases, minors have stated that they do not have a therapeutic goal, and therapy is terminated. (DE 1 (V. Compl.), ¶ 148.)

18. Every therapy session with every minor client is different for Dr. Hamilton. (DE 121-8 (Hamilton Dep.), pg. 81, lines 6–7; DE 121-24 (Hamilton Interrog. Resps.), pg. 6.)

19. Many of Hamilton's clients identify themselves as Christians and have sincerely held religious beliefs that the Bible is the only source of truth. Various Biblical truths are sometimes discussed with these Christian clients. (DE 121-24 (Hamilton Interrog. Resps.), pg. 7; DE 121-8 (Hamilton Dep.), pg 143, line 15–pg. 147, line 8; pg. 154, line 22–pg. 157, line 1.)

20. Prior to engaging in therapy for any issue, Dr. Hamilton provides all of her clients with informed consent, in which she explains that, because there are many variables in psychotherapy, there is no guarantee that by pursuing therapy clients will be happier; that no particular treatment method can be guaranteed to be effective; and that therapy can be uncomfortable as clients talk about unresolved life experiences. (DE 1 (V. Compl.), ¶ 143.)

21. Many of Dr. Hamilton's clients are referred through churches or word of mouth, and hold a Biblical worldview. (DE 1 (V. Compl.), ¶ 145.) Dr. Hamilton's clients with same-sex attractions, behaviors, or identity or gender identity confusion who adhere to a Biblical worldview believe that embracing a gay identity is not in accordance with God's plan for their lives, nor is adopting a gender identity that is different from their biological sex. (*Id.*). Many such clients who have same-sex attractions or gender identity confusion, who also prioritize their faith above their feelings, seek out therapy to clear up gender identity confusion, reduce same-sex attractions, change same-sex behaviors, and/or simply live a life consistent with their faith. (DE 1 (V. Compl.), ¶ 146.) Clients who have been living lives inconsistent with their faith often present with internal conflicts, depression, anxiety, substance abuse and so forth; therefore, they are seeking resolution to such turmoil. (*Id.*). Dr. Hamilton currently has clients seeking to engage in what would be considered SOCE counseling, but she is prohibited from engaging in such counseling because of the Ordinances. (DE 1 (V. Compl.), ¶¶ 148–161.)

22. Dr. Hamilton has never received any complaint or report of harm from any of her clients seeking and receiving therapy for any issue, including the many minors that she has counseled. (DE 1 (V. Compl.), ¶ 147.)

23. Dr. Hamilton 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. (DE 121-8 (Hamilton Dep.), pg. 329, line 24–pg. 335, line 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. (DE 126-29 (Hamilton Decl.), ¶ 2.)

B. Defendants' Ordinances Banning "Conversion Therapy."

24. The County began considering its ordinance banning "conversion therapy" on June 20, 2016, at the prompting of Rand Hoch, the President and Co-Founder of the Palm Beach County Human Rights Council (PBCHRC). (DE 121-9 (Hvizd Dep.), pg. 21, line 22–pg. 23, line 19, pg. 94, line 9–pg. 98, line 9; DE 126-6 (Pls.' Ex. 6).) In the same manner, Hoch prompted the City's consideration of its "conversion therapy" ordinance in July 2017. (DE 126-41 (Woika Dep.), pg. 12, line 24–pg. 13, line 24.) Defendants enacted their respective ordinances banning "conversion therapy" (collectively, the "Ordinances") in the Fall of 2017. (DE 126-27 (City of Boca Raton Ordinance 5407 (Oct. 10, 2017) (hereinafter "City Ordinance")); DE 126-20 (Palm Beach County Ordinance 2017-46 (Dec. 19, 2017) (hereinafter "County Ordinance")).)

25. The operative language of the Ordinances is identical, as are the practices prohibited. Both Ordinances provide that "[i]t shall be unlawful for any provider to practice conversion therapy on any individual who is a minor regardless of whether the provider receives monetary compensation . . . ." (DE 126-27 (City Ord.), Sec. 1 (9-106); DE 126-20 (Cnty. Ord.), Sec. 5.) The Ordinances' prohibitions are only applicable to licensed practitioners, including licensed marriage and family therapists. (DE 126-27 (City Ord.), Sec. 1 (9-105(c)); DE 126-20 (Cnty. Ord.), Sec. 4.)

26. The Ordinances' define "conversion therapy" in nearly identical terms:

> "Conversion therapy" . . . means . . . any counseling, practice, or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions towards individuals of the same gender or sex.

(DE 126-27 (City Ord.), Sec. 1 (9-105(a)); DE 126-20 (Cnty. Ord.), Sec. 4 ("the practice of seeking to change").)

27. Both Ordinances exclude from their definitions of "conversion therapy":

> counseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and development, including sexual orientation-neutral interventions to prevent or address unlawful

> conduct or unsafe sexual practices, **as long as such counseling does not seek to change sexual orientation or gender identity**.

(DE 126-27 (City Ord.), Sec. 1 (9-105(a)) (emphasis added); DE 126-20 (Cnty. Ord.), Sec. 4 (substituting "identity exploration and development" for "development" and other minor variations).)

28. Licensed practitioners who violate the Ordinances are subject to financial penalties. (DE 126-27 (City Ord.), Sec. 1 (9-107); DE 126-20 (Cnty. Ord.), Sec. 6.)

29. Neither Ordinance defines "sexual orientation," "gender identity," "gender expression," or "gender transition."

30. According to the County's 30(b)(6) witness, the same therapy content can be both allowed and prohibited by the County's Ordinance, depending on whether the **intent** is to change a minor's sexual orientation or gender identity. (DE 121-9 (Hvizd Dep.), pg. 260, line 11–pg. 262, line 12, pg. 266, line 14–pg. 267, line 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 County Ordinance prohibits licensed therapists from helping her. (DE 121-9 (Hvizd Dep.), pg. 268, lines 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**. (DE 121-9 (Hvizd Dep.), pg. 269, line 2–pg. 270, line 2.)

31. The City interprets its Ordinance the same way, as explained by its 30(b)(6) witness: "[I]f 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**." (DE 126-41 (Woika Dep.), pg. 154, line 23–pg. 158, line 13 (emphasis added).)

C. Defendants' Ordinances are Not Justified by "Overwhelming Research."

1. The "Overwhelming Research" Recited by the Ordinances Contains No Empirical Evidence of Harm.

32. The Ordinances identically claim justification in "overwhelming research," which refers exclusively to ten sources appearing in the Ordinances' respective recitals. (DE 126-27 (City Ord.), pgs. 1–5; DE 126-20 (Cnty. Ord.), pg. ECF 9–12; DE 121-11, (Hvizd Decl.); DE 121-1

(Cnty. Ord.); DE 121-12 – 121-22 (Cnty. Exs. 12–22); DE 121-9 (Hvizd Dep.), pg. 253, line 16–pg. 254, line 21; DE 126-41 (Woika Dep.), pg. 146, lines 12–24.) Neither the "overwhelming research" language nor the cited sources were original to Defendants, however, having been copied from Rand Hoch's model ordinance proposal. (DE 121-9 (Hvizd Dep.), pg 247, line 14–pg. 249, line 23; DE 126-41 (Woika Dep.), pg. 12, line 24–pg. 13, line 24.)

33. The ten sources cited in the Ordinances (collectively, the "Sources," DE 85-2 through 85-13) comprise various reports, statements, and position papers, centering on the 2009 Report of American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (DE 85-5, the "APA Report"). All of the other Sources either cite to the APA Report, or cite to no authorities at all for their positions. (*See, e.g.,* DE 85-12, Substance Abuse and Mental Health Services Administration (SAMHSA), *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (2015); DE 85-13 American College of Physicians Position Paper, *Lesbian, Gay, Bisexual, and Transgender Health Disparities* (2015); DE 85-11, American School Counselor Association Position Paper (2014).)

34. The APA Report does not use the term "conversion therapy." Rather, the APA Report uses "the term sexual orientation change efforts (SOCE) to describe methods (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) that aim to change a person's same-sex sexual orientation to other-sex, regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved." (DE 126-22 (APA Rep.), pg. 2 n.**.)

35. The APA Report discloses up front, and repeatedly throughout, that there is no empirical or other research supporting **any conclusions** regarding either efficacy **or harm** from SOCE, especially in children and adolescents. (DE 126-22 (APA Rep.), pg. 3 ("[T]he recent SOCE research **cannot provide conclusions** regarding efficacy or safety . . . ."), pg. 7 ("The research on SOCE **has not adequately assessed** efficacy and safety."), pg. 37 ("These [recent] studies all use designs that **do not permit cause-and-effect attributions to be made**."), pg. 42 ("[T]he recent studies **do not provide valid causal evidence** of the efficacy of SOCE **or of its harm** . . . ."), pg. 42 ("[T]he nature of these studies **precludes causal attributions** for harm or benefit to SOCE . . . ."), pg. 42 ("We conclude that there is a **dearth of scientifically sound research** on the safety of SOCE. . . . Thus, **we cannot conclude how likely it is that harm will occur** from SOCE."), pg.

72 ("**There is a lack of published research on SOCE among children**."), pg. 73 ("**We found no empirical research on adolescents who request SOCE** . . . ."), pg. 91 ("**We concluded that research on SOCE . . . has not answered basic questions of whether it is safe or effective and for whom**."), pg. 91 ("**[S]exual orientation issues in children are virtually unexamined**.") (all emphases added).) None of the other Sources adds anything to the empirical record unequivocally found to be lacking in the APA Report.

36. Despite the "overwhelming research" language in the Ordinances, both Defendants confirmed through their Rule 30(b)(6) witnesses that the Ordinances are not justified by any empirical research. The County said so concisely, albeit reluctantly:

> Q. Well, as you sit here today, are you able to identify a single empirical study since 2009 based upon a causal attribution could be made between SOCE and harm?
>
> A. I can cite at least—I could cite a study that shows a lack of efficacy of conversion therapy.
>
> Q. That's great. But that's not my question.
>
> A. Then no.

(DE 121-10 (Ginsburg Dep.), pg. 40, lines 11–21.) By contrast, the City said so forthrightly and thoroughly:

> Q. Okay. How much more likely is an LGBT minor who undergoes Sexual Orientation or Gender Identity Change Efforts to experience depression versus an LGBT minor who does not undergo those kinds of efforts?
>
> A. I don't—I don't think that I can give you a good answer on that.
>
> Q. Okay. The City—
>
> A. I don't know.
>
> Q. The City doesn't know?
>
> A. No.
>
> Q. The City doesn't know whether it's five percent more likely, one percent more likely or zero point zero one percent more likely?
>
> A. That's correct.
>
> Q. How much more likely is an LGBT minor who undergoes Sexual Orientation Change Efforts or Gender Identity Change

Efforts to experience feelings of fear or loneliness versus an LGBT minor who does not undergo those kinds of efforts?

A. I don't know, and the City does not know.

Q. And, if I ask you that same question for rejection, the answer would be the same? The City doesn't know?

A. That's correct.

Q. And, if I ask you the same question with respect to feelings of anger, the answer would be the same? The City doesn't know?

A. That's correct.

Q. And, if I ask you the same question as to suicidal thoughts, your answer would be the same? The City doesn't know?

A. That's correct.

Q. And is it fair to say that the reason the City doesn't know this is because no study has ever found a causal connection between Sexual Orientation or Gender Identity Change Efforts and any harm?

A. The reports and information that was—that was attached to this ordinance, the ones that was relied upon for the ordinance, did not have any of those. Whether one exists or not, I don't think we've done any independent review of the literature or studies.

Q. And so—

A. So we do not know of any.

Q. Okay. And so the City doesn't know the answer to the questions I just posed. And, because the City doesn't know of any study, the City would be unable to determine an answer to the question that I just posed, correct?

. . . .

THE WITNESS: If you're asking are we relying on any empirical studies, the answer is no.

(DE 126-41 (Woika Dep.), pg. 26, line 13–pg. 28, line 13.)

2. The APA Report Discloses Anecdotal Evidence of Benefits from SOCE at Least Equivalent to Anecdotal Evidence of Harm, and More Benefits Perceived by Religious Individuals.

37. Given the lack of empirical research on the outcomes of SOCE, the Task Force looked to participants' perceptions of SOCE, "in order to examine what may be perceived as being helpful or detrimental by such individuals, distinct from a scientific evaluation of the efficacy or harm . . . ." (DE 126-22 (APA Rep.), pg. 49.) The review did not show evidence of one outcome over the other. "[S]ome recent studies document that there are people who perceive that they have been harmed through SOCE, just as other recent studies document that there are people who perceive that they have benefited from it." (DE 126-22 (APA Rep.), pg. 42 (citations omitted).)

38. Nonetheless, the Task Force found several reported benefits of SOCE perceived by participants: "(a) a place to discuss their conflicts; (b) cognitive frameworks that **permitted them to reevaluate their sexual orientation identity, attractions, and selves in ways that lessened shame and distress and increased self-esteem**; (c) social support and role models; and (d) **strategies for living consistently with their religious faith and community**." (DE 126-22 (APA Rep.), pg. 49 (emphasis added) (citations omitted).) "Participants described the social support aspects of SOCE positively." (*Id.*)

39. The Task Force also observed that perceptions of harm may correlate specifically to "aversion techniques." (DE 126-22 (APA Rep.), pg. 41 ("Early research on efforts to change sexual orientation focused heavily on interventions that include **aversion** techniques. Many of these Studies did not set out to investigate harm. Nonetheless, these studies provide some suggestion that harm can occur from **aversive** efforts to change sexual orientation." (emphasis added)).) To illustrate, the Report gives some examples of aversion treatments:

> Behavior therapists tried a variety of aversion treatments, such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts. Other examples of aversive behavioral treatments included . . . shame aversion . . . .

(DE 126-22 (APA Rep.), pg. 22.)

40. The Task Force also found that individuals' religious beliefs shape their experiences and outcomes:

> [P]eople whose motivation to change was strongly influenced by their Christian beliefs and convictions were **more likely to perceive themselves as having a heterosexual sexual orientation after their efforts.** [T]hose who were less religious were more likely to perceive themselves as having an LGB sexual orientation after the intervention. **Some . . . concluded that they had altered their sexual orientation, although they continued to have same-sex sexual attractions.**

(DE 126-22 (APA Rep.), pg. 50 (emphasis added) (citations omitted).) "The participants had multiple endpoints, including LGB identity, 'ex-gay' identity, no sexual orientation identity, and a unique self-identity." (*Id.*) "Further, the findings suggest that some participants may have reconceptualized their *sexual orientation identity* as heterosexual . . . ." (*Id.* at 50.)

3. The APA Report Excludes Gender Identity Change Efforts, Which Similarly Lack Empirical Research.

41. The APA Report addressed only sexual orientation: "Due to our charge, we limited our review to sexual orientation and **did not address gender identity** . . . ." (DE 126-22 (APA Rep.), pg. 9 (emphasis added).)

42. Another Source cited by the Ordinances, however, points to the same lack of empirical research on the outcomes of gender identity change efforts:

> Different clinical approaches have been advocated for childhood gender discordance. **Proposed goals of treatment include reducing the desire to be the other sex**, decreasing social ostracism, and reducing psychiatric comorbidity. **There have been no randomized controlled trials of any treatment**. . . .

(DE 121-17 (AACAP Statement), ECF pg. 1 (emphasis added) (footnote omitted).) Also:

> **Given the lack of empirical evidence** from randomized, controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, and longitudinal evidence that gender discordance persists in only a small minority of untreated cases arising in childhood, **further research is needed** on predictors of persistence and desistence of childhood gender discordance as well as the long-term risks and benefits of intervention . . . .

(*Id.* at ECF pg. 13 (emphasis added).)

43. As with the APA Report, the AACAP Statement leaves discretion with licensed professionals to make an informed decision, with the patient, about the most appropriate treatment. (DE 121-17 (AACAP Statement), ECF pg. 13 ("As an ethical guide to treatment, 'the clinician has

an obligation to inform parents about the state of the empiric database' . . . ." (footnote omitted), ECF pg. 15 ("The ultimate judgment regarding the care of a particular patient must be made by the clinician in light of all of the circumstances presented by the patient and that patient's family, the diagnostic and treatment options available, and other available resources.").)

44. The APA itself more recently addressed issues of gender identity and minors which were not included in the APA Report. (DE 126-30 (*Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70(9) Am. Psychologist 832 (2015), https://www.apa.org/practice/guidelines/transgender.pdf. (hereinafter, "APA TGNC Guidelines").) As a discussion separate from SOCE, these later Guidelines make the point that "[t]he constructs of gender identity and sexual orientation are theoretically and clinically distinct, even though professionals and nonprofessionals frequently conflate them." (DE 126-30 (APA TGNC Guidelines), ECF pg. 4.) Nonetheless, the APA recognized the same absence of research on gender identity change in children: "Due to the evidence that not all children persist in a TGNC identity into adolescence or adulthood, and because **no approach to working with TGNC children has been adequately, empirically validated**, consensus does not exist regarding best practice with prepubertal children." (*Id.* at ECF pg. 11 (emphasis added).) One distinct approach recognized by the APA "to address gender identity concerns in children" is an approach where "children are encouraged to embrace their given bodies and to align with their assigned gender roles." (*Id.*) And again, calling for more research, the APA concludes, "**It is hoped that future research** will offer improved guidance in this area of practice." (*Id.* (emphasis added) (citation omitted).)

45. Notwithstanding the APA's call for future research, however, the APA 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.

(DE 126-30 (APA TGNC Guidelines), ECF pg. 12 (emphasis added).)

46. Other literature by a research scientist favorably cited in the AACAP Statement positively advances treatment to assist children in fading "cross-gender identity" by the time they

reach adolescence. (DE 126-31 (Heino F. L. Meyer-Bahlburg, *Gender Identity Disorder in Young Boys: A Parent- and Peer-Based Treatment Protocol*, 7 Clinical Psychol. and Psychiatry 360 (2002) (hereinafter, "Meyer-Bahlburg")), pg. 361[6] ("We expect that we can diminish these problems if we are able to speed up the fading of the cross-gender identity which will typically happen in any case.") (cited by DE-126-30 (AACAP Statement) at ECF pg. 13 (n.100)); *see also* DE 126-31 (Meyer-Bahlburg), pg. 365 ("The specific goals we have for the boy are to develop a positive relationship with the father (or a father figure), positive relationships with other boys, gender-typical skills and habits, to fit into the male peer group or at least into a part of it, and to feel good about being a boy.").)[7]

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[6] The CM/ECF system did not affix the Court's official filing header information, including page numbering, to the Meyer-Bahlburg study at DE 126-31 (Plaintiffs' Exhibit 31). Thus, citations are to the study's original page numbering.

[7] The County's attempt to discredit the Meyer-Bahlburg study is rejected. (Hrg. Tr., pg. 140, line 11–pg. 141, line 19.) The County asserted that the study is irrelevant to the Ordinances because the children being studied did not meet with the study therapists. (*Id.* at pg. 140, lines 16–19.) While the County recited one portion of the study ostensibly supporting this assertion (*id.* at pg. 140, line 20–pg. 141, line 3), the County neglected to advise the Court of the portion revealing that the children under study did, in fact, meet with the study therapists for at least two sessions:

> The *evaluation procedures* ***with the child***—usually involving two sessions—include both **structured and unstructured activities**. The first session begins with the observation of how the boy is able to separate from the parent(s) who bring(s) him in.
>
> The session **takes place in an office** . . . . Children who are mature enough are then **orally administered** the CGPQ. It is followed by a GID-specific Draw-a-Person **test with inquiry**. . . . Later the **clinician administers** selected sections of the child version of the GRAS-C . . . . Dependent on when the child appears comfortable enough during session 1 or 2, the **clinician administers** the Gender Identity Interview (Zucker et al., 1993), a semi-structured interview **designed to elicit disclosure** of cross-gender wishes and ambivalences.
>
> For the second session **with the child**, the toy set has been replaced by a dress-up set with stereotypically male (black cape, face mask, sword) and female (high-heeled shoes, hat, boa) role-

4. The APA Report Commends a Client-Directed Approach to Therapy for Clients with Unwanted Same-Sex Attractions, Commends More Research on Voluntary SOCE, and Condemns Only Coercive Therapies.

47. For adults desiring "**to change their sexual orientation** or their behavioral expression of their sexual orientation, or both," the APA reported that "adults perceive a benefit when they are provided with **client-centered** . . . approaches" involving "identity exploration and development," "**respect for the client's values, beliefs, and needs**," and "permission and opportunity to explore a wide range of options . . . **without prioritizing a particular outcome**." (DE 126-22 (APA Rep.), pg. 4.) The Task Force elaborated:

> Given that there is diversity in how individuals define and express their sexual orientation identity, **an affirmative approach is supportive of clients' identity development without an a priori treatment goal concerning how clients identify or live out their sexual orientation or spiritual beliefs.** This type of therapy . . . can be helpful to those who accept, reject, or are ambivalent about their same-sex attractions. **The treatment does not differ, although the outcome of the client's pathway to a sexual orientation identity does.**

(DE 126-22 (APA Rep.), pg. 5 (emphasis added).) "For instance, the existing research indicates that possible outcomes of sexual orientation identity exploration **for those distressed by their sexual orientation** may be: LGB identities[,] **Heterosexual sexual orientation identity**[,] Disidentifying from LGB identities[, or] Not specifying an identity." (*Id.* at pg. 60 (emphasis added) (citations omitted).)[8]

> play outfits. The **inquiry** focuses on the remaining sections of the GRAS-C . . . .

(DE 126–30 (Meyer-Bahlberg), pg. 367 (bold emphasis added).) Given that the County's argument obscured from the Court's view these administering, testing, inquiring, and eliciting practices of the study therapists, the Court did not have the benefit of asking the County's counsel how these practices plausibly could be excluded from the reach of the Ordinances' definitions of "conversion therapy" (*i.e.*, any "counseling, practice, or treatment").

[8] In connection with its SOCE review and recommendations, the APA Report highlighted a problem with the sexual orientation terminology in the academic research:

48. A key finding from the Task Force's review "is that those who participate in SOCE, **regardless of the intentions of these treatments**, and those who resolve their distress through other means, **may evolve during the course of their treatment in such areas as self awareness, self-concept, and identity**." (DE 126-22 (APA Rep.), pg. 66 (emphasis added); *id.* at 61 ("Given . . . that many scholars have found that **both religious identity and sexual orientation identity evolve**, it is important for LMHP to explore the development of religious identity and sexual orientation identity." (emphasis added) (citations omitted)).)

49. The Task Force identifies the **same essential framework** "for children and adolescents who present a desire to change either their sexual orientation or the behavioral expression of their sexual orientation, or both, or whose parent or guardian expresses a desire for the minor to change."[9] (DE 126-22 (APA Rep.), pg. 5.) Specifically, for children and youth, "[s]ervices . . . should support and respect age-appropriate issues of **self-determination**; services should also be provided in the least restrictive setting that is clinically possible and should maximize self-determination. At a minimum, **the assent of the youth should be obtained, including whenever possible a developmentally appropriate informed consent to treatment**." (*Id.* (emphasis added).)

50. The Task Force also highlighted the ethical importance of client self-determination, encompassing "the ability to seek treatment, consent to treatment, and refuse treatment. **The**

> Recent studies of participants who have sought SOCE **do not adequately distinguish between sexual orientation and sexual orientation identity**. We concluded that the failure to distinguish these aspects of human sexuality has led SOCE research to obscure what actually can or cannot change in human sexuality. . . . **[S]ome individuals modified their sexual orientation identity** (e.g., individual or group membership and affiliation, self-labeling) **and other aspects of sexuality** (e.g., values and behavior). . . . **[I]ndividuals, through participating in SOCE, became skilled in ignoring or tolerating their same-sex attractions. Some individuals reported that they went on to lead outwardly heterosexual lives, developing a sexual relationship with an other-sex partner, and adopting a heterosexual identity**.

(DE 126-22 (APA Rep.), pgs. 3–4 (emphasis added).)

[9] The APA Report defines "*adolescents* as individuals between the ages of 12 and 18 and children as individuals under age 12." (DE 126-22 (APA Rep.), pg. 71 n.58.)

informed consent process is one of the ways by which self-determination is maximized in psychotherapy." (DE 126-22 (APA Rep.), pg. 68 (emphasis added); *see also id.* at 6 ("LMHP **maximize self-determination** by . . . providing effective psychotherapy that explores the client's assumptions and goals, without preconditions on the outcome [and] **permitting the client to decide the ultimate goal of how to self-identify and live out her or his sexual orientation**. . . . [T]herapy that increases the client's ability to cope, understand, acknowledge, and integrate sexual orientation concerns into **a self-chosen life** is the measured approach.").)

51. The Task Force viewed the concept of self-determination as equally important for minors: "It is now recognized that **adolescents are cognitively able to participate in some health care treatment decisions**, and such participation is helpful. [The APA] encourage[s] professionals to seek the assent of minor clients for treatment." (DE 126-22 (APA Rep.), pg. 74 (emphasis added) (citations omitted); *see also id.* at 77 ("The ethical issues outlined [for adults] are also relevant to children and adolescents . . . .").)

52. In light of this strong self-determination ethic regarding youth, the Task Force "recommend[ed] that when it comes to treatment that purports to have an impact on sexual orientation, LMHP assess the adolescent's ability to understand treatment options, provide developmentally appropriate informed consent to treatment, and, at a minimum, obtain the youth's assent to treatment." (*Id.* at 79.) "[F]or children and adolescents who present a desire to change their sexual orientation or their behavioral expression of their sexual orientation, or both, or whose guardian expresses a desire for the minor to change," the Task Force recommended "approaches [that] support children and youth in identity exploration and development without seeking predetermined outcomes." (*Id.* at 79–80.) "LMHP should strive to maximize autonomous decision making and self-determination and avoid coercive and involuntary treatments."[10] (*Id.* at 76.) "The use of inpatient and residential treatments for SOCE is inconsistent with the recommendations of the field." (*Id.* at 74–75.)

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[10] The APA Report defines "*coercive treatments* as practices that compel or manipulate a child or adolescent to submit to treatment through the use of threats, intimidation, trickery, or some other form of pressure or force." (DE 126-22 (APA Rep.), pg. 71 n.59.) It defines "*involuntary treatment* as that which is performed without the individual's consent or assent and which may be contrary to his or her expressed wishes." (*Id.* at 71 n.60.)

53. Apart from recommending against coercive, involuntary, and residential treatments, the Task Force **did not recommend the end of SOCE**. Rather, without empirical evidence of SOCE efficacy or harm, the Task Force merely recommended that clients not be lead to **expect** a change in sexual orientation through SOCE. (DE 126-22 (APA Rep.), pg. 66.) Indeed, The Task Force cited literature expressly cautioning **against declining SOCE** therapy for a client who requests it.

> LMHP who turn down a client's request for SOCE at the onset of treatment without exploring and understanding the many reasons why the client may wish to change may instill hopelessness in the client, who already may feel at a loss about viable options. . . . **[B]efore coming to a conclusion regarding treatment goals, LMHP should seek to validate the client's wish to reduce suffering and normalize the conflicts at the root of distress**, as well as create a therapeutic alliance that recognizes the issues important to the client.

(DE 126-22 (APA Rep.), pg. 56 (emphasis added) (citation omitted).)

54. The Task Force also called for more research on SOCE. (DE 126-22 (APA Rep.), pg. 91 ("Any future research should conform to best-practice standards for the design of efficacy research. Additionally, **research into harm and safety is essential**."), pg. 91 ("**Future research** will have to better account for the motivations and beliefs of participants in SOCE."), pg. 91 ("**This line of research should be continued and expanded to include conservatively religious youth and their families**.") (all emphases added).)

55. The Task Force also noted, "The debate surrounding SOCE has become mired in ideological disputes and competing political agendas." (DE 126-22 (APA Rep.), pg. 92 (citation omitted).) One policy recommendation "urges the APA to: . . . Encourage **advocacy groups, elected officials**, policymakers, religious leaders, and other organizations to seek accurate information and avoid promulgating inaccurate information." (*Id.* (emphasis added).) The Task Force's call for future research implicitly rejected the suggestion by some that "SOCE should not be investigated or practiced until safety issues have been resolved." (*Id.* at 91.)

56. Given the absence of empirical evidence on SOCE outcomes, and the emphasis on client-centered approaches, the Task Force recommended that choosing SOCE counseling be given to the discretion of licensed mental health providers (LMHP):

> [The APA Ethics Code] establishes that psychologists aspire to provide services that maximize benefit and minimize harm. . . .

> When applying this principle in the context of providing interventions, **LMHP assess the risk of harm, weigh that risk with the potential benefits, and communicate this to clients through informed consent procedures** that aspire to provide the client with an understanding of potential risks and benefits that are accurate and unbiased. . . .
>
> In weighing the harm and benefit of SOCE, LMHP can review with clients the evidence presented in this report. Research on harm from SOCE is limited, and some of the research that exists suffers from methodological limitations that make broad and definitive conclusions difficult. . . .

(DE 126-22 (APA Rep.), pg. 67 (emphasis added) (citations omitted); *see also id.* at 6 ("LMHP reduce potential harm and increase potential benefits by basing their scientific and professional judgments and actions on the most current and valid scientific evidence, such as the evidence provided in this report.").)[11]

5. The APA Report Specifically Calls for Therapists to Respect and Consider the Religious Values of Individuals Desiring Therapy.

57. The APA Task Force highlighted the particular stress experienced by individuals of conservative religious faiths who "struggle to live life congruently with their religious beliefs," and that this stress "had mental health consequences." (DE 126-22 (APA Rep.), pg. 46–47.) "Some conservatively religious individuals felt a need to change their sexual orientation because of the positive benefits that some individuals found from religion . . . ." (*Id.* at 47.) Thus, the Task Force "proposed an approach that respects religious values and welcomes all of the client's actual and potential identities by exploring conflicts and identities without preconceived outcomes. This approach does not prioritize one identity over another and may aide a client in creating a sexual orientation identity consistent with religious values." (DE 126-22 (APA Rep.), pg. 67 (citation omitted).) "Although there are tensions between religious and scientific perspectives, the task force

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[11] The AAMFT, which sets ethical standards for marriage and family therapists such as Plaintiffs, agrees with the APA Task Force's permissive approach for licensed providers: "AAMFT expects its members to practice based on the best research and clinical evidence available," and, "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 121-23 (Cnty. Ex. 23), pgs. 3, 5.)

and other scholars do not view these perspectives as mutually exclusive." (DE 126-22 (APA Rep.), pg. 67 (citations omitted).)

D. Defendants Received No Complaints or Evidence of Harm from SOCE When Considering Their Ordinances.

58. In Rand Hoch's e-mailed memorandum which prompted the County to take up the therapy ban, Hoch represented 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**." (DE 126-6 (Pls.' Ex. 6), pg. 2) (emphasis added).) Hoch also represented that "conversion therapy . . . **is most often forced upon minors** by their parents or guardians [and] is extremely harmful." (DE 126-6 (Pls.' Ex. 6), pg. 4 (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, aversive, or otherwise. (DE 121-9 (Hvizd Dep.), pg. 26, line 21–pg. 27, line19.) 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. (DE 121-9 (Hvizd Dep.), pg. 27, line 20–pg. 28, line 3, pg. 31, line 1–pg. 33, line 25.) Hvizd found no reports of any person harmed by "conversion therapy" in Palm Beach County, or in Florida. (*Id.*; DE 121-1 (Ginsburg Dep.), pg. 12, lines 5–25.)

59. 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." (DE 121-9 (Hvizd Dep.), pg. 34, lines 1–13, pg. 36, line 9–pg. 37, line 18; DE 126-2 (Pls.' Ex. 2), pg. 1, lines 10–17 (emphasis added).) 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. (DE 121-9 (Hvizd Dep.), pg. 50, line 5–pg. 51, line 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." (DE 121-9 (Hvizd Dep.), pg. 55, line 2–pg. 58, line 21; DE 126-3 (Pls.' Ex. 3), pg. 3, lines 10–13.) And, according to Hoch, the friends of the complainants' children were being **forced** to go. (DE 121-9 (Hvizd Dep.), pg. 61, line 20–pg. 62,

line 12; DE 126-3 (Pls.' Ex. 3), pg. 3, lines 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. (DE 121-9 (Hvizd Dep.), pg. 65, line 2–pg. 66, line 7.)

60. 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. (DE 121-9 (Hvizd Dep.), pg. 73, line 2–pg. 78, line 20; DE 126-4 (Pls.' Ex. 4), pg. 3.) 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." (DE 121-9 (Hvizd Dep.), pg. 78, line 21–pg. 79, line 2.; DE 126-4 (Pls.' Ex. 4), pg. 3.) Sofoul's email cited an article discussing forced, involuntary, aversive conversion therapy. (DE 126-5 (Pls. Ex. 5).) 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 as was illustrated in Sofoul's linked article. (DE 121-9 (Hvizd Dep.), pg. 79, line 3–pg. 82, line 4.)

61. In sum, the County received no evidence of harm suffered by any minor in its jurisdiction as a result of voluntary SOCE or "conversion therapy." (DE 121-10 (Ginsburg Dep.), pg. 15, lines 11–22.) The only "evidence" of harm attributed to SOCE was the anecdotal, multi-layered hearsay communicated by Hoch, 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. (DE 121-10 (Ginsburg Dep.), pg. 10, line 9–pg. 12, line 4.)

62. Hoch was also the originator of the City Ordinance, and he made the same unsubstantiated representations of harm to the City Council. (DE 126-41 (Woika Dep.), pg.12, line 24–pg. 14, line 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." (DE 126-41 (Woika Dep.), pg. 16, line 19–pg. 18, line 9.) The City based its determination of need for the Ordinance entirely on Hoch's request. (DE 126-41 (Woika Dep.), pg. 16, line 19–pg. 20, line 11; DE 126-23 (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. (DE 126-41 (Woika Dep.), pg. 26, line 13–pg. 28, line 13.)

E. Defendants Did Not Consider Any Less Restrictive Alternatives to Their Outright Therapy Bans.

63. 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. (DE 126-6 (Pls.' Ex. 6), pgs. 2–3.) There is no evidence that, for example, Dr. 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. (DE 121-9 (Hvizd Dep.), pg. 273, line 2–pg. 279, line 23; DE 126-21 (Pls.' Ex. 21), pg. 1–2.) 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. (DE 121-9 (Hvizd Dep.), pg. 39, line 20–pg. 30, line 11.)

64. Though it could have, the City did not consider any alternative to the blanket ban contained in its Ordinance. (DE 126-41 (Woika Dep.), pg. 28, line 16–pg. 32, line 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. (DE 126-41 (Woika Dep.), pg. 52, line 12–pg. 63, line 20; DE 126-24 (Pls.' Ex. 24).)

F. Defendants Knew Their Ordinances Were Not Enforceable by Their Code Enforcement Officials.

65. In her September 7 "definite-no-to-maybe" e-mail to Commissioners (DE 126-16 (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.

(DE 126-16 (Pls.' Ex. 16), pg. 1 (emphasis added).)

66. 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**.[12]

(DE 126-41 (Woika Dep.), pg. 104, line 7–pg. 107, line 16; DE 126-25 (Pls.' Ex. 25) (emphasis added).)

67. 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?

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[12] 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* Part II.I; DE 126-23 (Pls.' Ex. 23), pg. 1.)

(DE 126-41 (Woika Dep.), pg. 112, line 17–pg. 114, line 18; DE 126-26 (Pls.' Ex. 26), pg. 3.) 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.**

(DE 126-41 (Woika Dep.), pg. 119, lines 5–21; DE 126-26 (Pls.' Ex. 26), pg. 2 (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. (DE 126-41 (Woika Dep.), pg. 120, line 15–pg. 121, line 5, pg. 122, line 8–pg. 123, line 3.) A likely explanation for the City Council's 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**." (DE 126-26 (Pls.' Ex. 26), pg. 2 (emphasis added).)

68. 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.**

(DE 126-26 (Pls.' Ex. 26), pg. 1 (emphasis added).) Neither LaVerriere's nor Schofield's concurrences with Brown's enforcement doubts were shared with the Boca Raton City Council. (DE 126-41 (Woika Dep.), pg. 135, lines 5–9.)

69. 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 the City Manager 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...
>
> [CITY MANAGER]: 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.

(DE 126-41 (Woika Dep.), pg. 59, lines 12–18, pg. 61, lines 5–21, pg. 62, line 23–pg. 63, line 3.) Suffice it to say, at the time of enactment, enforcement of the City Ordinance had not been clearly delineated or even thought out. (DE 126-41 (Woika Dep.), pg. 65, lines 5–16.)

70. The practical inability of the City to enforce its ordinance was confirmed by the City's Rule 30(b)(6) witness on enforcement, who struggled (understandably) to grasp the concepts underlying the City Ordinance:

> Q. So you have a ten-year-old prepubertal child—
>
> A. Uh-huh.
>
> Q.—and he was born as a boy; and he presents to Dr. Otto and says, you know, that he is really interested in girls, wants to play with dolls, wants to hang out with friends that are girls, wants to dress up as a girl, wants to do things that girls want to do and he has no interest in things that boys want to do and is experiencing distress as a result of the fact that he wants to do all these things that girls want to do and yet, you know, he has a male anatomy. When he shows up—
>
> A. So, to me—and, **clearly, I'm not a clinician** in any event. But what you just explained to me sounds like someone who is identifying with—as a female. **But, again, I am not the best person to make that call. Perhaps someone, you know, who's a therapist could do so**.
>
> Q. Okay.
>
> A. And, if that were the case and the goal of Dr. Otto—I think was your example of this case—tried to change that identity, the

> gender identity to a male, then, yes, that would be a violation of this ordinance.
>
> Q. Okay. So what if the ten-year-old prepubertal child hasn't progressed far enough into the exploration of gender identity to say clearly I now identify as a girl—
>
> A. Uh-huh.
>
> Q.—but still, nonetheless, experiences all of the inclinations that I've just talked about in terms of wanting to do—
>
> . . . .
>
> —wanting to do all the things that girls want to do and not wanting to do things that boys want to do. So, without a clear declaration that I identify as a girl, is it still a violation of the ordinance for Dr. Otto to do the things that we talked about, that is, to verbally endorse and support behaviors and attitudes that align with the male biology of the child while to verbally discourage behaviors and attitudes that align with the female identity?
>
> A. **I would guess that, whether or not the child declares that they have a different—or are identifying as one or the other, their actions would really put them in the category of one or the other or both** or—and so, whether they declare it or not, I think it's—that gender identity as presented is one that this ordinance would prohibit the attempt to convert through therapy, counseling—or counseling, practice or treatment.

(DE 126-41 (Woika Dep.), pg. 163, line 17–pg. 165, line 18 (emphasis added).)

71. 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. (DE 121-9 (Hvizd Dep.), pg. 208, lines 3–15, pg. 214, line 18–pg. 215, line 8; DE 126-41 (Woika Dep.), pg. 67, line 10–pg. 69, line 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. (DE 126-41 (Woika Dep.), pg. 90, line 12–pg. 91, line 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. (DE 121-9 (Hvizd Dep.), pg. 264, line 13–pg. 266, line 13.)

72. According to an unwritten, internal policy, the County's Ordinance will be enforced by any of five senior code enforcement officers. (DE 121-9 (Hvizd Dep.), pg. 219, line 20–pg. 221, line 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. (DE 121-9 (Hvizd Dep.), pg. 223, line 21–pg. 225, line 14; DE 126-18 (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. (DE 121-9 (Hvizd Dep.), pg. 225, line 15–pg. 228, line 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. (DE 126-18 (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. (DE 121-9 (Hvizd Dep.), pg. 232, line 3–pg. 233, line 11.) To be sure, at the preliminary injunction hearing the County admitted it **still—nearly a year since enactment—has no procedure to handle a complaint under its Ordinance.** (Hrg. Tr. pg. 184, lines 13–20 ("There is not a firm procedure in place yet, we are working with our Code Enforcement to have a procedure in place, but it is not—there is not one that has been officially approved yet.").)

73. City Code officials likewise only need a high school diploma or equivalent. (DE 126-41 (Woika Dep.), pg. 72, line 3–pg. 73, line 4.) And like the County, the City has no written policies or procedures for enforcing its Ordinance, and no plans for any. (DE 126-41 (Woika Dep.), pg. 74, line 19–pg. 75, line 9, pg. 78, lines 2–5.) No current City code compliance officials have experience enforcing ordinances against licensed professionals concerning their professional standards. (DE 126-41 (Woika Dep.), pg. 110, line 5–pg. 111, line 8.)

G. Defendants' Knew Their Ordinances Regulated a Field Preempted to the State.

74. 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. (DE 121-9 (Hvizd Dep.), pg. 111, line 25–pg. 115, line 6; DE. 126-9 (Pls.' Ex. 9), pg. 1 ("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.**

(DE 121-9 (Hvizd Dep.), pg. 126, line 4–pg. 127, line 12; DE 126-11 (Pls.' Ex. 11), pg. 1 (emphasis added).) Nieman adopted Hvizd's analysis without reservation: "Rand, that sums it up." (DE 126-11 (Pls.' Ex. 11), pg. 1.)

75. 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**." (DE 121-9 (Hvizd Dep.), pg. 147, lines 5–15, pg.156, line 22–pg. 157, line 19; DE 126-13 (Pls.' Ex. 13), pg. 1 (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." (DE 121-9 (Hvizd Dep.), pg. 158, line 21–pg. 159, line 6, pg. 163, lines 3–9; DE 126-14 (Pls.' Ex. 14), pg.1 (emphasis added).)

76. 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. (DE 121-9 (Hvizd Dep.), pg. 164, line 25–pg. 165, line 12; DE 126-15 (Pls.' Ex. 15), pg. 3.) 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**." (DE 121-9 (Hvizd Dep.), pg. 177, line 16–pg. 178, line 19; DE 126-16 (Pls.' Ex. 16), pg. 1 (emphasis added) "[W]e still have legal concerns including, but not limited to, **implied preemption, the Florida Patients' Bill of Rights** . . . ." (*Id.*)

77. 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. (DE 126-16 (Pls.' Ex. 16), pg. 1 ("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 (DE 121-9 (Hvizd Dep.), pg. 185, line 17–pg. 196, line 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. (DE 126-15 (Pls.' Ex. 15), pg. 3 ("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 . . . .").)

78. 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)**.

(DE 126-23 (Pls.' Ex. 23), pg. 2 (emphasis added).)

II. CONCLUSIONS OF LAW.

A. Plaintiffs have Standing to Challenge the Ordinances.

79. To demonstrate standing,

> the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations in original) (citations omitted). Plaintiffs easily satisfy this standard.

1. Dr. Otto Wants to Provide SOCE Talk Therapy That the Ordinances Prohibit.

80. 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.'" (DE 83 (City Opp'n Pls.' Mot. Prelim. Inj.), pgs. 15–16; DE 85 (Cnty. Opp'n Pls.' Mot. Prelim. Inj.), pg. 2.) These contentions have no merit.

81. As shown in the Court's Findings of Fact, Dr. Otto does not believe that he can himself change any person's sexual orientation. (*See supra* Part I.A.1.) But Dr. Otto does believe that, through therapy, minors can make their own changes to reduce or eliminate unwanted same-sex attractions, behaviors, or identity; and Dr. Otto can and does assist minor clients with their own change goals. (*See supra* Part I.A.1.) As also shown in the Court's Findings of Fact, both the City and the County interpret their Ordinances to prohibit talk therapy where the goal or intent to change belongs to the minor client alone, and the therapist merely assists the minor with the minor's goals, regardless of the therapist's intent. (*See supra* Part I.B.)

82. Thus, Otto faces an actual, imminent risk of 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 provides him sufficient standing to challenge the Ordinances.

2. Dr. Otto Wants to and Does Practice in Unincorporated Palm Beach County.

83. The County contends that Dr. Otto does not have standing to challenge the County Ordinance because he only practice in the City of Boca Raton, where he is subject only to the City Ordinance. (DE 85 (Cnty. Opp'n Pls.' Mot. Prelim. Inj.), pgs. 1–2.) The County is wrong, however, because the undisputed record facts demonstrate that Dr. Otto keeps ongoing, regular client appointments in unincorporated Palm Beach County where the County Ordinance applies. (*See supra* Part I.A.1.)

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

84. The City contends that Dr. Hamilton does not have standing to challenge the City Ordinance because the threat of prosecution of Dr. Hamilton for violating the City Ordinance is too speculative. (DE 83 (City Opp'n Pls.' Mot. Prelim. Inj.), pgs. 14–15.) The City is wrong for two reasons. First, as shown in the Court's Findings of Fact, Dr. Hamilton 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. (*See supra* Part I.A.2.) 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. (*See supra* Part I.A.2.) Hamilton's practice and desired practice in Boca Raton are more than sufficient to provide her standing to challenge the City Ordinance.

4. Plaintiffs Have Standing to Challenge the Ordinances on Behalf of Their Minor Clients.

85. Defendants also contend Plaintiffs do not have standing to challenge the Ordinances on behalf of Plaintiffs' minor clients. (DE 83 (City Opp'n Pls.' Mot. Prelim. Inj.), pgs. 16–17; DE 85 (Cnty. Opp'n Pls.' Mot. Prelim. Inj.), pg. 2.) Defendants are wrong again.

86. The Supreme Court and 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 doctors or mental health professionals have standing to bring claims on behalf of their clients when (1) the professional has suffered concrete injury, (2) the professional and the clients have a close relationship, and (3) the clients face some obstacles to asserting their own rights. *See Miller*, 934 F.2d at 1465 n.2. The Court addresses the third element only, as Defendants have not challenged the first two. (DE 83 (City Opp'n Pls.' Mot. Prelim. Inj.), pgs. 16–17; DE 85 (Cnty. Opp'n Pls.' Mot. Prelim. Inj.), pg. 2.)

87. Plaintiffs' clients face substantial obstacles to bringing these claims. "For 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.*

88. To be sure, "[t]he stigma associated with receiving mental health services presents a considerable deterrent to litigation." *Penn. Psychiatric Soc'y v. Green Spring Health Services, Inc.*, 280 F.3d 278, 290 (3d Cir. 2002) (citing *Parham v. J.R.*, 442 U.S. 584 (1979) (Stewart, J., concurring)). This consideration is only increased when counseling involves intimate details concerning a minor's development, growth, and sexuality. Just 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).

89. The desire to keep private the intimate details associated with SOCE counseling are clearly obstacles for Plaintiffs' clients and constituents to bring their claims publicly in 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 Defendants' sensibilities. The status of Plaintiffs' clients as minors compounds these obstacles to litigation. Thus, Plaintiffs have third party standing to challenge the Ordinances on behalf of their minor clients.

B. Plaintiffs Have Made a Sufficient Facial Challenge to the Ordinances Under the First Amendment.

90. As a threshold issue, the Ordinances are subject to a facial First Amendment challenge.

> In evaluating a facial challenge [the Court] must look beyond the application of an ordinance in the specific case before [it]. To ultimately succeed on the merits, a plaintiff theoretically has to establish that no set of circumstances exists under which [the Ordinances] would be valid, or that the [Ordinances lack] any plainly legitimate sweep. In the First Amendment context, the Supreme Court has softened that daunting standard somewhat, saying that a law may also be invalidated on its face if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.

Bruni v. City of Pittsburgh, 824 F.3d 353, 362 (3d Cir. 2016) (citations and internal quotation marks omitted) (quoting *United States v. Stevens*, 559 U.S. 460, 472–473, (2010) Thus, "[t]he [Supreme] Court has often considered facial challenges simply by applying the relevant constitutional test to the challenged statute, without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid." *Id*. at 363 "[W]here a statute fails the relevant constitutional test (such as strict scrutiny . . . or reasonableness review), it can no longer be constitutionally applied to anyone—and thus there is no set of circumstances in which the statute would be valid." *Id*. (alterations in original) (internal quotation marks omitted). Therefore, the Court will evaluate the Ordinances facially for viewpoint discrimination (*see infra* Part II.E) and otherwise for constitutionality under strict scrutiny (*see infra* Parts II.G, H).

91. Moreover, prior restraints against constitutionally protected expression are highly suspect and disfavored. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). In fact, "any system of prior restraints comes to this Court bearing the heavy presumption against its

constitutional validity." *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). This is why "[t]he Supreme Court and [the Eleventh Circuit] consistently have permitted facial challenges to prior restraints without requiring a plaintiff to show that there are no conceivable set of facts where the application of the particular government regulation might or would be constitutional." *United States v. Frandsen*, 212 F.3d 1231, 1236 (11th Cir. 2000); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1331-32 (11th Cir. 2001) ("the Supreme Court itself in *Salerno* acknowledged [that prior restraints are the] exception to the 'unconstitutional-in-every-conceivable-application' rule" (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

92. Total prohibitions, such as the Ordinances here, constitute prior restraints. *See, e.g.*, *Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360, 1364 (M.D. Fla. 2000) ("This Court also finds that . . . moratoria are governed by prior restraint analysis in the same manners as permitting schemes."); *D'Ambra v. City of Providence*, 21 F. Supp. 2d 106, 113-14 (D.R.I. 1998) (same); *ASF, Inc. v. City of Seattle*, 408 F. Supp. 2d 1102, 1108 (W.D. Wash. 2005) (total prohibitions on protected expression fail prior restraint analysis).

93. Here, as in *ASF*, the Ordinances go "a step further in suppressing protected speech." *Id.* The Ordinances completely prohibit SOCE counseling, even voluntary counseling, with minors in the City and County. There is no exception to the Ordinances' perpetual prohibition on protected expression. As the court held in *Howard*, such bans are subject to prior restraint analysis. *Howard*, 109 F. Supp. 2d at 1364. The Ordinances fail that analysis.

94. Given the foregoing authorities, the Court rejects the County's argument that Plaintiffs gave up their facial challenge to the Ordinances with the mere observation that, "If the Defendants had banned only aversive therapy, your Honor, we wouldn't be here this morning." (Hrg. Tr., pg. 12, lines 18–19, pg. 121, line 25–pg. 122, line 13.) It is obvious that Plaintiffs would not have needed to sue Defendants if they had enacted bans of only aversive treatments because Plaintiffs' talk therapy practices do not include those treatments. (*See supra* Part I.A.) This observation by Plaintiffs' is not an admission that Defendants could have constitutionally banned some forms of "conversion therapy," nor is it an admission that Defendants even have authority to legislate in this arena under state law.

C. Though Plaintiffs Must Show the Preliminary Injunction Prerequisites, Defendants Have the Burden of Proof on the Constitutionality of Their Ordinances Under the First Amendment.

1. Plaintiffs' "Substantial Likelihood" of Success on the Merits Showing Requires Only a Probability That They Will Prevail.

95. "The grant or denial of a preliminary injunction rests within the sound discretion of the district court and is reversible on appeal only for an abuse of that discretion . . . ." *Shatel Corp. v. Mao Ta Lumber & Yacht Corp.*, 697 F.2d 1352, 1354 (11th Cir. 1983). The four prerequisites a movant must show for preliminary injunctive relief are well known:

> (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

Id. at 1354–55.

96. Plaintiffs' "substantial likelihood" of success on the merits showing requires only that Plaintiffs show a probability of prevailing:

> [Defendant] argues . . . that a *substantial* likelihood is required in this Circuit. But "substantial" means real, valuable, material, or of substance. Black's Law Dictionary 1280 (rev. 5th ed. 1979). **In our opinion the word "substantial" does not add to the quantum of proof required to show a likelihood of success on the merits.** The requirement of a substantial likelihood of success was established in the Fifth Circuit in *Buchanan v. United States Postal Service*, 508 F.2d 259, 266 (5th Cir.1975). . . . Fifth Circuit precedent handed down before September 30, 1981, is binding on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc). *Buchanan* supports its requirement of a substantial likelihood of success by citing Wright and Miller, *Federal Practice and Procedure*, § 2948, which requires plaintiff to show "the probability that plaintiff will succeed on the merits." **The word likelihood is synonymous with probability.**

Id. at 1355 n.2 (bold emphasis added).[13] "[T]he definition most often applied in this Circuit's precedent is the 'more likely than not' standard." *In re Terazosin Hydrocholride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1301 (S.D. Fla. 2005).[14]

2. Defendants Have the Burden of Proving the Constitutionality of Their Ordinances Under the Strict Scrutiny Standard.

97. Defendants face a much higher burden to prove the Constitutionality of their Ordinances under the applicable constitutional standards. (*See infra* Parts II.F–G.) Defendants bear the burden of demonstrating that the Ordinance satisfies strict scrutiny. 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) (holding, on preliminary injunction motion, "**the burden is on the government**

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[13] This Court has cited *Shatel Corp.* on this point numerous times. *See, e.g.*, *3903427 Canada, Inc. v. Milos Rest., Inc.*, No. 08-80354-Civ-Ryskamp/Vitunac, 2008 WL 11333657, *4 (S.D. Fla. June 6, 2008) ("Under the likelihood of success on the merits inquiry the Court has followed Eleventh Circuit precedent holding that the word 'substantial' does not add to the 'quantum of proof' required, rather the appropriate standard is if it is 'probable' or 'likely' that the movant will succeed on the merits." (quoting *Shatel Corp.*)); *Bronestein v. Bronstein*, No. 06-80656-CIV, 2007 WL 646965, *6 (S.D. Fla. Feb. 27, 2007) (same); *Lennar Pac. Prop. Mgmt., Inc. v. Morgan*, 2007 WL 9702467, *7 (S.D. Fla. July 20, 2007) ("The 11th Circuit interprets the 'substantial likelihood of success on the merits standard' to merely mean the plaintiff is required to show that its success on the merits is probable." (citing *Shatel Corp.*)); *Terazosin Hydrocholride*, 352 F. Supp. 2d at 1301 ("'[T]he word likelihood is synonymous with probability.'" (quoting *Shatel Corp.*)). Given the repeated and relatively recent reliance by this Court on the *Shatel Corp.* standard, the Court rejects the alternative, more burdensome standard proposed by the County at the preliminary injunction hearing in reliance on *Barnes v. Burger King Corp.*, 1994 U.S. Dist. LEXIS 21005, No. 94-889-CIV-UNGARO-BENAGES (S.D. Fla. July 31, 1994). (Hrg., at 106:13–107:4.) The *Barnes* report and recommendation cites to no Eleventh Circuit or other case precedent for its novel "more than a probability of success or even a preponderance of evidence" standard, and this Court declines to follow *Barnes* in its unsanctioned innovation.

[14] The standard may be even more lenient. *See, e.g.*, *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) ("Accordingly, we follow our precedent that a movant for preliminary equitable relief must meet the threshold for the first two 'most critical' factors: it must demonstrate that it can win on the merits (which requires a showing **significantly better than negligible but not necessarily more likely than not**) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief." (emphasis added)).

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 (*see infra* Parts II.G, H)—the burden of proving narrow tailoring here. *Gonzales*, 546 U.S. at 429; *Ashcroft*, 542 U.S. at 665.

D. Plaintiffs' Talk Therapy is Protected Speech.

1. Speech is Speech.

98. Plaintiffs' talk therapy, whether or not it involves SOCE, is speech. The government cannot label the **speech** of professionals as **conduct** in order to restrain it without scrutiny. *See, e.g., Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (hereinafter, "*NIFLA*") ("[T]his 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) (holding government may not apply alternative label to protected speech to evade First Amendment review, when 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.").

99. Indeed, as the *NIFLA* Court recently reiterated, permitting the government to label a professional's speech as unprotected conduct 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.

100. The en banc Eleventh Circuit decision in *Wollschlaeger v. Florida* also compels the conclusion that the Ordinances ban speech. There, 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' arguments 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), 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.

2. Neither of *NIFLA*'s Carve-Outs for Commercial Speech and Conduct Applies to the Ordinances.

a. The Talk Therapy Prohibited by the Ordinances Is Not Commercial Speech.

101. *NIFLA* carved out two possible categories of speech with less protection, neither of which applies here:

> This Court's precedents do not recognize such a tradition for a category called "professional speech." This Court has afforded less protection for professional speech **in two circumstances—neither of which turned on the fact that professionals were speaking**. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." [citations omitted] Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. See, *e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (opinion of O'Connor, KENNEDY, and Souter, JJ.). But neither line of precedents is implicated here.

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

102. The talk therapy prohibited by the Ordinances cannot be excepted from First Amendment protection as commercial speech under *NIFLA*. Commercial speech is that speech which "does no more than propose a commercial transaction." *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (commercial speech is that which can be "characterized merely as proposals

to engage in commercial transaction"); *Dana's R.R. Supply v. Attorney General*, 807 F.3d 1235, 1246 (11th Cir. 2015) (same).

> Athough a professional may be viewed as engaged in the transaction of selling his professional advice, **one must, of course, distinguish between the offer and the actual presentation of professional advice, which is no more a commercial transaction that is the actual writing or reading of a book or newspaper that is available for sale.**

Wollschlaeger, 848 F.3d at 1309 n.4 (quoting Daniel Halberrtson, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 840-841 (1999)) (emphasis added).

b. The Talk Therapy Prohibited by the Ordinances Is Not Mere Professional Conduct.

103. The talk therapy prohibited by the Ordinances cannot be excepted from First Amendment protection as mere professional conduct under *NIFLA*.

104. 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." 848 F.3d 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.* (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)). "Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation." *Id.* at 1308 "As noted earlier, characterizing speech as conduct is a dubious constitutional enterprise." *Id.* at 1309. As was true in *NIFLA* and *Wollschlaeger*, Plaintiffs here have demonstrated that their practices involve only speech.

105. The City's argument that Plaintiffs' talk therapy should be considered mere professional conduct, akin to applying leeches to treat blood disorders, cannot be taken seriously.

(Hrg. Tr., pg. 197, lines 3–13.) The *King* court considered the same argument: "The parties agree that modern-day SOCE therapy, and that practiced by Plaintiffs in this case, is 'talk therapy' that is administered wholly through verbal communication. Though verbal communication is the quintessential form of 'speech' as that term is commonly understood, Defendants argue that these particular communications are 'conduct' and not 'speech' for purposes of the First Amendment because they are merely the 'tool' employed by therapists to administer treatment. Thus, the question we confront is whether verbal communications become 'conduct' when they are used as a vehicle for mental health treatment." *King v. Governor*, 767 F.3d 216, 224 (3d Cir. 2014), *abrogated by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018). And the *King* court rejected the idea: "**We hold that these communications are 'speech' for purposes of the First Amendment**. Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized verbal or written communications as 'conduct' based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 177 L.Ed.2d 355 (2010)." 767 F.3d at 224–25 (emphasis added).

106. "Given that the Supreme Court had no difficulty characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are 'conduct.'" *King*, 767 F.3d at 225.

107. "To classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game.'" *King*, 767 F.3d at 228. "Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 228–29. "Thus, we conclude that the verbal communications that occur during SOCE counseling are not 'conduct,' but rather 'speech' for purposes of the First Amendment." *Id.* at 229.

3. The County's Argument That Plaintiffs' Speech Is Not Protected Because It Is Not Expressive Is Wrong as a Matter of Fact and Law.

108. The Court rejects the County's argument that Plaintiffs' talk therapy is not protected speech because it is not "expressive," as a matter of both fact and law.

109. First, as shown in the Court's Findings of Fact, the content of Plaintiffs' talk therapy sessions sometimes includes Biblical and other viewpoints on the creation and purpose of men, women, and sex. (*See supra* Part I.A.) These sessions also include at times discussions of Biblical values regarding sexuality, and clients' desires to conform their identities, concepts of self,

attractions, and behaviors to their sincerely held religious beliefs. (*See supra* Part I.A.) All of these discussions are inherently expressive as a matter of fact.

110. Second, all pure speech is inherently expressive. This is why there is a long-recognized distinction between pure speech and expressive **conduct**. *See, e.g.*, *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1285 (11th Cir. 1999) (noting First Amendment protection applies to three distinct categories: "pure speech, expressive conduct, or the use of various media that facilitate the communication of ideas"); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) (noting speech technically means "spoken or written word" but that First Amendment protection extends to "acts qualifying as signs with expressive meaning"); *Geaneas v. Willets*, 911 F.2d 579, 584 (11th Cir. 1990) (noting First Amendment's protection clearly applies to "pure speech" but that its application is different from expressive conduct"); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (same).

111. The distinction between speech and express conduct is critical because "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," *Texas v. Johnson*, 491 U.S. 397, 406 (1989), and the test for determining the application of the First Amendment is different between speech and conduct. *Fort Lauderdale*, 901 F.3d at 1240. Thus, the only circumstance in which the application of the First Amendment hinges on whether something is inherently expressive involves **conduct**. *See, e.g.*, *Johnson*, 491 U.S. at 404 (noting that only conduct is subject to the test of whether it is sufficiently expressive to warrant First Amendment protection); *Spence v. Washington*, 418 U.S. 405, 410 (1974) (noting only "expression of an idea through **activity**" is subject to requirement that it be intended "to convey a particularized message" (emphasis added)); *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560 (1991) (determining First Amendment protection by determining whether nude dancing was inherently expressive); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft cards); *Fort Lauderdale*, 901 F.3d at 1240 (noting Supreme Court "formulated a two-part inquiry to determine whether the **conduct** is sufficiently expressive"); *Holloman*, 370 F.3d at 1270 ("to determine whether a particular **act** counts as expressive **conduct**, a court must determine whether an intent to convey a particularized message is present" (emphasis added)); *Burns v. Town of Palm Beach*, No. 17-CV-81152-BLOOM/REINHARDT, 2018 WL 4868710, *14 (S.D. Fla. July 13,

2018) ("delineating which expressive **conduct** receives First Amendment protection" depends on "whether it is sufficiently imbued with elements of communication" (emphasis added)).

112. Thus, as a matter of law, the talk therapy prohibited by the Ordinances is protected speech because it is speech, and no additional inquiry as to whether it is also expressive is warranted.

E. The Ordinances Are Viewpoint-Based Restrictions on Speech and Therefore Unconstitutional as a Matter of Law.

113. A viewpoint-based restriction on private speech has never been upheld by the Supreme Court or any court. Indeed, a finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667 (2011). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. In fact, **viewpoint-based regulations are always unconstitutional**. *See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'") (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses"); *see also Searcy v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989) (the government "may not discriminate between speakers who will speak on the topic merely because it disagrees with their views"), *id.* at 1325 ("**The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis**." (emphasis added)); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 444 ("the Court almost always rigorously reviews and then invalidates regulations based on viewpoint").

114. The Ordinances are textbook examples of viewpoint discrimination. On their face, the Ordinances purport to allow licensed therapists to discuss the subject of sexual orientation, but explicitly prohibit only one particular viewpoint on that subject, namely that unwanted SSA can be reduced or eliminated to the benefit of the client, if the client so desires. The Ordinances define "conversion therapy" in such a way that it is clear that Defendants are targeting only one viewpoint,

i.e., SOCE that seeks to "eliminate or reduce sexual or romantic attractions or feelings **toward individuals of the same gender or sex**." (DE 126-20 (Cnty. Ord.), pg. 12 (emphasis added); DE 126-27 (City Ord.), pg. 7 (same).). Similarly, the Ordinances permit counselors to accept and facilitate same-sex attraction, even if their minor clients are merely questioning such feelings, but prohibit counselors from counseling minor clients to change unwanted same-sex attractions, even when the minor clients themselves request and seek that outcome. (*Id.*).

115. The Ordinances also purport to prohibit licensed counselors from engaging in any practice that seeks to change behaviors, gender identity, or gender expression. (*Id.*) But the plain text of the Ordinances demonstrates that they only prohibit such counseling for minor clients who wish to reduce or eliminate behaviors, identity, or expressions that differ from their biological sex. (*Id.*) That this is true cannot be questioned because the Ordinances specifically exempt counseling that "provides support and assistance to a person undergoing gender transition." (*Id.*). To undergo "gender transition," one has to be—at minimum—seeking to change from one gender to the other. **Change is the definition of transition**. *See* Dictionary.com Unabridged, https://www.dictionary.com/browse/transition?s=t (last visited Nov. 13, 2018) ("movement, passage, or **change** from one position, state, stage, subject, concept, etc., to another; **change**" (emphasis added).) So, under the Ordinances, if a minor client wants to undergo radical surgery to alter his appearance or genitalia, Defendants have no problem with a counselor providing counseling to assist in **that** change. But, if a minor client merely wants to speak with a counselor about unwanted feelings concerning her gender identity or expression, the counselor is absolutely prohibited from engaging in such counseling if it aids the minor in reducing unwanted cross-gender identity, behaviors, or expressions. There can be no question that this is viewpoint discrimination.

116. The Supreme Court and several other courts have invalidated regulations of professional speech as unconstitutional viewpoint discrimination. *See Sorrell*, 131 S. Ct. 2653 (2011); *Legal Servs. Corp. v. Valazquez*, 531 U.S. 533 (2001); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). In these cases, the courts recognized the axiomatic truth that the government is not permitted to impose its viewpoint on speakers, even professional speakers subject to licensing requirements and regulation.

117. In *Velazquez*, the Court addressed a federal funding limitation on legal aid attorneys that operated in the same viewpoint-based manner as the Ordinances. *Velazquez*, 531 U.S. at 537–38. The law provided that attorneys could not receive funds if they challenged welfare laws. The

Court invalidated the law as viewpoint discriminatory, because it had the effect of prohibiting "advice or argumentation that existing welfare laws are unconstitutional or unlawful," and thereby excluded certain "vital theories and ideas" from the lawyers' representation. *Id.* at 547–49.

118. In *Conant*, the Ninth Circuit invalidated a federal policy that punished physicians for communicating with their patients about the benefits or options of marijuana as a potential treatment. *Conant*, 309 F.3d at 633. The Ninth Circuit noted that the doctor-patient relationship is entitled to robust First Amendment protection:

> An integral component of the practice of medicine is the communication between a doctor and a patient. **Physicians must be able to speak frankly and openly to patients**. That need has been recognized by courts through the application of the common law doctor-patient privilege.

Id. at 636 (emphasis added). Far from being a First Amendment orphan, such professional speech "may be entitled to the strongest protection our Constitution has to offer." *Id.* at 637 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). The ban impermissibly regulated physician speech based on viewpoint:

> The government's policy in this case seeks to punish physicians on the basis of the content of doctor-patient communications. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger the policy. Moreover, the **policy does not merely prohibit the** discussion **of marijuana; it condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient**. Such condemnation of particular views is especially troubling in the First Amendment context.

Id. at 637–38 (emphasis added). The court rejected as inadequate the government's justification that the policy prevented clients from engaging in harmful behavior, and permanently enjoined enforcement of the policy. *Id.* at 638–39.

119. The Ordinances here operate almost identically to the federal policy enjoined in *Conant*. Just as the policy in *Conant* prohibited physicians from speaking about the benefits of marijuana to a suffering patient, so do the Ordinances prohibit counselors from speaking about the potential for reduction or elimination of unwanted same-sex attractions, or desires to "transition to another gender," that might benefit a client distressed by the unwanted desires. In both cases, the laws express a preference for the message the government approves and disdain attached to

punishment for the viewpoint the government abhors. As was true of the law in *Conant*, the Ordinances here should be invalidated as unconstitutional viewpoint discrimination.

120. If a minor client presents to Dr. Otto with the desire to change his same-sex attractions and behavior to conform to his Christian beliefs on homosexuality, and Dr. Otto proceeds with talk therapy in which Dr. Otto affirms the client's *beliefs*, while leaving any decisions about change to the client, then the City and County would both interpret that therapy as a violation of their Ordinances because Dr. Otto would have facilitated the client's goal to change sexual orientation.[15] By this interpretation—which neither Defendant has attempted to walk

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[15] This hypothetical encounter is drawn directly from Dr. Otto's unrefuted testimony in response to questioning by the County:

> Q Okay. So you state here or the response states that "Otto focuses on the issues that the client wants to address, including those situations where clients seek assistance in conforming their identity and attractions to their sincerely held religious beliefs, values, and concepts of self."
>
> My question to you is: How do you do that? How do you reconcile when there's a conflict between the client's unwanted sexual attraction, sexual orientation with their religious beliefs if there's a conflict?
>
> . . . .
>
> THE WITNESS: Okay. So if a client comes in and says, "Hey, this is what I'm feeling, but this is what I believe," there's a conflict there. So there are three choices: You change one, you change the other, or you learn to live with that conflict in place. And we'll talk about where their priorities are. We'll talk about which one of those is most important to them. We'll talk about maybe the root causes of some of these issues that they're feeling, what they think the root causes are, how much—to what degree the discomfort is there. Is it just a minor nuisance or is it a significant issue for them?
>
> And we'll have conversations. We'll speak about those kinds of things. And as they gain an understanding of their—as they're able to talk through their feelings and articulate their feelings, oftentimes they're able to come to some resolution about what they think they should do on

back—the Ordinances discriminate against Dr. Otto's Christian viewpoint that voluntary change is possible and good, which viewpoint he expressed by accepting the client's goals and affirming the client's beliefs. By contrast, if presented with the same minor client desiring to conform attractions and behaviors to the client's Christian beliefs, a therapist who expresses beliefs contrary to the client's in order to effect the desired conformity—*i.e.*, by changing the client's beliefs instead of the client's attractions or behavior—would not violate the Ordinances under Defendants' interpretation because the therapist would not have facilitated the client's goal of changing sexual orientation. But the only substantive difference between the therapies offered by Dr. Otto and the hypothetical therapist was the viewpoint expressed regarding the client's beliefs.

121. The record leaves little doubt that it is "conversion therapy" from a religious viewpoint that the County had in view when the Ordinances were passed. (DE 126-16 (Pls.' Ex. 16), pg. 1 ("Most of the universal complaints seem to be about religious organizations . . . .").) It is also clear from the Sources relied on by Defendants that counselors and clients with strong religious beliefs about the efficacy of SOCE are disproportionately affected by the bans because this category of clients perceive the most benefit from SOCE. (*See supra* Part I.C.5.)

122. It is not enough that the Ordinances purport to protect a therapist's right to recommend or refer clients out for "conversion therapy." (DE 126-20 (Cnty. Ord.), pg. 10 ("County does not intend to prevent mental health providers from . . . expressing their views to patients; recommending SOCE to patients; . . . or referring minors to unlicensed counselors . . . ."); DE 126-27 (City Ord.), pg. 5 (same).) In reality, as soon as a therapist informs a client that the talk therapy recommended by the therapist as beneficial and good is nonetheless illegal, the

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> what things they think they should change or what boundaries they think they should put up or what relationships they think they should modify.
>
> And, again, that's all client-driven. That's all directed by what the clients' priorities are and how they bring the issues to the table.

(DE 121-7 (Otto Dep.), pg. 155, line 9–pg. 156, line 20; DE 121-28 (Otto Interrog. Resps.), pg. 2; *see also supra* Part I.A.1, ¶ 7 ("Dr. Otto shares those [Christian] beliefs, and therapy sessions sometimes include discussion of Biblical viewpoints . . . ."); DE 121-7 (Otto Dep.), pg. 158, line 7–pg. 159, line 8 ("There are a lot of biblical truths that would come out in the counseling . . . .").)

credibility of the therapist's viewpoint is immediately undermined, to the injury of the therapist's reputation and the therapeutic alliance. To be sure, this undermining of the therapist's viewpoint is intended, and intentionally discriminatory.

123. The County contends that *R.A.V. v. City of St. Paul*, gives the government license to discriminate on the basis of content and viewpoint in this context. (Hrg. Tr., pg. 109, line 17–pg. 110, line 24.) But *R.A.V.* provides no such refuge. There, the Supreme Court noted that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." 505 U.S. 377, 387 (1992). What the County failed to grasp, however, is that such categories of so-called "unprotected speech" are severely limited by Supreme Court precedent to certain "well-defined and narrowly limited classes of speech," including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010). The reason such categories, though content-based, can be more easily restricted is because their "prevention and punishment [has] never been thought to raise any Constitutional problem." *Id.* at 469 (citing *Chaplinski v. New Hampshire*, 315 U.S. 568, 571 (1942)).

124. Not only is the talk therapy speech of licensed professionals glaringly absent from the severely restricted list, but the Supreme Court's recent precedents prove it has been explicitly excluded from the list of proscribable categories. *See NIFLA*, 138 S. Ct. at 2372 ("Speech is not unprotected merely because it is uttered by professionals."); *Reed*, 135 S. Ct. at 2229 (noting that professional speech is protected, and not one of the proscribable categories of speech). Thus, even if the First Amendment did not stand against all "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," *Stevens*, 559 U.S. at 472, this Court would still be bound by *NIFLA* and *Reed* to reject Defendants' contentions that Plaintiffs' speech is akin to the long-recognized categories of unprotected speech discussed in *R.A.V.* Plaintiffs' speech does not fall within the narrowly limited classes of speech for which this Court can disregard the traditional strictures of the First Amendment.

F. Even If Not Viewpoint-Based Restrictions, the Ordinances Are Content-Based Restrictions on Speech That Must Satisfy Strict Scrutiny.

125. As was true in *King*, the Ordinances here ban speech on the basis of content. Like the Third Circuit, this Court has "little doubt" in concluding that the Ordinances ban speech on the basis of content. *See* 767 F.3d at 236 n.20. Indeed, like the statute in *King*, the Ordinances "on

[their] face, prohibit[] licensed counselors from speaking words with a particular content; *i.e.* words that 'seek[] to change a person's sexual orientation.'" *Id.* (final alteration in original). (DE 126-20 (Cnty. Ord.), pg. 12; DE 126-27 (City Ord.), pg. 7.). "Thus . . . 'Plaintiffs want to speak to [minor clients], and whether they may do so under [the Ordinances] depends on what they say.'" *Id.* (first alteration in original). That is textbook content discrimination.

126. Because this Court finds that the Ordinances ban speech on the basis of content, unequivocal Supreme Court precedent requires the Ordinances to survive strict scrutiny to be upheld. Indeed, in *Reed*, the Supreme Court issued its firm rule: all content-based restrictions on speech must receive strict scrutiny. 135 S. Ct. at 227 ("[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."). 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").

127. *NIFLA* also confirmed that regulations on the speech of licensed professionals is no exception to this rule. In *NIFLA*, the Supreme Court affirmed *Reed*'s firm rule mandating strict scrutiny for all content-based restrictions on speech, expressly abrogated *King*'s and *Pickup*'s erroneous conclusion 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," *id.* at 2375, such as any counseling that seeks to help a minor reduce or eliminate their unwanted same-sex attractions, behaviors, and identity. Thus, binding precedent requires this Court to subject the Ordinances to strict scrutiny.

G. Defendants Have the Burden of Proof on Strict Scrutiny.

1. Defendants Must Show Empirical or Concrete Evidence of Harm.

128. As show above, Defendants have the burden of proving the constitutionality of their Ordinances under the strict scrutiny standard. And in this 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.

129. 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.*

130. 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 Must Show That the Ordinances Were the Least Restrictive Means Available at the Time of Enactment.

131. Under strict scrutiny, Defendants must also demonstrate that the Ordinances are the least restrictive means of remedying their claimed governmental interests. *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).

132. The government must demonstrate that it "seriously undertook" efforts to address the problem "with less intrusive tools available to it." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014). In *McCullen*, the government even identified numerous other statutes already on the books that could have theoretically accomplished the government's objective, but it argued that such means were ineffective. *Id.* at 2540. The Supreme Court said that even identifying and considering those existing laws was insufficient to satisfy intermediate scrutiny because the government had not identified "a single prosecution brought under those laws" and could not identify any attempted

use of those statutes to accomplish the objective without unnecessarily restricting speech. *Id.* at 2539. The Supreme Court's requirement that the government actually attempt to use existing laws **prior to** enacting the challenged speech prohibition necessarily means that the government cannot identify other alternatives after the enactment of the speech restriction and then offer post-hoc rationalizations as to why they are ineffective.

133. In *Bruni*, the Third Circuit stated that to meet the *McCullen* burden of showing that it seriously undertook to consider less speech restrictive alternatives, the government must put forward "**a meaningful record** demonstrating that those options would fail to alleviate the problems meant to be addressed." 824 F.3d at 371 (emphasis added). In fact, the concurrence highlights the majority's application of *McCullen*: "The majority opinion [requires that] a municipality **must now also prove that, *before adopting a regulation that significantly burdens speech*, it either attempted or seriously considered and reasonably rejected less intrusive alternatives**." *Id.* at 379 (Fuentes, J., concurring) (emphasis added).

134. The McCullen Court expressly rejected the government's convenience as a justification for skipping the narrow tailoring step:

> The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."

134 S. Ct. at 2534. "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. In *Alford v. Walton County*, No. 3:16cv362/MCR/CJK, 2017 WL 8785115 (N.D. Fla. Nov. 22, 2017), the district court held that the government cannot meet its burden under *McCullen* when the "record reflects that the County admittedly failed to consider any less restrictive alternatives," and instead favored a total ban because it was "cleaner and easier." *Id.* at *8.

H. Defendants' Ordinances Are Unconstitutional Because They Fail Strict Scrutiny.

1. Defendants Have No Compelling or Other Sufficient Governmental Interest to Ban Voluntary SOCE Talk Therapy.

135. As shown in the Court's findings of fact above, Defendants never received or considered any evidence that any person was harmed, or complained of harm by any SOCE counseling in their respective jurisdictions, let alone voluntary SOCE counseling that minors request and want to receive. Moreover, despite claiming "overwhelming research" justifying their Ordinances, the "research" cited by Defendants justifies no conclusions regarding harmful outcomes from SOCE. 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 cannot satisfy strict scrutiny by pointing to empirical or concrete evidence of harm justifying their Ordinances.

136. Furthermore, Defendants' Ordinances undermine several specific admonitions from the APA Report and related Sources, such as the APA imperative that minors be allowed to return to their biological gender, even after identifying as the other gender for a period of time. The Ordinances also require therapists such as Plaintiffs to cut off counseling with clients who express a desire to change their sexual orientation or gender identity, which directly contradicts the APA Report's admonition to explore a client's identity issues instead of declining them outright. Thus, the Ordinances prohibit therapists from assisting minors with change decisions the APA expressly endorses, and otherwise create harm identified by the APA rather than reducing any.

2. Defendants' Ordinances Are Not the Least Restrictive Means or Otherwise Narrowly Tailored.

137. Under strict scrutiny, Defendants are required to demonstrate that the Ordinances are the least restrictive means available. *See Boos*, 485 U.S. at 329 (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*, 491 U.S. at 798 n.6 (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. Defendants cannot do so.

138. To satisfy the narrow tailoring prong of their strict scrutiny burden, Defendants must show that they "**seriously** undertook to address the problem with less intrusive tools readily available to [them]." *McCullen*, 134 S. Ct. at 2539 (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*, 824 F.3d at 370 (emphasis added); *see also Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) ("As the Court explained in *McCullen*, however, the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem.") Defendants neither tried nor closely examined any alternatives to their outright bans.

139. As shown in the Court's findings of fact, Defendants failed to try, discuss, or even consider any less restrictive alternatives to their blanket therapy bans. Even the anecdotal hearsay brought to Defendants by the Ordinances' chief advocate, Rand Hoch, complained of alleged "aversive" and "coercive" therapies, happening to someone somewhere, and not voluntary SOCE as practiced by Plaintiffs; but Defendants did not consider banning only aversive or coercive therapies, or even imposing specific informed consent requirements consistent with the APA Report's recommendations. Instead, Defendants acted contrary to the APA Report recommendations and banned SOCE outright, foreclosing the further development of the scientific record on SOCE sought by the APA, and usurping for politicians and activists the discretionary judgment that the APA deemed appropriate for licensed mental health professionals. Defendants' failure to consider any alternatives cannot satisfy the demanding narrow tailoring burden placed upon them by the Supreme Court in *McCullen*.

140. Remarkably, despite *McCullen's* clear rejection of the government's convenience as a justification to skip narrow tailoring, the County one-upped the Commonwealth of Massachusetts and argued its **ignorance** as justification at the preliminary injunction hearing:

> As I will show you in the . . . APA report, your Honor, **there have been no factors discovered about what types of therapy cause harm** and what types of therapies are going to lead to a benefit.
>
> **Because we don't know** the identifying factors of what about this person makes the therapy beneficial, **we don't know.**

(Hrg. Tr., pg. 124:3–8 (emphasis added).) Though worse than the Commonwealth's convenience argument in *McCullen*, the County's "we don't know" plea is sufficiently similar that there can be little doubt it, too, should be rejected. *See McCullen*, 134 S. Ct. 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.').

141. Likewise to be rejected is the County's hearing argument that the Ordinances are working. (Hrg. Tr., pg. 150, line 24–pg. 151, line 8.) This argument proves far too much—claiming that the Ordinances' burdens on speech are effective at restricting the speech Defendants want to restrict begs the question of whether Defendants could have restricted less, which is precisely the burden Defendants have failed to carry.

142. Defendants also fail narrow tailoring because their Ordinances cannot, as a practical matter, be enforced to remedy any purported harms Defendants claim to have in view. As the Supreme Court taught in *McCullen*, the First Amendment "demand[s] a close fit between ends and means." 134 S. Ct. at 2534. The inability to enforce the Ordinances through their respective code officials, which is admitted by both City and County senior officials in their unfiltered pre-Ordinance correspondence, forecloses the required fit between the Ordinances and Defendants' purported interests in enacting them. Defendants' code officials are objectively ill-equipped to investigate and make determinations about appropriate mental health therapeutic practices. For example, the City's Rule 30(b)(6) witness on enforcement of the City Ordinance candidly admitted it would take a clinician or therapist to determine whether a minor's affinity or movement towards a particular gender identity constituted a change of gender identity under the Ordinance. (*See supra* Part I.F.) And at the hearing, the County admitted it **still—nearly a year since enactment—has no procedure to handle a complaint under its Ordinance**. (Hrg. Tr. pg. 184, lines 13–20 ("There

is not a firm procedure in place yet, we are working with our Code Enforcement to have a procedure in place, but it is not—there is not one that has been officially approved yet.").) Moreover, there is no evidence of any trained or qualified professional upstream from code enforcement personnel to preside over a final determination, such as a board of professional standards,[16] or even a single reviewing professional with appropriate training or licensure. Such a fatally flawed process could never satisfy the constitutional "fit" requirement of narrow tailoring.

143. Furthermore, if the purpose of the Ordinances is to protect children and youth from the purported harms of SOCE counseling, they are "'wildly underinclusive,'" further undermining any notion of narrow tailoring. *See NIFLA*, 138 S. Ct. at 2376 (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 802 (2011)). Both ordinances regulate only licensed professionals, and expressly exclude conversion therapy offered by unlicensed religious counselors and clergy. (DE 126-27 (City Ord.), DE 1-4, at 6:26–7:3; DE 126-20 (Cnty. Ord.), DE 1-5, at ECF 13:16–19.) The Palm Beach County Attorney, however, expressly advised the County Commissioners that "[m]ost of the universal complaints seem to be about religious organizations that the ordinance would not legally be able to address." (Pls.' Ex. 16 at PBC 008000.) If Defendants genuinely believe all "conversion therapy" is harmful to minors, then exempting unlicensed religious counselors and clergy from regulation makes no sense, especially if they are the source of the "universal complaints." Given the County's supposition of the prevalence of religious conversion therapy perpetrators, its 30(b)(6) witness could offer no justification for exempting religious persons where the ostensible government interest is regulating harmful conduct directed at children. (DE 121-9 (Hvizd Dep.), 200:14–18, 202:5–9.) The City likewise has the authority to regulate behavior by adults that is considered harmful to children, whether or not those adults are religious or part of a religious institution, but did not consider doing so in its Ordinance. (DE 126-41 (Woika Dep.), 48:7–49:8.) The APA Report is also relevant here because, not only does it fail to present empirical evidence of harm from **any** kind of SOCE counselling, its non-empirical,

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[16] *See infra* Part II.I; *see also supra* Part I.F, ¶ 68 ("[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.**" (quoting DE 126-26 (Pls.' Ex. 26), pg. 1)).

anecdotal reporting of harm does not differentiate between SOCE from licensed professionals and SOCE from religious organizations or persons. Thus, Defendants cannot justify the underinclusivity of their Ordinances on any claimed difference in harm between licensed SOCE and unlicensed religious SOCE, still further undermining any notion of narrow tailoring.

I. Defendants' Ordinances Are *Ultra Vires* Because They Purport to Regulate a Field Preempted to the State.

1. The State's Legislative Scheme Regulating Licensed Mental Health Providers Is so Pervasive as to Evidence an Intent to Preempt the Area.

144. As shown above, Defendants' most senior in-house lawyers sounded the alarm on preemption to their respective legislative bodies prior to their enactment of the Ordinances. Defendants' lawyers were correct then, and nothing has changed legally to remove the State's preemption of the field of regulating the practices of licensed mental health professionals. Defendants Ordinances are *ultra vires* and unenforceable.

145. 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). "Preemption is implied when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010) (internal quotation marks omitted).

146. The proper pervasiveness inquiry is whether the State has "preempted **a particular subject area**," not one discrete form of counseling. *Sarasota Alliance*, 28 So. 3d at 886 (emphasis added). The subject area in this matter is regulation of mental health professionals, not one subset of an entire course of counseling for one subset of a particular issue relating to that course of counseling. Were the rule otherwise, 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.

147. Florida regulation of licensed mental health providers is pervasive. Florida Statutes Chapter 456 sets forth the general provisions related to the regulation and licensure of health

professions and occupations. Specifically, in Fla. Stat. § 456.003(2)(b) the Legislature identified the absence of local regulation as a justification for the State to authorize 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:

> (2) 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**. Such professions shall be regulated when:
>
> . . . .
>
> (b) **The public is not effectively protected by other means, including, but not limited to**, other state statutes, **local ordinances**, or federal legislation.

Fla. Stat. § 456.003. This statement of legislative intent justifies the state's entry into, and occupation of, the field of health professional regulation, because no preexisting local ordinances were there to protect the public.

148. Florida Statutes Chapter 491 more specifically regulates professionals in clinical social work, marriage and family therapy, and mental health counseling. For example, Fla. Stat. § 491.003 defines the "'practice of marriage and family therapy,'" identifies who "[m]arriage and family therapy may be rendered to," and restricts the "use of specific methods, techniques, or modalities within the practice of marriage and family therapy . . . to marriage and family therapists appropriately trained in the use of such methods, techniques, or modalities." Fla. Stat. § 491.003(8). The section similarly regulates the practices of clinical social work and mental health counseling.

149. Section 491.004 creates within the State Department of Health the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (the "State Board") composed of nine members, six of which must be licensed professionals in the three practice fields. Fla. Stat. § 491.004(1), (2). The section also grants rulemaking authority to the Board to implement Chapter 491. Fla. Stat. § 491.004(5).

150. Section 491.005 imposes licensure requirements for clinical social work, marriage and family therapy, and mental health counseling professionals, including requirements for education, experience, passage of a "theory and practice examination," and "knowledge of the laws and rules governing the practice of clinical social work, marriage and family therapy, and mental health counseling." Fla. Stat. § 491.005(1), (3), (4).

151. Section 491.009 specifies grounds for discipline of licensed clinical social work, marriage and family therapy, and mental health counseling professionals, including "False, deceptive, or misleading advertising or obtaining a fee or other thing of value on the representation that beneficial results from any treatment will be guaranteed," and "Failing to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee, registered intern, or certificateholder is not qualified by training or experience." Fla. Stat. § 491.009(1)(d), (r).

152. Florida Administrative Code Subtitle 64b4 contains the rules implemented by the State Board to implement Fla. Stat. Ch. 491. For example, § 64B4-3.003 specifies the respective "theory and practice" licensure examinations to be administered to social work, marriage and family therapy, and mental health counseling professionals, such as the "examination developed by the Examination Advisory Committee of the Association of Marital and Family Therapy Regulatory Board (AMFTRB)" for marriage and family therapists. F.A.C. § 64B4-3.003(2)(c). Section 64B4-3.0035 additionally specifies how the three types of professionals "shall demonstrate knowledge of the laws and rules for licensure:"

> (1) An applicant shall complete an approved course consisting of a minimum of eight (8) hours which shall include the following subject areas:
>
> (a) Chapter 456, Part II, F.S., (Regulation of Professions and Occupations, General Provisions)
>
> (b) Chapter 90.503, F.S., (Psychotherapist-Patient Privilege)
>
> (c) Chapter 394, F.S., (Part I Florida Mental Health Act)
>
> (d) Chapter 397, F.S.
>
> (e) Chapters 415 and 39, F.S., (Protection from Abuse, Neglect and Exploitation)
>
> (f) Chapter 491, F.S., (Clinical, Counseling and Psychotherapy Services)
>
> (g) Chapter 64B4, F.A.C., (Rules of the Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling)
>
> (2) The laws and rules course must provide integration of the above subject areas into the competencies required for clinical practice and must include interactive discussion of clinical case examples

> applying the laws and rules that govern the appropriate clinical practice.

No local regulations are included.

153. Section 64B4-5.001 provides for the determination of violations and imposition of discipline on the grounds provided by Fla. Stat. § 491.009, such as "False, deceptive, or misleading advertising or obtaining a fee or other thing of value on the representation that beneficial results from any treatment will be guaranteed," and "Failing to meet the MINIMUM standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee is not qualified by training or experience." F.A.C. § 64B4-5.001(1)(d), (s). Such determinations of violations and imposition of discipline against licensed social work, marriage and family therapy, and mental health counseling professionals are made by the State Board, six members of which are licensed professionals in the respective fields.

154. The foregoing regulation of licensed health providers in general, and licensed mental health providers specifically, including education, experience, licensure, practice, and discipline, administered by a state board of licensed professionals, is pervasive, and implies an intent by the Florida Legislature to occupy the field to the exclusion of local regulation.

2. Strong Public Policy Reasons Exist for finding Regulation of Licensed Mental Health Providers to Be Preempted by the State.

155. In addition to the pervasive state regulation of licensed mental health providers, there are strong public policy reasons to reserve such regulation to the State. It is axiomatic 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)).

156. Moreover, given that the Legislature has mandated that determinations of whether licensed professionals have met the "minimum" standards of their professions must be made by similarly licensed professionals on the State Board, it defies reason to assert that the Legislature intended to allow unlicensed city and county code enforcement officials to make highly specialized professional practice determinations regarding sexual orientation and gender identity therapies for which there are no empirical bases for measuring safety or efficacy.

157. Furthermore, the absence of **any** regulation of professions or professionals in general, and of mental health professions and professionals specifically, by either Defendant, especially when viewed in light of Defendants' purported compelling interests, confirms that Defendants heretofore have submitted to the state's "will to be the sole regulator" of mental health and similarly situated professionals. *See Lake Hamilton Lakeshore Owners Ass'n, Inc. v. Neidlinger*, 182 So. 3d 738, 743 (Fla. 2d DCA2015) (internal quotation marks omitted). This, complete absence of local regulation, coupled with the unanimous reaction by Defendants' senior legal and administrative officials in their unfiltered communications (*see supra* Part I.G), is persuasive evidence of a strong public policy against local regulation.

158. Finally, the Court is not persuaded by the City's argument that Plaintiffs' conceded Defendants' authority to regulate locally with the mere observation that, "If the Defendants had banned only aversive therapy, your Honor, we wouldn't be here this morning." (Hrg. Tr., pg. 12, lines 18–19, pg. 203, lines 12–20.) Quite obviously, Plaintiffs would not have needed to sue Defendants if they had enacted bans of only aversive treatments because Plaintiffs' talk therapy practices do not include those treatments. (*See supra* Part I.A.) This commonsense observation is by no means an admission that Defendants had the authority to enter the State's field of mental health provider regulation.

J. Plaintiffs Have Satisfied the Remaining Preliminary Injunction Elements.

1. Plaintiffs Have Demonstrated That They Are Suffering Irreparable Injury.

159. As shown above, Plaintiffs are likely to succeed on the merits of their constitutional and preemption challenges to the Ordinances. Given their likelihood of success on their First Amendment claims, the irreparable harm prong of the preliminary injunction standard is satisfied

as a matter of law: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (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)).

2. Plaintiffs Have Demonstrated That Defendants Suffer No Harm from Injunctive Relief and That the Public Interest Favors an Injunction.

160. A law that is like unconstitutional for preliminary injunction purposes is not only presumed to cause irreparable injury, but also *ipso facto* is not in the public interest. *See Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010). Indeed, the inability to punish Plaintiffs and other licensed counselors for engaging in an ethical form of counseling that 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).

161. 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.

162. Moreover, as shown above, the Ordinances are unenforceable by Defendants' code officials in any event. Defendants cannot be harmed by an injunction against Ordinances that they lack the capacity or competency to enforce.

163. 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

THE COURT having made the foregoing findings of fact and conclusions of law, and being otherwise fully advised, it is hereby,

ORDERED:

164. Plaintiffs' Motion for Preliminary Injunction (DE 8) is GRANTED.

165. Defendants and their officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them, are hereby enjoined from enforcing the Ordinances during the pendency of this action, or until further order of the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this November 13, 2018, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:18-CV-80771-ROSENBERG/REINHART

ROBERT W. OTTO & JULIE H. HAMILTON,

Plaintiffs,

v.

CITY OF BOCA RATON, FLORIDA, &
COUNTY OF PALM BEACH, FLORIDA,

Defendants.
_____/

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Table of Contents

I. INTRODUCTION

"[T]his case presents a conflict between one of society's most cherished rights—freedom of expression—and one of the government's most profound obligations—the protection of minors." *American Booksellers v. Webb*, 919 F.2d 1493, 1495 (11th Cir. 1990) (citation omitted). Plaintiffs, licensed therapists, seek to provide talk therapy to minors with the goal of changing their sexual orientation and/or gender identity. Defendants, governmental entities, have passed ordinances to prohibit this practice by the therapists, because they believe that such "conversion therapy" or "sexual orientation change efforts" ("SOCE") are contraindicated and harmful to all persons, but especially minors. At its core, this case is about whether Defendants can prohibit the licensed therapists from administering SOCE therapy to minors where the available medical and subject matter literature concludes that the therapy is harmful to minors.

The case is before the Court on Plaintiffs Robert Otto and Julie Hamilton's Renewed Motion for Preliminary Injunction ("the Motion"), DE 8. In their Motion, Plaintiffs seek to enjoin Defendants from enforcing the two ordinances, passed in 2017, which ban the use of conversion therapy by licensed medical providers on minor patients.

Defendants City of Boca Raton (the "City") and Palm Beach County (the "County") (collectively referred to as "Defendants") filed responses at DE 83 and DE 85, and Plaintiffs filed a consolidated reply at DE 95. The Court granted leave to the Trevor Project, Equality Florida, and the Alliance for Therapeutic Choice to file amicus briefs at DE 73 and DE 116, which were filed at DE 90 (Trevor Project), DE 91 (Equality Florida), and DE 115 (Alliance for Therapeutic Choice). The Court also had the benefit of a full day of oral argument regarding the Motion on October 18, 2018. Following oral argument, the Court requested that the parties

submit proposed findings of fact and conclusions of law, and they were filed at DE 132, DE 133, and DE 134. The Motion is fully ripe for review.

The Court has considered all of the briefings referenced above, the record, and is otherwise fully advised in the premises. For the reasons stated below, the Renewed Motion for Preliminary Injunction is **DENIED**.

II. SUMMARY OF ANALYSIS

In moving for a preliminary injunction, Plaintiffs must demonstrate that they have a substantial likelihood of success on the merits, that they will suffer irreparable harm in the absence of this preliminary relief, that the balance of equities tip in their favor, and that an injunction serves the public interest.

The Court concludes that the Plaintiffs have not met their burden of showing that the ordinances violate the Free Speech Clause of the First Amendment, and thus a preliminary injunction barring their enforcement shall not issue. In reaching this result, the Court examines the three possible standards of review for Plaintiffs' free speech claim. Succinctly, rational basis review requires Plaintiffs to show that Defendants acted irrationally or unreasonably in enacting the ordinances. Intermediate scrutiny requires Defendants to show that they had a substantial interest in passing the ordinances and that the ordinances are narrowly drawn to achieve that interest. Strict scrutiny requires Defendants to show that they had a compelling interest in passing the ordinances, that the ordinances are narrowly tailored to achieve that interest, and that no other less restrictive means could serve that interest.

The Court concludes that the law is unsettled as to which of these standards should apply to the facts of this case. The ordinances regulate conversion therapy that is effectuated entirely

through speech, which suggests that the ordinances are subject to a standard greater than rational basis review. The ordinances also arguably are content-based, as they apply "to particular speech because of the topics discussed or the idea or message expressed."

While content-based laws ordinarily are subject to strict scrutiny, that conclusion in this case is not clear. The case does not involve a heartland content-based speech regulation. No public forum restrictions exist in the ordinances. The ordinances define the reach of their prohibitions by topic or subject matter, but they do so only to identify the type of therapy covered, not the content of communications outside of the therapy itself. It is the type of therapy that is regulated. The regulation touches speech only when it is a part of conversion therapy. The ordinances do not prohibit or limit proponents or opponents of conversion therapy to speak about gender or sexual orientation conversion publicly and privately, including to their minor clients in forms other than therapy. And, the therapeutic prohibition of conversion therapy is plenary; it does not choose sides.

Regardless of the level of review applied to the ordinances, the Court concludes that Defendants have identified a compelling interest in protecting the safety and welfare of minors. Protecting minors may be the paradigm example of a compelling interest. Defendants have pointed to and relied upon extensive credible evidence of the damage that conversion therapy inflicts. This body of information comes from well-known research organizations and subject matter experts.

At this early stage of the litigation, the Court need not resolve whether strict scrutiny is the applicable standard and whether the ordinances are the *least* restrictive means that Defendants could have used to achieve their interest in order to reach a decision regarding the

Motion. While at trial Defendants will have the burden of demonstrating the constitutionality of their ordinances, at the preliminary injunction stage, the burden is on the Plaintiffs to establish that they have a substantial likelihood of success on the merits at trial. The Court analyzes the challenged ordinances through the lenses of all three methods of review, and concludes that the ordinances pass rational basis review, withstand intermediate scrutiny, and may survive strict scrutiny. The Plaintiffs, therefore, have not met their burden of showing that they have the requisite substantial likelihood of success on the merits. As such, the preliminary injunction shall not issue on Plaintiffs' free speech claim.

The Court also concludes that Plaintiffs have not demonstrated a substantial likelihood of success on the merits as to their prior restraint and vagueness claims, so the preliminary injunction shall not issue on these grounds.

Finally, on their claim that Defendants acted outside their authority based on Florida state law, Plaintiffs have not demonstrated that an irreparable injury will occur in the absence of a preliminary injunction. Accordingly, the preliminary injunction shall not issue on this ground.

III. BACKGROUND

A. The Plaintiffs

Plaintiff Robert W. Otto, Ph.D, LMFT, is a licensed marriage and family therapist. DE 1 ¶ 122.[1] Dr. Otto maintains a counseling practice in the City of Boca Raton and in other parts of Palm Beach County, including regular appointments in unincorporated Palm Beach County. DE 121-7, Otto Dep. 19:21–20:5, 143:23–144:2; DE 1 ¶¶ 125, 127. Dr. Otto practices exclusively talk therapy, consisting of client-centered and client-directed conversations with his clients, concerning the clients' goals. DE 121-7, Otto Dep. 20:23–21:22 ("I want to make a distinction

[1] The facts of the Verified Complaint, DE 1, are accepted as true for the purposes of this Motion. *See* DE 83, 2 n.5.

that the therapy I provide is 100 percent speech . . . ."). Dr. Otto's talk therapy practice does not include any form of aversive treatment, which is treatment involving reprimand, punishment, or shame to turn a person away from certain thoughts or behaviors. DE 1 ¶ 72; DE 121-7, Otto Dep. 121:22–23.

Plaintiff Julie H. Hamilton, Ph.D., LMFT, is a licensed marriage and family therapist as well. DE 1 ¶ 140. Dr. Hamilton practices throughout Palm Beach County, including in the City of Boca Raton. DE 121-8, Hamilton Dep. 329:3–335:15; DE 96-1. In her current practice, Dr. Hamilton provides individual, marital, and family therapy for a wide variety of issues, including the issues of "unwanted same-sex attractions" and "gender identity confusion." DE 1 ¶ 142. Dr. Hamilton's practice also consists only of talk therapy, which is a conversation that takes place between herself and the client. Dr. Hamilton does not engage in aversive or coercive techniques. DE 1 ¶ 72. Dr. Hamilton does not coerce her clients into any form of counseling, engages in SOCE counseling only with those clients who desire and consent to it, and permits her clients to set the goals of any counseling she offers. DE 1 ¶¶ 77, 131, 144.

B. The Ordinances

Drs. Otto and Hamilton challenge two ordinances passed by Defendants in the fall of 2017 that ban mental health providers from engaging in conversion therapy with minor patients. The two ordinances are very similar, although not identical.[2]

[2] The City Ordinance differs from the County Ordinance in that the penalties are different. The City Ordinance provides that "[a]ny person that violates any provision of this article shall be subject to the civil penalty prescribed in section 1-16" of the City's Ordinance, which provides for a fine "not exceeding $500.00." DE 1-4. The County, in contrast, penalizes a first violation of the Ordinance with a fine of $250.00 and a second violation with a fine of $500.00. DE 1-5, 13:26–28.

1. The City Ordinance

On October 10, 2017, the City enacted the Ordinance, which prohibits the practice of conversion therapy on minors by licensed providers (the "City Ordinance"). DE 1-4. The City Ordinance defines conversion therapy as:

> Any counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.

Id. at 6:10-14.

The City Ordinance does not restrict anyone's conduct or speech outside of a formal therapy session. *Id.* at 4:21–22 ("[The City Ordinance] does not intend to prevent mental health providers from speaking to the public about SOCE.").

> The Ordinance also excludes from its definition of conversion therapy, any counseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change sexual orientation or gender identity.

Id. at 6:14–19.

The City Ordinance only prohibits formal treatment by licensed providers that has the goal of changing an individual's sexual orientation or gender identity. Thus, even within a therapy session, the City Ordinance does not prevent licensed therapists from "expressing their views to patients; recommending SOCE to patients … or referring minors to unlicensed counselors, such as religious leaders." *Id.* at 4:21–5:2.

The City's Ordinance defines "provider" as:

> [A]ny person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training under chapters 456, 458, 459, 490 or 491 of the Florida Statutes, as such chapters may be amended, including but not limited to, medical practitioners, osteopathic practitioners, psychologists, psychotherapists, social workers, marriage and family therapists, and licensed counselors. The term "provider" does not include members of the clergy or other religious leaders who are acting in their roles as clergy or pastoral counselors, or are providing religious counseling or instruction to congregants, provided they do not hold themselves out as providing conversion therapy pursuant to any of the aforementioned Florida Statutes licenses.

Id. at 6:21–7:3.

2. The County Ordinance

On December 19, 2017, the County passed Ordinance 2017-046 (the "County Ordinance").[3] DE 1-5; DE 121-3, 12/19/17 County Commissioners' Meeting Tr. 100. The County Ordinance bans providers from engaging in "conversion therapy" on minors. Conversion therapy is defined as:

> [T]he practice of seeking to change an individual's sexual orientation or gender identity, including but not limited to efforts to change behaviors, gender identity, or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.

DE 1-5, 13.

The County Ordinance states:

> Conversion therapy … does not include counseling that provides support and assistance to a person undergoing gender transition, or counseling that: provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and does not seek to change an individual's sexual orientation or gender identity.

Id.

[3] The City Ordinance and County Ordinance are hereinafter referred to simply as "the ordinances."

The County's Ordinance defines "provider" as "any person who is licensed by the State of Florida to perform counseling pursuant to Chapters 456, 458, 459, 490 or 491 of the Florida Statutes ..." *Id.* at 13. The County Ordinance does not "prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders." *Id.* at 11. Furthermore, the County Ordinance does not prevent "unlicensed providers, such as religious leaders, from administering SOCE to children or adults" or "minors from seeking SOCE from mental health providers in other political subdivisions" outside of Palm Beach County. *Id.* The County Ordinance does not ban advertisement. DE 121-1, County Ordinance 2017-046; *see also* DE121-7, Otto Dep. 149:16–18.

C. Procedural Posture of the Litigation

Plaintiffs filed the instant case on June 13, 2018, at DE 1, to permanently enjoin enforcement of the ordinances, and moved for a preliminary injunction the following day, DE 3. After serving Defendants, Plaintiffs filed this Renewed Motion for Preliminary Injunction. DE 8. The Court set the case for trial at DE 11, and set a limited discovery plan for the purposes of considering the preliminary injunction, DE 25 (amended at DE 50). In addition to briefing the Motion addressed by the Order, the parties also have briefed Defendants' Motions to Dismiss, filed on August 1, 2018. *See* DE 34; DE 39; DE 62; DE 82; DE 84. The Motions to Dismiss are ripe, and the Court will address those in a separate order.

Plaintiffs allege that the ordinances violate their constitutional rights and state law in eight separate counts. In Count I, Plaintiffs allege that the ordinances violate their free speech

rights as protected by the First Amendment. DE 1, 36. Count II alleges that the ordinances violate Plaintiffs' clients' First Amendment right to receive information. *Id.* at 39. Count III alleges violations of Plaintiffs' First Amendment free exercise rights. *Id.* at 40. Counts IV and V allege violations of the Florida Constitution, specifically, Plaintiffs' rights to liberty of speech and right to free exercise. *Id.* at 43, 46. Count VI alleges that the ordinances are *ultra vires*. *Id.* at 48. Count VII alleges that the ordinances violate Plaintiffs' rights under Florida's Patient's Bill of Rights and Responsibilities. *Id.*at 51. Finally, Count VIII alleges that the ordinances violate Florida's Religious Freedom Restoration Act ("FRFRA"), Fla. Stat. Ann. § 761.03.

Plaintiffs moved for a preliminary injunction on fewer grounds than alleged in their Complaint, which seeks a permanent injunction. *See* Hr'g. Tr. 107:9–18. The Motion contends that a preliminary injunction should issue based on Plaintiffs' freedom of speech and *ultra vires* arguments. *See* DE 8, ii. Specifically, Plaintiffs argue that the ordinances are viewpoint discriminatory, and therefore per se unconstitutional. In the alternative, they assert that the ordinances are content-based, and do not survive strict scrutiny. Plaintiffs also contend that the ordinances are unconstitutional prior restraints on their expression and unconstitutionally vague. Finally, Plaintiffs claim that the ordinances were passed outside of the Defendants' authority, and therefore are void.

IV. PLAINTIFFS' STANDING

In their Motions to Dismiss, DE 34 and DE 39, Defendants challenge the Plaintiffs' standing to pursue this case. Defendants also address standing in their responses to the Motion. *See* DE 83; DE 85. The City challenges Dr. Hamilton's standing, as she does not currently practice in the City. DE 83, 14. Both Defendants challenge Dr. Otto's standing, alleging that he

does not seek to change his clients, and therefore does not have a practice of performing SOCE. DE 83, 15; DE 85, 1–2. Defendants also challenge the named Plaintiffs' ability to sue on behalf of their minor clients. DE 83, 16; DE 85, 2.

To establish standing, a plaintiff must establish three elements, which are the "irreducible constitutional minimum" to pursue a case in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'' *Id.* (citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Id.* (citations omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561.

The Court finds that Dr. Otto and Dr. Hamilton have standing to challenge both ordinances. Both are practitioners in Palm Beach County, with practices that would be impacted by the City's Ordinance: Dr. Otto maintains a counseling practice in the City of Boca Raton and in other parts of Palm Beach County, including regular appointments in unincorporated Palm Beach County. DE 121-7, Otto Dep. 19:21–20:5, 143:23-144:2; DE 1 ¶¶ 125, 127. Dr. Hamilton practices throughout Palm Beach County, including in the City of Boca Raton. DE 121-8, Hamilton Dep. 329:3–335:15; DE 96-1, Hamilton Dec. Dr. Hamilton has not consistently practiced in Boca Raton, but the Court is satisfied that she likely will be regulated by the City's Ordinance if enforced. DE 121-8, Hamilton Dep. 341:7–342:3; DE 126-29, Hamilton Decl.

(describing Hamilton's efforts to obtain Boca Raton and Palm Beach County business tax receipts for annual periods ending September 30, 2018 and September 30, 2019). And, both named Plaintiffs have counseled minors on their unwanted same sex attractions. DE 1, ¶¶ 132–36, 149–57 (describing Plaintiffs' performance of SOCE on minors prior to the ordinances' enactment); DE 121-7, Otto Dep. 59:19–25 ("Q: How many clients have you had where the issue to be addressed is the minor's same-sex sexual attractions? A: I've dealt with four."). Therefore, the Court finds that Drs. Otto and Hamilton will be regulated by the ordinances, and, if they establish their constitutional claims, will suffer "an injury in fact" that is not "hypothetical."

As to the Plaintiffs' minor clients: A person "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalsi v. Tesmer*, 543 U.S. 125, 129 (2004) (citations omitted). "This rule assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Id.* The doctrine therefore expresses a "'healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed,' the courts might be 'called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions.'" *Id.* (citations omitted).

This rule is not absolute. Third-party standing may be appropriate when "the party asserting the right has a 'close' relationship with the person who possesses the right" and when "there is a 'hindrance' to the possessor's ability to protect his own interests." *Id.* This rule may be more forgiving in the First Amendment context. *Id.* at 130.

While Plaintiffs may have "close" relationships with their clients, they have not sufficiently demonstrated that their clients would be hindered in advancing their own litigation challenging the ordinances. Plaintiffs argue that their minor clients would not want to bring litigation for fear of stigma and exposing intimate details of their therapy. DE 95, 14. These generalized statements are not enough to confer third-party standing. "While a fear of social stigma can in some circumstances constitute a substantial obstacle to filing suit, Plaintiffs' evidence does not sufficiently establish the presence of such fear here." *King v. Gov. of N.J.*, 767 F.3d 216, 244 (2014). Further, the Court notes, as the Third Circuit did in *King*, that "minor clients have been able to file suit pseudonymously" in other cases challenging bans on SOCE. *Id.* Accordingly, the Court's consideration of the Motion is limited to the relief Plaintiffs seek for themselves.

V. PRELIMINARY INJUNCTION STANDARD OF REVIEW

The party seeking a preliminary injunction must establish:

> (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1247 (11th Cir. 2016) (citation omitted); *see also Alabama v. United States Army Corps of Engineers*, 424 F.3d 1117, 1128 (11th Cir. 2005). "A preliminary injunction is an 'extraordinary and drastic remedy,' and [Plaintiff] bears the 'burden of persuasion' to *clearly* establish all four of these prerequisites." *Wreal, LLC*, 840 F.3d at 1247 (emphasis added) (citing *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en

banc)). Failure to show any of the four required elements is fatal. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009).

A preliminary injunction is "never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008); *see also United States v. Jefferson Cty.*, 720 F.2d 1511, 1519 (11th Cir. 1983). "[I]njunctive relief is an extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (emphasis added) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972, (1997) (per curiam)). Plaintiffs face a "tough road in establishing [the] four prerequisites to obtain a preliminary injunction in the first instance." *Wreal, LLC*, 840 F.3d at 1247.

Furthermore, granting a preliminary injunction is a "powerful exercise of judicial authority." *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990). In evaluating the request for a preliminary injunction that would enjoin enforcement of a duly passed legislative enactment, courts must tread especially carefully:

> When a federal court before trial enjoins the enforcement of a municipal ordinance adopted by a duly elected city council, the court overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government. Such a step can occasionally be justified by the Constitution (itself the highest product of democratic processes). Still, preliminary injunctions of legislative enactments—because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits—must be granted reluctantly and only upon a *clear* showing that the injunction before trial is *definitely* demanded by the Constitution and by the other strict legal and equitable principles that restrain courts.

Id. at 1285 (emphasis added).

VI. SUCCESS ON THE MERITS: PLAINTIFFS' FREE SPEECH CLAIM

The Court begins its analysis of Plaintiffs' primary claim – that the ordinances violate their free speech rights under the First Amendment – with the first prong of the standard for a preliminary injunction: substantial likelihood of success on the merits.

Plaintiffs' first two claims allege that the ordinances unconstitutionally discriminate on the basis of viewpoint, or in the alternative, unconstitutionally discriminate on the basis of content. The parties vigorously contest whether the ordinances implicate the First Amendment's Free Speech Clause, and if so, what level of scrutiny is appropriate – rational basis review, some form of heightened but intermediate review, or strict scrutiny.

A. The First Amendment Landscape

The Free Speech Clause of the First Amendment commands that Congress, and the states, through the Fourteenth Amendment, "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; *see, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 667 (1925) (noting the First Amendment's application to the states). Nonetheless, it is also a "long established" and "fundamental principle" that "the freedom of speech . . . does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language." *Gitlow*, 268 U.S. at 667 (collecting cases). "From 1791 to the present, . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992). Accordingly, First Amendment case law acknowledges the fundamental importance of freedom of speech on the one hand, but also recognizes that the freedom of speech must occasionally be restricted or limited to accommodate

other important governmental interests on the other. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). In grappling with how to strike this critical balance, the Supreme Court has recognized varying levels of scrutiny for analyzing laws that in some way curtail individuals' free speech rights. Laws that limit speech based on the content of that speech are generally subject to strict scrutiny – the most stringent form of review in the panoply of standards of statutory review. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–67 (2011). Content-neutral restrictions on speech are usually subjected to intermediate scrutiny. *See Holder*, 561 U.S. at 26–27. Regulations that do not affect protected speech, or only incidentally do so, are subject to rational basis review. Determining whether the First Amendment applies to the ordinances and the appropriate level of review are critical, and potentially dispositive questions in this case.

This case and the instant Motion present a matter of first impression in the Southern District of Florida and the Eleventh Circuit[4] regarding whether prohibitions on the use of SOCE therapy by licensed medical providers in treating minor patients are constitutional.

Similar bans have survived constitutional challenges however, in other federal courts. The Third and Ninth Circuits have considered the conversion therapy bans passed in New Jersey and California, respectively. Both concluded that such bans, which are nearly identical to those at issue here, are constitutional. The Ninth Circuit held in *Pickup v. Brown*, that the California law was constitutional because it regulated professional conduct, and thereby did not implicate the First Amendment at all. 740 F.3d 1208 (9th Cir. 2014). The Third Circuit in *King v.*

[4] Plaintiffs' counsel, representing another litigant, is simultaneously pursuing a similar challenge to a conversion therapy ban in the Middle District in *Vazzo v. City of Tampa*, Case No. 8:17-CV-02896 (M.D. Fla. 2017). In that case, the magistrate judge has issued two Reports and Recommendations on the motion to dismiss and motion for preliminary injunction. However, the district court has not yet ruled on the motions.

Governor of the State of New Jersey concluded that the law regulated speech, but only *professional* speech, and therefore was subject to intermediate scrutiny, which the law passed. 767 F.3d 216 (3rd Cir. 2014). While the Court looks to *Pickup* and *King* as examples for possible analysis, it is not bound by these decisions. The Court does not have the benefit of case law from the Eleventh Circuit on this particular matter.

Since these cases were decided, the Supreme Court has issued two opinions, *Reed v. Town of Gilbert* and *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*"), which raise questions as to the validity of the Third and Ninth Circuits' reasoning. 135 S. Ct. 2218 (2015); 138 S. Ct. 2361 (2018). The Eleventh Circuit also issued its *en banc* opinion in *Wollschlaeger v. Governor of Florida*, which was critical of the Ninth Circuit's opinion in *Pickup*, and is binding precedent on this Court. 848 F.3d 1293 (11th Cir. 2017).

These opinions and others show that the landscape of relevant First Amendment precedent is a morass when trying to address the specific facts in this case, that is, licensed professionals administering treatments, effectuated through speech, on minors. At least three possible approaches emerge from the case law, employing different standards of review.

B. Determining the Appropriate Standard of Review

1. Conduct v. Speech

A preliminary question, before applying the appropriate level of review, is whether the ordinances regulate speech or conduct. The Free Speech Clause of the First Amendment prohibits regulation of *speech*, so it is only implicated by laws that regulate or restrict *speech or certain types of expressive conduct*.

The difference between speech and conduct is not always easy to discern and the distinction is frequently criticized. *Wollschlaeger*, 848 F.3d at 1307 ("In cases at the margin, it may sometimes be difficult to figure out what constitutes speech protected by the First Amendment."); *see also King*, 767 F.3d at 228 ("[T]he enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation."). Nonetheless, the speech/unprotected conduct dichotomy is a distinction repeatedly employed in First Amendment case law. "While drawing the line between speech and conduct can be difficult, [the Supreme Court's] precedents have long drawn it." *NIFLA*, 138 S. Ct. at 2373 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

Where speech and conduct overlap, courts have recognized that restrictions on non-expressive conduct that only *incidentally* burden speech, do not implicate the First Amendment's protections. *See Sorrell*, 564 U.S. at 567. "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*"). "[I]t has never been deemed an abridgement of speech or press to make a course of conduct illegal merely because the conduct was *in part* initiated, evidenced or carried out by means of language." *Id.* at 62 (emphasis added) (quoting *Giboney*, 336 U.S. at 502).

In the space between speech and conduct, the Supreme Court also has recognized that some conduct is inherently expressive and deserving of *some* degree of First Amendment protection. *See United States v. O'Brien*, 391 U.S. 367 (1968); *see also FAIR*, 547 U.S. at 65. In *O'Brien*, the Court considered the constitutionality of a law banning the destruction of draft cards. *O'Brien*, 391 U.S. at 371. The Court rejected the proposition that *any* conduct could be labelled "speech" and receive First Amendment protection. *Id.* at 376 ("We cannot accept the view that an apparently limitless variety of conduct be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). However, the Court assumed in *O'Brien* that the burning of a draft card *was* sufficiently expressive to implicate the First Amendment, and tested the law against a heightened standard of review. *Id.* The Court concluded that the law was constitutional:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no great than is essential to the furtherance of that interest.

Id. at 377.

Since the speech/conduct issue is germane to all three levels of scrutiny, the analysis is further discussed and incorporated into each section below as appropriate.

In *Pickup v. Brown*, the Ninth Circuit reviewed two district court decisions[5] on preliminary injunction motions in cases very similar to this case. 740 F.3d 1208, 1221 (9th Cir. 2014). The *Pickup* court found that California's ban on SOCE regulated conduct, and was

[5] The district courts' decisions in *Pickup* came to opposite conclusions – one granted a preliminary injunction of a similar ban on licensed medical providers performing SOCE on minor clients, and one denied the preliminary injunction. *See id.* The district court opinions were issued within one day of each other. *Compare Welch*, 907 F. Supp. 2d 1102 (issued December 3, 2012) *with Pickup*, 42 F. Supp. 3d 1347 (issued December 4, 2012).

therefore subject to rational basis review. If subject to rational basis review, Plaintiffs must demonstrate that the ordinances do not "bear[] any rational relationship to a legitimate [government] interest." *Id.* at 1231. As a result, the court held that the ban was a constitutionally valid regulation of "professional conduct." *Id.* at 1225–1231 ("The statute does not restrain Plaintiffs from imparting information or disseminating opinions; the regulated activities are therapeutic, not symbolic. And an act that 'symbolizes nothing,' even if employing language, is not 'an act of communication' that transforms conduct into First Amendment speech."). "[T]he key component of psychoanalysis was the *treatment* of emotional suffering and depression, *not* speech." *Id.* at 1226 (emphasis original) (citation omitted). "[A]ny effect [the law] may have on free speech interests is merely incidental, [so the law] is subject to only rational basis review." *Id.* at 1231. Thus, the ban "survives the constitutional challenges presented here." *Id.* at 1236.

Defendants urge the Court to adopt the Ninth Circuit's reasoning and conclude that the ordinances regulate conduct, or only incidentally burden speech. *See* DE 83, 2; DE 85, 5–6. Defendants' theory is appealing in its simplicity and its consistency with common conceptions of talk therapy as a form of mental health care.

This outcome, however, is stymied by the Eleventh Circuit's analysis in *Wollschlaeger*, 848 F.3d 1293, 1311 (11th Cir. 2017). There, Floridian doctors challenged provisions of Florida's Firearms Owners' Privacy Act (FOPA), which among other restrictions, prohibited doctors from inquiring into their patients' firearm ownership or from recording knowledge of patients' firearm ownership in patients' medical records. *Id.* at 1300–01. Upon rehearing of the case,[6] the *en banc* court found that the "record-keeping and inquiry provisions expressly limit the

[6] The case was reheard *en banc*, after the divided panel issued three separate opinions, "each using a different First Amendment standard of review" when the case was first heard. *Id.*

ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms." *Id.* at 1301. Therefore, FOPA "restrict[ed] their ability to communicate and/or convey a message." *Id.* The Eleventh Circuit determined that the First Amendment was implicated, but did not determine whether strict scrutiny or intermediate scrutiny applied. *Id.* at 1308. Despite not answering the question regarding the applicable test, the court was clear that "we do not think it is appropriate to subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review."[7] *Id.* at 1311. "[S]peech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 1307 (quoting *King*, 767 F.3d at 229).

The ordinances in this case regulate therapies.[8] But as applied to the Plaintiffs in this case, the ordinances impact their speech to patients because Plaintiffs Otto and Hamilton's therapeutic practices are entirely speech-based. "Speech is the *only* tool [they] use in their counseling with minors seeking to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity. The *only* thing that happens in their counseling sessions is speech." DE 1, ¶ 74 (emphasis added). The Plaintiffs' treatment of their patients is not just carried out *in part* through speech: the treatment provided by Drs. Otto and Hamilton *is entirely* speech. "Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation." *Wollschlaeger*, 848 F.3d at 1308. The Court concludes that the ordinances, as applied to Plaintiffs, likely cannot be construed as regulating conduct only or as mere incidental burdens on speech in light of

[7] The Eleventh Circuit, however, found *Pickup* "distinguishable on its facts." 848 F.3d at 1309.
[8] Therapies may include aversive practices such as "inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts." DE 1-6, APA Task Force Report 31.

Wollschlaeger. Therefore, the ordinances are not likely to be subject to rational basis review, and must be reviewed under intermediate or strict scrutiny.

2. Content Based v. Content Neutral Regulations: Application of Strict Scrutiny

Assuming that the ordinances regulate protected speech, the Court must next determine whether the ordinances are content-based or content-neutral. "[C]ontent-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling government interest." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *see also Wollschlaeger*, 848 F.3d at 1308 ("Content-based restrictions on speech normally trigger strict scrutiny.") (collecting cases). In *Reed*, the plaintiffs challenged a municipal sign code, which regulated temporary directional signs differently from other kinds of signs. 135 S. Ct. 2218, 2227 (2015). The plaintiffs, members of a church group without a physical building, challenged the sign code because it interfered with their ability to post signs directing their parishioners to their weekly worship services. *Id.* at 2226. The Supreme Court subjected the sign code to strict scrutiny, because the sign code on its face regulated on the basis of content, and found that it failed to survive review. *Id.* at 2231. In contrast, intermediate scrutiny is applied to content-neutral regulations: a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010).

If the ordinances are content-based, the Court also must consider whether the ordinances are viewpoint discriminatory, and therefore, unconstitutional. DE 8, 3; Hr'g. Tr. 26–29. "In the

ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). Viewpoint discrimination is a subset of content discrimination. *Rosenberger v. Rector*, 515 U.S. 819, 828–29 (1995). A viewpoint-based law goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express." *McKay v. Federspiel*, No. 14-CV-10252, 2014 WL 7013574, at *10 (E.D. Mich. Dec. 11, 2014), *aff'd*, 823 F.3d 862 (6th Cir. 2016) (citations omitted). Viewpoint discrimination occurs when the government favors "one speaker over another." *Rosenberger*, 515 U.S. at 828. Viewpoint discrimination also occurs when speech is prohibited "because of its message." *Id.* Thus, the government may not target "particular views taken by speakers on a subject." *Id.* at 829. But, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, *no significant danger of viewpoint discrimination exists*." *R.A.V. v. City of St. Paul*¸ 505 U.S. 377, 388 (1992) (emphasis added). The Court analyzes viewpoint discrimination as applied to the facts of this case separately in Section VI.E *infra*.

"Deciding whether a particular regulation is content-based or content-neutral is not always a simple task." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994). "Content based laws [are] those that target speech based on its communicative content." *Reed*, 135 S. Ct. at 2226. A regulation is content based "if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System*, 512 U.S. at 643. A law "would

be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation [of the law] has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014).

Reed would seem to compel the conclusion that if the ordinances are content-based, they are subject to strict scrutiny. The ordinances identify certain speech–speech aimed at changing minor patients' sexual orientation–for prohibition because the speech constitutes conversion therapy. The ordinances target *what* Plaintiffs say to their minor patients.

3. Content-Based Regulations Subject to less than Strict Scrutiny

Beyond the content-based/content-neutral dichotomy, there are several lines of cases that exempt content-based laws from automatically being considered under strict scrutiny. "[C]ontent-based restrictions on speech have been permitted, as a general matter, [but] only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012). It does not appear that these traditional exemptions have been upset by *Reed*. *Cf. Flanigan's Enterprises, Inc. of G.A. v. City of Sandy Springs*, 703 F. App'x 929, 935 (11th Cir. 2017).

One set of categories of content-based laws that are not subject to strict scrutiny include "inciting imminent lawless action, . . . obscenity, . . . defamation, . . . speech integral to criminal conduct, . . . so-called 'fighting words,' . . . fraud, . . . child pornography, . . . true threats, . . . and speech presenting some grave and imminent threat [that] the government has the power to prevent." *Alvarez*, 567 U.S. 709, 717 (citing case law for each category of speech). "From 1791 to the present, . . . our society, like other free but civilized societies, has permitted restriction on the content of speech in a few limited areas, which are 'of such slight social value as a step to

truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V.*, 505 U.S. at 382 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). *Reed* has not eliminated these traditional categories, which are exempt from strict scrutiny. *Cf. Flanigan's Enterprises*, 703 F. App'x at 935. The ordinances at issue in this case do not fall within these limited areas in which restrictions on the content of speech has been historically recognized.

Another category of content-based speech, "commercial speech," also is subject to heightened review, and not strict scrutiny. *See Sorrell*, 564 U.S. at 571–72. There is a "commonsense distinction" between "speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–56 (1978)). "In commercial speech cases, then, a four-part analysis has developed" that is less exacting than a strict scrutiny analysis. *See Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. "Under a commercial speech inquiry, it is the State's burden to . . . show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 571–72.

The ordinances in this case may not fit neatly into any of the categories outlined above. However, they demonstrate that a strict First Amendment rule will not always work for all cases.

4. The Speech of Licensed Providers

Against this backdrop of First Amendment case law, the Court must also consider how the First Amendment applies to doctors in treating their patients. Talk-based conversion therapy, as both a treatment to be provided and an utterance to be said, cannot easily be analyzed using

case law decided in the context of public hearings, signage regulations, and school-based activities, yet so much of traditional First Amendment case law is decided in those contexts. As a result, the Court must pay close attention to cases that bear directly on the question of how provider speech can be regulated.

The speech of medical providers is routinely limited through prescription drug laws, medical malpractice lawsuits, accreditation requirements, and other means. As discussed below, case law demonstrates a simultaneous judicial commitment to protecting the conversation between doctors and their patients, and a recognition of the government's ability to regulate the practice of medicine and to protect patients from harmful practices. Quite simply, "[t]here is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).

Casey v. Planned Parenthood considered the constitutionality of certain disclosures about pregnancy and abortion that Pennsylvania required its doctors to make to their patients prior to performing an abortion. 505 U.S. 833 (1992). The majority of the joint opinion addresses whether the disclosures violate the mother's constitutional rights. *See id.* However, the opinion also briefly addressed whether the doctor's right to free speech was implicated by the disclosure requirements. *See id.* at 884. The joint opinion concluded that "the physician's First Amendment rights" were only "implicated . . . as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* Although some of the disclosures required by the law in *Casey* were part of obtaining informed consent, some of the disclosures were not. *See NIFLA*,

138 S. Ct. 2361, Tr. 23:25–24:2 ("But there were definitely requirements in *Casey* that don't have much to do with informed consent.") (Kagan, J.).

In *NIFLA*, the Supreme Court considered a challenge to California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (the "FACT Act"), which, among other directives, required licensed clinics to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call." 138 S. Ct. 2361, 2368. The Court *did not determine* what level of scrutiny should be applied to the FACT Act, but found that the notification requirement would not survive even intermediate scrutiny.[9] *Id.* at 2375. *NIFLA* found that California's FACT Act violated the First Amendment in compelling certain disclosures about abortion to patients, but the FACT Act is distinguishable from the ordinances at issue here. There, the doctors were compelled to speak, despite the fact that the required notice "is not an informed-consent requirement or . . . tied to a procedure at all." *Id.* at 2373.

In *Wollschlaeger*, the Eleventh Circuit declined to say whether intermediate or strict scrutiny would be the appropriate standard of review. 848 F.3d 1293, 1308 (11th Cir. 2017). Importantly, the court there was concerned that Florida's FOPA impacted doctors' ability to "speak frankly and openly to patients," because FOPA prohibited the *discussion* of firearm ownership with patients. *Id.* at 1313 (internal quotations omitted). In *Conant v. Walters*, the Ninth Circuit upheld a permanent injunction against a government policy of investigating doctors who *recommended* marijuana for medical use to their patients. 309 F.3d 629 (9th Cir. 2002). There, the court found the policy restricting doctors' recommendations to "strike at core First

[9] The Court remanded the case with the instruction that the Plaintiff-doctors would be "likely to succeed on the merits of their claim that the FACT Act violates the First Amendment." *Id.* at 2378.

Amendment interests of doctors and patients" because communication is an "integral component of the practice of medicine." *Id.* at 636.

Furthermore, the Third Circuit recognized professional speech as a category of speech subject to intermediate scrutiny. In *King*, the Third Circuit considered New Jersey's ban on SOCE performed on minors and reviewed the district court's order on summary judgment, which was entered against the plaintiff-doctors who challenged the statewide SOCE ban. *See* 767 F.3d 216 (3rd Cir. 2014); *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013) The *King* court disagreed with the district court's analysis (which had followed *Pickup's* lead in applying rational basis review), and rejected the proposition that the ban should only be subject to rational basis review. *See King*, 767 F.3d at 246. Instead, the court found that "intermediate scrutiny is the applicable standard of review in this case" and that a conversion therapy ban on minors is a "permissible prohibition of professional speech." *See id.* [10]

Plaintiffs insist that *NIFLA* abrogated the "professional speech" standard that the Third Circuit employed, 138 S. Ct. 2361 (2018). There, the Court observed that its "precedents do not recognize such a tradition for a category called 'professional speech'" and thus appeared to reject the Third Circuit's analysis in *King*. 138 S. Ct. 2361, 2372 (2018) (collecting cases).[11] Even though the Court rejected professional speech as a recognized exceptional category, it acknowledged that "under [Supreme Court] precedents, States may regulate professional

[10] The District of New Jersey considered New Jersey's SOCE ban a second time in *Doe v. Christie*, 33 F.Supp.3d 518 (2014). This second challenge to the New Jersey law arose out of a case brought by minors who wished to have SOCE provided to them by their therapists and their parents. *Id.* There, the district court relied on its prior opinion in finding that the law did not violate the Free Speech Clause of the First Amendment and granted the State's motion to dismiss. *Id.* The court also found the plaintiff-children's free exercise claim and the parents' "right to direct the upbringing of children" to be without merit. *Id.* The Third Circuit affirmed in *Doe v. Christie*, 783 F.3d 150 (3rd Cir. 2014).

[11] The *NIFLA* majority, however, did "not foreclose the possibility that some such reason" for "treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2375.

conduct, even though that conduct incidentally involves speech." *Id.* at 2372 (emphasis added) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992) (O'Connor, J.)).

Taken collectively, these cases instruct that this case may fall outside of *Reed*'s onerous edict that all content-based laws must be subject to strict scrutiny. While *NIFLA* disparaged the use of "professional speech" as a separate category of speech, it did not foreclose the possibility that reasons might exist for treating professional speech as a separate category. *See* 138 S. Ct. 2361, 2375 (2018). Although the "First Amendment stands against any 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment,' the Court has acknowledged that perhaps there exist 'some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law." *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (citations omitted). It is not clear that a separate category for professional speech is required to recognize this case's unique features, given the Supreme Court's recognition in *Casey* that regulations of doctors' speech that are incidental to a treatment (or in this case, effectuating a treatment) do not offend the First Amendment.

The ordinances here are much closer to the regulation at issue in *Casey* than the regulations in *Wollschlaeger*, *Conant*, and *NIFLA*. The speech not only is directly related to the treatment, it *is the manner of delivering* the treatment. Plaintiffs are essentially writing a prescription for a treatment that will be carried out verbally. In contrast to *Wollschlaeger*, *Conant*, and *NIFLA*, the ordinances do *not* prohibit a dialogue between patient and provider. *See Wollschlaeger*, 848 F.3d at 1309 (observing that the SOCE ban in *Pickup* "did not restrict what

the practitioner could say or recommend to a patient or client"). The regulated treatment is both speech and conduct – directed at minors – administered by a licensed medical professional, as part of "the practice of medicine," as in *Casey*.

Accordingly, applying intermediate scrutiny to medical treatments that are effectuated through speech would strike the appropriate balance between recognizing that doctors maintain some freedom of speech within their offices, and acknowledging that *treatments* may be subject to significant regulation under the government's police powers. The First Amendment is of paramount importance to our democracy, but, as quoted above, "the freedom of speech . . . does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language." *Gitlow v. New York*, 268 U.S. 652, 667 (1925) (collecting cases).

5. First Principles of the First Amendment

Furthermore, this case demonstrates why an unbending, categorical approach to the First Amendment proves unwieldy to the point of unworkable. In fact, the exemptions to the automatic "trigger" of strict scrutiny illustrate a recognition that an ironclad, categorical approach is untenable in applying the First Amendment to seemingly endless permutations and circumstances. "[C]ategories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny' would permit." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring); *see also Reed*, 135 S. Ct. at 2238 (Kagan, J., concurring); *Williams Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (Breyer, J.,

concurring) ("I view this Court's doctrine referring to tiers of scrutiny as guidelines *informing* our approach to the case at hand, not tests to be mechanically applied.") (citations omitted) (emphasis added); *Wollschlaeger*, 848 F.3d at 1334 ("Rather than relying on strict categorical definitions as automatic triggers for particular levels of constitutional scrutiny, we should instead embrace an approach focused on the values underlying the jurisprudential significance of those categories.") (Tjoflat, J., concurring). One way to avoid the pitfalls of a strictly categorical approach to the First Amendment is to glean the common principles from the relevant cases and apply them in a coherent manner to this set of facts.

Applying intermediate scrutiny to this case is entirely consistent with the historic understandings of the First Amendment and its purpose. The First Amendment's "purpose [is] 'to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)). "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943)). Indeed, "[t]he best test of truth is the power of thought to get itself accepted in the competition of the market." *Id.* at 2375 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). Justice Thurgood Marshall

observed that "[t]he First Amendment services not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression." *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring). It is a "guiding First Amendment principle" that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

This case presents facts in which speech is not always expressive, and thus warrants less scrutiny. *Cf. O'Brien*, 391 U.S. 367 (1968). Plaintiffs' words serve a function; their words constitute an *act* of therapy with their minor clients, which makes Plaintiffs' speech different from the protected dialogues in *Wollschlaeger* and *NIFLA*, and from highly protected, political speech in the metaphoric or literal "public square."

The ordinances do not limit or change in any way advocacy for SOCE. Plaintiffs retain their right and prerogative to seek greater acceptance of SOCE, to lobby Defendants to repeal the ordinances, and to lobby the State of Florida to explicitly preempt the ordinances. The public marketplace of ideas is not limited in any way. What *is* limited, is the therapy (delivered through speech and/or conduct) by a licensed practitioner to his or her minor patient, within the confines of a therapeutic relationship. In the context of the relationship between a minor and his or her therapist, there is *no* competitive marketplace of ideas to infringe upon. Given the multitude of avenues of expression available to Plaintiffs, intermediate or heightened level of review is consistent with the justifications for and principles of the First Amendment.

6. Conclusions Regarding the Appropriate Standard of Review

The Court concludes that it is unclear what standard of review should apply to this case. It seems likely that the ordinances are subject to more than rational basis review, but beyond that determination, it is unclear whether intermediate or strict scrutiny should apply. *Reed* suggests that strict scrutiny is appropriate, but case law specifically addressing the regulation of licensed providers indicates that a lower standard of review would be appropriate. As such, intermediate review may be the correct standard to apply, to acknowledge that licensed providers are not completely stripped of their freedom of expression in their offices and exam rooms, but governments can readily regulate treatments provided by licensed providers.

In the following two sections, the Court evaluates the ordinances using the principles found in all three levels of review.

C. The Governments' Interest in the Ordinances

If the ordinances are subject to rational basis review, it is the Plaintiffs' burden to show that there was no legitimate government interest in passing the ordinances. *See Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014). If the ordinances are subject to intermediate scrutiny, it is Defendants' burden to show that they had a "substantial" interest in passing the ordinances. *See Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293, 1312 (11th Cir. 2017). If the ordinances are subject to strict scrutiny, it is Defendants' burden to show they had a "compelling" interest in passing the ordinances. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015).

In this case, both Defendants assert a "compelling interest in protecting the physical and psychological well-being of minors . . . and in protecting its minors against exposure to serious harms caused by sexual orientation and gender identity change efforts" within the body of the

ordinances. DE 1-4; DE 1-5. This Court finds these interests are legitimate, substantial, and compelling. *See Sable Commc'ns of Cal., In. v. FCC*, 492 U.S. 115, 126 (the state has a "compelling interest in protecting the physical and psychological well-being of minors"); *New York v. Ferber*, 458 U.S. 747, 756–57 ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (citations omitted).

In concluding that SOCE is harmful and should be prevented, the Defendants considered multiple publications by major research and professional organizations. The following are examples of the conclusions of studies and position papers regarding the harms of conversion therapy (including therapy relating to both same-sex attractions and gender identity on both minors and adults), which Defendants relied upon in enacting the ordinances:

- According to the American Academy of Pediatrics, "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." DE 1-4, 2; DE 1-5, 9; DE 128-2, 633; DE 121-12, 633.
- In 1998, the American Psychiatric Association "published its opposition to any psychiatric treatment, including reparative or conversion therapy." DE 1-4, 3; DE 1-5, 9. "The potential risks of 'reparative therapy' are great and include depression, anxiety, and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient." DE 128-3; DE 121-13.
- The American Psychological Association ("APA") created a task force in 2009 to

conduct a "systematic review of peer-reviewed journal literature on sexual orientation change efforts (SOCE)." DE 128-4 at v; DE 121-14 at v. The report "concluded that efforts to change sexual orientation are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners and advocates." *Id.* *See also* DE 1-4, 3; DE 1-5, 9.

- The APA Task Force found:

> [S]ome recent studies document that there are people who perceive that they have been harmed though SOCE . . . . Among those studies reporting on the perceptions of harm, the reported negative social and emotional consequences include self-reports of anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family. Loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction.

DE 128-4, 42; DE 121-14, 42.

- The Task Force also found that children may not understand the consequences of SOCE. "Children and adolescents are often unable to anticipate the future consequences of a course of action and are emotionally and financially dependent on adults. Further, they are in the midst of developmental processes in which the ultimate outcome is unknown. Efforts to alter that developmental path may have unanticipated consequences." *Id.* at 77.

- The Task Force concluded:

> [T]here is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE. However, studies from both periods indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including

> depression and suicidal thoughts. The lack of rigorous research on the safety of SOCE represents a serious concern, as do studies that report perceptions of harm.
>
> *Id.* at v.

- The American Psychological Association Council of Representatives has adopted a policy statement against SOCE, which noted that "[d]istress and depression were exacerbated" in individuals subjected to such therapy. DE 121-15; DE 128-5. *See also* DE 1-4, 3; DE 1-5, 9.
- The Pan American Health Organization, an office of the World Health Organization, has stated, "'Reparative' or 'conversion therapies' have no medical indication and represent a severe threat to the health and human rights of the affected persons. They constitute unjustifiable practices that should be denounced and subject to adequate sanctions and penalties." DE 121-19, 2012 Pan American Health Organization Position Statement 2. *See also* DE 1-4, 4; DE 1-5, 10.
- "Psychoanalytic technique does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes," according to the American Psychoanalytic Association in 2012. DE 121-16; DE 128-6. *See also* DE 1-4, 3–4; DE 1-5, 9–10.
- The American Academy of Child & Adolescent Psychiatry's Practice Parameter states, "Just as family rejection is associated with problems such as depression, suicidality, and substance abuse in gay youth, the proposed benefits of treatment to eliminate gender discordance in youth must be carefully weighed against such possible deleterious

effects." DE 121-17, 969; DE 128-7, 969. *See also* DE 1-4, 4; DE 1-5; 10.

- "Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial, or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated," contrary to the claims of SOCE practitioners and advocates. DE 121-17, 968; DE 128-7, 968.
- According to the American School Counselor Association, "School counselors recognize the profound harm intrinsic to therapies alleging to change an individual's sexual orientation or gender identity and advocate to protect LGBTQ students from this harm." DE 121-20, 37; DE 128-9, 37. *See also* DE 1-4, 4; DE 1-5, 10.
- The report prepared by U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration found as follows: "Conversion therapy perpetuates outdated views of gender roles and identities as well as the negative stereotype that being a sexual or gender minority or identifying as LGBTQ is an abnormal aspect of human development. Most importantly, it may put young people at risk of serious harm." DE 121-21; DE 128-10, SAMHSA Report. *See also* DE 1-4, 4–5; DE 1-5, 10–11.

The sources cited in the ordinances all conclude that rigorous research on the safety and effectiveness of seeking to change sexual orientation is deficient,[12] but that there already is substantial evidence and consensus in the medical community that conversion therapy can cause harm, including depression, self-harm, self-hatred, suicidal ideation, and substance abuse. *See*,

[12] Notably, the APA Task Force Report suggests that the lack of rigorous studies is *because* SOCE is harmful. *See e.g.*, DE 1-6, pp. 51, 76 ("High dropout rates[of participants] characterize early treatment studies and may be an indicator that research participants experience these treatments as harmful."); DE 1-6, p. 33 ("Behavior therapists became increasingly concerned that aversive therapies designed as SOCE for homosexuality were inappropriate unethical, and inhumane.").

e.g., DE 1-6, 59 ("Participants in studies . . . described the harm they experienced as (a) decreased self-esteem and authenticity to others; (b) increased self-hatred and negative perceptions of homosexuality; (c) confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, and suicidality; (d) anger at and a sense of betrayal by SOCE providers; (e) an increase in substance abuse and high-risk sexual behaviors; (f) a feeling of being dehumanized and untrue to self; (g) a loss of faith; and (h) a sense of having wasted time and resources. Interpreting SOCE failures as individual failures was also reported in this research, in that individuals blamed themselves for the failure (i.e. weakness, and lack of effort, commitment, faith, or worthiness in God's eyes)."). *See generally* DE 121, Exhibits 12, 13, 15; 17–22; DE 128, Exhibits 2–11. The small number of reports of harm from minors is understood in light of the retrospective reports and delayed perceptions of harm noted by the sources cited by the ordinances. *See* DE 121-21, 2015 SAMHSA Position Statement 33; DE 121-15, 2009 APA Resolution 50.

The County identified six providers within incorporated parts of Palm Beach County who practiced conversion therapy. *See* DE 121-39, 1. At the first reading of the County Ordinance, on December 5, 2017, mental health professionals spoke out against conversion therapy. A resident of Palm Beach County and mental health professional stated:

> As a therapist, the first rule of thumb is to do no harm. Conversion therapy not only violates this ethic, but it implies that a therapist has the ability to change one's sexual orientation. As great as we are, therapists are far and wide [sic] unable to pinpoint the therapeutic intervention which can make an individual change this part of who they are. ...

DE 121-2, 12/05/17 County Commissioners' Meeting Tr. 49–50. A psychologist and certified sex therapist, who practices in the County, also advised the County that:

> Research has actually found that efforts and so-called therapies aimed at changing one's gender, identity, or sexual orientation can result in a number of mental health issues for minors; including shame, guilt, depression, decreased self-esteem, increased self-hatred, ... feelings of anger and betrayal, loss of friends, social withdrawal, problems in sexual and emotional intimacy, high-risk behaviors, confusion, self-harm, substance abuse, and suicidal ideation.

Id. at 11–14.

The County Commission heard from the leader of a local human rights group, who reported receiving complaints about minors who were being subjected to conversion therapy within Palm Beach County. *Id*. at 65; *see also* DE 121-3, 12/19/17 County Commissioners' Meeting Tr. 80–81.

On December 19, 2017, the County heard from a local licensed clinical social worker and a family therapist who had been practicing for more than thirty years. DE121-3, 12/19/17 County Commissioners' Meeting Tr. 15. He advised the County that he had "worked with youth and families [his] entire career" and that "conversion therapy" was "an extremely dangerous and unethical practice that does not work." *Id*. The County also heard testimony from many community members and practitioners who strongly opposed the ban. *See, e.g.*, DE 121-2, 21–22 (community member explaining that voluntary SOCE worked for him); DE 121-2, 34–36 (licensed mental health counselor urging the Board of Commissioners to oppose the ordinance because "if a minor, an adolescent, wants to line their life up with a belief, a core heart belief that they want a heterosexual life and marriage and wants help," counselors should be allowed to provide that help).

At oral argument on the Motion, Plaintiffs challenged the quality of the above-cited authorities, describing them as "no evidence at all." Hr'g. Tr. 48:9–13. The Court disagrees. Far from anecdotal remarks that constitute mere conjecture, the authorities relied upon by

Defendants in adopting the ordinances are overwhelmingly the official position statements of major medical and mental health organizations. While their findings and views may differ as to degree, they present a consistent position that conversion therapy is harmful or potentially harmful to all people, and especially to minors. Defendants could properly find that the research about the dangers of conversion therapy, particularly for minors, was "overwhelming." DE 128-1, 11. *But, cf. Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293, 1316 (11th Cir. 2017) ("There is no claim, much less any evidence, that routine questions to patients about the ownership of firearms are medically inappropriate, ethically problematic, or practically ineffective.").

To the extent Plaintiffs quarrel with the empirical nature of the cited position papers and studies, courts "have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quotations omitted). "Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject." *Id.* "We do not, however, require that 'empirical data come . . . accompanied by a surfeit of background information . . . .'" *Id.*; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) (noting certain recognized harms will necessarily be lacking empirical support); *Collins v. Texas*, 223 U.S. 288, 297–98 (1912) (recognizing the "right of the State to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"); *King*, 767 F.3d at 238 (recognizing that the same studies and position papers relied upon by

Defendants showed "substantial" evidence of the serious health risks accompanying conversion therapy).

Moreover, the Defendants need not wait for a minor to publicly confess that the minor had agreed to try to change his or her sexual orientation through therapy only to experience self-hatred and suicidal ideation after the therapy failed. *See King*, 767 F.3d at 239 (3d Cir. 2014) ("[A] state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm."). Given the stakes, legislative bodies do not need to wait for further evidence of the negative and, in some cases, fatal consequences of SOCE before acting to protect their community's minors. The APA Task Force, in its 2009 Report, explained that scientifically rigorous studies of SOCE had dropped off precipitously when homosexuality was delisted as a "disorder" in the DSM (Diagnostic and Statistical Manual of Mental Disorders) and practitioners were made aware of the harms of SOCE. *See* DE 1-6, p. 33 ("Following the removal of homosexuality from the DSM, the publication of studies of SOCE decreased dramatically, and nonaffirming approaches to psychotherapy came under increased scrutiny."). The Supreme Court made a similar observation when considering a change in FCC rules on indecency in broadcasts: "there are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts, . . . and others are shielded from all indecency." *Fox Television Stations*, 556 U.S. at 519. Here too, Plaintiffs cannot demand a multiyear controlled study in which some minors, even those who would voluntarily seek SOCE, are subjected to SOCE and some are not.

Plaintiffs also argue that Defendants' failure to outright ban all SOCE or conversations about SOCE vitiates Defendants' interest in preventing the identified harm from SOCE. However, the limits of the SOCE ban, for instance to apply only to licensed professionals, does not defeat the compelling interest here. "We will not punish [a government] for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pre-textual motive." *Williams Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015).

Having considered Defendants' evidence, and Plaintiffs' objection to this body of publications, the Court concludes that Defendants have a legitimate, compelling interest in protecting minors in their communities from the harms of SOCE. This compelling interest satisfies Defendants' burden under all levels and types of scrutiny.

D. The Relationship between the Ordinances and the Governments' Interest

All levels of judicial review require a relationship between the government interest and the ordinances, and an evaluation of the closeness of that relationship. If the ordinances are subject to rational basis review, it is Plaintiffs' burden to show that there is no "rational relationship" between the ordinances and the governments' legitimate interest. *See Pickup*, 740 F.3d at 1231. If the ordinances are subject to intermediate scrutiny, it is Defendants' burden to show that the ordinances "directly advance" and are "drawn" to achieve Defendants' substantial interest. *Wollschlaeger*, 848 F.3d at 1312. Defendants must demonstrate that there is "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *King v. Gov. of N.J.*, 767 F.3d 216, 239 (3rd Cir. 2014) (quoting *Board of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480

(1989)). If the ordinances are subject to strict scrutiny, it is Defendants' burden to show the ordinances are "narrowly tailored" to satisfy the compelling government interest. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015). Furthermore, the ordinances must be "the least restrictive means or the least intrusive means of serving the government's interest." *See McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) (internal quotes omitted).

The Court first evaluates the scope of the ordinances.

1. *The Scope of the Ordinances: Application to Minor Clients Only*

The ordinances are drafted to prohibit only the practice of, as opposed to any discussion or recommendation of, conversion therapy by licensed professionals on minors, which is condemned by numerous professional organizations as contraindicated, harmful, and ineffective, because minors' "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."[13]

2. *The Scope of the Ordinances: General Speech vs. the Performance of SOCE*

The ordinances were drafted in such a way that Plaintiffs are not hindered in their expression of their views about SOCE, their advocacy of SOCE, and even their discussions with minor clients about SOCE. *See* DE 1-4; DE 1-5. As mentioned *supra*, "There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011); *see also Wollschlaeger*, 848 F.3d at 1335 (Tjoflat, J., concurring). Plaintiffs do not deny that they continue to publicly advocate for SOCE. *See, e.g.*, DE 77-1, Hamilton Dep. 19:12–17 ("I speak about it [SOCE] all the time because I'm so appalled that the county has

[13] *See Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990); *see also* DE 1-6, 86 ("Children and adolescents are often unable to anticipate the future consequences of a course of action and are emotionally and financially dependent on adults.").

taken away our freedom of speech in the therapy office. So I talk about it with my friends, my family. Yes I talk about it a lot on a personal . . .”). Plaintiffs also may discuss the benefits of SOCE with their minor clients and their parents. *See* DE 1-4; DE 1-5.

The Court next addresses whether the Defendants considered alternative means to the ordinances.

3. Alternative Means

Defendants concluded that their interest in preventing harm to minors was not adequately protected by existing regulations. Plaintiffs argue the ordinances are not narrowly tailored to the government interests. Plaintiffs rely heavily on *McCullen v. Coakley*, in which the Supreme Court considered the constitutionality of a thirty-five foot buffer zone around entrances to abortion providers in Massachusetts, 134 S. Ct. 2518 (2014). Hr’g. Tr. 77–78. There, the Court struck down the buffer zone law after finding the law was not narrowly tailored. *McCullen*, 134 S. Ct. 2518, 2534. Massachusetts had not seriously considered “less intrusive tools readily available to it” and had not “considered different methods that other jurisdictions have found effective.” *Id.* at 2539.

As in *McCullen*, Defendants arguably could have used other laws to prevent harm to minors from SOCE. When asked, the Florida Department of Health had no records regarding complaints against medical providers regarding SOCE. *See* DE 1-9. The lack of complaints to the Florida Department of Health, however, is not dispositive of whether the Defendants could have taken less restrictive actions, such as engaging in a publicity campaign - urging minors who feel they have been harmed to make a formal complaint about their providers - or passing a

resolution condemning SOCE and encouraging concerned citizens to come forward with their complaints.[14]

The lack of SOCE-based complaints to the State could instead lead to the conclusion that existing regulations, such as the providers' codes of ethics and child abuse laws, were not sufficient to prevent this harm. Indeed, Plaintiffs have not interpreted the blanket and general prohibitions against discrimination and "harming minors" to prohibit them from exposing minors to the risk of conversion therapy. *See* DE 1, ¶¶ 132–36, 149–57 (describing Plaintiffs' performance of SOCE on minors prior to the ordinances' enactment); DE 121-7, Otto Dep. 59:19–25 ("Q: How many clients have you had where the issue to be addressed is the minor's same-sex sexual attractions? A: I've dealt with four."). Nor has the requirement that Plaintiffs "meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance" caused Plaintiffs to heed the judgments of prevailing professional organizations that conclude that conversion therapy is contraindicated. *See id.* Thus, no other regulation, according to the Defendants, has effectively prevented the harms associated with conversion therapy. And, Defendants believed they needed to provide a specific mechanism for minors exposed to SOCE to come forward to make a complaint. *See* DE 121-3, 86:20–87:13 ("[Commissioner Berger:] [M]y strong feeling is that there's a young man or a young lady who wants to come forward with a complaint, . . . So I support the ordinance . . . completely.").

Furthermore, the communities and states that have addressed the problem of SOCE have adopted nearly identical ordinances and laws to the ordinances here. Thus, this case is distinguishable on its facts from *McCullen*, where the Commonwealth of Massachusetts had not

[14] Notably, Defendants' code enforcement officers did make recommendations to pass a resolution as opposed to an ordinance. *See* DE 126-26.

considered methods that other jurisdictions had found to be effective. 134 S. Ct. at 2539. Defendants passed bans on SOCE that mirror similar bans enacted or passed by fifteen state legislatures and dozens of local governments.[15] The vast majority of these bans prohibit medical providers from performing SOCE on minors.[16]

4. Alternative Means: Informed Consent or Voluntary SOCE

Plaintiffs also argue that informed consent protocols could have protected minors from coerced SOCE. However, Defendants maintain that informed consent does not adequately prevent the harms associated with conversion therapy. *See King v. Gov. of N.J.*, 767 F.3d 216, 240 (2014). First, it is questionable whether minors *could* consent to such a treatment. *See* DE

[15] For statewide bans on conversion therapy performed on minors, *see*, Cal. Bus. & Prof. Code § 865 (West 2013) ("Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."); Conn. Gen. Stat. Ann. § 19a-907a (West 2017) ("No health care provider shall engage in conversion therapy."); 24 Del. Admin. Code § 3514 (2018); D.C. Code § 7-1231.14a (2015) ("A provider shall not engage in sexual orientation change efforts with a consumer who is a minor."); Haw. Rev. Stat. § 453J-1; 405 Ill. Comp. Stat. An.. 48/1 (West 2016) ("Youth Mental Health Protection Act"); Md. Code Ann., Health Occ. § 1-212.1 (West 2018) ("A mental health or child care practitioner may not engage in conversion therapy with an individual who is a minor."); Nev. Rev. Stat. § 629,600 ("Conversion Therapy Prohibited. A psychotherapist shall not provide any conversion therapy to a person who is under 18 years of age regardless of the willingness of the person or his or her parent or legal guardian to authorize such therapy."); N.J. Stat. Ann. § 45:1-55 (2013) ("Prohibition upon imposing sexual orientation change efforts upon a person under 18 years of age"); N.H. Rev. Stat. § 332-L:2; N.M. Stat. Ann. § 61-1-3.3 (West 2017) (A person who is licensed to provide professional counseling . . . shall not engage in conversion therapy with a person under 18 years of age."); N.Y. Educ. Law §6531-a (2019) ("It shall be professional misconduct for a mental health professional to engage in sexual orientation change efforts upon any patient under the age of eighteen years."); Or. Reg. Stat. § 675.850 (2015) ("Practice of conversion therapy on recipients under 18 years of age prohibited"); 23 R.I. Gen. Laws Ann. § 23-94-3 (West, 2017) (Conversion therapy efforts for minors prohibited"); VT. Stat. Ann. Tit. 18, § 8352 (West 2016) ("A mental health care provider shall not use conversion therapy with a client younger than 18 years of age."); Wash. Rev. Code Ann. § 18.130.180 (West, 2018) (defining unprofessional conduct as "[p]erforming conversion therapy on a patient under age eighteen.").

For examples of local bans on conversion therapy performed on minors, *see, e.g.*, Milwaukee, WI Code of Ordinances 75-19 ("It is unlawful for any person to practice conversion therapy with anyone under 18 years of age."); Columbus, OH Code of Ordinances § 2331.10 ("No mental health professional shall knowingly engage, within the geographic boundaries of the City of Columbus, in sexual orientation or gender identity change efforts with a minor, without regard to whether the mental health professional is compensated or receives any form of remuneration for his or her services."); Pittsburg, PA Code of Ordinances, § 628.02 ("No mental health professional shall engage, within the geographic boundaries of the City of Pittsburgh, in sexual orientation or gender identity or expression conversion efforts with a minor without regard to whether the mental health professional is compensated or receives any form of remuneration for his or her services.").

[16] In fact, the County relied on other jurisdictions' existing language to draft their ordinance. *See* DE 121-9, Hvizd Dep. 249:17–23 ("This is an amalgamation of several different ordinances, including West Palm Beach . . . .").

126-39, 3 ("[P]ursuant to Florida law, Minors are incapable of consenting to SOCE counseling."), DE121-10, Ginsburg Dep. 25:19–26:8, 28:10–19 ("I believe [the question] was why – why couldn't they consent. . . . And I think that – you know, that speaks to minors not being fully cognitively and emotionally developed. Their prefrontal cortex, their frontal lobes are – are not fully developed. And so they're not able to engage in consequential thinking and executive functions that would be needed to make informed decisions."); *see also King*, 767 F.3d at 240 ("Minors constitute an especially vulnerable population, and may feel pressured to receive SOCE counseling by their families and their communities despite their fear of being harmed.") (quotations omitted).

Indeed, Defendants have presented evidence that the alleged desires of some minors to eliminate same sex attractions may be generated by the minor's parents. DE 1-6, 81 ("There is no published research suggesting that children are distressed about their sexual orientation per se. Parental concern or distress about a child's behavior, mental health, and possible sexual orientation plays a central role in referrals for psychotherapy."); *see also* DE 1-6, 55–60, 82 ("The absence of evidence for adolescent sexual orientation distress that results in requests for SOCE and the few studies in the literature on religious adolescents seeking psychotherapy related to sexual orientation suggest that such distress is most likely to occur among adolescents in families for whom a religion that views homosexuality as sinful and undesirable is important.").

In addition, even if minors were legally able to consent, publications "have cautioned against providing interventions that have very limited evidence of effectiveness, run counter to current scientific knowledge, and have the potential for harm, *despite client requests*." DE 1-6,

78 (emphasis added) (quotations omitted). Defendants were entitled to conclude that an informed consent protocol would not adequately protect minors from this harm.

Plaintiffs also criticize the studies relied upon by Defendants, because they argue that the studies do not differentiate between coerced and consented-to SOCE. To the contrary, the studies relied upon by Defendants demonstrate that most of the collected data about SOCE comes from individuals who did voluntarily engage in the practice. DE 1-6, 8 ("[T]he task force concluded that the population that undergoes SOCE tends to have strongly conservative religious views that lead them to seek to change their sexual orientation."); DE 1-6, 13 ("Many religious individuals desired to live their lives in a manner consistent with their values (telic congruence), . . . "); DE 1-6, 25 ("Most of the recent studies on SOCE focus on populations with strong religious beliefs" who seek SOCE) (citing seven separate publications).

5. *Alternative Means: Prohibition of Aversive Therapies Only*

Plaintiffs also argue that Defendants could have passed ordinances that ban aversive therapy, but not talk therapy. To the extent this alternative was raised in public hearings before the County, the County did consider this alternative, and apparently rejected it. *See, e.g.*, DE 121-3, 38. No community members spoke at the City's public hearing. *See* DE 128-17, 3.

The publications relied upon by the Defendants recognize a lack of research on non-aversive SOCE: "We found that nonaversive and recent approaches to SOCE have not been rigorously evaluated." DE 1-6, 52. This may be due to the reluctance of practitioners and research institutions to engage in *any* SOCE practices. Still, Defendants' cited authorities did not limit their recommendations against conversion therapy to only coercive, behavioral, or aversive techniques. *See, e.g.*, DE 128-6, Am. Psychoanalytic Ass'n Position Statement ("Psychoanalytic

technique does not encompass purposeful attempts to 'covert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing internalized attitudes"); DE 128-10, SAMHSA Report 1 ("[C]onversion therapy – efforts to change an individual's sexual orientation, gender identity, or gender expression – is a practice that is not supported by credible evidence and has been disavowed by behavioral experts and associations….Most importantly, it may put young people at risk of serious harm."). Rather, the authorities that the Defendants relied upon for enactment of the ordinances warn against all conversion therapy, including the type of "talk therapy" performed by Plaintiffs on minors.

Requiring Defendants to produce specific evidence that engaging in SOCE through talk therapy is as harmful as aversive techniques would likely be futile when so many professional organizations have declared their opposition to SOCE. *See, e.g.*, DE 1-6, 20, 33.

6. Conclusions Regarding the "Fit" of the Ordinances to the Governments' Interests

If the ordinances are subject to rational review, the ordinances are "rationally related" to their purpose. Under intermediate scrutiny as well, these limitations are sufficient to show that the ordinances were "narrowly drawn."

However, if the ordinances are subject to strict scrutiny, Defendants must also demonstrate that the ordinances are *the least restrictive* means to accomplish their objectives of limiting harmful SOCE therapeutic practices on minors. This is a heavy burden for Defendants: "[I]t is the rare case" in which a government is able to demonstrate "that a speech restriction is narrowly tailored to serve a compelling interest." *Williams Yulee v. Fla. Bar*, 135 S. Ct. 1656,

1665–66 (2015) (internal quotations omitted). It is not clear from the record at this stage that the ordinances are the "least restrictive means" to protect minors from the documented harms of SOCE. Furthermore, there may be slight, but important differences between the Defendants' respective deliberative processes. The County has nearly two hundred pages of public hearing transcripts containing community members' support and opposition to the County Ordinance, including recommendations on limiting the ordinance. *See* DE 121-2; DE 121-3. These public hearing records may demonstrate the County "considered" less restrictive alternatives. The City's ordinance did not encounter such opposition publicly, *see* DE 128-17, and therefore there is no similar record of the City's consideration of alternative means. That being said, the standard articulated in *McCullen* cannot mean that one ordinance fails, because it received *less* public opposition than a nearly identical ordinance, which was vociferously opposed. Regardless, the Court need not probe the depths of the least restrictive means requirement at this stage. For now, it is sufficient to conclude that whether one or both of the ordinances survive the least restrictive means analysis is a close question, and Plaintiffs have not met their burden of demonstrating substantial likelihood of success on this point.

E. Viewpoint Discrimination

Finally, the Court returns to Plaintiffs' argument that the ordinances are viewpoint discriminatory. Although this issue is theoretically dispositive, courts often may not reach this question, because they decide the challenged law fails under a strict scrutiny analysis. *See, e.g.*, *Conant v. Walters*, 309 F.3d 629, 637–39 (9th Cir. 2002).

Plaintiffs argue that the ordinances discriminate against the viewpoint of those "who wish to reduce or eliminate behaviors, identity, or expressions that differ from their biological sex."

DE 8, 4; *see also* Hr'g. Tr. 26–29 ("So, what makes th[is] viewpoint discriminatory is not that it prohibits equally change in either direction, from heterosexual to homosexual, that is not discriminatory; what is discriminatory is the viewpoint that they share is one that *affirms* the current state of affairs and disaffirms or disavows any kind of change, your Honor.") (emphasis added). In addition, Plaintiffs argue that the exclusion of counseling that "provides support and assistance to a person undergoing gender transition" from the definition of conversion therapy demonstrates that the ordinances are viewpoint discriminatory. DE 1-4, 6; DE 1-5, 13; *see* DE 8, 4.

The Court finds that the alleged viewpoint discrimination against those who believe that it is possible to change a person's sexual orientation or attractions is not distinguishable from the subject matter being regulated. The ordinances may be construed to be content-discriminatory, because they may prohibit speech based on the ideas, or the message that it conveys. But, "[w]hen the basis for the content discrimination consists *entirely* of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). To illustrate this point, the Supreme Court explained that obscenity could be regulated for "*its prurience*," but not for including "offensive *political* messages." *Id.* (emphases in original).

The plaintiffs in *R.A.V.* challenged a statute which prohibited displays that would arouse "anger, alarm, or resentment . . . on the basis of race, color, creed, religion or gender." 505 U.S. at 380. The Court explained that the law was both content-based and viewpoint-based, because it chose a side in a debate, when both sides posed a harm to the public: "One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are

for that would insult and provoke violence 'on the basis of religion.'" *Id.* at 391–92. Both signs could cause public unrest, but only one side was prohibited, so the law was viewpoint-discriminatory. "[The government] has no such authority to license one side of a debate to fight freestyle[.]" *Id.* at 391–92.

In this case, Defendants purport that SOCE is regulated because the harm or potential harm is in the treatment itself, not because of the viewpoint or beliefs of the speaker. The ordinances do not regulate Plaintiffs' views about SOCE, homosexuality, or human attraction more generally. The ordinances also do not indicate a preference between heterosexual or homosexual individuals seeking to change their sexual orientation one way or another. *See* DE 1-4; DE 1-5; Hr'g. Tr. 26–29 ("So, what makes the viewpoint discriminatory is *not* that it prohibits equally change in either direction, from heterosexual to homosexual, that is *not* discriminatory.") (emphasis added); *see also* Hr'g. Tr. 119:2–8. The ordinances do regulate the practices of licensed medical providers in trying to change a child's sexual orientation. This *practice* is what is regulated, not any particular viewpoint on the subject. And, the "proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace." *R.A.V.*, 505 U.S. at 385. The rationale of preventing harm to minors by prohibiting a type of therapy could be construed as viewpoint neutral. If the Court concludes that SOCE may be regulated, then the perspective that SOCE is beneficial also may be regulated. To find otherwise would swallow the subdivision of viewpoint-discrimination from content-discrimination.

In addition, the ordinances do not prohibit or affect the expression of Plaintiffs' views regarding the benefits of SOCE, sexual orientation or any issue related to it. The ordinances do

not ban change, or the expression of the viewpoint that change in sexual orientation is possible. The ordinances do ban efforts, through a medical intervention, by a licensed provider, to therapeutically change a minor's sexual orientation. Presented with a minor client seeking to change his or her sexual orientation or gender identity, Plaintiffs may commend and recommend conversion therapy. Plaintiffs cannot *perform* SOCE in Palm Beach County or the City Boca Raton. *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 875 (11th Cir. 2011) (remediation plan that required a student to comply with a universally applicable code of ethics prohibiting her from imposing her religious values on patients, including those regarding homosexuality, was viewpoint neutral).

The Court does not agree that the ordinances are viewpoint-based because they exclude from the definition of "conversion therapy" practices that support a minor who is already undergoing gender transition. *See* DE 126-20, 5; DE 126-27, 6. The "counseling" and "support" that is excluded from the definition of conversion therapy is different in kind from SOCE, and is consistent with the modes of communication still available to Plaintiffs. The exclusion of counseling for persons undergoing gender transition underscores the fact that the ordinances only ban *the practice of SOCE*, but licensed professionals are entitled to provide counseling and support to their minor patients on a wide variety of topics, including the benefits of SOCE and/or coping strategies for patients undergoing gender transition. "The First Amendment does not require States to regulate for problems that do not exist." *McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014) (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion)). Here, Defendants did not identify any problem with therapists providing coping strategies and support to children; they have identified problems with therapists providing SOCE.

Finally, the exclusion of religious leaders, and the focus of the law on licensed providers makes sense in light of doctors' role in society. "It is of course true that 'an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people." *McCullen*, 134 S. Ct. at 2533 (2014). But that does not seem to be the case here. *Cf. id.* As licensed providers, doctors are cloaked with the authority of science and the state. They are expected to be objective providers of care for their patients. While both religious leaders and licensed providers enjoy deep respect from their parishioners and patients, the source of that respect is different – licensed providers enjoy that respect in part because of the approval of their practice by the state. In addition, it is worth noting that the studies relied upon by Defendants are self-reflective studies of the practice of various forms of mental health care provided by licensed providers. The studies are about licensed providers, and intended to give guidance to licensed providers, not religious leaders. Finally, Defendants' failure to prohibit all SOCE from all sources does not vitiate their prerogative to enact legislation to attempt to curtail SOCE from other sources. *Williams Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015) ("We will not punish [a government] for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pre-textual motive.").

For the foregoing reasons, the Court concludes that the ordinances likely are viewpoint neutral, and therefore are not per se unconstitutional.

F. Conclusions on Plaintiffs' Free Speech Claim

For all of the foregoing reasons, the Court declines to announce a standard of review for this case. Based on *Wollschlaeger*, the ordinances likely affect protected speech, and are

therefore subject to a higher level of review than rational basis review. The ordinances also seem to regulate on the basis of their content, which would compel strict scrutiny under *Reed*. However, the Court is unconvinced that strict scrutiny is necessarily the appropriate standard of review, when the ordinances apply to a licensed provider's *treatment* of a minor patient.

The Court finds that if either rational basis review or intermediate review were applied to the ordinances, the ordinances would survive this constitutional challenge. The analysis under strict scrutiny is a closer call, and the Court is unconvinced that Plaintiffs have demonstrated that they are substantially likely to succeed on the merits.

VII. PLAINTIFFS' PRIOR RESTRAINT CLAIM

Plaintiffs next argue that the ordinances are unconstitutional prior restraints on protected speech. DE 8, 22–23. "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis and quotation marks omitted) (stating that temporary restraining orders and permanent injunctions that forbid speech activities are classic examples of prior restraints); *see also Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1223 (11th Cir. 2017) (defining the phrase "prior restraint" as a situation where "the government can deny access to a forum for expression before the expression occurs" and stating that a classic example of a prior restraint is a requirement that a would-be speaker obtain a permit or license before speaking). A prior restraint is not unconstitutional *per se*, but must be accomplished with the following procedural safeguards designed to obviate the dangers of a censorship system: (1) the censor must bear the burden of proving that the expression is unprotected; (2) prompt and final judicial review must be

available; and (3) any restraint prior to judicial review may be imposed only for a specified, brief period and only for the purpose of preserving the *status quo*. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–60 (1975).

A prior restraint on speech is distinguishable from a penalization of past speech. *See Alexander*, 509 U.S. at 553–54 (stating that "our decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments"); *Barrett*, 872 F.3d at 1223 ("Prior restraints contrast with subsequent punishments, which regulate a given type of speech by penalizing the speech only after it occurs." (emphasis and quotation marks omitted)); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("If it can be said that a threat of criminal or civil sanctions after publication chills speech, prior restraint freezes it at least for the time." (quotation marks omitted)). Plaintiffs' argument—that the ordinances are prior restraints because they suppress speech before it occurs—ignores this key distinction. The ordinances do not establish a permit or licensing scheme enabling the government to allow or forbid speech in advance, but rather penalize providers who have practiced conversion therapy. *See* DE 1-4, 8; DE 1-5, 7. Plaintiffs have not demonstrated a substantial likelihood of succeeding on the merits of their claim that the ordinances are prior restraints on speech, so a preliminary injunction shall not issue on this ground. *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016).

VIII. PLAINTIFFS' VAGUENESS CLAIM

Plaintiffs also argue that the ordinances are unconstitutionally vague because "sexual orientation and gender identity are fluid and changing concepts," and, therefore, licensed professionals and officers who would enforce the ordinances are uncertain about what the

ordinances prohibit. DE 8, p. 23-24. A law is impermissibly vague if it (1) fails to provide a person of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited or (2) authorizes or encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The standards for permissible vagueness are particularly strict in the area of free expression, so as to prevent an unnecessary chilling effect on speech. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967).

However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). An ordinance is not unconstitutionally vague if "it is clear what the ordinance as a whole prohibits." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). The language of a law may be flexible and need not be defined with mathematical certainty. *Id.* When a law does not define a term, that term is given its common and ordinary meaning, absent an established technical definition. *Konikov v. Orange Cty.*, 410 F.3d 1317, 1329 (11th Cir. 2005).

Although Plaintiffs are correct that the ordinances do not define the phrases "sexual orientation" and "gender identity," the Court is unconvinced that Plaintiffs will succeed on their claim that the use of those phrases renders the ordinances vague. Both phrases have a common and readily-ascertainable meaning, such that a person of ordinary intelligence would understand the type of therapy that is prohibited. *See, e.g.*, The American Heritage Dictionary of the English Language (5th ed. 2019) (defining "gender identity" as "[a]n individual's self-identification as being male, female, neither gender, or a blend of both genders" and defining "sexual orientation" as "[t]he direction of a person's sexual interest, as toward people of a different sex, toward people of the same sex, or without regard to sex").

In fact, the Supreme Court has used the phrase "sexual orientation" in numerous opinions, with no apparent difficulty in understanding the phrase's meaning. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (considering a cease and desist order precluding a shop from discriminating against potential customers based on sexual orientation); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (concluding that marriage is a fundamental right and liberty, of which same-sex couples may not be deprived). Similarly, the United States Court of Appeals for the Eleventh Circuit has used the phrase "gender identity" in opinions with no apparent difficulty. *See, e.g.*, *Kothmann v. Rosario*, 558 F. App'x 907 (11th Cir. 2014) (concluding that a transgender prisoner pled a plausible Eighth Amendment violation by alleging that a prison denied her requests for hormone treatment); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that discrimination on the basis of gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause).

Consequently, the Court is unconvinced that licensed professionals and officers who would enforce the ordinances would be unclear about what the ordinances prohibit. Plaintiffs have not demonstrated a substantial likelihood of succeeding on the merits of their claim that the ordinances are unconstitutionally vague, so a preliminary injunction shall not issue on this ground. *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016)

IX. PLAINTIFFS' *ULTRA VIRES* CLAIM

In their Motion, Plaintiffs finally contend that that the ordinances are *ultra vires* because "the State has impliedly preempted the field of regulation of mental health professionals" and because "the Ordinances conflict with Florida law." DE 8, 18. On these bases, Plaintiffs maintain that they are entitled to a preliminary injunction. Plaintiffs argue in just three paragraphs that

they are suffering an irreparable injury, and they focus their argument entirely on the irreparable injury they suffer at the loss of their speech. DE 8, 19–20. Plaintiffs have not articulated a separate irreparable injury for the Defendants' alleged overreach into a subject area preempted by the State of Florida. If the County and City have overstepped their legislative mandate, Plaintiffs may have suffered and continue to suffer, during the pendency of this action, an injury insofar as they are unable to engage in a form of treatment that they would otherwise perform for their minor clients. This may result in the loss of current clients who seek SOCE and the loss of future clients who are specifically seeking SOCE-providers. *See* DE 1, ¶¶ 132–36, 149–57.

However difficult it may be to calculate the lost income and professional growth from this injury, this is not the "irreparable" injury required to justify the extraordinary remedy of a preliminary injunction. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974). "A showing of irreparable harm is 'the sine qua non of injunctive relief.'" *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir.1978)). Furthermore, "[a]n injury is 'irreparable' only if it cannot be undone through monetary remedies." *Id.*

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am., 896 F.2d at 1285 (quoting *Sampson*, 415 U.S. at 90); *accord United States v. Jefferson Cty.*, 720 F.2d 1511, 1520 (11th Cir. 1983).

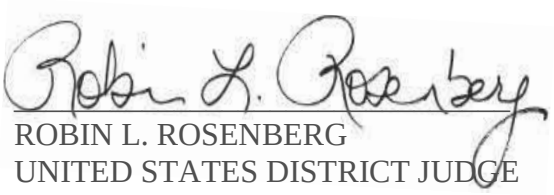
Plaintiffs have not met their burden of demonstrating that they will suffer an *irreparable* injury if the County and City have outstepped their bounds. The Court need not reach the remaining three elements for a preliminary injunction. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). Accordingly, a preliminary injunction shall not issue on Plaintiffs' *ultra vires* claim.

X. CONCLUSIONS

Accordingly, for the all of the reasons stated above, it is hereby **ORDERED AND ADJUDGED**

1. The Renewed Motion for Preliminary Injunction [DE 8] is **DENIED**.
2. The Court will set a status conference in this case in a separate order.

DONE AND ORDERED in Chambers, West Palm Beach, Florida, this 13th day of February, 2019.



ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

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

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, Plaintiffs, v. CITY OF BOCA RATON, FLORIDA, and COUNTY OF PALM BEACH, FLORIDA, Defendants.	)	Civil Action No. 9:18-cv-80771-RLR

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs, ROBERT W. OTTO, Ph.D., LMFT, individually and on behalf of his patients, and JULIE H. HAMILTON, individually and on behalf of her patients, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from this Court's Order Denying Plaintiffs' Motion for Preliminary Injunction, entered on February 13, 2019 (DE 141).

DATED this February 13, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this February 13, 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/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on this April 16, 2019, a copy of the foregoing Appendix, Volumes I-XI, was electronically filed through the Court's ECF system, and that I also provided a copy by e-mail to the following:

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