

NO. 19-10604-A

**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.

**Interlocutory Appeal From the United States District Court
for the Southern District of Florida**

APPELLEE, COUNTY OF PALM BEACH, FLORIDA'S, BRIEF

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

ROBERT W. OTTO, et al. v. CITY OF BOCA RATON, et al.

Case No. 19-10604-A

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Case No. 19-10604-A

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ROBERT W. OTTO, et al. v. CITY OF BOCA RATON, et al.

Case No. 19-10604-A

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No publicly traded company or corporation has an interest in the outcome of this
appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellee, County of Palm Beach, Florida (County), suggests that oral argument is not necessary in this case where the District Court's Order Denying Motion for Preliminary Injunction is amply supported with reference to record evidence, and a correct application of the law to that evidence.

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**STATEMENT REGARDING ADOPTION OF
BRIEFS OF OTHER PARTIES**

The County adopts the Statement of the Case, Standard of Review, Summary of Argument, Argument, and Conclusion portions of the Brief of Co-Appellee, the City of Boca Raton (City). The Ordinances enacted by Appellees are virtually identical in their terms, except for the amount of fine imposed for violation of the Ordinances.

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

The United States District Court for the Southern District of Florida had jurisdiction over the eight-count complaint filed by Drs. Otto and Hamilton (Plaintiffs) alleging Federal and State law claims pursuant to 28 U.S.C. §§ 1331, 1343, and 1367 (2017).

The Southern District denied Plaintiffs' Motion for Preliminary Injunction on February 13, 2019, and Plaintiffs timely filed their Notice of Appeal that same day (App. Vol. XI, DE 141,142, pgs. 76-139).¹ This Court has jurisdiction to review

¹ Appellants' appendix is cited "App." with the corresponding volume number, docket number, and pdf page number. Appellee, The County of Palm Beach, Florida's, appendix is cited "Co. App." followed by the docket number and pdf page

the interlocutory Order Denying Plaintiffs' Motion for Preliminary Injunction pursuant to 28 U.S.C. § 1292(a) (2018).

number. The citation "Co. App." is used to differentiate between the County's supplemental appendix, and the supplemental appendix of co-appellee, The City of Boca Raton.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION BECAUSE PLAINTIFFS FAILED TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS AS TO THEIR FIRST AMENDMENT CHALLENGE TO THE COUNTY ORDINANCE (RESTATED).

II. WHETHER THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION BECAUSE PLAINTIFFS FAILED TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS AS TO THEIR PRIOR RESTRAINT CHALLENGE TO THE COUNTY ORDINANCE (RESTATED).

III. WHETHER THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION BECAUSE PLAINTIFFS FAILED TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS AS TO THEIR VAGUENESS CHALLENGE TO THE COUNTY ORDINANCE (RESTATED).

IV. WHETHER THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION BECAUSE

PLAINTIFFS FAILED TO ESTABLISH IRREPARABLE HARM AS TO THEIR PREEMPTION CHALLENGE TO THE COUNTY ORDINANCE (RESTATED).

STATEMENT OF THE CASE

**COURSE OF PROCEEDINGS AND
DISPOSITION IN THE DISTRICT COURT**

Plaintiffs filed an eight-count complaint in the United States District Court for the Southern District of Florida, alleging, among other claims, that the Defendants' ordinances banning the practice of conversion therapy on minors were violative of the First Amendment (App. Vol. I, DE 1). Plaintiffs moved for a preliminary injunction seeking to temporarily and preliminarily enjoin Palm Beach County and the City of Boca Raton from enforcing their respective ordinances banning the practice of conversion therapy on minors (App. Vol. I, DE 8).

Following a full-day hearing, the District Court entered its sixty-page Order Denying Plaintiffs' Motion for Preliminary Injunction, and Plaintiffs timely filed their notice of appeal from that interlocutory order (App. Vol. XI, DE 141,142).

STATEMENT OF THE FACTS

Plaintiffs' Statement of the Facts omits significant facts before the District Court supporting that Court's Order Denying Plaintiffs' Motion for Preliminary Injunction.

The evidence of record revealed the following facts, as outlined for the District Court in the County's Proposed Findings of Fact and Conclusions of Law Concerning Plaintiffs' Renewed Motion for Preliminary Injunction (Co. App., DE 132).

PALM BEACH COUNTY'S CONVERSION THERAPY BAN ORDINANCE

On December 19, 2017, the County passed Ordinance 2017-046 which banned Providers from engaging in "conversion therapy" with minors, where conversion therapy was defined as "the 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" (App. Vol. II, DE 121-1, pg. 109). "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.” (App. Vol. II, DE 121-1, pg. 109).

The Ordinance does not “prevent mental health providers from speaking to the public about [sexual orientation change efforts] 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.” (App. Vol. II, DE 121-1, pgs. 107-08). Furthermore, the 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. (App. Vol. II, DE 121-1, pg. 108).

SUBSTANTIAL EVIDENCE OF HARMFUL EFFECTS FROM PERFORMING CONVERSION THERAPY ON MINORS

In the “whereas” clauses of the Ordinance, the County summarized the findings of several scientific and professional organizations (App. Vol. II, DE 121-

1, pgs. 105-07). The County reasonably found that the research was “overwhelming” and “demonstrat[ed] that sexual orientation and gender identity change efforts can pose critical health risks to lesbian, gay, bisexual, transgender or questioning persons.” (App. Vol. II, DE121-1, pg. 108).

In 1993, the American Academy of Pediatrics stated, “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.” (Co. App., DE121-12, pg. 237).

The 2009 American Psychological Association (“APA”) task force report noted:

Although the recent studies do not provide valid causal evidence of the efficacy of SOCE or of its harm, some recent studies document that there are people who perceive that they have been harmed through SOCE (Beckstead & Morrow, 2004; Nicolosi et al., 2000; Schaeffer et al., 2000; Schroeder & Shidlo, 2001; Shidlo & Schroeder, 2002; G. Smith et al., 2004), just as other recent studies document that there are people who perceive that they have benefited from it (Beckstead & Morrow, 2004; Nicolosi et al., 2000; Pattison & Pattison, 1980; Schaeffer et al., 2000; Spitzer, 2003). 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. ... Many participants in studies by Beckstead and Morrow (2004) and Shidlo and Schroeder (2002) described experiencing first the positive effects and then experiencing

or acknowledging the negative effects later.

* * *

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 (cf. Lilienfeld, 2007).

(App. Vol. I, DE 85-5, pg. 165).

The APA Council of Representatives adopted, “Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts,” which stated:

Although sound data on the safety of SOCE are extremely limited, some individuals reported being harmed by SOCE. Distress and depression were exacerbated. Belief in the hope of sexual orientation change followed by the failure of the treatment was identified as a significant cause of distress and negative self-image (Beckstead & Morrow, 2004; Shidlo & Schroeder, 2002).

Although there is insufficient evidence to support the use of psychological interventions to change sexual orientation, some individuals modified their sexual orientation identity (i.e., group membership and affiliation), behavior, and values (Nicolosi et al., 2000). They did so in a variety of ways and with varied and unpredictable outcomes, some of which were temporary (Beckstead & Morrow, 2004; Shidlo & Schroeder, 2002). Based on the available data, additional claims about the meaning of those outcomes are scientifically unsupported.

(Co. App. DE121-15, pg. 245).

The Pan American Health Organization denounced conversion therapy:

“‘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.” (Co. App. DE121-19, pg. 253).

The American Psychoanalytic Association also warned against conversion therapy for sexual orientation and gender identity:

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.

(Co. App. DE 121-16, pg. 250).

The American Psychiatric Association echoed these concerns: “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.” (Co. App. DE 121-13, pg. 242).

In 2015, the Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration (“SAMHSA”) issued a report on efforts to change both sexual orientation and gender identity. (App. Vol. II, DE 85-12).

SAMHSA stated:

Lesbian, gay, and bisexual orientations are normal variations of human sexuality and are not mental health disorders; therefore, treatment seeking to change an individual's sexual orientation is not indicated. Thus, behavioral health efforts that attempt to change an individual's sexual orientation are inappropriate. In 2009, the APA Taskforce on Appropriate Therapeutic Responses to Sexual Orientation Change Efforts conducted a thorough review of peer-reviewed literature published on conversion therapy. The APA Taskforce concluded that no methodologically-sound research on adults undergoing conversion therapy has demonstrated its effectiveness in changing sexual orientation. There have been no studies on the effects of conversion therapy on children, though adults' retrospective accounts of their experiences of conversion therapy during childhood or adolescence suggests that many were harmed (American Psychological Association, 2009). No new studies have been published that would change the conclusions reached in the APA Taskforce's 2009 review.

Given the lack of evidence of efficacy and the potential risk of serious harm, every major medical, psychiatric, psychological, and professional mental health organization, including the American Psychological Association, the American Psychiatric Association, the National Association of Social Work, the Pan American Health Organization, and the American Academy of Child and Adolescent Psychiatry, has taken measures to end conversion therapy efforts to change sexual orientation.

(App. Vol. II, DE 85-12, pgs. 37-38).

Regarding efforts to change gender identity, SAMHSA reported:

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 professionals to have a prescriptive goal related to gender identity, gender expression, or sexual orientation for the ultimate developmental outcome of a 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.

(App. Vol. II, DE 85-12, pg. 26).

In 2012, the American Academy of Child and Adolescent Psychiatry (“AACAP”) discussed the harm of seeking to change a child's gender identity:

Similarly, the possible risk that children may be traumatized by disapproval of their gender discordance must be considered. 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.

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.

(App. Vol. VII, DE121-17, pg. 185).

HARM TO MINORS

The sources cited in the County's Ordinance noted the specific harm of

conversion therapy performed on minors. The American Academy of Child and Adolescent Psychiatry specifically discussed the harm to minors:

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.

* * *

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 ideation and attempts. ... 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.

(App. Vol. VII, DE121-17, pgs. 183-84).

The American College of Physicians also stated:

Available research does not support the use of reparative therapy as an effective method in the treatment of LGBT persons. Evidence shows that the practice may actually cause emotional or physical harm to LGBT individuals, particularly adolescents or young persons. 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 [.]

(Co. App. DE121-22, pg. 270).

In 2014, the American School Counselor Association stated, “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 (APA, 2009).” (Co. App. DE121-20, pg. 257).

The American Psychological Association task force reported that:

[It] found no empirical evidence that providing any type of therapy in childhood can alter adult same-sex orientation ... [and] the theories that such efforts are based on have not been corroborated by scientific evidence or evaluated for harm. Thus, [it] recommend[ed] that [licensed mental health providers] LMHP avoid such efforts and provide instead multicultural, client-centered, and affirmative treatments that are developmentally appropriate (Perrin, 2002).

* * *

SOCE that focus on negative representations of homosexuality and lack a theoretical or evidence base provide no documented benefits and can pose serious harm through increasing sexual stigma and providing inaccurate information....

(App. Vol. I, DE 85-5, pg. 202). This statement was not limited to aversive or involuntary treatment. The task force also reported that: “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[.]”

(App. Vol. I, DE 85-5, pg. 200).

SAMHSA also advised that, “[I]nterventions 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.” (App. Vol. II, DE 85-12, pg. 40).

On the topic of self-determination, the APA task force reported:

Self-determination is the process by which a person controls or determines the course of her or his own life (according to the Oxford American Dictionary, 2007). LMHP maximize self-determination by (a) providing effective psychotherapy that explores the client’s assumptions and goals, without preconditions on the outcome; (b) providing resources to manage and reduce distress; and (c) permitting the client to decide the ultimate goal of how to self-identify and live out her or his sexual orientation. **Although some accounts suggest that providing SOCE increases self-determination, we were 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.

(App. Vol. I, DE 85-5, pg. 129) (emphasis supplied).

COUNTY'S LEGISLATIVE RECORD INCLUDES EVIDENCE OF HARMS OF CONVERSION THERAPY

In the process of researching the Ordinance, the Assistant County Attorney who drafted the County's Ordinance found anecdotal evidence of a teenager, albeit outside of Florida, who committed suicide after receiving conversion therapy. (App. Vol. VI, DE 121-9, pgs. 33-4).

At the first reading of the County Ordinance, on December 5, 2017, the County's Ordinance was discussed and debated for over two and one-half hours, and mental health professionals spoke out against conversion therapy. (Co. App. DE 121-2). A therapist informed the County that:

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 unable to pinpoint the therapeutic intervention which can make an individual change this part of who they are....

(Co. App. DE 121-2, pg. 53). A psychologist and certified sex therapist 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 for 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.

(Co. App. DE 121-2, pgs. 15-8).

The County heard from the president and founder of the Palm Beach County Human Rights Council that his organization had received two complaints about minors who were being subjected to conversion therapy. (App. Vol. VII, DE 126-2, pgs. 240-43; App. Vol. VII, DE 126-3, pgs. 244-50).

The possible under-representativeness of these two complaints was acknowledged by Commissioner Berger, who shared an example she read in an article wherein it took four years for a 19 year old to speak out about what happened to him in conversion therapy. (Co. App. DE 121-3, pgs. 196-97). Commissioner Berger explained her “strong feeling” that “there’s a young man or young lady who wants to come forward with a complaint.” *Id.*

The County received emails from individuals writing in support of the Ordinance, one of whom had “personally heard and been moved by the horrific stories of friends that have been subject to these cruel and inhumane methods,” (Co. App. DE121-6, pg. 233), and another who stated that “[c]onversion therapy has been demonstrated in research to be ineffective and sometimes profoundly harmful to children who receive it.” (Co. App. DE 121-44, pgs. 283-96).

The second reading of the County Ordinance took place on December 19,

2017, and the Ordinance was discussed and debated for an additional nearly two hours (Co. App. DE 121-3). During the second reading the County heard from a local licensed clinical social worker and a family therapist who had been practicing for more than 30 years. (Co. App. DE121-3, pgs. 126-28). 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.* at pg. 125.

Local providers and members of the public gave the County reason to believe that “conversion therapy” was being practiced on minors in its jurisdiction. (Co. App. DE121-2, pgs. 21-2; DE 121-3, pgs. 118,156,157,158-9).

PLAINTIFFS’ KNOWLEDGE OF CONVERSION THERAPY

Plaintiffs abide by the code of ethics issued by the American Association for Marriage and Family Therapy (“AAMFT”). (App. Vol. V DE 121-8, pg. 72).

The AAMFT webpage, states “positions on couples and families,” including:

From time to time AAMFT receives questions about a practice known as reparative or conversion therapy, which is aimed at changing a person’s sexual orientation. As stated in previous AAMFT policy, the association does not consider homosexuality a disorder that requires treatment, and as such, we see no basis for such therapy. AAMFT expects its members to practice based on the best research and clinical evidence available.

(Co. App. DE121-23, pg. 277).

The continuing learning education accrediting body for the Florida board that licenses marriage and family therapists revoked certification for credits from one of Hamilton's presentations that the board said was about "conversion therapy." (App. Vol. V, DE121-8, pgs. 102-04).

Plaintiffs admitted they cannot change their clients' sexual orientation. (App. Vol. IV, DE 121-8, pg. 139 ("I can't change your attractions"); App. Vol. III, DE121-7, pg. 49 ("I can't change any client.")).

Otto does not practice "conversion therapy" (App. Vol. III, DE121-7, pg. 181). He does not attempt and in fact cannot change a client's sexual orientation. (App. Vol. III, DE121-7, pgs. 48-50).

Both Plaintiffs know what "conversion therapy" is and what it means to "seek to change" a minor's sexual orientation or gender identity. (App. Vol. III, DE 121-7, pgs. 48-50, 181; App. Vol. IV, DE121-8, pgs. 99-100,142-43,146-47).

THE COUNTY'S MECHANISM FOR ENFORCING THE ORDINANCE

The County's five senior Code Enforcement Officers would handle any complaints made to the County about the practice of conversion therapy. (App.

Vol. VI, DE 121-9, pgs. 224-26). The complaint could come from anyone: a child, a parent, a friend. (App. Vol. VII, DE 121-9, pg. 17). The officers would receive the complaint, collect all available evidence and determine, based on the evidence they collected, whether there was evidence of a violation of the Ordinance. *Id.* at 18. If evidence of a violation existed, the code enforcement officer would bring a notice of violation of the Ordinance before a special master. (App. Vol. VI, DE 121-9, pg. 240).

The special master would hear evidence from both sides, the County and the alleged violator, and determine whether the evidence shows that the alleged violator had engaged in the practice of conversion therapy as defined by the Ordinance. (App. Vol. VII, DE 121-9, pg. 12).

The ultimate decider of fact in the code enforcement process is the special master. (App. Vol. VI, DE 121-9, pgs. 240-41).

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

The District Court denied Plaintiffs' Motion for Preliminary Injunction noting initially that the case presented "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).” (App. Vol. XI, DE 141, pg. 78).

The Court summarized the issue: “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.” *Id.*

The Court noted its conclusion that Plaintiffs failed to satisfy their burden of showing that the ordinances violated the First Amendment. *Id.* at 79. The Court concluded that the law was unsettled as to which level of scrutiny should apply to the facts of the case, yet it “analyze[d] the challenged ordinances through the lenses of all three methods of review”. *Id.* at 79-81. The Court noted the compelling interest underlying the ordinances:

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.

Id. at 80.

The District Court began its analysis by concluding that Plaintiffs had standing to challenge the ordinances, though they did not have standing to argue on behalf of their clients, a ruling Plaintiffs do not currently challenge.

Id. at 87-90.

The District Court noted that federal courts must “tread especially carefully” when evaluating a request for a preliminary injunction that would enjoin enforcement of a duly passed legislative enactment:

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 legal and equitable principles that restrain courts.

Id. at 90 (quoting *Northeast Fla. Chapter of the Ass’n of Gen. Contractors of Am. V. Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990)) (emphasis added).

The District Court concluded the treatment provided by the Plaintiffs was entirely speech, and therefore “not likely to be subject to rational basis review” as a law regulating conduct that incidentally involved speech. *Id.* at 97.

The District Court distinguished the facts before it from those in this Court’s opinion in *Wollschlaeger v. Governor*, 848 F.3d 1293 (11th Cir. 2017), noting that the subject Ordinances do not prohibit a dialogue between

patient and provider, and concluding that “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.” *Id.* at 105-06.

Ultimately the District Court noted the overwhelming medical evidence presented by the governmental Defendants of the harm caused by SOCE, and determined that the Defendants had a compelling interest in protecting minors from the harms of SOCE, which interest “satisfies Defendants’ burden under all levels and types of scrutiny.” *Id.* at 110-18,118.

Under the heading: “The Relationship between the Ordinances and the Governments’ Interest”, the District expressly stated that *the Defendants* had the burden under all three levels of review and scrutiny to establish either: a rational relationship to the government’s legitimate interest; that the ordinances “directly advance” the government’s substantial interest, or that the ordinances were narrowly tailored to satisfy the compelling government interest. *Id.* at 118-19 (emphasis added).

The District Court noted that the Defendants’ Ordinances “mirror”

similar ordinances passed by fifteen state legislatures and dozens of local governments. *Id.* at 121-2. It concluded that the Ordinances were rationally related to their purpose and under intermediate scrutiny, were narrowly drawn. *Id.* at 125. The Court noted that for purposes of ruling on Plaintiffs' Motion for Preliminary Injunction, it was sufficient to conclude that whether one or both of the Ordinances survived the "least restrictive means" analysis for strict scrutiny was a close question, "and Plaintiffs have not met their burden of demonstrating substantial likelihood of success on this point." *Id.* at 126.

The Court rejected Plaintiffs' claim that the Ordinances were viewpoint discriminatory, noting that the Ordinances regulated the practice of trying to change a child's sexual orientation, and not any particular viewpoint on the subject. *Id.* at 126-28. The District Court concluded that the subject Ordinances likely affected protected speech and there therefore subject to a higher level of review than rational basis review, but even under intermediate review or strict scrutiny, the Plaintiffs failed to demonstrate a substantial likelihood of success on the merits. *Id.* at 130-1.

The District Court rejected Plaintiffs' claim that the Ordinances were unconstitutional prior restraints, noting that the plain language of the

Ordinances provided for a penalization of past speech. *Id.* at 132.

As to Plaintiffs' vagueness claim, the District Court noted that the terms "sexual orientation" and "gender identity" both have a common and readily-ascertainable meaning, and in fact the Supreme Court has used the phrase "sexual orientation" in numerous opinions. *Id.* at 133-34). It concluded Plaintiffs failed to establish a likelihood of success on the merits on their claim that the Ordinances were unconstitutionally vague. *Id.* at 134.

Finally, as to Plaintiffs claim that the State of Florida impliedly preempted the field of regulation of mental health professionals, the District Court noted the scant argument offered in support of Plaintiffs' assertion that they were irreparably harmed by the Ordinances; however, the Court noted that monetary damages for any lost income and professional growth from the alleged injury defeated a claim of irreparable injury. *Id.* at 135.

STATEMENT OF THE STANDARD OF REVIEW

Issues I-IV: This Court "may reverse the district court's order [rejecting a preliminary injunction motion] only if there was a *clear* abuse of discretion." *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (emphasis in original). As this Court noted in *Siegel*: "In this Circuit, '[a] preliminary injunction is an

extraordinary and drastic remedy not to be granted unless the movant clearly established the ‘burden of persuasion’ as to each of the four prerequisites.” *Id.* at 1176 (quoting *McDonald’s Corp v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (internal citation omitted)).

SUMMARY OF ARGUMENT

“[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.”

Order Denying Plaintiffs’ Motion for Preliminary Injunction (DE 141 – pg 1).

At its core, Plaintiffs’ argument is this: the First Amendment prohibits government from enacting laws that ban certain conduct with minors, even when that conduct has been conclusively shown to cause harm including hopelessness, depression, grief, anger, anxiety, confusion, social isolation, and suicidal ideation.

Plaintiffs assert that the First Amendment compels County Commissioners to stand mute despite evidence that individuals living within their boundaries are engaging in this harmful conduct with minors.

To the contrary, County Commissioners are granted broad home rule power to enact laws to protect the health, safety, and welfare of their citizens, including their minor charges, and the First Amendment must not be read to prohibit the Government from doing so when the conduct being regulated incidentally involves speech.

In denying Plaintiffs' motion for preliminary injunction, the District Court concluded that the County had "identified a compelling interest in protecting the safety and welfare of minors", indeed "[p]rotecting minors may be the paradigm example of a compelling interest." The District Court noted that the governmental defendants relied on "extensive credible evidence of the damage that conversion therapy inflicts" which evidence came from well-known research organizations and subject matter experts.

The District Court noted that neither of the Defendants' ordinances restricts conduct or speech outside of a formal therapy session, and even within a formal therapy session, the ordinances allow therapists to recommend SOCE to patients, express their views to patients, provide SOCE to everyone 18 years-of-age and

above, and refer minors to unlicensed counselors, such as religious leaders, to receive SOCE. (As of this writing, Dr. Hamilton’s “Homosexuality 101” videos remain readily available on the internet. <https://lindaseiler.com/homosexuality-101-dr-julie-hamilton/>; <http://homosexuality101.com/>; <http://www.voicesofchange.net/dr-julie-harren-hamilton.html>.)

The District Court properly concluded that the First Amendment was not violated by a legislative enactment that banned a harmful treatment on minors where the County demonstrated both a compelling interest in protecting minors, and a narrowly tailored Ordinance enacted to achieve that compelling interest. It properly concluded that Plaintiffs failed to show a substantial likelihood of success as to their First Amendment, Prior Restraint, and Vagueness claims, and failed to show irreparable harm as to their *ultra vires* claim.

The Order here appealed should be affirmed.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION BECAUSE PLAINTIFFS FAILED TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS AS TO THEIR FIRST AMENDMENT CHALLENGE TO THE COUNTY ORDINANCE (RESTATED).

PRELIMINARY INJUNCTION STANDARD

To obtain a preliminary injunction, Plaintiffs were required to establish by a preponderance of the evidence that: “(1) [they had] 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.” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citation omitted).

“A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the ‘burden of persuasion’ as to each of the four prerequisites.” *Id.* Moreover, “[w]here a plaintiff seeks to enjoin the enforcement of a legislative enactment, the relief ‘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.” *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314, 1331 (S.D. Fla. 2006) (citation omitted). Because Plaintiffs fail to show a likelihood of success on the merits, they are not entitled to preliminary injunctive relief. *See Siegel*, 234 F.3d at 1176.

STANDARD OF REVIEW

This Court “may reverse the district court’s order [rejecting a preliminary injunction motion] only if there was a *clear* abuse of discretion.” *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (emphasis in original). As this Court noted in *Siegel*: “In this Circuit, ‘[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the ‘burden of persuasion’ as to each of the four prerequisites.” *Id.* at 1176 (quoting *McDonald’s Corp v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (internal citation omitted)).

PRELIMINARY MATTER

Plaintiffs’ quotation at the beginning of its Statement of the Case of fifty-five words uttered by trial counsel for the County during the full-day hearing held on Plaintiffs’ motion is puzzling. It is axiomatic that argument of Counsel is not

evidence. Plaintiffs' apparent suggestion that fifty-five words uttered by trial counsel could somehow render meaningless the thousands of pages of record evidence before the District Court when it entered its sixty-page Order lacks merit.

COUNTY ORDINANCE REGULATES PROFESSIONAL CONDUCT THAT INCIDENTALLY INVOLVES SPEECH

The United States Supreme Court recently reaffirmed the authority of governments to “regulate professional conduct, even though that conduct incidentally involves speech.” *National Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (“*NIFLA*”) (citing *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 884 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.)). Here, the County’s Ordinance regulates professional conduct. *See Pickup v. Brown*, 740 F.3d 1208, 1225-31 (9th Cir. 2014). (Plaintiffs’ assertion that *Pickup* and *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014) were abrogated by *NIFLA* finds no support with reference to the *NIFLA* opinion itself, which merely recognized that the Supreme Court “has not recognized ‘professional speech’ as a separate category of speech.” *NIFLA*, 138 S.Ct. at 2371.)

The County’s Ordinance does not ban communication about conversion

therapy. It does not ban inquiries like the law in *Wollschlaeger v. Governor*, 848 F.3d 1293 (11th Cir. 2017). The Ordinance does not ban recommendations for treatment like the law in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Nor does the Ordinance compel a governmental message, which is “not tied to a procedure at all,” like the law in *NIFLA*, 138 S. Ct. at 2373. The County’s Ordinance bans the procedure of conversion therapy. Like the consent requirement in *Casey*, 505 U.S. 833 (1992), the words of Plaintiffs are only implicated as part of the practice of therapy.

The cases relied on by Plaintiffs are distinguishable. Unlike the restrictions on legal challenges in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), the ban on conversion therapy does not restrict speech that is necessary for the proper functioning of any system akin to an independent judiciary. The ban only restricts words that are bound up in the practice of private conversion therapy, which is not part of any larger governmental or free-press system. Furthermore, unlike the solicitation restrictions in *NAACP v. Button*, 371 U.S. 415 (1963), the Ordinance does not hinder political association or the vindication of constitutional rights. The Ordinance is unlike the “material support” prohibition in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), which prohibited the plaintiffs from “communicating a message” through teaching, training, or advocating on behalf of

terrorist organizations. Here, Plaintiffs are free to associate, advertise, and advocate as they please. Plaintiffs' input in political processes and the marketplace of ideas remains untouched; only their practices on minors are restricted.

Restrictions on non-expressive conduct that only incidentally burden speech do not implicate the First Amendment's protections. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). As the District Court noted: "[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." (App. Vol. XI, DE 141, pg. 94) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)).

Based on this precedent, the District Court's Order should be affirmed.

COUNTY'S ORDINANCE WITHSTANDS INTERMEDIATE AND STRICT SCRUTINY

Should this Court determine, as the District Court did, that the County's Ordinance should be subject to a higher level of scrutiny, either intermediate scrutiny or strict scrutiny, the District Court's Order should be affirmed as correctly concluding Plaintiffs failed to satisfy their burden of showing a substantial likelihood of success to their challenge to the County Ordinance under either level

of judicial review.

Contrary to Plaintiffs' assertion that the District Court incorrectly relieved the Defendants of satisfying their burden regarding demonstration of narrow tailoring (Appellants' Brief at 46), examination of the Order here appealed reveals that the District Court expressly stated that *the Defendants* had the burden under all three levels of review and scrutiny to establish either: a rational relationship to the government's legitimate interest; that the ordinances "directly advance" the government's substantial interest, or that the ordinances were narrowly tailored to satisfy the compelling government interest. *Id.* at 118-19 (emphasis added).

COUNTY'S COMPELLING INTEREST IN PROTECTING MINORS

As the District Court concluded, the County established a compelling interest in protecting minors from physical and psychological harm. The face of the County Ordinance establishes the County's "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." The County's interest in protecting the physical and psychological well-being of minors is not only legitimate, it is compelling. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (noting 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 (1982) (“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.’”) (citation omitted).

The harms sought to be avoided by the County’s Ordinance are not imagined. The sources cited in the Ordinance unanimously conclude that rigorous research on the safety and effectiveness of seeking to change sexual orientation is deficient, but that there is evidence that conversion therapy can cause harm, including depression, self-harm, self-hatred, and suicidal ideation. None of the organizations whose positions and research are cited in the County Ordinance’s whereas clauses identified a basis for distinguishing between minors likely to experience harm and those likely to perceive a benefit. *See 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”). Neither the County nor the Court was presented with an adequate basis for concluding that any conversion therapy on a minor, voluntary or otherwise, is safe and effective. The County heard substantial testimony during nearly four hours of public comment and debate regarding the very real harms suffered at the hands of therapists performing conversion therapy.

Thus, the County has a compelling interest in banning conversion therapy to protect the health, safety, and welfare of its minor charges.

COUNTY ORDINANCE IS NARROWLY TAILORED

To address this compelling interest, the Ordinance is narrowly tailored to prohibit only the practice, (as opposed to any discussion or recommendation, of conversion therapy), which is condemned by numerous professional organizations as contraindicated, harmful, and ineffective, on minors, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely, as performed by licensed providers, who would be the only ones legally able to apply the principles and methods of the profession in their efforts to change a minor.

The County's narrow curtailment of speech implicated by licensed professionals practicing conversion therapy is justified given: the lack of a scientific basis for conversion therapy; the number of national mental-health associations condemning conversion therapy; the lack of empirical support for the claims of conversion-therapy benefits; the possibility that the benefits, if any, may be achieved through treatment approaches that do not attempt to change sexual orientation; the fact that conversion therapy on minors, at best, has not been

evaluated for harm and, at worst, can cause significant physical and psychological harm; the time it takes some psychological harms to manifest or be reported; the vulnerability and susceptibility of minors to social and familial pressures to conform with the desires of authority figures; the inappropriateness of therapists imposing their beliefs on patients; the number of local practitioners who told the County that the conversion therapy ban would restrict their practices; the existence of two Palm Beach County children who were being subjected to conversion therapy; and the threat of harm licensed practitioners may be inflicting on minors who may not now know what damage is being done to them.

The Ordinance is not over-inclusive for banning non-aversive, voluntary conversion therapy because the legislative record does not reveal that such therapy is safer or more effective. The authorities relied upon by the County condemned any type of therapy that sought to change the minor and recommended therapy that had no a priori goal. Nor is the Ordinance under-inclusive for banning only the conduct of licensed providers. The County's legislative record reflects harms associated only with the professional practice of conversion therapy. The legislative record reflects no position statements by any religious organizations renouncing or decrying efforts by religious leaders to change a minor's sexual orientation or gender identity. Thus, the County had no legislative basis to ban

anything other than the licensed, professional provision of conversion therapy.

The County's interests were not adequately protected by other regulations. No other regulation actually prohibits providers in the County from subjecting minors to the risk of the harms associated with seeking to change a minor's sexual orientation or gender identity. Moreover, informed consent, which cannot be provided for a therapy that is not effective, does not adequately prevent the harms associated with conversion therapy when there is no safeguard to ensure that only those who are likely to benefit from conversion therapy will consent to it.

Plaintiffs' argument that the County must have considered alternative measures at the time it enacted the Ordinance is not supported by *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014). In *McCullen*, the Supreme Court found that the buffer zone regulation burdened substantially more speech than necessary to achieve the Commonwealth's interests because other, existing laws could be employed to address those interests. *Id.* The Court could not accept the Commonwealth's response that it had "tried other approaches" that had not worked because "the Commonwealth ha[d] not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor ha[d] it shown that it considered different methods that other jurisdictions have found effective." *Id.* Here, unlike *McCullen*, no readily-available tools have been identified that the

County could have used to address its interests in protecting minors from the harms of conversion therapy. Additionally, Plaintiffs identified no different methods of achieving the County's goals that other jurisdictions have found effective. "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 that the government actually considered and rejected those measures at the time of enactment. *See id.* at 2540.

As the District Court properly concluded, the evidence before it established the County's compelling interest in protecting the physical and psychological health of minors, and the County's narrow tailoring of an Ordinance enacted to accomplish that purpose. The District Court's Order should be affirmed.

COUNTY ORDINANCE IS NOT VIEWPOINT-BASED

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (emphasis added). The County Ordinance bans a practice regardless of the content of the words implicated by the practices or the provider's ideological basis for the practice. *Compare Virginia v. Black*, 538 U.S. 343 (2003) (ban on cross burning with the intent to

intimidate was content-neutral because it did “not single out for opprobrium only that speech directed toward ‘one of the specified disfavored topics’”) *with R. A. V. v. St. Paul*, 505 U.S. 377 (1992) (ban on cross burning with intent to intimidate “on the basis of race, color, creed, religion or gender” found to be content-based) and *Wollschlaeger*, 848 F.3d at 1307 (ban on discrimination and harassment based on gun ownership or possession found to be content based).

The County Ordinance bans a practice – no matter the basis of the practice. Content is not regulated. For example, the Ordinance does not prohibit Hamilton from telling a girl in therapy that she looks “so beautiful” in a dress, as long as that is not Hamilton’s practice of seeking to change that girl’s gender identity. Similarly, Hamilton may not tell a boy that he is “so beautiful” in a dress if that is a practice of seeking to change that boy’s gender identity. The Ordinance bans a particular practice – no matter its basis or content. Thus, the Ordinance is content neutral.

The Ordinance is also viewpoint neutral. The Ordinance does not discriminate based on the direction of the intended change as to gender identity or sexual orientation. A provider is equally prohibited from seeking to change a heterosexual minor into a non-heterosexual as they are from seeking to change a non-heterosexual minor into a heterosexual.

Moreover, the Ordinance is not viewpoint-based for excluding from the definition of “conversion therapy” practices that support a minor who is undergoing gender transition. This exclusion is consistent with the definition of “conversion therapy,” which prohibits the provider from engaging in a practice that seeks to change the minor.

The Ordinance does not discriminate against the viewpoint that change is possible or desirable. The Ordinance does not ban change. It bans efforts by a provider to change a minor. Presented with a minor client seeking to change their sexual orientation or gender identity, Plaintiffs may commend and recommend conversion therapy. But, Plaintiffs cannot perform it in Palm Beach County. The Ordinance does not discriminate based on the viewpoint of the provider but prohibits all providers from specified practices. *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). As a content and viewpoint-neutral regulation, the Ordinance, if it implicates the First Amendment at all, is entitled to intermediate scrutiny. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (“Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision

cannot stand”); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (“In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, ...”); *Bell v. City of Winter Park*, 745 F.3d 1318, 1323 (11th Cir. 2014) (“Having determined that § 62-79 is content-neutral, we consider whether it withstands intermediate scrutiny.”).

The content-neutral regulation need not fall within some particular category of speech, such as commercial speech, to qualify for intermediate scrutiny. *See id.*

As noted above, the County’s Ordinance withstands intermediate scrutiny, thus Plaintiffs failed to establish a substantial likelihood of success on the merits and their Motion for Preliminary Injunction was properly denied.

**II. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS’
MOTION FOR TEMPORARY INJUNCTION BECAUSE PLAINTIFFS
FAILED TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS
AS TO THEIR PRIOR RESTRAINT CHALLENGE TO THE COUNTY
ORDINANCE (RESTATED).**

**PRELIMINARY INJUNCTION STANDARD AND STANDARD OF
REVIEW**

The preliminary injunction standard and standard of review recited under

Issue I above also applies to this issue on appeal.

COUNTY ORDINANCE IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT

Plaintiffs dedicate a few paragraphs to this issue, asserting without any evidence in support of that assertion that the County's Ordinance is an unconstitutional prior restraint. As the District Court correctly noted, the County's Ordinance penalizes past speech and is thus not an unconstitutional prior restraint.

III. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION BECAUSE PLAINTIFFS FAILED TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS AS TO THEIR VAGUENESS CHALLENGE TO THE COUNTY ORDINANCE (RESTATED).

PRELIMINARY INJUNCTION STANDARD AND STANDARD OF REVIEW

The preliminary injunction standard and standard of review recited under Issue I above also applies to this issue on appeal.

THE COUNTY ORDINANCE IS NOT VAGUE

The District Court properly concluded the County Ordinance is not vague, as the Supreme Court has used the term “sexual orientation” in numerous opinions, and the terms “gender identity” and “sexual orientation” each have a common and readily-ascertainable meaning. The Ordinance provides Plaintiffs with a reasonable opportunity to understand what is prohibited. Dr. Hamilton testified she knew what it meant to seek to change sexual orientation or gender identity. Dr. Otto also knows: he gives clients an informed consent form that outlines the nature of SOCE counseling, explains the controversial nature of SOCE counseling, and informs the client of the potential benefits and risks associated with SOCE counseling.

The District Court properly concluded Plaintiffs failed to establish a substantial likelihood of success on their vagueness challenge.

IV. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION BECAUSE PLAINTIFFS FAILED TO ESTABLISH IRREPARABLE HARM AS TO THEIR PREEMPTION CHALLENGE TO THE COUNTY ORDINANCE (RESTATED).

PRELIMINARY INJUNCTION STANDARD AND STANDARD OF REVIEW

The preliminary injunction standard and standard of review recited under Issue I above also applies to this issue on appeal.

NO IRREPARABLE HARM ESTABLISHED

The District Court properly concluded Plaintiffs failed to establish irreparable harm as to their claim that the County was preempted from enacting the subject Ordinance. "A showing of irreparable harm is 'the sine qua non of injunctive relief.'" *Northeast 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). An injury is irreparable only if it cannot be undone through monetary remedies. *Id.*

As the District Court noted, money damages would be available to Plaintiffs if they were able to establish a loss of income or clients due to the County's

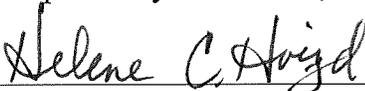
enactment of an *ultra vires* ordinance. Thus, Plaintiffs failed to establish an irreparable injury as to their *ultra vires* claim, and the District Court properly denied injunctive relief as to this claim.

CONCLUSION

The District Court properly denied Plaintiffs' Motion for Preliminary Injunction because Plaintiffs failed to establish a substantial likelihood of success on their First Amendment claim, and failed to establish irreparable harm as to their preemption claim.

The County respectfully requests this Honorable Court affirm the Order Denying Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,



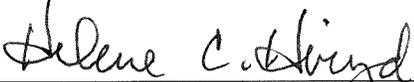
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(7). According to the Word

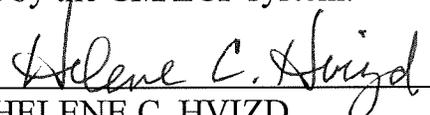
program on which it is written, the pages of this brief contain 9027 words and are typed using Times New Roman 14-point font.



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CERTIFICATE OF SERVICE

I CERTIFY that on June 10, 2019, I electronically filed the foregoing Appellee County of Palm Beach, Florida's Brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. Service will be accomplished by the CM/ECF system.



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