

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

ROBERT L. VAZZO, et al.,	)	Tampa, Florida
	)	
Plaintiffs,	)	No. 8:17-cv-2896-T-02AAS
	)	
	)	Docket No. 161
vs.	)	
	)	March 5, 2019
CITY OF TAMPA, FLORIDA,	)	
	)	
Defendant.	)	Courtroom 15B
_____	)	

**TRANSCRIPT OF MOTION HEARING**  
BEFORE THE HONORABLE WILLIAM F. JUNG  
UNITED STATES DISTRICT JUDGE

*Official Court Reporter:*

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Tampa, Florida 33602  
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P R O C E E D I N G S

1  
2 March 5, 2019

9:03 a.m.

3 - - -

4 COURT SECURITY OFFICER: All rise.

5 The United States District Court is now in  
6 session. The Honorable William F. Jung presiding.

7 Please be seated.

8 THE COURT: Good morning.

9 Let's call the case, please.

10 THE COURTROOM DEPUTY: Yes, Your Honor.

11 Robert L. Vazzo versus City of Tampa, Case No.  
12 8:17-cv-2896-T-02AAS. I'll begin by having counsel state  
13 their appearances, starting with counsel for the plaintiff.

14 MR. MIHET: Good morning, Your Honor. Horatio  
15 Mihet on behalf of the plaintiffs.

16 MR. GANNAM: Roger Gannam on behalf of the  
17 plaintiffs. Good morning.

18 THE COURT: Good morning.

19 MR. WILLIAMS: Good morning, Your Honor. Robert  
20 Williams on behalf of the defendant, City of Tampa, and  
21 helping me is Miss Dana Robins, who has just joined our law  
22 firm.

23 THE COURT: Good morning and welcome.

24 MR. HARVEY: David Harvey, Assistant City  
25 Attorney.

1 MS. WALBOLT: Good morning, Your Honor. Sylvia  
2 Walbolt from Carlton Fields, on behalf of Equality Florida  
3 Institute.

4 MR. PORTER: Brian Porter on behalf of Equality  
5 Florida.

6 MR. DINIELLI: David Dinielli on behalf of  
7 Equality Florida.

8 THE COURT: Good morning.

9 Let me say at the outset, I guess I'm just inured,  
10 but I'm so -- thrilled is a little strong of word, but  
11 grateful to see such incredible lawyers on both sides. I  
12 enjoy it. I know it's a lot of work and a headache for you  
13 all, but this is the highest level of law practice on both  
14 sides, and I'm so grateful for it.

15 We are here on the defendants' objections to the  
16 two magistrate orders, recommending the grant -- at least  
17 partial grant of the injunctive -- temporary is not the right  
18 word -- initial injunctive relief and on the motions to  
19 dismiss.

20 The City of Tampa has filed objections to both of  
21 those. And for the record, I better, just for fun, that's  
22 docket 148, is the R and R on the motions to dismiss and 149  
23 is the R and R on the preliminary injunction.

24 So may I just recommend the City go ahead, and I'm  
25 all ears. Have at it. You have the floor. Thank you,

1 Mr. Williams. And just FYI, no one cares in here. You can  
2 stay seated. You can stand up. You can move around the  
3 courtroom. You don't have to ask permission to approach.  
4 Whatever.

5 So tell me why I should reject one or both of  
6 those.

7 MR. WILLIAMS: Your Honor, I'm going to focus on  
8 the motion for preliminary injunction because I think that  
9 goes really to the heart of where the City's position is.

10 Even more pointedly, I would like to address what  
11 I think is the core issue that is before this Court and the  
12 dispositive issue that is before this Court, and that goes to  
13 the question of what level of scrutiny should this Court  
14 apply in determining the constitutional viability of the city  
15 ordinance at issue under the First Amendment.

16 We address that in all of our multitude of  
17 submissions in this case, and thank you very much for Your  
18 Honor's -- I'll speak on behalf of all counsel. We  
19 appreciate that, because it does take a lot of work, but we  
20 addressed it in our objection.

21 To go to the very heart of the issue, the City of  
22 Tampa -- and a little history I think is important and helps  
23 me in terms of addressing Your Honor's question.

24 The City of Tampa took the time, with the help of  
25 its City Attorney's Office, to research the law and come up

1 with an ordinance that it believed was the perfect ordinance  
2 to address what they believe to be a pernicious treatment by  
3 the counseling professional essentially to convert somebody  
4 who had different sexual feelings back to where they came  
5 from. Conversion therapy. SOCE, as the plaintiffs like to  
6 call it, but the purpose of conversion therapy is to convert  
7 people back.

8           As the ordinance very carefully -- very carefully  
9 and very thoroughly addresses, there are multitudeness  
10 reports by very prestigious organizations that basically say  
11 this is not a good thing. This is bad, potentially dangerous  
12 for minors. That's an important aspect of the ordinance. It  
13 just addresses children, people who are under the age of 18  
14 and in the eyes of the law are children.

15           That ordinance was passed unanimously by the city  
16 council, speaking on behalf of the people of the City of  
17 Tampa and our Republican form of government, and it was  
18 challenged by the plaintiffs as being violative of a number  
19 of things. But the heart of their challenge is their First  
20 Amendment challenge.

21           So the question then arises, what level of  
22 scrutiny should apply to this Court's evaluation of the  
23 constitutional basis of this ordinance?

24           Our position has been and is today before  
25 Your Honor that this ordinance does not abridge speech, pure

1 speech, per se, speech as speech, as some courts have  
2 referred to it. Instead, it prohibits a therapeutic  
3 treatment or procedure, as my wife calls it because she's a  
4 mental health counselor, not speech as such. And it  
5 prohibits that speech -- I mean that therapeutic procedure,  
6 because as I said earlier, the studies show this is  
7 potentially very dangerous, including up to suicide.

8 I think what is important in terms of Your Honor's  
9 evaluation of the ordinance is their argument that how can  
10 you separate treatment from speech? Well, if you look at the  
11 ordinance, the ordinance doesn't talk about speech at all.  
12 The ordinance doesn't say that you have to say this or the  
13 ordinance doesn't say specifically you can't say these words  
14 or these sentences or these phrases.

15 Instead, the ordinance, as I said a little while  
16 ago, only addresses procedures. Well, it's the performance  
17 of those procedures that is at the heart of the ordinance,  
18 not the speaking of words or phrases or anything of that ilk.

19 Now, because of that, if we go to the doctrine of  
20 law from the Eleventh Circuit, *Wollschlaeger*, and the more  
21 recent decision out of the Supreme Court, which we call  
22 NIFLA, *Wollschlaeger* is a very different case than the one  
23 that we have before Your Honor.

24 The *Wollschlaeger* statute was very different from  
25 the ordinance before Your Honor. The critical difference at

1 the outset is, incredibly, the Florida legislature -- at  
2 least incredible to me -- passed a rather far-reaching  
3 statute based on six anecdotes, two of which, in my opinion,  
4 have nothing to do with the subject of the statute.

5 Here, the city council passed this ordinance  
6 unanimously after two public hearings, after anecdotal  
7 evidence at the public hearing, after the studies and so  
8 forth and, therefore, to use the language of the  
9 *Wollschlaeger* case, as I recall, a disciplined doctrinal  
10 approach to passing this ordinance.

11 It was not a willy-nilly issue. It was not a  
12 political issue. They were basing it on peer-reviewed, very  
13 thorough studies. In doing so -- and in doing so, what they  
14 accomplished was a measure to protect the children in the  
15 City of Tampa and the City of Tampa alone.

16 Now, going to the ordinance and how it correlates  
17 to the case law, the ordinance not only doesn't ban specific  
18 words or phrases or phraseology or sentences, it makes it  
19 very clear that a counselor in a counseling session has every  
20 right to talk to the client, as my wife calls it, about  
21 conversion therapy. And the word "about" is very important,  
22 because that is where the First Amendment would become  
23 important.

24 But there is no prohibition in this ordinance that  
25 prohibits a counselor from talking about SOCE or conversion

1 therapy. There is no prohibition by this ordinance that  
2 prohibits the counselor from recommending conversion therapy.  
3 There is no prohibition that the counselor can't talk about  
4 what SOCE is all about. There is no prohibition to the  
5 counselor from recommending that they go to another  
6 jurisdiction to receive that therapy.

7           There is no prohibition in that ordinance that  
8 bans the ability of a counselor or proponent of conversion  
9 therapy from coming down to the federal courthouse and making  
10 speeches out on the front of the courthouse or the state  
11 courthouse, where people do it quite a bit -- not on that  
12 subject but other subjects -- or in Lykes Square, closer to  
13 where my office is, or anyplace in the city of Tampa for that  
14 matter.

15           So the burden on the First Amendment as it relates  
16 to the implementation of this ordinance is virtually nil.  
17 And to go to the *Wollschlaeger* case and then let me quickly  
18 go to the NIFLA case, because the *Wollschlaeger* case we have  
19 addressed in our submissions very thoroughly and I know  
20 Your Honor has read those.

21           NIFLA was decided by the Supreme Court last  
22 summer, after this ordinance was passed, after this ordinance  
23 was vetted by the City Attorney's Office, after the public  
24 hearings that led up to the enactment of this ordinance,  
25 after this lawsuit was filed, and after the various motions,

1 including a motion for preliminary injunction, was filed by  
2 the plaintiffs. So it came midstream, if you will.

3 I would submit to Your Honor that NIFLA doesn't  
4 change the First Amendment landscape at the slightest. Not  
5 in the slightest, because this ordinance is not a  
6 content-based ordinance. This ordinance is a content-neutral  
7 ordinance.

8 It's content neutral because, as I said a minute  
9 ago, its purpose is to ban a therapeutic procedure. Period.  
10 End of discussion.

11 In NIFLA, Justice Thomas made it very clear that  
12 if strict scrutiny applied -- it was content based, then  
13 strict scrutiny would apply. Okay. I get that. But at the  
14 end of the decision, he makes it very clear. He carves out  
15 that it recognizes that the state has a legitimate interest  
16 in regulating profession; and if that regulation has only an  
17 incidental burden on the First Amendment, on free speech,  
18 then it passes constitutional muster.

19 Now, is that a carve-out of strict scrutiny or is  
20 that simply another way of saying that is not a content-based  
21 law? It is a content-neutral law, assuming that the burden  
22 on the First Amendment is only incidental.

23 We go back to this ordinance. The burden of this  
24 ordinance on the First Amendment is, as I said, virtually  
25 nil. Much less than incidental as far as I'm concerned,

1 because as I said earlier, they are free to talk as much as  
2 they want about this.

3           So, how do we get to the level of scrutiny? Well,  
4 although the NIFLA case doesn't really elaborate on it, I  
5 think logically and plausibly it devolves into an  
6 intermediate scrutiny test that Your Honor should apply, as  
7 we've set forth in all of our submissions, and it also  
8 furthers the federalism principle that I think is really very  
9 important to the progress of this case.

10           These kinds of empirical research are very local  
11 in nature. The city council had a legitimate interest in  
12 protecting its children. The other side doesn't argue with  
13 that. Magistrate Judge Sansone recognized it. I think we  
14 are talking basic common sense, basic ethical sense.

15           By the way, I would request -- I want to give, if  
16 you want to call it that, ten of my minutes to Miss Walbolt.

17           THE COURT: Of course. And anyone else, you are  
18 welcome as well. I'm not familiar with Mr. Porter or  
19 Mr. Dinielli, but I want everybody to feel they have had  
20 their say, both sides.

21           MR. WILLIAMS: Okay. So back to my argument, we  
22 have set forth in our objection, we have set forth in our  
23 submissions the distinction between other cases and this  
24 case, or the parallel case, as we have said, is the Casey  
25 case out of Pennsylvania, which Your Honor is very familiar

1 with. This case really should be dictated by the *Casey* case  
2 because the *Casey* case is the analogous case here. Not  
3 NIFLA. Frankly, not *Wollschlaeger* either.

4           Where does that leave us? The *Wollschlaeger* case  
5 required doctors, under the facts of that case, to actually  
6 depart from professional guidelines recommended by the  
7 American Medical Association. That was remarkable as far as  
8 I was concerned, particularly given the lack of disciplined  
9 approach that the Florida legislature had in passing that law.

10           Here, it's the exact opposite. The exact  
11 opposite. What we are requiring that the ordinance requires  
12 counselors to do is to not do something that the professional  
13 guidelines abhor actually. If you read those studies, they  
14 make it very clear that conversion therapy is a very  
15 dangerous form of therapy, particularly as it relates to  
16 children.

17           So that's why *Wollschlaeger* is so different from  
18 this, and *Wollschlaeger* doesn't dictate the outcome here.  
19 They are different empirical research, different regulations,  
20 with different backgrounds and different objectives.

21           As I said, *Casey* is probably the best law that the  
22 Court can look to. It talks about a state law in that case  
23 requiring doctors to provide certain information to patients  
24 seeking abortions. Well, that's an edict from the State of  
25 Pennsylvania. You shall make these statements to your

1 patients, Dr. Smith, or Dr. Welby, as the case may be. I'm  
2 old enough to remember that.

3 This case doesn't involve something like this.  
4 This case doesn't even get into you shall or shall not  
5 speechify about anything. Just don't do the conversion. You  
6 shall not implement that conversion therapy.

7 So to be totally candid with Your Honor, there are  
8 three levels, as I read the case law: Rational,  
9 intermediate, heightened and strict scrutiny.

10 It doesn't get to strict scrutiny. The City of  
11 Tampa when -- the city council, I should say, enacted this  
12 ordinance, I will concede, as Councilman Maniscalco conceded  
13 in his testimony, did not go through a litany of lesser  
14 intrusive measures.

15 The reason I raise this is because, as always, I  
16 want to be totally candid with the Court, and I know this is  
17 an issue that's not going to go away. I know they will talk  
18 about it. They did not go through and check off a number of  
19 so-called lesser intrusive measures in terms of deciding  
20 whether to pass this ordinance or not.

21 What they did was they decided this therapeutic  
22 procedure is bad. Period. And there is no lesser included  
23 that would satisfy our need to protect our children.

24 Now, whether that satisfies strict scrutiny or  
25 not, I leave that to Your Honor. But I will say that they

1 didn't do it, and that's the reason they didn't do it.

2           We don't reach that point -- we don't reach that  
3 point because, as I said, this is a heightened scrutiny case,  
4 and we easily pass heightened scrutiny. There is a  
5 compelling governmental interest, and the measure that was  
6 passed is more than reasonable and necessary and limited in  
7 order to achieve that objective.

8           I want to save some time for rebuttal if I can. I  
9 don't know how Your Honor wants to proceed.

10           THE COURT: Absolutely.

11           MR. WILLIAMS: And I don't know how long I've been  
12 up here.

13           But the recommendation and report that Magistrate  
14 Judge Sansone entered basically says this case must be  
15 decided based on strict scrutiny. I urge Your Honor to  
16 reject that, respectfully. I have a lot of respect for  
17 Magistrate Judge Sansone, but I disagree with her,  
18 respectfully; and I urge Your Honor to reject that, because  
19 if strict scrutiny were to be applied to ordinances or laws  
20 of this nature across the land -- across the land, then I  
21 submit that no governmental entity -- city, county, state --  
22 could ever pass a law that regulated harmful conduct,  
23 protected children. Again, that's important. This is only  
24 children that we are talking about here -- without running  
25 afoul of the First Amendment. Because, to be obvious,

1 clearly a counseling session involves some sort of talk.

2 THE COURT: You know, one of the things that -- I  
3 haven't talked to her about this in any detail at all or on  
4 the merits. The thing that kind of sticks and I think might  
5 have impaired your position in front of her, just by reading  
6 her R and R, is that the ordinance -- and forgive me, I  
7 forgot Jerry's last name, the assistant city attorney that  
8 did the PowerPoint. The ordinance in his PowerPoint both  
9 expressly discussed *King* and *Pickup*.

10 MR. WILLIAMS: Yes. That was Jerry Simpson, Your  
11 Honor.

12 THE COURT: Mr. Simpson. I'm sorry. See, in my  
13 notes I have him down as Jerry. Sorry. Please give him my  
14 apologies for being so informal. Late at night, you take  
15 crazy notes.

16 So then you read the latest thing out of the  
17 Supreme Court, and they appear, by name, to, you know, at  
18 least, in part, discount -- not vacate, but by name criticize  
19 these cases. And then we are down -- way down here, like  
20 researching on Westlaw. We are not up at the Supreme Court,  
21 and you put in *King* and *Pickup* in your little Westlaw  
22 terminal, it's a big red flag: Abrogated.

23 So it's a little bit -- you understand that's kind  
24 of a limb that, climbing out on, given what happened, is a  
25 little worrisome when you are sort of at the magistrate

1 judge/district judge level.

2 MR. WILLIAMS: Sure.

3 THE COURT: So are you saying that notwithstanding  
4 Westlaw, which of course is just some staff guy in a carrel,  
5 putting that in, that the logic of *King* and *Pickup* are still  
6 with us and we should follow that path?

7 MR. WILLIAMS: I don't think that really is part  
8 of the calculus, Your Honor. I mean, I agree. If I had  
9 followed Westlaw headnotes, I would have been --

10 THE COURT: I know, I know. But, nevertheless,  
11 when you are "What am I going to do here?" and you ping it up  
12 and, oh, boy, here's that red flag, and I was told in law  
13 school that means something, which just means a guy in a  
14 carrel --

15 MR. WILLIAMS: Sure. I don't think we even have  
16 to worry about it, to be honest with you. The reason I don't  
17 is that quote in *NIFLA* by Justice Thomas at the end where he  
18 talks about the state's right to regulate professions as long  
19 as it's only an incidental burden on free speech.

20 Now, I happen to like Judge Tjoflat's dissent in  
21 *Wollschlaeger*, the en banc decision.

22 THE COURT: I read that as well. I'm familiar  
23 with that.

24 MR. WILLIAMS: I like his sliding scale approach.  
25 It's perhaps not as precise as we would like it, but I don't

1 know in First Amendment jurisprudence that you can be as  
2 precise as people would like.

3 THE COURT: Do you agree with me that in  
4 *Wollschlaeger* Judge Jordan's opinion did not select the level  
5 of scrutiny but just said, well, this doesn't satisfy  
6 intermediate level; therefore, that's our ruling. It's no  
7 good, but we are not going to say what shelf it fits on?

8 Did I read that correctly?

9 MR. WILLIAMS: I agree with you, Your Honor. And  
10 in that sense, it's not that helpful to us down in the  
11 trenches trying to figure out what's right and what's wrong  
12 and what's constitutional and what's not constitutional.

13 Again, that gets back to Judge Tjoflat's dissent  
14 because -- I like the sliding scale concept. Shades of grey,  
15 if you will. But in this arena, the First Amendment arena,  
16 the freedom of speech arena, which we all, of course, find  
17 very important to our democracy, things don't necessarily fit  
18 nicely into little formulas that come out with the right  
19 answer.

20 I say that simply because my 13-year-old daughter  
21 just competed in an empirical research contest and she did  
22 pretty good in it. But that's algebra. The First Amendment  
23 is not algebra. To have a sliding scale is perhaps  
24 imprecise, but it perhaps is the best way to do it because  
25 each case is different.

1           You can take this ordinance, for example -- and  
2 I've celebrated about this, that if you change this part of  
3 it, then that might change the calculus. It might be less  
4 than incidental and more significant, as the case may be.  
5 Much like in a trial when you cross-examine an expert and you  
6 change the facts. Well, the opinion can change, and we have  
7 all done that many a time in jury trials. So I thought that  
8 approach had a lot of attraction to me, frankly.

9           But NIFLA carves out that -- I call it a  
10 carve-out. It's two circumstances, is I think the way  
11 Justice Thomas articulated it, and this ordinance fits into  
12 the second set of circumstances. It's a compelling reason to  
13 regulate the counseling profession on this discrete, little  
14 issue for children and allows them to talk to their heart's  
15 content about it in the session or outside of the session.

16           Where does that fit on that sliding scale? I  
17 submit that it fits at the lower end of that sliding scale  
18 because the burden on the First Amendment is insignificant,  
19 in my opinion.

20           And I go back to where I started. If you don't  
21 have some flexibility in this area, how can any governmental  
22 entity feel safe in passing an ordinance they feel strongly  
23 is important for the people that elected them and not worry  
24 about it being held unconstitutional because of some issue  
25 that is not really in front of them at the time they enact

1 the ordinance?

2 States, counties, cities have a right to regulate  
3 professions in order to protect their children. This city  
4 council felt very strongly about it. It was unanimous. If  
5 you read Councilman Maniscalco's deposition transcript, he  
6 was very -- great guy -- very daimon about it because it  
7 protected children.

8 That is why I go back to where I started and that  
9 is this is not a strict scrutiny case. This is not a  
10 content-based ordinance. This is a content-neutral ordinance  
11 that commands, at most -- at most, an intermediate or  
12 heightened level of scrutiny. And, frankly, I could probably  
13 make an argument that you could apply the rational basis. It  
14 certainly would apply there -- I mean would pass there.

15 So having said that, I'm going to allow  
16 Miss Walbolt to get up and --

17 THE COURT: Sure. If I may, I'm not going to cut  
18 anybody off and say, ah-ha, 60 minutes. We will stay here  
19 until everybody has had their say and until I've blathered  
20 out whatever I might blather, as well. Thank you.

21 MR. WILLIAMS: If you have any questions  
22 specifically of me now -- I haven't addressed the motion to  
23 dismiss and, frankly, don't intend to take up time.

24 THE COURT: Before Miss Walbolt stands up, let me  
25 say one thing. My pet peeve when I was practicing law, as

1 you go to these hearings and the judge sits there like this,  
2 okay, I'll get an order out, and off he goes off the bench.  
3 You have no idea what he's thinking, and sometimes I think  
4 they sit there like that because they haven't read anything  
5 and they don't want to open their mouth and show they don't  
6 know what they are talking about, which I might do anyway.

7           So for both sides -- sort of the overriding -- not  
8 overriding, but the thread that runs through my thought here,  
9 okay, no one has ever -- we have -- after this, this  
10 afternoon I have an international kidnapping case where  
11 someone is alleged to have kidnapped -- domestic kidnapping  
12 from Europe and brought the child here.

13           We just had a case where a cop shot somebody in  
14 the back and killed them, a case where someone got their hand  
15 blown off by a can of Fix-A-Flat.

16           Okay. So, you know, real hard cases in -- I don't  
17 mean difficult, but I mean solid. So here we have got  
18 something, an ordinance, protected children, but it's never  
19 happened in Tampa since Tampa was formed in 1879. There is  
20 no evidence in this record that anybody, whether adverse or  
21 voluntary, ever did SOCE in Tampa. Ever.

22           I know it's prophylactic, and by the same token,  
23 the plaintiff, well, we're chilled. We're chilled. Well,  
24 you weren't so chilled. You didn't show up until the  
25 ordinance was passed, and one of you may or may not even be

1 licensed. And you know what? Hillsborough County is 1300  
2 square miles and Tampa is 175 of it.

3           Okay. Where most doctors and psychologists are in  
4 Brandon, in Carrollwood, they are up by USF on Bruce B.  
5 Downs. None of that is in the city limits. So you're  
6 chilled. If we left from here, we could drive literally  
7 three minutes and be in Clair-Mel and we are not in the city  
8 limits anymore. So just FYI on both sides.

9           I've got somebody here with his hand blown off and  
10 I have you all here, which is a real dispute, and I  
11 understand there is Court of Appeals cases and we have an  
12 appeal headed to Atlanta out of Boca or out of West Palm  
13 right now, but it's just not the most concrete thing. It has  
14 an air of a little less concrete.

15           So I just want you to know that's sort of -- and I  
16 know neither one of you are arguing that, you know, and it's  
17 not -- it may auger a little less in favor for an injunction,  
18 given that it -- you know, there is a chill in the air, but  
19 you can drive literally two minutes from here in a car and  
20 the chill doesn't exist anymore. I just want you all to know  
21 that.

22           MR. WILLIAMS: If I may comment before I let --

23           THE COURT: Please. I wanted to share that  
24 thought with you.

25           MR. WILLIAMS: And it's a thought that we have

1 obviously considered as part of our handling of this case.  
2 It is prophylactic. And as someone who's probably done more  
3 dangerous things than I should have in my youth and in my  
4 adulthood, actually, just because you can doesn't mean you  
5 should. Just because the weather people say that the weather  
6 is clear, but your eyes tell you there is a thunderstorm over  
7 there, it doesn't mean you should take off because the  
8 consequences are severe. You die. And so when the  
9 consequences are severe, that's when prophylactic measures  
10 are important. And flying, as a former pilot, you just say,  
11 no, I'm not taking off, and that resolves the issue once and  
12 for all. We are all on the ground. We will be safe.

13           Here, contrasting with *Wollschlaeger* and other  
14 cases, the city council said, wait a minute. We have all  
15 these studies that tell us that this procedure is potentially  
16 dangerous, potentially fatal to children. And I think the  
17 Court can take judicial notice that children, teenagers do  
18 stupid things for stupid reasons. And I will use myself as  
19 an example. I certainly did. I wonder I'm alive today  
20 sometimes, as I think back on it.

21           THE COURT: Me, too. I think, oh, my goodness.

22           MR. WILLIAMS: So, fortunately, I had parents that  
23 were pretty strict, so I didn't do something stupid or fatal.  
24 But that doesn't mean it's true across the board.

25           By using these well-respected organizations'

1 peer-reviewed reports as a basis for making the decision to  
2 enact this prophylactic ordinance, as far as the city council  
3 is concerned, they are protecting their children from that  
4 kind of behavior, from that kind of therapy, from that kind  
5 of outcome.

6 Just like when you don't take off, you don't have  
7 to worry about auguring in because you run into the  
8 thunderstorm. Forget what the weather people said.

9 Here, you don't have to worry what parents may do  
10 or not do in certain circumstances. That's the prophylactic  
11 approach and doesn't do any real harm. As you say, three  
12 minutes away and you're in the county.

13 I would point out that the ordinance was enacted  
14 in April of '17. This lawsuit was not filed until December  
15 of that year. Eight months later. So it's not as if there  
16 was a rush to judgment. It's not as if there was a  
17 life-threatening issue that the plaintiffs were looking at.

18 THE COURT: I didn't mean to take a slap at them  
19 either because it cuts both ways. It suggests that this  
20 isn't a horrible, imminent threat; but by the same token, the  
21 lack of history of this ever happening in Tampa suggests,  
22 also, against your side that maybe it's sort of politically  
23 content -- there is some of that in your motivation rather  
24 than to protect the children.

25 So the fact that it's so inchoate -- we are just

1 talking about strict scrutiny. Of course, there was never  
2 any such speech in Tampa and now they want to speak. It cuts  
3 both ways.

4 MR. WILLIAMS: There is no history that I'm aware  
5 of that it is happening --

6 THE COURT: This record has none.

7 MR. WILLIAMS: Zero. None. I'm not aware of any.  
8 If I was, I would certainly tell the Court today, but it has  
9 apparently happened elsewhere.

10 THE COURT: Oh, I know. And there is certainly a  
11 bad history, especially back not that long ago, when, you  
12 know, same-sex attraction was viewed as some sort of mental  
13 defect or something.

14 MR. WILLIAMS: Well, homosexuality was --

15 THE COURT: We are, hopefully, beyond that.

16 MR. WILLIAMS: -- was deemed as a disease in  
17 DSM-II.

18 THE COURT: Until '73 or something.

19 MR. WILLIAMS: And today, of course, that's  
20 abhorrent to most people.

21 I read a decision the other day by the Supreme  
22 Court of the United States of America that says a wife is an  
23 appendage of her husband. That was 1893.

24 THE COURT: Sure.

25 MR. WILLIAMS: And times change.

1 THE COURT: They do.

2 MR. WILLIAMS: And we have a living Constitution.  
3 And because those studies have established that fatalities  
4 can arise as a result of it, why do we want to take any  
5 chance -- any chance at all of taking off and running into  
6 that thunderstorm? Let's be prophylactic.

7 Thank you, Your Honor. I will stand down.

8 THE COURT: I'm not going to cut anybody off. You  
9 can come back if you want.

10 MR. WILLIAMS: Thank you.

11 MS. WALBOLT: Good morning, Your Honor, and thank  
12 you for the opportunity to speak.

13 THE COURT: Good morning. Yes, ma'am.

14 MS. WALBOLT: And thank you, Rob, for saving me a  
15 little bit of time.

16 THE COURT: Thank you.

17 MS. WALBOLT: On behalf of the Amicus, I want to  
18 join in their objections to the recommendation of Judge  
19 Sansone. We urge this Court to follow the very careful and  
20 principled reasoning of Judge Rosenberg in her very detailed  
21 order, which I'm sure the Court will read.

22 I want to focus on two points, and I want to start  
23 with the Court's concern about were there concrete harms to  
24 Tampa minors.

25 As Mr. Williams has said, the city relied on

1 reports of multiple organizations. Not just a single  
2 organization, but multiple ones, and we have a list that,  
3 with the Court's permission, Mr. Porter would like to give.  
4 It's a list of the national organizations that have expressed  
5 their opinions on this type of mental health therapy for  
6 children, and these are all cited in our papers that have  
7 been filed.

8 THE COURT: Thank you. Thank you, Mr. Porter.

9 (*Document tendered.*)

10 MS. WALBOLT: The plaintiffs take issue with the  
11 APA reports that we cite and was relied on by the city. They  
12 note that the association said it would be good if there  
13 would be some follow-up studies. This was a report in 2009.  
14 And notwithstanding their observation that it would be good  
15 to have further research and studies, here's what that  
16 association found:

17 They found that "the scientific evidence shows  
18 conversion therapy is not likely to produce its intended  
19 outcomes and can produce harm for some patients." That's at  
20 Page 83.

21 Then, going to your question about the harms, it  
22 outlines the very concrete harms, at Page 42, that have been  
23 reported by minors who were subjected to this type of mental  
24 health therapy.

25 It concludes -- notwithstanding the observation

1 that it would be good, as it always is, to have continued  
2 studies, it concludes that licensed healthcare providers  
3 should not use this therapy -- quote -- under any  
4 circumstances -- end quote -- whether adverse or  
5 non-adverse, and including minors who express a desire to  
6 change their sexual orientation. That's at Page 79 and 80 of  
7 the report.

8 I would suggest to the Court that there is no  
9 logical reason why harms that have been found from studies  
10 across the nation to minors would not have that same type of  
11 very serious harm. These aren't just light self-image  
12 issues, although that's one, and it's one I don't suggest  
13 isn't very, very important. But the issue of suicidal  
14 desires and attempts by minors who have been subjected to this  
15 therapy is quite high and has been reported in these studies.

16 The APA actually, late last year, just right  
17 before the hearing we had before Judge Sansone, strongly  
18 endorsed its 2019 [sic] report and stood by that, that there  
19 should not be conversion therapy on children.

20 We have also cited in our papers the report of the  
21 United States Department of Health and Human Services. It  
22 was in 2015. Obviously, a number of years after the 2009  
23 report of the APA. The department found that the practice of  
24 conversion therapy was not supported by credible evidence and  
25 that mental health interventions -- quote -- aimed at

1 achieving a fixed standard -- which conversion therapy does.  
2 That's one of the issues, and I'll get to that in a minute.  
3 This is therapy that is aimed at changing the identity. Not  
4 making the child comfortable with the sexual orientation, but  
5 changing it. It's a fixed outcome. There is only one  
6 acceptable outcome of this therapy, and for that reason the  
7 department said that such interventions are -- quote --  
8 coercive, can be harmful, and should not be part of treatment.

9 We have cited that in our papers below and  
10 submitted that report.

11 So the overwhelming medical consensus is that this  
12 is a dangerous treatment for children, for minors, that can  
13 have very, very serious harms to them, including suicide and  
14 efforts at suicide.

15 The 2018 position paper of the APA was cited by  
16 us, Your Honor, in document 142, which was filed December 3rd  
17 of last year. It was our supplemental Amicus brief.

18 So that's the first question I wanted to address,  
19 and then the remaining time I have I want to make the point  
20 that counsel for the city has made and stressed that this is  
21 not "speech is speech," which was a distinction that the  
22 NIFLA court made.

23 This is speech as part of a medical treatment, as  
24 a part of a mental health treatment. And the plaintiffs have  
25 acknowledged that in their response. They have said that

1 speech is the treatment, and that's exactly the point. This  
2 isn't speech is speech. It is speech as a mental health  
3 treatment for minors.

4 I would urge the Court, if the Court has any  
5 thought that this is simply a matter of therapists having a  
6 conversation, which was the word that the plaintiffs' counsel  
7 used over and over again at the hearing before the magistrate  
8 judge, this is not just a conversation about a person's  
9 sexual orientation or identity or changing it.

10 This is the practice guidelines that are issued by  
11 the proponents of this therapy. It's practice guidelines for  
12 the treatment of same-sex attraction and behavior. It's 62  
13 pages of a protocol of extended multiple sessions that are  
14 held with the fixed goal of changing the patient's sexual  
15 orientation. And that is what causes these children who are  
16 unable to do that, who have been told that if you just listen  
17 and follow and really try hard, you will be able to change  
18 this attraction, and then when they are unable to do so, they  
19 feel they've failed and some of them become actually so  
20 depressed that they become suicidal.

21 I would like to -- I think I'm out of my time, but  
22 before I sit down, I want to also stress that I urge the  
23 Court to read what Judge Rosenberg said about the *Keeton* case  
24 and about the claim of the plaintiffs that this is a  
25 viewpoint discrimination.

1           In our papers, we relied heavily on the Eleventh  
2 Circuit's decision in *Keeton*. Judge Sansone did not address  
3 *Keeton*. Judge Rosenberg did. But *Keeton* involved a  
4 university that required their mental health therapist  
5 students to comply with the ethical standards of the  
6 profession, which means you don't do conversion therapy.

7           The Eleventh Circuit said -- quote -- the  
8 generally applicable rules of ethical conduct of the  
9 profession are not designed to suppress ideas or viewpoints  
10 but apply to all regardless of the particular viewpoint the  
11 counselor may possess.

12           That's exactly the same with respect to the  
13 ordinance here. It can't be -- this therapy can't be  
14 performed by any licensed mental health professional who is  
15 asked to perform it on a minor.

16           We urge the Court to reject the recommendation of  
17 Judge Sansone. We think the potential harm to children from  
18 this therapy that has been completely discredited, has been  
19 found to be dangerous, far outweighs any potential harm to  
20 licensed mental health professionals who will simply be  
21 required to abide by the ethical and professional standards  
22 of their profession.

23           Thank you, Your Honor.

24           THE COURT: I appreciate that. Anybody else for  
25 the objectors?

1 MR. WILLIAMS: Your Honor, if I may, I would like  
2 to reserve my time for rebuttal.

3 THE COURT: Of course. I shared a couple of  
4 thoughts just because they were floating through my id, you  
5 know, one other one -- and maybe it's really not, I guess,  
6 fair for me to bring up because it wasn't part of her R and  
7 R. Let's see if I can articulate this without sounding  
8 completely ultravirus to why we are here.

9 It wasn't part of her R and R, but I always -- the  
10 ordinance, it's not only family therapists. I mean, it's  
11 medical doctors. So the City of Tampa has made a decision  
12 that -- let's say it's an M.D. from Harvard Medical School  
13 that's got an office in Davis Island, can't do this, and the  
14 plaintiffs say, well, we are not electroshocking people.

15 This may be some child that wants to -- as the  
16 child enters sort of post-puberty, wants to realign the  
17 child's gender identity with the child's biological. So the  
18 City of Tampa, who's never done this before, who has no one  
19 trained in anything, neither the code enforcers, nor the  
20 legislators, nor the city attorneys have any more training  
21 than Mr. Williams and I do on psychotherapy, have said, you  
22 can't say this.

23 You can't -- you know, there is a line where the  
24 child might be questioning, where you can talk, but once a  
25 child has identified one way, perhaps contrary to the

1 biological body, you can't -- even though the child might  
2 want to talk about it, you can't do that, Mr. Psychiatrist  
3 from Harvard Medical School.

4           The strength for that is what I call law review  
5 articles, psychological therapy articles that are in the  
6 record, some of which are debated. Then we have the Florida  
7 Board of Medicine. We have an entire regulatory apparatus in  
8 Tallahassee that tells doctors what they can and can't do,  
9 and the City of Tampa code now has one piece of that.

10           That's there, too. And it's really unfair because  
11 Judge Sansone didn't make any ruling on implied preemption  
12 really. And to be quite honest, Judge Rosenberg kind of went  
13 over it in about a paragraph, but that is also kind of in the  
14 air here.

15           So I wanted to mention this before you've  
16 concluded, but I'll let you think about it. And anyone else,  
17 before I switch over to the plaintiffs, and then we will come  
18 back to you because you -- I'm not going to say you have the  
19 burden of proof, but you are the objecting party.

20           So may I recognize plaintiffs' side? And  
21 everybody okay? Anybody need a break? No hard feelings if  
22 you do. Okay. We will keep going. All right.

23           MR. MIHET: Good morning, Your Honor.

24           THE COURT: Good morning.

25           MR. MIHET: Once again, Horatio Mihet for the

1 plaintiffs, and I think I do have about an hour's worth of  
2 presentation.

3 THE COURT: All right. Let's get right after it,  
4 and we might take a little break here halfway through. We  
5 will see.

6 MR. MIHET: Sure. Now, in the Court's written  
7 order a few days ago, the Court had asked us to begin our  
8 presentation by discussing what we would like to see --

9 THE COURT: Please do. And I'll chime in on my  
10 view. Go ahead.

11 MR. MIHET: Let me take a couple of minutes to do  
12 that. If there is to be an interlocutory appeal flowing from  
13 the Court's forthcoming preliminary injunction order, the  
14 plaintiffs do believe that a stay of this litigation would be  
15 appropriate while the Eleventh Circuit entertains that appeal.

16 However, we don't know now whether there is going  
17 to be an interlocutory appeal, and so we think that decision  
18 is premature at this point. We would like for the Court to  
19 postpone a longer term determination of what to do with this  
20 case until the Court decides the pending objections and the  
21 time -- the 30-day period for an appeal expires.

22 Having said that, there is an upcoming expert  
23 report deadline in about 30 days, and we do think that we  
24 need the Court's guidance on the matters before the Court  
25 before we decide how to conclude or complete the discovery in

1 this case.

2           So what the plaintiffs would propose is, in the  
3 short term, for the Court to vacate the existing discovery  
4 deadlines in this case and to reconvene the parties for a  
5 status conference, to take place roughly 35 or 40 days after  
6 the Court's forthcoming decision on the preliminary  
7 injunction order, by which time we will know what direction  
8 the case is going to go from here on out. So that's what the  
9 plaintiffs would like.

10           THE COURT: I appreciate that. Let me tell you  
11 what I'm going to do on that. I'm going to deny that motion,  
12 as I denied Mr. Williams' motion.

13           Look, my understanding is that Judge Rosenberg's  
14 preliminary injunction -- she denied the preliminary  
15 injunction. So I think that the appeal to the Eleventh  
16 Circuit on her case is discretionary with Atlanta. I'm not  
17 sure about that. I don't think that the plaintiffs down  
18 there will have an appeal of right because nothing was  
19 enjoined, other than the status quo before that order.

20           This case has a '16 on it, and I'm not going to  
21 change the Case Management Order. We are going to -- as I  
22 used to -- I'm not saying you would, but I would say to my  
23 partner, oh, this is et cetera, et cetera, because you know  
24 how litigators are. They complain about the case. And he  
25 would always say, the only way out is through.

1           So we will proceed on this matter. So if you need  
2 a couple more weeks on a discovery issue, I'm not going to  
3 say, no, no, you can't. I'm going to cut you off; but by the  
4 same token, if we need to get on something, call chambers,  
5 Miss Olden, and I won't defer your discovery issue down to  
6 the magistrate where it's delayed eight weeks and you get  
7 behind the eight ball.

8           So it would be nice if we could all end up at the  
9 Supreme Court, but you are going to have to get it through  
10 summary judgment first. Now, nothing is stopping anyone --  
11 there is a dispositive motion cutoff -- other than your  
12 cooperation with discovery, which really my hat's off. I  
13 salute you, both sides, for that. But if you feel you are at  
14 a point where you want to file cross-motions for summary  
15 judgment, have at it. That's a deadline. As long as  
16 everybody has completed their discovery they need. So I'm  
17 sorry to not be able to accommodate you all, both sides, on  
18 that.

19           MR. MIHET: Thank you, Your Honor.

20           Moving on then to the merits of the objections  
21 before the Court, at his deposition, Councilman Maniscalco,  
22 who was the principal sponsor of the ordinance that's being  
23 challenged here, testified that it was his intent and the  
24 city's intent behind this ordinance to ban what he termed to  
25 be torture, which he referred to as the coercive kind of

1 therapy, the conduct-based, the electroshock therapy, induced  
2 vomiting, involuntary confinements, things that, thankfully,  
3 no one practices and no one has practiced for decades. You  
4 can find that testimony at docket 133-2.

5 THE COURT: Please know that I've read his  
6 deposition. I've read Sal Ruggiero's deposition. Again,  
7 forgive me, Jerry's deposition.

8 MR. MIHET: Mr. Simpson, Your Honor.

9 Okay. So, now, the city didn't know it at the  
10 time, but the literature term for that kind of treatment is  
11 aversive treatment as opposed to non-aversive treatment, and  
12 that's a critical distinction in this case.

13 Now, if that's all the city had banned, Your  
14 Honor, then we wouldn't be here before the Court, not because  
15 we would concede that the city has the authority to ban  
16 that -- we don't. We do believe this entire field has been  
17 preempted by the Florida legislature for reasons that we have  
18 briefed fully before the Court, but we wouldn't be here  
19 because that kind of a limited ban would not affect the  
20 plaintiffs.

21 It's undisputed in this case that the plaintiffs  
22 do not seek to engage in any of those things. It's  
23 undisputed that none of those things have ever happened in  
24 the City of Tampa since its founding, as the Court has  
25 already noted.

1           It's undisputed that the only thing that the  
2 plaintiffs wish to do in Tampa is to engage in speech-only  
3 talk therapy that is voluntary, that's client centered,  
4 that's client driven, that's client initiated, that's desired  
5 and willingly received by the client.

6           Now, Your Honor, the problem here is that under  
7 the guise of banning torture and aversive kind of therapy,  
8 what the city has done with this ordinance is ban it all.  
9 And that's the problem that Judge Sansone recognized. And  
10 the city did that without even -- admittedly, as Mr. Williams  
11 admitted today, without even considering a more limited ban,  
12 one that would have only banned the torture that concerned  
13 Councilman Maniscalco. That's the problem that lies at the  
14 bottom of this case.

15           Now, moving into the -- actually, before I go into  
16 the speech versus conduct argument, let me address the  
17 Court's concerns with respect to whether or not an injunction  
18 is really necessary or needed here.

19           In the Complaint, at paragraphs 110 through 112,  
20 Vazzo testifies, undisputedly, that he has existing clients  
21 in Tampa that he has a relationship with, that he was  
22 providing this counsel to, and that he cannot counsel at this  
23 time.

24           THE COURT: Not that he wanted to.

25           MR. MIHET: I'm sorry?

1 THE COURT: Let me ask you on that. What's the  
2 status of Mr. Pickup's license?

3 MR. MIHET: Mr. Pickup, I believe, has sat for the  
4 examination and is awaiting licensing. That's not --

5 THE COURT: Your First Amended Complaint said that  
6 in October he was sitting. We are now in February. Did they  
7 not grade him yet or did he not sit?

8 MR. MIHET: I'm not sure, Your Honor. I can find  
9 out and supplement the record if the Court wishes. I  
10 honestly don't know today.

11 THE COURT: I just thought I would ask since it's  
12 injunctive. You want me to put a freeze on this legislative  
13 act.

14 What about -- you say that Vazzo and Pickup have  
15 spent money looking for an office. Okay. What money? Where  
16 is the office?

17 MR. MIHET: I don't know the actual address, Your  
18 Honor. It's an executive office that they have rented and  
19 was available to them and continues to be available. I don't  
20 have the address handy, but I can provide it to the Court.

21 THE COURT: Okay. Just so he -- I thought it said  
22 he had one client, but you say plural, waiting to or wanting.

23 So he can't do this in Carrollwood? Are you  
24 familiar with Tampa? Okay. Tampa is 175 square miles.  
25 Hillsborough County -- this isn't like Jacksonville where the

1 whole county is a city. Hillsborough County is, like, 1600  
2 square miles. Most people -- like doctors' offices, there is  
3 a whole bunch of them in Carrollwood and Brandon and out on  
4 Bruce B. Downs by the hospital. So you just can't do that?

5 MR. MIHET: Your Honor, the testimony is that he  
6 wants to do it in Tampa because this is where his client is  
7 and he doesn't want to make his client drive out of the city  
8 limit.

9 THE COURT: To the football stadium? Just north  
10 of there is Carrollwood. To be quite honest, let's just tell  
11 it the way it is. It sort of smells like it's politics and  
12 he's not really chilled in his therapy practice. They made a  
13 political statement and you want to slap it down. Okay. You  
14 are allowed to do that. Amen. But the chill -- I mean  
15 Claremont is, from here, two minutes in a car.

16 MR. MIHET: Your Honor, respectfully, I submit  
17 it's not merely a chill. It is an outright ban.

18 THE COURT: A bar. And you are entitled to speak  
19 your full First Amendment rights -- of course, we are  
20 discussing what the metes and bounds of those are -- in the  
21 City of Tampa. Amen. We will get there. But you want me to  
22 put liquid nitrogen on this legislative thing because you  
23 claim you are presently chilled. You just can't drive to  
24 Carrollwood?

25 MR. MIHET: I commit the Court to the case we

1 cited on Page 3 of our post-hearing memorandum. Not the one  
2 that we just filed on Sunday, but the one we filed for Judge  
3 Sansone.

4 THE COURT: Give me the docket number.

5 MR. MIHET: This is docket 145, point 3, and we  
6 quote the Supreme Court in *Schad versus Borough of Mount*  
7 *Ephraim*, where the Court says -- quote -- One is not to have  
8 the exercise of his liberty of expression in appropriate  
9 places abridged on the plea that it may be exercised in some  
10 other place.

11 THE COURT: Well, you are absolutely right, and we  
12 are going to get you a ruling on the merits ASAP on this  
13 case, but --

14 MR. MIHET: I understand the Court's concern.

15 THE COURT: -- I have to find that you are  
16 chilling -- that his inability to service his client and  
17 speak is real.

18 MR. MIHET: I assure the Court it's not contrived.  
19 The client is in Tampa.

20 THE COURT: He just can't go to Temple Terrace?  
21 It's about six minutes by car that way.

22 MR. MIHET: The Supreme Court, Your Honor, the way  
23 I read it, says he doesn't have to go there.

24 THE COURT: Because we are talking about  
25 injunctive. I'm not talking not about ruling on the merits

1 here. I'm talking that I'm going to take this gavel and say,  
2 freeze. Okay. All right. And so better I enjoin them than  
3 he goes to the Medical Arts Building where my doctor is in  
4 Temple Terrace, five minutes from here.

5 MR. MIHET: For two reasons, yes. No. 1, there is  
6 no record of any harms occurring in Tampa for this ban to be  
7 justified and, No. 2, Your Honor, the preliminary injunction  
8 analysis focuses on whether or not the plaintiffs are likely  
9 to succeed at trial.

10 If this Court concludes that the ordinance is  
11 likely unconstitutional and that my clients are likely to  
12 succeed, particularly because the city cannot meet its burden  
13 of proof on narrow tailoring, then the Court should not delay  
14 my clients' First Amendment rights until a trial six or eight  
15 or nine or ten months down the road. The Court should enter  
16 injunctive relief now, as is appropriate.

17 THE COURT: All right. Okay. There is no  
18 allegation that he had these clients before this injunction?

19 MR. MIHET: I believe that there is, Your Honor.  
20 In paragraph --

21 THE COURT: In 2016? Or is there? Just correct  
22 me if I'm wrong.

23 MR. MIHET: Let me just ... so the Complaint  
24 actually doesn't say when the client was acquired. It says  
25 that Vazzo currently has a client, and that was as of June

1 2018.

2 THE COURT: Singular, not plural. That can't get  
3 to Carrollwood. Okay.

4 MR. MIHET: Your Honor, importantly, this  
5 ordinance because it is an outright ban on my clients'  
6 speech --

7 THE COURT: Speech.

8 MR. MIHET: -- it prohibits the clients from going  
9 out and finding additional clients to counsel. It  
10 prohibits --

11 THE COURT: No, it doesn't. If they have an  
12 office in Temple Terrace, they can come to Tampa and say come  
13 up to Temple Terrace. I have the therapy.

14 MR. MIHET: They could do that, Your Honor, but  
15 the Supreme Court says they don't have to do that.

16 THE COURT: Okay.

17 MR. MIHET: So moving on to the speech versus  
18 conduct distinction, which is a critical distinction in this  
19 case, the Supreme Court did decide the NIFLA case in June of  
20 2018. As Your Honor has noted, it called by name the *Pickup*  
21 and the *King* decisions. It abrogated their conclusions that  
22 professional speech, specifically SOCE counseling, which was  
23 at issue in both of those cases, was deserving of less  
24 constitutional protection and that content-based restrictions  
25 of professional speech could be subjected to anything less

1 than strict scrutiny.

2           The Supreme Court said that is not the case.  
3 Those two cases, by name, were wrongly decided. And,  
4 instead, the Court re-affirmed and reapplied its earlier  
5 ruling in *Reed*, which held that all content-based  
6 restrictions on speech, including the speech of professionals  
7 and including medical professionals, must be subjected to  
8 strict scrutiny.

9           Now, that's the unmistakable import of NIFLA. I  
10 submit you can't read NIFLA and come away with a different  
11 conclusion than that one.

12           Now, as soon as the decision came out, the city  
13 switched gears 180 degrees and began to say, to argue, that  
14 this ordinance bans only conduct, not professional speech.  
15 And the problem that we have with that is what Your Honor has  
16 already noted, which is that the city had already committed  
17 to calling its ordinance a ban on professional speech.

18           If I could ask the clerk to give me access here on  
19 the PowerPoint ...

20           THE COURT: I'm looking here, if you see my face  
21 this way, or here.

22           MR. MIHET: Excellent.

23           THE COURT: Do you want to take a three-minute  
24 break here?

25           THE COURTROOM DEPUTY: Maybe a couple of minutes.

1 THE COURT: We will take a four-minute break.

2 That might have to do with the judge needing a break.

3 (Recess taken from 10:11 a.m. to 10:27 a.m.)

4 COURT SECURITY OFFICER: All rise.

5 This Honorable Court is now in session.

6 THE COURT: Okay. You have the floor, Counsel.

7 MR. MIHET: Thank you, Your Honor, for the  
8 indulgence. We were able to figure it out.

9 THE COURT: That's our fault. Thank you.

10 MR. MIHET: Right before the break, I was  
11 beginning to show the Court how prior to the NIFLA decision  
12 coming out, the city had already committed firmly to the idea  
13 that this ordinance bans professional speech. I'm showing  
14 the Court a slide that's got a quote right out of the  
15 ordinance itself. This is filed at docket 24-1, page ID 347.  
16 It's one of the whereas clauses in the ordinance where the  
17 city says:

18 Two Federal Circuit Court of Appeals have upheld  
19 bans on conversion therapy. That's *Pickup* and *King*, we know  
20 from the footnote. In the last sentence they say that the  
21 courts have found that counseling is professional speech,  
22 subject to a lower level of judicial scrutiny.

23 That's right in the ordinance, and Judge Sansone  
24 was right to hone in on that and focus in on that. Also, we  
25 do have this PowerPoint slide that the city put together in

1 order to train its code enforcers on how to enforce this  
2 particular ordinance. And here, as well, in the second  
3 bullet point, the city says -- quote -- conversion therapy is  
4 a form of professional speech. It could not be more clear.  
5 They again cite to the *King* case that at that time was still  
6 good law and that said that professional speech is subject to  
7 a lower standard of scrutiny.

8           So, Your Honor, this is a factual determination,  
9 whether or not the counseling at issue is speech or conduct  
10 is a factual determination, and the city had already  
11 committed itself to the notion that this is professional  
12 speech.

13           NIFLA comes out. It doesn't magically transform  
14 overnight what previously had been speech to now be conduct.  
15 I will point out that Judge Sansone was very gracious with  
16 us. She gave us a full day of argument, so we had three or  
17 four hours.

18           No argument was brought before her from the city  
19 on how to deal with its prior admissions. No argument by the  
20 city in its briefs -- in any of its briefs on how to deal  
21 with its prior admissions. No attempt by the city to explain  
22 away what cannot be explained, which is that it had already  
23 admitted that this is professional speech. So we think that  
24 issue is clear before the Court.

25           Now, because the city now says that *King* and

1 *Pickup* are no longer relevant, well, I would say they were  
2 the basis of the ordinance. Clearly the ordinance was  
3 premised on what *Pickup* and *King* did, and the city cannot now  
4 disavow *King*. Particularly the central holding of *King* was  
5 to conclude that this is professional speech, not conduct.

6           So the same argument that the city is making now  
7 before this Court was submitted to the *King* court, and you  
8 can see the slide that has the excerpt from page 224 where  
9 the Court outlines the argument that was being made by the  
10 parties, and it's the same exact argument that's being  
11 presented to Your Honor today. So this isn't new ground.

12           The *King* court then, on the next slide, on pages  
13 224 and 225, unequivocally rejects the conduct argument and  
14 says: We hold that these communications -- and by these  
15 communications, they mean the same exact SOCE counseling  
16 that's at issue in this case -- these communications are  
17 speech for purposes of the First Amendment.

18           Then, going on to page 225, they say: Because the  
19 Supreme Court had no difficulty finding that legal counseling  
20 is speech, there is no difficulty here concluding that SOCE  
21 counseling is also speech and not conduct. I'm paraphrasing  
22 what they say there on page 225.

23           I'm going to skip through some of these because I  
24 know the Court has read *King* and I don't want to belabor the  
25 point, but the bottom line of *King* is here on this slide,

1 pages 228 and 229, where they say: To classify some  
2 communications as speech and others as conduct is to engage  
3 in nothing more than a labeling game. And they say, finally:  
4 We conclude that the verbal communications that occurred  
5 during SOCE counseling are not conduct but, rather, speech  
6 for purposes of the First Amendment.

7 So, Your Honor, *King* is the case that they started  
8 off with in this case. And to the extent any part of *King*  
9 remains good law today, it's this part, the part that says  
10 that this is speech and not conduct.

11 Now, I'll explain in a minute where *King* went off  
12 the rail with respect to what level of scrutiny applies and  
13 how the Supreme Court rectified that. But on this issue, at  
14 least, *King* is clear, and we have not heard any attempt from  
15 the city to disavow the case that they started out with in  
16 this case.

17 So we have, then, also in the *Wollschlaeger* case,  
18 the en banc Eleventh Circuit says that there are serious  
19 doubts about whether *Pickup*, which is the other companion  
20 case to *King*, was correctly decided. And they say:  
21 Characterizing speech as conduct is a dubious constitutional  
22 enterprise.

23 We respectfully submit that that's the kind of  
24 dubious enterprise the city is urging here. We would ask the  
25 Court to reject that.

1           Now, importantly, we have this argument from the  
2 city that, well, *Wollschlaeger* and NIFLA are different  
3 because they don't deal with treatment that doctors provide  
4 to patients.

5           I think the city would have the Court believe  
6 that, for example, *Wollschlaeger* was an attempt to ban what  
7 doctors can say about guns at NRA meetings. That's not the  
8 case. *Wollschlaeger* dealt with an attempt to ban what  
9 doctors could say, not at NRA meetings, but in the confines  
10 of a doctor-client relationship where the doctor was  
11 dispensing counseling, just like we have the case before the  
12 Court here.

13           Same thing in NIFLA. NIFLA wasn't concerned with  
14 what crisis pregnancy centers could say about abortion at a  
15 March For Life political event in Washington, D.C. It dealt  
16 with what counselors could say to their clients or were  
17 required to say to their clients within the confines of that  
18 client-counselor relationship. Exactly what we have in this  
19 case.

20           So this distinction that, well, what doctors may  
21 do outside of their office, that may be speech, but what they  
22 do when they talk to a client, that's medical treatment, that  
23 flies in the face of both *Wollschlaeger* and NIFLA.

24           I would also note, with respect to NIFLA, the  
25 Supreme Court there, on page 2374 of NIFLA, the Supreme Court

1 lists a litany of examples of how governments historically  
2 have tried to control what doctors can say to their patients,  
3 and it talks about the Nazi regime, talks about Nicolae  
4 Chaushesku's regime in Romania, under whom I had the  
5 misfortune of living for a time in my life.

6 All of those examples that concerned the Supreme  
7 Court had to do with government directing what doctors could  
8 say to their patients, what counselors could say to their  
9 clients. That's the crux of NIFLA, and it cannot be escaped  
10 in this case.

11 THE COURT: We could pass a law that says  
12 therapists can't, you know, counsel children to sample kiddie  
13 porn on the internet.

14 MR. MIHET: Sure. That goes to the strict  
15 scrutiny argument, which I will get into.

16 THE COURT: Okay. So you are saying that any of  
17 those sort of ridiculous examples would satisfy strict  
18 scrutiny.

19 MR. MIHET: Sure. My colleague, Mr. Williams,  
20 said that governments have to have flexibility in addressing  
21 harmful conduct. No doubt. I mean, governments have a lot  
22 of flexibility when they regulate conduct. So if Tampa had  
23 decided that electroshock therapy is heinous and is a real  
24 danger, not withstanding the lack of evidence of it ever  
25 having been engaged in Tampa, or the same with induced

1 vomiting or our types of conduct, they could have banned  
2 those practices. And because those are conduct, not speech,  
3 they would not have had to contend with strict scrutiny.

4           Where you lose that flexibility that Mr. Williams  
5 advocates is necessary is when you, as a government, decide  
6 that you are going to regulate speech on the basis of its  
7 content.

8           The Constitution, the First Amendment says that  
9 when a government tries to regulate speech on the basis of  
10 its content, as we have here, our First Amendment freedom is  
11 much too precious to allow anything other than a strict level  
12 of scrutiny for that, and that's what we have here.

13           THE COURT: So why couldn't a reviewing body, the  
14 Eleventh Circuit, for example, determine that -- I know you  
15 have talk therapy and all that, and this is a very touchy,  
16 changeable issue, especially adolescent sexuality is very  
17 difficult, but why couldn't they say that even given the  
18 history here -- which there is bad history, not in Tampa, not  
19 with your client, but the concept has some pretty -- you  
20 know, it brings some -- again, not your clients, the concept  
21 brings some pretty not real palatable practices with it  
22 historically.

23           Why couldn't they say, well, given that -- you  
24 know, we want to prescribe it prophylactically, and why  
25 doesn't that satisfy strict scrutiny?

1 MR. MIHET: Because, Your Honor, in order for  
2 something to satisfy strict scrutiny you have to have both a  
3 compelling interest and a narrow tailoring effort. And what  
4 the Supreme Court taught us in the *McCullen* case is the  
5 narrow tailoring has to happen at the legislative stage. It  
6 couldn't happen in Your Honor's courtroom.

7 They can't come now and say, well, these other  
8 alternatives would not have worked. So what strict scrutiny  
9 says is that the government has to employ the least-  
10 restrictive alternative after it carefully considers all of  
11 these other issues.

12 So in this case, if there is a need for a  
13 prophylactic measure to ban conversion therapy, as that term  
14 is used, to ban electroshock therapy and all those things  
15 that my clients have no interest in doing, then the city  
16 would have had a constitutional, solemn obligation to at  
17 least consider -- at least consider the other alternatives of  
18 banning only this conduct while allowing speech to go on.

19 They have admitted that they have not even  
20 considered that, and that's what the problem is here.

21 So one other quick thing I want to say on the  
22 speech versus conduct and then I'll move to strict scrutiny,  
23 and I raise this because --

24 THE COURT: I'm sorry I jumped you off your --

25 MR. MIHET: No problem.

1 I raise this because the Court has raised this  
2 argument, and I think it helps to identify exactly what the  
3 speech is here or what the treatment is here. But Your Honor  
4 raised the question of the Harvard-trained doctor who has  
5 some ideas about how a prepubescent child dealing with  
6 transgender issues might be counseled.

7 I think Your Honor thought maybe it was unfair to  
8 foist it on the parties. I don't think it's unfair because,  
9 actually, before, Judge Sansone went into those exact issues.

10 In the record we have the study by Professor  
11 Balber, who is not Harvard but Columbia, which I submit is  
12 perhaps in the same category, and Professor Balber says that  
13 when you have a prepubescent child that is dealing with  
14 transgender issues, there are two or three different courses  
15 of treatment, if you will, or counseling.

16 One course is to encourage them towards hormone  
17 therapy and a full-gender transition, but another course that  
18 Professor Balber has found effective in over 93 percent of  
19 the cases that he studied was to encourage the child to act  
20 in conformance with his or her biological gender. And he  
21 found that when that is done, then the child, in many cases,  
22 desists from those tendencies and ends up not needing radical  
23 surgery, intrusive surgery, and hormones and all those other  
24 things.

25 This is Dr. Balber, who is actually a laureate in

1 the LGBT field. He is not a rabid bigot, as some would have  
2 my plaintiffs appear -- my clients appear. He is a  
3 Columbia-trained doctor who says this is a valid piece of  
4 counseling.

5 In Tampa, he would not be able to conduct the kind  
6 of counseling that he has found to be helpful. And what's  
7 worse, Tampa has now entrusted the code enforcers -- and I  
8 have nothing against code enforcers. They provide a valuable  
9 service to the city; but, respectfully, the testimony in this  
10 case is these code enforcers are high school trained,  
11 diplomas or GEDs.

12 Now they get to sit in judgment over Dr. Balber  
13 and tell him that what he is doing is harming these children,  
14 when the state of Florida, as Your Honor has mentioned, has a  
15 regulatory body that's trained to deal with these issues.  
16 It's improper for Tampa to take it on in the way that it did.

17 I know that gets into the preemption argument and  
18 that's not really before the Court today, but it also goes to  
19 the question of narrow tailoring, because if it's impossible  
20 for the City of Tampa to properly apply and police this  
21 ordinance in the way that we have argued that it is, then  
22 that also goes to the narrow tailoring aspect and evidences  
23 that the city is not able to address what it believes are  
24 compelling interests.

25 All of that is in the record, and I don't think

1 it's unfair. I'm glad the Court has brought it up.

2           Now, once we conclude, as we believe Judge Sansone  
3 probably concluded, as *King* says, and as the defendants  
4 themselves have admitted, that what we are dealing with here  
5 is speech, not conduct, then the next question is, is this a  
6 content-based restriction on speech? And we submit to the  
7 Court that that question is an easy question to answer. It's  
8 easy because, again, the *King* case itself concluded that this  
9 is a content-based restriction.

10           This is prohibiting speech on the basis of its  
11 content. This is prohibiting the plaintiffs from saying  
12 things based on the things that they are saying. It's a  
13 classic content-based restriction, and the Court in *King* said  
14 that we have no -- this is the slide here. This is on  
15 page 236 in *King* where they say, we agree that -- in that  
16 case it was A3371, but the counseling ban discriminates on  
17 the basis of content; and footnote 20 in *King*, they say, we  
18 have little doubt in this conclusion. They say this is not a  
19 difficult decision, and we submit that it's not, and we  
20 believe that Judge Sansone got it exactly right.

21           Now, once we conclude that it's a content-based  
22 restriction on speech, then we think it's equally easy after  
23 NIFLA to conclude that it must satisfy strict scrutiny. As I  
24 mentioned, this is where *King* got it wrong. *King* said this  
25 is speech; this is a content-based restriction on speech.

1 But, nevertheless, because it's professional speech, we will  
2 apply something other than strict scrutiny.

3           We will apply intermediate scrutiny. And the  
4 Supreme Court comes in in NIFLA and rectifies that very issue  
5 and does so very clearly on page 2372. Pages 2371 to 2372 is  
6 where the Supreme Court delves into *Pickup* and *King* by name  
7 and says that in those cases they concluded that it was  
8 professional speech, and they concluded that because of that,  
9 they could apply a lower standard.

10           The Supreme Court says, no, that's not the case.  
11 The Supreme Court has not recognized professional speech as a  
12 separate category of speech. Speech is not unprotected  
13 merely because of its status.

14           So, Your Honor, Judge Sansone was correct. NIFLA  
15 has abrogated *King* and *Pickup*. The Westlaw clerks have got  
16 it right. There is no reason to think they got it wrong when  
17 they put the red flag on those prior decisions because it  
18 could not have been clearer; and so because of that, we  
19 believe that strict scrutiny is the only type of scrutiny  
20 that this Court can or should apply.

21           So, now, briefly showing the Court how it is  
22 impossible for the defendants here to satisfy strict  
23 scrutiny, the two major components are a compelling interest  
24 and narrow tailoring.

25           Now, the city has identified the compelling

1 interest of protecting minors, and we readily concede that  
2 protecting minors is a compelling interest. But that's not  
3 sufficient. You have to articulate a specific compelling  
4 interest. Protecting minors from what? Well, if it's  
5 protecting minors from shock therapy and aversive treatments,  
6 then it doesn't matter whether that's a compelling interest  
7 or not because that's not the ban that they passed.

8           It has to be a compelling interest in protecting  
9 minors from receiving the kind of speech that they have  
10 banned in this case, the kind of voluntary, noncoercive talk  
11 therapy that my clients wish to engage in. That's the  
12 interest they have to identify, and they haven't been able to  
13 do that.

14           We have seen in their request for admission No. 1,  
15 which is filed in the record, they readily admit that there  
16 has never been any complaint by any minor that has been  
17 harmed from any SOCE counseling, let alone the voluntary  
18 non-aversive kind that my clients wish to provide. That's in  
19 their request for admission, and it's also on page 41 of the  
20 Maniscalco deposition.

21           I'm not going to belabor it and read what it said  
22 because Your Honor has read that, but Councilman Maniscalco  
23 said not only did they not have any complaints, they never  
24 even made any effort to identify any studies, any  
25 investigation to identify whether this was an actual problem

1 in the city of Tampa or not.

2           So that's No. 1, is that we don't believe they  
3 have shown the requisite, specific compelling interests they  
4 are required to show. But even if they can, then the next  
5 question is, is there a compelling interest to ban this  
6 particular kind of speech.

7           So here, again, Judge Sansone was kind with us.  
8 She gave us the entire day, and we went into great detail at  
9 the macro level on all of these various studies. We won't be  
10 able to do that here with the Court, but it's in that  
11 transcript of that hearing.

12           But I do want to show the Court just a couple of  
13 things from the APA 2009 report. This is the magnum opus, if  
14 you will, on SOCE counseling. It's this report that  
15 everybody else -- all of those entities that were provided to  
16 Your Honor, all of those position papers that they issue cite  
17 to --

18           THE COURT: And Miss Walbolt mentioned a follow-up  
19 that they recently filed.

20           MR. MIHET: Correct, in which they basically  
21 re-affirmed this report.

22           THE COURT: I'm going to, of course, review that  
23 closely. Go ahead.

24           MR. MIHET: Very good. Let me point out a couple  
25 of things for Your Honor that are in this report.

1           This is what the APA says. Quote: We conclude  
2 that there is a dearth of scientifically sound research on  
3 the safety of SOCE. And by the way, let me just stop and say  
4 this: Conversion therapy is not a scientific term. It's a  
5 politically charged derisive term that's been used to  
6 denigrate those that are engaged in this kind of counseling.

7           My clients don't provide conversion therapy. They  
8 provide SOCE counseling, and there is a difference.

9           THE COURT: But that's not completely inclusive,  
10 either, because we are talking about two things, not just  
11 sexual orientation. We are talking about gender identity.  
12 So you provide both. Includes both.

13           MR. MIHET: It includes both.

14           THE COURT: Sexual orientation --

15           MR. MIHET: Change, efforts, counseling.

16           THE COURT: Yes, okay. So it includes both sexual  
17 orientation and gender identity, even though we only have the  
18 one term.

19           MR. MIHET: The way it's used today it does.

20           Interestingly enough, the APA report flat outright  
21 says we didn't address the issue of safety of --

22           THE COURT: Wasn't there a subsequent report that  
23 did that?

24           MR. MIHET: There was. There was by the APA.

25 And, incidentally, with Judge Sansone we showed her how even

1 in that report they actually conclude that there are  
2 different ways of dealing with transgender children,  
3 including the things I've outlined. And they say we just  
4 need more research to figure out what works and what doesn't,  
5 but they don't say that any particular modality should be  
6 banned, as the city has done here.

7           Going back to the APA report, they say there is a  
8 dearth of scientific research on the safety of SOCE. Then  
9 they say: Early and recent research studies provide no clear  
10 indication of the prevalence of harmful outcomes among people  
11 who have undergone efforts to change their sexual orientation  
12 or the frequency of occurrence of harm because no study to  
13 date of adequate scientific rigor has been explicitly  
14 designed to do so.

15           And this is what they say next: Thus, we cannot  
16 conclude how likely it is that harm will occur from SOCE.

17           THE COURT: And I appreciate that, and I haven't  
18 read the whole thing, of course. It's pretty dense. It's  
19 about 75 pages.

20           MR. MIHET: It is.

21           THE COURT: But would you agree with me that  
22 the -- maybe you won't. I'm not saying I've made this  
23 finding.

24           MR. MIHET: Sure.

25           THE COURT: But your opponents say -- and it sure

1 looks that way, but I may be wrong, but the bulk of -- you  
2 know, not political, not polemical, but the bulk of sort of  
3 science/medical reporting on this is not in favor of SOCE, at  
4 a minimum.

5 MR. MIHET: It's not in favor of SOCE, Your Honor,  
6 insofar as they cite to the APA report.

7 THE COURT: I know. And the argument that  
8 Mr. Gannam made may or may not be wrong -- again, I'm in the  
9 other hearing and it then becomes an echo chamber -- Report B  
10 cite is sort of misleading to the APA and then goes to  
11 Reports C and D. There is quite a bit of literature. They  
12 didn't make it up. There is quite a bit of adverse  
13 literature.

14 MR. MIHET: Well, but when you look at that  
15 adverse literature, it's position papers, not studies.

16 THE COURT: I know. This thing is, as the --  
17 gosh, what is it? I guess it was the APA. One of the  
18 reports of this is fraught with a lot of politics and all  
19 that.

20 MR. MIHET: And when you look at the position  
21 papers, what we showed Judge Sansone in the record, some of  
22 them -- the way we know it's an echo chamber kind of a deal  
23 here is they come up with such statements as the APA has  
24 concluded that the SOCE is harmful.

25 Well, we look at the APA report and we see

1 actually that's not at all what they concluded.

2 Couple more slides to drive this point home.

3 They say the nature of these studies precludes  
4 causal attributions of harm or benefit to SOCE. I'll skip  
5 over a couple of these because they are just -- it's just  
6 more and more of the same. But bottom line, they say: We  
7 found no empirical research on adolescents who request SOCE.  
8 So we are now even more specific into what my clients wish to  
9 do, which is voluntary SOCE requested by adolescents.

10 Never mind whatever the issue might be with forced  
11 conversion therapy as defined by the city, when it comes to  
12 adolescents who request SOCE, the APA says, we found no  
13 empirical research.

14 THE COURT: The city found to the contrary after  
15 they read these reports and took evidence. I mean, there was  
16 one -- I read the transcript of it. There was a lot of  
17 anecdotal stuff. There was at least one or two -- one, I'll  
18 call him a psychologist. He may have been a medical doctor  
19 at USF who testified.

20 Is the city incapable -- their finding to the  
21 contrary, you are just saying it's erroneous?

22 MR. MIHET: The city has admitted it hasn't  
23 conducted any of its own research.

24 THE COURT: Right. And it says it relied on these  
25 studies, but there was a couple of -- the one guy from USF,

1 he sounded very sober, and he was a Ph.D. or something, in  
2 his field. So all right. So the question is, are you saying  
3 they are incapable of making that finding legislatively? Or  
4 they are just wrong? Or both?

5 MR. MIHET: I'm saying both, Your Honor. They are  
6 wrong based --

7 THE COURT: If they are wrong, am I supposed to,  
8 sort of as a Court of Appeals on a fact-finding thing, find  
9 that they are wrong?

10 MR. MIHET: I think what you should find, Your  
11 Honor, is that there is no compelling interest for the city  
12 to ban my client's constitutionally protected speech.

13 Part of the reason for that is the very studies  
14 that the city cites as the rationale undercut and, I would  
15 say, gut that particular argument.

16 So what the APA report has found and what other  
17 position papers have found is that there is anecdotal  
18 evidence that in some cases, some people perceive to be  
19 harmed by this kind of counseling while there is --

20 THE COURT: It's a little stronger than that, but  
21 we don't need to argue how strong it is.

22 MR. MIHET: Right. In other cases, the APA report  
23 notes that other clients have perceived great benefit from  
24 this. And what the APA says is, look, none of this anecdotal  
25 evidence has been rigorously studied, so we can't take from

1 that any kind of conclusion on whether or not SOCE causes  
2 harm. That part, I think, is not in dispute. Even though  
3 the city --

4 THE COURT: Well, they disputed it.

5 MR. MIHET: They do, but it's in black and white  
6 in the APA report itself, Your Honor. The nature of the  
7 studies preclude a causal attribution for harm or benefit to  
8 SOCE. That's in the APA report.

9 Now, the city says we have cherry-picked one or  
10 two statements of a 70- or 80-page report. We have not done  
11 that. That is the unmistakable bottom line that's prevalent  
12 in this.

13 If you look at the brief that we filed on this  
14 past Sunday, on pages 7 through 8 of that brief, we detail  
15 all of these. I don't have time to go into them now, but  
16 it's not cherry-picking because it's quote after quote after  
17 quote where they say, be careful; you cannot make a causal  
18 attribution.

19 Going back to the Court's question on whether or  
20 not the city was entitled to reach its own independent  
21 conclusion, we asked the city about that in discovery, in  
22 depositions.

23 By the way, there is -- there was a suggestion  
24 made by the city that because we chose to do limited  
25 discovery prior to the PI hearing, which delayed the process,

1 that somehow that means we weren't in a hurry. We did some  
2 limited discovery and we were able to bring to the Court some  
3 very strong factual evidence that I think makes the Court's  
4 job somewhat easier in this case.

5 So I don't think that we could be fairly faulted  
6 for having done two or three depositions and some paper  
7 discovery.

8 THE COURT: We are not faulting you for that.

9 MR. MIHET: So we asked the city, its 30(b)(6)  
10 designee, sort of what is your opinion as to negative  
11 outcomes that come from SOCE counseling in light of the APA  
12 and in light of anything else that you might have heard at  
13 the hearings or you might have done yourself. We asked them  
14 what is your opinion on that? And this is what the city  
15 says.

16 Question -- starting on line 13 on this slide.  
17 And this is, by the way, page 110 of the city's deposition.

18 Does the city have a position about how likely it  
19 is that loneliness, for example, will result from SOCE  
20 counseling or conversion therapy?

21 Answer, on line 17: Once again, you know, it  
22 would have no position because everybody is different;  
23 everybody is going to react differently.

24 So then the question is being asked again. Would  
25 it be true that the City of Tampa cannot say whether the

1 likelihood of a negative outcome for a minor who receives  
2 SOCE is 50 percent or 1 percent or -- and this is  
3 important -- zero percent? Meaning no likelihood of harm.

4           And the answer from the city is: I can't come to  
5 a number because humans have freewill and people -- you know,  
6 you don't know how someone is going to react or behave or  
7 change or what incidents in their lives will trigger  
8 whatever.

9           So page 11, line 3. The answer is: No, the city  
10 can't tell what the likelihood is -- and this is critical --  
11 for a negative outcome from SOCE.

12           This is the compelling interest that they are  
13 bringing before this Court, and the city says, answering on  
14 line 5, nobody can.

15           THE COURT: All right. I agree with that. This  
16 councilman is not skilled in the therapeutic arts. However,  
17 the whereas clauses are legislative findings, and they kind  
18 of expand on those views a little bit. So the city is not  
19 bereft of findings. The ordinance contains a number of them.

20           MR. MIHET: So, a couple of points I would make to  
21 that, Your Honor. No. 1, this councilman was designated as  
22 the city's 30(b)(6) witness. We weren't just asking him of  
23 his knowledge.

24           THE COURT: He was unable to give you any  
25 therapeutic or mathematical opinion on failure rates.

1 MR. MIHET: And I would --

2 THE COURT: That's acknowledged.

3 MR. MIHET: That's his position. That's the  
4 record, then. So, if the city cannot identify or quantify  
5 the harm, that's not surprising because the APA said it can't  
6 be done either.

7 I'm just showing the Court how it wasn't some  
8 surprise testimony at the city council hearing that all of a  
9 sudden allowed the city to reach a different conclusion than  
10 the APA had.

11 We know the city has reached the same conclusion  
12 as the APA and that is that it cannot determine whether the  
13 asserted harm is 50 percent more likely, 1 percent more  
14 likely, or zero percent.

15 So with due respect to Miss Walbolt, when she  
16 comes and she argues that suicidal thoughts are a real and  
17 present and clear and immediate danger, the city doesn't have  
18 any evidence.

19 THE COURT: This witness didn't, but they  
20 attached -- didn't they reference a bunch of legislative  
21 findings about that in there? They are not without a basis  
22 for this conclusion. Obviously he was unable to provide it.

23 MR. MIHET: All of the things that the city  
24 attaches are, again, rooted in the 2009 report, which we  
25 submit has the same -- the same conclusion.

1           So with respect to strict scrutiny, the other  
2 aspect of it, then, is narrow tailoring. Let's suppose they  
3 have identified a compelling interest that's specific enough  
4 for the situation, then we go into the narrow tailoring. And  
5 here again we think Judge Sansone got it absolutely right  
6 when she looked at the record, again, from the city's own  
7 deposition where the city said, look, we never even debated  
8 or considered anything other than a total ban.

9           And I have the slides here, but since it was  
10 already admitted to Your Honor, as well, I'm not going to  
11 take the time, but it could not have been more clear. We  
12 wanted to make sure that it was clear and so we asked the  
13 same question six or seven different times on page 100 and  
14 101 of the deposition, and just at the very end, I'll read  
15 sort of the bottom line of what the city says -- quote -- on  
16 line 8 of page 102. We never debated anything else because  
17 we specifically wanted the complete ban.

18           They never even debated anything else. So that's  
19 where the Supreme Court decision in *McCullen versus Coakely*  
20 comes in, and that's what precludes the city from now telling  
21 Your Honor why some of these other alternatives that we put  
22 forth, such as, for example, banning only coercive therapy,  
23 only aversive therapy, while leaving pure speech, talk  
24 therapy, available.

25           That's why they can't meet their burden now with

1 those kinds of arguments because they admit they never even  
2 considered them when they passed a law, which is what  
3 *McCullen* says that they would have to do.

4 I think Judge Sansone was very right to hone in on  
5 that failure at the legislative stage under *McCullen*. And I  
6 will just emphasize here that it is the city's burden. I  
7 recognize the plaintiffs on a PI motion have the burden of  
8 showing the likelihood of success on the merits. That's  
9 clear. But within that analysis, it is the city that has the  
10 burden even at the PI stage of demonstrating to this Court  
11 that they have done sufficient narrow tailoring, that they  
12 satisfy a strict scrutiny. That comes out of *Ashcroft* and  
13 *Gonzalez* at the Supreme Court.

14 What *Ashcroft* teaches is, if they fail in that  
15 burden, if it's unclear to Your Honor what exactly they did  
16 on their narrow tailoring, then the plaintiffs -- quote --  
17 must be deemed likely to prevail. Yes, the plaintiffs have  
18 the overall burden on likelihood of success; but because the  
19 city cannot satisfy its burden on narrow tailoring, we submit  
20 that the finding on likelihood of success is a foregone  
21 conclusion, as Judge Sansone did.

22 That brings me to the *Otto* decision from Judge  
23 Rosenberg that has been raised before Your Honor, and I'll  
24 just say a couple of things about that.

25 No. 1, Judge Rosenberg agreed that this was speech

1 that we are dealing with and not conduct. That's No. 1.  
2 No. 2, she agreed that we are dealing with a content-based  
3 restrictional speech, à la *King*. And so that also undercuts  
4 the argument here, but then she made the same mistake that  
5 *King* had made, which is not to subject the content-based  
6 restrictional speech to strict scrutiny. Her mistake,  
7 respectfully, was actually not to choose any standard. She  
8 basically said she didn't have to decide the issue, which we  
9 wholeheartedly disagree with.

10 Judge Sansone did the hard work of examining NIFLA  
11 and properly concluded that strict scrutiny is the correct  
12 standard and applied it, and Judge Rosenberg doesn't  
13 disagree. She didn't say that strict scrutiny doesn't apply.  
14 She just put that decision off for another day.

15 So in that sense, there is nothing in the *Otto*  
16 ruling there that mandates a different response here because  
17 the Court there did not articulate a valid reason for  
18 declining strict scrutiny.

19 The other thing I want to say about the *Otto*  
20 decision is that very clearly the Court there shifted the  
21 burden of narrow tailoring to the plaintiffs. And the Court  
22 said, look, at trial, the defendants will have the burden of  
23 proof on narrow tailoring, but at the PI stage it's the  
24 plaintiffs that have the burden. And because here it's not  
25 clear as to what the narrow tailoring was, I'm not persuaded,

1 and so I fault the plaintiffs, essentially is what the Court  
2 did there.

3 We submit that is a clear error that is not  
4 reconcilable with *Ashcroft* and *Gonzalez*. And Judge Rosenberg  
5 never engaged with *Ashcroft* and *Gonzalez*, so we have no  
6 reason to think she disagrees with those holdings.

7 Judge Sansone did engage with *Ashcroft*, I believe,  
8 on page 27 of the report and recommendation. So she applied  
9 the correct burden and properly concluded that the city  
10 failed to meet its burden, which means that the plaintiffs  
11 are likely to succeed.

12 So on that score, again, the two decisions are not  
13 in conflict because we submit that if Judge Rosenberg had  
14 done the proper analysis that Judge Sansone did and if she  
15 had concluded that it is the defendants who bear the burden  
16 even at the PI stage of proving narrow tailoring, then her  
17 decision, which is clear in there that she wasn't quite  
18 certain of the narrow tailoring aspect and of what the  
19 city -- the government defendants had done there, that would  
20 have meant necessarily that the defendants had not met their  
21 burden, and so ergo on the *Ashcroft*, the plaintiffs would so  
22 prevail.

23 That decision is on appeal now, but we submit  
24 there is nothing in that decision that mandates reversing or  
25 rejecting what Judge Sansone did here.

1           Mr. Williams also asked you to review Judge  
2 Rosenberg's discussion on the *Keeton* decision and how that  
3 somehow absolves the ordinance here from its obvious  
4 viewpoint of discrimination. We submit that *Keeton* is not  
5 apposite either because what we were dealing with in  
6 *Keeton* -- or rather what the Eleventh Circuit was dealing  
7 with in *Keeton* was a rule by an employer that its employee  
8 could not impose her own viewpoints on --

9           THE COURT: Wasn't *Keeton* the college -- the lady  
10 who was studying therapy in college?

11           MR. MIHET: In college.

12           THE COURT: They weren't employers.

13           MR. MIHET: A college.

14           THE COURT: A college there in Georgia or  
15 something.

16           MR. MIHET: Correct. I misspoke. It was not an  
17 employer, but within the confines of an educational program.

18           THE COURT: And she said, well, I'm going to tell  
19 these people to get with the Bible, and they said that's not  
20 really consistent with the ethical constraints. So the city  
21 here is saying that just like *Keeton*, you'll be violating  
22 your ethical duty if you --

23           MR. MIHET: This could not be more different from  
24 *Keeton* because the city here could have said that we are  
25 going to ban counselors from imposing their personal

1 viewpoints on their clients; and if that's what they had  
2 done, then that would have been a viewpoint-neutral  
3 ordinance, just like was upheld in *Keeton*.

4           If that's what they had done, we wouldn't be here,  
5 not because they have the authority to do it, but because my  
6 clients don't seek to impose their viewpoints on anyone.  
7 They seek only to facilitate what the client's wishes are --  
8 client-driven, client-centered counseling.

9           So this is entirely different because their  
10 ordinance doesn't prohibit my clients from imposing their  
11 viewpoint on someone. Their ordinance prohibits my clients  
12 from even sharing a particular viewpoint or even encouraging  
13 and amplifying the viewpoint of the client whenever that  
14 viewpoint is one that seeks a particular outcome or a  
15 particular change. So the two cases I believe could not be  
16 more different.

17           I just want to spend a minute on the limited  
18 injunction aspect of Judge Sansone's ruling.

19           She recommended that the Court issue a limited  
20 injunction that only enjoins the ordinance insofar as it bans  
21 noncoercive --

22           THE COURT: I didn't get that part. Why do you  
23 care? You're not going to hook people up to shock meters;  
24 are you?

25           MR. MIHET: Correct. What I'm here to tell

1 Your Honor is we don't care because that kind of limited  
2 injunction provides the relief that my clients seek. So  
3 practically speaking, my clients could be fine with that, and  
4 we would urge the Court at the very least to enter that. I  
5 only raise it because it's my duty of candor to the Court  
6 based on how I read the case law.

7 THE COURT: So at the end -- as opposed to at a PI  
8 stage, at the end of the day you are saying -- and you may be  
9 right -- she can't blue pencil that and all that? But for a  
10 PI thing, because it's simply you requesting the ability to  
11 do what you want to do, I think that's kind of where she  
12 would have come down.

13 MR. MIHET: I've read those cases, and I just  
14 disagree that's what those cases stand for. I think when you  
15 read the cases, they say, look, if you can look at an  
16 ordinance and it's got two discrete parts, maybe you can  
17 enjoin one part. Here we have --

18 THE COURT: There was this picture -- it is not in  
19 the courtroom, but not far from here, but there is a picture  
20 of Judge Carr. He was one of a couple of judges that were  
21 very well thought of, and he always said -- he's from  
22 Lakeland, Florida, back when Lakeland was the old south.  
23 Probably still is. I don't know. I haven't been over there  
24 in a while.

25 "Nobody gets an injunction unless somebody is

1 standing on your air hose." That's what he would always say.  
2 There is a lot of wisdom to that, you know. So what you are  
3 saying here is we will get him off my air hose and get him  
4 off of everyone else's air hose even though they are doing  
5 something much worse.

6 MR. MIHET: What I am saying is a couple of  
7 things. There is no evidence of even the egregious kind of  
8 conversion therapy happening in Tampa, so there is no need  
9 for the ban to begin with. And, then, therefore, no need for  
10 a limited injunction because this isn't a problem in Tampa.

11 No. 2, we think it's the city that should have the  
12 first crack on a proper narrowly tailored regulation. And  
13 the city passed this ban, I believe, inside the span of two  
14 months.

15 So understanding that there is not the sort of  
16 hoards of conversion therapists waiting to knock down the  
17 city's doors to provide shock therapy in Tampa while this  
18 injunction is enjoined, the city can be given a chance to  
19 draw a sufficiently narrowly tailored ordinance.

20 THE COURT: They are not going to do that. Right?  
21 Isn't everyone waiting to get to Atlanta as quick as they can  
22 on this? Really? Anyway, go ahead.

23 MR. MIHET: That's how we read the case law.  
24 Again, I only raise it out of my duty of candor to the Court.  
25 A limited injunction would satisfy my client's needs in this

1 case.

2           Your Honor, let me just double-check one thing  
3 here to make sure that I've covered it.

4           Oh, just with respect to the irreparable harm  
5 argument, it wasn't raised today, but it was raised in the  
6 briefs.

7           We think Judge Sansone got it right when she  
8 concluded that once you show lack of narrow tailoring and  
9 likelihood of success on the merits for a First Amendment  
10 violation, the injury -- irreparable injury is presumed in  
11 that context.

12           The plaintiffs -- the defendants, rather, have not  
13 cited a single First Amendment case. And we haven't found  
14 one either, so we don't believe it exists, that holds that  
15 even though a court might conclude that a statute is likely  
16 unconstitutional and in violation of the First Amendment that  
17 somehow there is no irreparable harm because the plaintiffs  
18 waited too long to bring a lawsuit.

19           There is no case like that out there, and we would  
20 ask this Court to not be the first court to so hold. I would  
21 simply say, Your Honor, eight months is not overnight. But  
22 it's not -- in the grand scheme of things, it's not that long  
23 here either. It's not like lawyers are growing on trees to  
24 bring this particular case. It's a very unpopular case, and  
25 it's one that --

1 THE COURT: All right. Forgive me if I zoned out.  
2 Just that last point is that the delay in bringing suit, you  
3 are saying, shouldn't inure to your detriment on it.

4 MR. MIHET: It cannot.

5 THE COURT: I don't disagree with that. And I  
6 agree that your First Amendment rights aren't less when you  
7 cross Sligh Avenue and enter Carrollwood proper and enter the  
8 city. But there really is just an air here that nobody is  
9 stopping your clients in the Tampa Bay area from doing this.

10 I mean, you are entitled to a full adjudication of  
11 your First Amendment rights in the city limits of Tampa.  
12 Absolutely. But considering whether someone is standing on  
13 your air hose, they might be, unless you go -- I was actually  
14 pointing the wrong way -- unless you go two minutes that way  
15 and you are outside the city limits.

16 Probably most doctors in this area aren't  
17 inside -- there are a bunch of doctors on Davis Island and  
18 Hyde Park. Most of them are in Carrollwood and Brandon and  
19 on Bruce B. Downs. So there is an air of lack of alacrity.  
20 I just want to share that with you because I'm not trying to  
21 hide my thoughts --

22 MR. MIHET: I understand, Your Honor. And I did  
23 have --

24 THE COURT: -- for the injunction. I'm not  
25 talking about the merits, which will soon be here. Okay.

1 MR. MIHET: The only thing I would add to what  
2 I've already said, I had a chance during the break to just  
3 look at the facts of *Schad* again, and the Supreme Court said  
4 there that a county could issue an ordinance that says that  
5 some protected activity can only happen in this section of  
6 the county but not in that section, but a county can't say  
7 that an activity cannot happen anywhere within its sovereign  
8 boundaries.

9 THE COURT: The City of Tampa is unavailable to  
10 restrict your right to First Amendment rights within its city  
11 limits. Absolutely. The other thought is -- right now we  
12 are kind of in the hurry-up and it's not a TRO.

13 MR. MIHET: I would say -- and I'll be careful not  
14 to go outside the record, but these kind of ordinances are  
15 popping up all over the state. And in the South Florida  
16 litigation we are dealing not only with the city of Boca  
17 Raton but also the county of West Palm Beach.

18 THE COURT: And Miami Beach. And what is it?  
19 Wilton Shores?

20 MR. MIHET: Well, that particular litigation  
21 itself deals only in Boca Raton.

22 THE COURT: Is there one in Miami Beach now?

23 MR. MIHET: I believe there is. The Miami city  
24 council considered one and rejected a ban at the legislative  
25 process, but Miami Shores and a few others have passed bans.

1           By the Court's rationale, if this is such an icky  
2 area and everybody says, not in our backyards, not in our  
3 backyards, eventually, if that's the justification that's  
4 used for denying relief --

5           THE COURT: I'm not saying that's justification  
6 for denying relief. It might be the justification to deny  
7 extraordinary equitable remedy, given that are you really  
8 chilled? Like right now, I know we have some customer that  
9 we -- okay.

10           MR. MIHET: All I can say, Your Honor, is knowing  
11 my clients, I'm very comfortable that this is not a  
12 contrived --

13           THE COURT: I'm not saying it is, but it has the  
14 air -- a little bit on both sides -- of politics and not a  
15 whole bunch of case in controversy that's real concrete.

16           And in that regard I need you to take a look,  
17 Counsel, if Mr. Pickup hasn't passed the -- I'll call it the  
18 bar, since that's how we think, okay, and he said he was  
19 going to take it in October, not to just be a stickler, but  
20 you need to think about whether he should step down as a  
21 party plaintiff because I'm not really sure he would have  
22 standing if he wasn't either a licensed Florida therapist or  
23 imminently becoming one. So his imminent becoming of one has  
24 existed at least since 2017, so look into that.

25           I don't have a problem with it. I'm not going to

1 penalize you or penalize him if that's the case. Hopefully  
2 he did pass the licensing exam that he said -- in the Second  
3 Amended Complaint or First Amended Complaint, that he said he  
4 was taking in October. Look at that. I know it's not  
5 relevant.

6 Mr. Vazzo has standing, and I think likely --  
7 highly likely that Soli Deo, the other plaintiff -- but  
8 please look at that because he doesn't get a free ride  
9 because he's one of the nationwide litigants, which he  
10 appears to be.

11 MR. MIHET: I will definitely do that and update  
12 the Court.

13 THE COURT: And, you know, it's probably not a  
14 real good answer, well, I didn't take it in October, but I'm  
15 going to take it next September. So just take a look at  
16 that. This is not a real hard, concrete injury case, and  
17 it's less so when we have got someone that may or may not  
18 really have standing.

19 MR. MIHET: We will definitely look at that and  
20 update the Court.

21 THE COURT: I didn't mean to interrupt your chain  
22 of thought.

23 MR. MIHET: Thank you, Your Honor. You've been  
24 very patient.

25 THE COURT: Thank you. I appreciate that.

1 All right. We will give Mr. Williams or his  
2 designee a little more time here.

3 Mr. Williams, I have a question for you. Come on  
4 up. To me, this is a more -- I don't know what the right  
5 word is -- troubling or complex or fraught matter on gender  
6 identity. So let me give you a hypo, and maybe this is just  
7 so esoteric and unlikely to happen that it's de minimis non-  
8 curat lex, but they proffer it and so it goes like this: We  
9 have got this doctor from Columbia. Let's say he went to the  
10 University of Pennsylvania.

11 MR. WILLIAMS: How about Florida, Your Honor?

12 THE COURT: I went to the University of Illinois.  
13 We will bring him down from Champaign, Illinois. He's an  
14 M.D., psychiatrist, he's on Davis Island. So he has a kid  
15 who was born biologically a male and always said I'm a girl,  
16 I'm a girl, I'm a girl. And they posit this -- I don't know  
17 if this is just so out there factually that we don't ever  
18 consider these crazy scenarios or unusual scenarios.

19 I'm a girl, I'm a girl, and the child has a male  
20 body, biological male, and then the child is 17 and says,  
21 wow, look what's happening here. I'm going through puberty.  
22 I don't want to be a girl, and I want help. I want to be a  
23 boy because now I look at myself. So this doctor on Davis  
24 Island can't counsel this child with that goal under the  
25 ordinance.

1 MR. WILLIAMS: Actually the answer is black and  
2 white, Your Honor, because if one looks at the definition in  
3 the ordinance, the definition says as follows:

4 Conversion therapy -- and they define what that  
5 is. Reparative therapy is the alternative way they put it.  
6 Then in the middle of the paragraph -- and I'll read it if  
7 Your Honor will allow me. Conversion therapy does not --  
8 does not include counseling that provides support and  
9 assistance to a person undergoing gender transition or  
10 counseling that provides acceptance, support, and  
11 understanding of a person or facilitates a person's coping,  
12 social support, development, et cetera, et cetera, about  
13 sexual orientation.

14 THE COURT: So if the child says, Doctor, my goal  
15 is to change my gender identity to align it with my male  
16 biological body, I want to -- that's my goal, is to change  
17 it, isn't that barred by the ordinance, or did I read it  
18 wrong?

19 MR. WILLIAMS: No, I think conversion therapy is  
20 what's barred, which is prohibited.

21 THE COURT: So the doctor can then say, okay, your  
22 goal is to change your gender identity. You now don't want  
23 to be a girl anymore in your identity, so I can counsel you  
24 on reverting to -- or for the first time, expressing your  
25 gender identity, consistent with your biological body.

1 MR. WILLIAMS: That's the way I read this  
2 ordinance, Your Honor. Conversion therapy does not include  
3 counseling that provides -- it says, undergoing gender  
4 transition. Gender transition -- I would beg the Court's  
5 indulgence. I'm not an expert on that, but I understand it  
6 to be exactly the way Your Honor described it.

7 THE COURT: So reverting back to my biological  
8 body is gender transition, as you and I are discussing it  
9 here.

10 MR. WILLIAMS: I think that's correct.

11 THE COURT: Let me give you one other one.

12 MR. WILLIAMS: In other words, a teenage boy or  
13 girl, they want to be something else and they are not  
14 biologically, that would be gender transition, as I  
15 understand it.

16 THE COURT: Okay. But so he -- all right.

17 MR. WILLIAMS: That's carved out of the definition  
18 of conversion therapy.

19 THE COURT: Okay. Let me give you one more. A  
20 male, sort of raised -- now, this is the sexual orientation  
21 thing, and I agree it's very difficult, and I'm no expert in  
22 any way, shape, or form, and you aren't either.

23 MR. WILLIAMS: No, I'm not.

24 THE COURT: So the male says --

25 MR. WILLIAMS: I rely on my wife. She knows this.

1 THE COURT: The male says, my sexual orientation  
2 is to females, to other sex, and he's 17 and he says, you  
3 know, I think I'm changing, Doctor, and I want to express a  
4 sexual orientation -- I want to be gay -- to the same sex. I  
5 want to change my sexual orientation. I'm 17, Doctor.

6 Isn't that barred by the ordinance?

7 MR. WILLIAMS: No, what's barred by the ordinance  
8 is for the counselor to say, wait a minute, let's not do  
9 that. Let's convert back to where you were.

10 THE COURT: But he's same sex. He describes his  
11 sexual orientation -- it shows how difficult this is and  
12 fraught with a lot of -- he's expressing the opposite sex  
13 sexual orientation, and then he sort of says, I now want to  
14 go same sex. I want to be gay. Help me get there. So he's  
15 changing his sexual orientation. A doctor can't help him do  
16 that; can he?

17 MR. WILLIAMS: Can or cannot?

18 THE COURT: Cannot under the ordinance.

19 MR. WILLIAMS: That's an interesting question. I  
20 will admit that.

21 THE COURT: My goal is to change my sexual  
22 orientation from other sex to same sex, Doctor. I want to be  
23 gay. I feel I want to be that way. Help me accomplish my  
24 goal. He's barred by the ordinance from doing that; isn't he?

25 MR. WILLIAMS: The ordinance prevents or bars a

1 counselor, doctor, whatever you want to call it, from  
2 trying -- I'm 18 -- I'm 17, underage, and I have decided I am  
3 no longer heterosexual. I'm a homosexual, and I have acted  
4 out on these feelings and I'm committed. That's what I am.  
5 I'm finally coming to grips with my real self.

6 I have a friend whose son did that, so I'm  
7 familiar with that.

8 THE COURT: And the doctor can't try to help him  
9 change back to hetero.

10 MR. WILLIAMS: Right.

11 THE COURT: Okay. That's not the -- I guess you  
12 and I just realized how difficult this is. So the next  
13 question --

14 MR. WILLIAMS: If I may at this juncture, Your  
15 Honor, Mr. Mihet made a comment about the code enforcers  
16 being high school graduates. Well, there is nothing wrong  
17 with being a high school graduate. I know a lot of very  
18 successful high school graduates.

19 But what he didn't tell you is that under the  
20 city's regimen, once this ordinance went into effect, all of  
21 the enforcers, if they got a complaint, they would report it  
22 to the City Attorney's Office, much like an FBI agent works  
23 with an Assistant U.S. Attorney.

24 THE COURT: And the PowerPoints said "all" or  
25 whatever it was, in caps and we made a point about that.

1 MR. WILLIAMS: Right. So it's not as if the city  
2 has ignored the --

3 THE COURT: Right. And no one at the city,  
4 including the City Attorney's Office, has any training in  
5 this any more than you or I do. So they are all kind of  
6 scratching their head. And quite frankly, I'll take some  
7 city code enforcers for common sense, everyday smarts over a  
8 bunch of lawyers like me and you anyway.

9 Now, here's another question, and I don't want to  
10 put you off. I want to listen to everything you have to say.

11 He makes -- he, meaning your opponent, you know,  
12 says that at the PI stage you still have the burden. You,  
13 the city, still have the burden to show this was narrowly  
14 tailored and that failure to narrowly tailor this ban is a  
15 big problem for you.

16 Now, it ain't too narrowly tailored according to  
17 the councilman. He says, no, we want an across-the-board ban  
18 on all of it.

19 Is Mr. Mihet wrong? Or how do you -- if he's not  
20 wrong, then why don't I need to worry about that?

21 MR. WILLIAMS: He is wrong in two ways, at least.  
22 First of all, he assumes this is a content-based ordinance.  
23 I argued earlier and I will continue to argue that it's  
24 content neutral.

25 He made a big deal about the fact that

1 Mr. Simpson, the Assistant City Attorney, did his PowerPoint  
2 where he cited *King* and professional speech, and the  
3 ordinance refers to it, as he put up on the board.

4 Well, okay. That was the law at the time that the  
5 ordinance was enacted. NIFLA came along back in July of last  
6 year, eight months, nine months after the law was actually  
7 enacted. And did that change the landscape? Somewhat, but  
8 not really because NIFLA -- I have it here.

9 As I alluded to in my earlier argument, NIFLA  
10 makes it clear that there are two circumstances under which  
11 NIFLA doesn't apply, one of which is states may regulate  
12 professional conduct even though that conduct incidentally  
13 involves speech.

14 Well, as I said earlier, I'm not going to argue  
15 that in counseling sessions people don't talk. That would be  
16 stupid of me, and I'm not going to do it and haven't done it.  
17 But the burden is only incidental because it is the ban on  
18 the procedures, I argued earlier, that is the focal point,  
19 the *raison d'etre* of this ordinance. Period. End of  
20 discussion. So to the extent that we have a burden to show  
21 narrow tailoring --

22 THE COURT: I'm pulling NIFLA out of my stack. Go  
23 ahead.

24 MR. WILLIAMS: -- that only comes --

25 THE COURT: Do you have the burden here? I don't

1 mean later, but right now. Do you have the burden to show  
2 narrow tailoring?

3 MR. WILLIAMS: No.

4 THE COURT: Is he right or are you wrong?

5 MR. WILLIAMS: No, because this is not a  
6 content-based ordinance.

7 THE COURT: Go ahead.

8 MR. WILLIAMS: And as I said earlier, to the  
9 extent that if one were to rule that it is content based, as  
10 Mr. Maniscalco testified about -- and that's why I raised it  
11 before Mr. Mihet got up. I knew he was going to say it. We  
12 didn't do that, but there was a good reason for it because  
13 all these studies suggest it's not going to do you any good.  
14 You need to ban the whole thing.

15 Now, is that narrow tailoring? I think that's  
16 something, the contours of which maybe, the Supreme Court  
17 some day will tell us.

18 Again, I go back to Judge Tjoflat's paradigm. I  
19 liked it a lot because it allows flexibility to determine on  
20 a case-by-case basis what is involved and what is not involved.

21 I would suggest and submit that we cannot prove --  
22 and I said that earlier in my presentation. We cannot prove  
23 that we went chapter and verse through every possible lesser  
24 intrusive measure, had a robust debate about it in a public  
25 hearing and rejected all of them and finally got back to

1 where we started. We could not do that because it didn't  
2 happen.

3 That's what Mr. Maniscalco testified to, and he  
4 also testified as to why.

5 Is that narrow tailoring? You simply have to  
6 touch bases in order to have narrow tailoring. If the  
7 concept itself is, to the legislators, to the representatives  
8 of the people, such that this is what we want to do for the  
9 safety of your children, I submit that you don't, that's an  
10 esoteric argument, I acknowledge, but this is an esoteric  
11 area in that sense.

12 If I may, Mr. Mihet made a couple of comments, and  
13 then I'll sit down because I want to allow Sylvia Walbolt to  
14 stand up. She can probably address the issue of what we were  
15 talking about earlier better than I, the gender transition.

16 Mr. Mihet made the argument that we switched after  
17 NIFLA, and I disagree with that. That's not what we did at  
18 all. The law of the land, as relates to this kind of  
19 ordinance at the time that it was enacted, was embodied in  
20 *Pickup* and in *King*, both respected circuit court opinions.

21 They talked about professional speech. NIFLA  
22 clearly says, nope; you don't have a separate carved-out  
23 category of professional speech. And we agree with that.

24 But as I just read, NIFLA, in doing that,  
25 recognized that there are some circumstances where there

1 is -- whether you call it a carve-out, exception, whatever,  
2 it doesn't really matter. The state may regulate  
3 professional conduct. State and county and city, doesn't  
4 matter. That's what's happening here, and the question is  
5 whether it's an incidental burden on free speech.

6 We have submitted and argued and so forth. So we  
7 didn't switch gears. It's all part of the -- to use a  
8 football analogy, when the running game isn't working very  
9 well, maybe you pass more. But it's still part of the game  
10 plan, and so although NIFLA did change the dynamics a bit,  
11 that argument was always there from the very beginning, if it  
12 came up.

13 I've already talked about the code enforcers.

14 I want to reiterate, before I sit down and allow  
15 Sylvia to talk further, that the issue of what level of  
16 scrutiny is still hanging over this case -- and I think  
17 Mr. Mihet had some accuracy in terms of what Judge Rosenberg  
18 did in the decision, which I felt was very well structured,  
19 by the way, and agree with the end result, I take the  
20 position, the City of Tampa takes the position that this is a  
21 content-neutral -- at worst or best, however you want to put  
22 it -- ordinance, and heightened scrutiny is the highest level  
23 of scrutiny that would be obtained and that the city and its  
24 ordinance passed that with flying colors.

25 And last but not least, I want to comment on the

1 alacrity issue. At 72 I've given up a lot of my hobbies, and  
2 SCUBA diving is one of them, but having done a lot of that,  
3 when you are running out of air, you better do something  
4 quick because you are going to drown, particularly if you are  
5 down a hundred feet.

6 So nobody is stepping on their air hose. Nobody  
7 has pulled their mouthpiece out. Nobody has cut it, like  
8 they do this James Bond movies. I'm not criticizing them for  
9 waiting eight months to file the lawsuit. Maybe it takes a  
10 while to find lawyers to do that kind of stuff. Although,  
11 these gentlemen seem to do it all over the country.

12 But after they filed it, they didn't move forward  
13 to get a TRO. I think because they couldn't. Nobody was  
14 stepping on their air hose, and they didn't really take steps  
15 to accelerate, like they have the appeal in the Eleventh  
16 Circuit, the motion for preliminary injunction that they  
17 actually filed.

18 The first time it was scheduled was six months  
19 after they filed the lawsuit. That is plain-and-simple fact,  
20 inarguable, and it proves beyond any question that nobody was  
21 stepping on their air hose.

22 So for that reason -- I like the word alacrity,  
23 because that's exactly what it was. Lack thereof. This  
24 Court on that reason alone should not grant their preliminary  
25 injunction. But we don't need to read that, because from a

1 likelihood of -- on the merits, that doesn't exist either.

2 Thank you, Judge. I'll turn it over to --

3 THE COURT: Just a comment on that --

4 MR. WILLIAMS: Sure.

5 THE COURT: -- so counsel on the other side knows.

6 I'm not holding against them that it was eight months or

7 whatever or somebody moved for a continuance.

8 To me -- I'm not holding this against them either,

9 but I'll tell you where my thought was. If we are really --

10 putting aside the merits of whether you can do this to such

11 counselors, which we are going to get to pretty dang soon, to

12 me, the ability to carry out this behavior and for people to

13 receive this therapy as a practical matter in Tampa, Tampa

14 proper, is not, frankly, in any way impacted.

15 Do you have to get off at Davis Island and drive

16 five minutes? Maybe. So that was sort of where I'm coming

17 from. But we are all lawyers and we've got trials and stuff,

18 so the calendar -- how things move on the calendar, I want

19 the defendants to know, doesn't -- I'm not saying how I'm

20 going to rule anyway, but that doesn't enter into my thought process.

21 MR. WILLIAMS: I respect that certainly. I'm not

22 making a big deal out of it.

23 THE COURT: Mr. Mihet doesn't have to hit

24 Mr. Gannam, going, I told you we should have filed sooner.

25 I'm not taking that into account.

1 MR. WILLIAMS: Mr. Mihet is from Orlando. As I  
2 understand it, the rents are cheaper out there than they are  
3 on Davis Island.

4 THE COURT: They are both dang good lawyers. I'll  
5 say that.

6 MR. WILLIAMS: They are.

7 THE COURT: All right.

8 MR. WILLIAMS: Thank you, Your Honor. I'll leave  
9 it to Mrs. Walbolt.

10 MS. WALBOLT: I'll be brief. You've been very  
11 patient.

12 THE COURT: Take your time. We are in no hurry.

13 MS. WALBOLT: I will start with a confession of  
14 error. I started my quote from the APA report at page 79 and  
15 80 earlier than I should have, and all I can say is I  
16 apologize and it's bad, old eyes. No malevolent intent.

17 I further say to Your Honor that I stand by what  
18 we have said about the APA report. I urge the Court to read  
19 pages 79 through 80, page 83 and page 42, as well as the  
20 supplemental -- what we put in our supplemental brief, which  
21 was document 142, which was its 2018, expressing its  
22 strong -- standing by its 1998 position statements and  
23 reiterating its strong opposition to any psychiatric  
24 treatment such as conversion therapy that is based on the  
25 assumption that homosexuality, per se, is a mental disorder

1 and that the patient should change his or her homosexual  
2 orientation.

3           So the APA is in no doubt that this is dangerous  
4 therapy that ethical, professional mental health -- licensed  
5 mental health professionals should not use.

6           I will also call the Court's attention to page 5  
7 of that same supplemental brief because we cited in that a  
8 very recent -- again, a 2018 study. Actually, we cited two  
9 recent studies that specifically did talk about the dangers  
10 to these young people, including increased risk of suicide.  
11 And even though those were after this ordinance had been  
12 adopted, they certainly answer, it seems to me, the  
13 accusation that the jury is out on whether this is or is not  
14 dangerous to the public.

15           I want to just turn briefly -- and I know I'm all  
16 over the place, because my notes were all over the place, so  
17 forgive me.

18           I join Mr. Williams in saying that NIFLA did not  
19 abrogate *King* and *Pickup*. It certainly criticized and raised  
20 questions as to certain parts of the analysis, but I suggest  
21 the Supreme Court knows how to say if it disapproves a  
22 result, a holding; and they did not in any way suggest, much  
23 less hold, in NIFLA that it would be unconstitutional to  
24 prohibit conversion therapy for minors.

25           To the contrary, they specifically re-affirmed

1 their decision earlier in *Casey*, applying rational-basis  
2 review to a law that regulated speech only as part of the  
3 practice of medicine. And that's what we have here. This is  
4 a treatment.

5           That's what the plaintiffs have called it. They  
6 call it mental health treatment. They have a protocol for  
7 it. It's multi-sessions and there are guidelines for how to  
8 do it. And we suggest that falls precisely within *Casey*.  
9 It's not regulating speech as speech. It's regulating a  
10 mental health treatment.

11           I want to again return to the question of nobody  
12 had committed suicide in the city of Tampa before this  
13 ordinance was adopted. But the fact is that -- the Court  
14 kind of alluded to it -- the city made a legislative finding  
15 and it made it based on studies that reported instances or  
16 problems across the country.

17           The city was entitled to make a legislative  
18 finding that that same harm could occur to its minor children  
19 from this therapy in the city of Tampa.

20           Your Honor, we have a lot of laws around that are  
21 named after kids who either were killed or kidnapped or  
22 suicided after they were bullied and it's too late, and then  
23 they adopt the law and they name it for the child.

24           The city of Tampa made a legislative decision that  
25 the medical consensus was clear, including the United States

1 Department of Health and Human Services, that this is  
2 dangerous therapy for minors and that it would not expose its  
3 children to that harm.

4           Lastly, as to the argument that the Court should  
5 enter a limited -- and, again, I lied before. I want to  
6 address narrowly tailored because I couldn't agree more with  
7 Mr. Williams. It is a narrowly tailored ordinance. It's  
8 limited to children, to minors. It's not all adults. It is  
9 limited to therapy that's offered by a licensed mental health  
10 professional, which carries with it its own suggestion that  
11 this is valid and therapy that will be affected. So it was  
12 narrowly tailored in that record.

13           And as to the further narrowly tailoring that they  
14 suggest that it be limited to coercive and voluntary and only  
15 to adverse, the studies that the city relied on  
16 specifically found that this therapy is, in itself,  
17 inherently coercive. We cited the Department of Health and  
18 Human Services report of finding that. And so to say that  
19 you are going to make this ordinance only as to coercive or  
20 involuntary means, that is ineffective to avoid the very  
21 harm, because as that department report went on to explain  
22 after saying it's inherently coercive, they further found --  
23 they explained that it's usually not the children that are  
24 concerned about it. It's the parents. It's the social  
25 pressure, if you will, or whatever, the religious belief.

1 But it's the parents who are worried about it, and the  
2 parents take these children to the therapists.

3           There is no way that children are -- even  
4 adolescents, even teenagers, are going to be able to say --  
5 make an informed decision that, no, I understand this is not  
6 effective and it could have bad effects. A child can't make  
7 those kinds of decisions.

8           So I suggest that the limitation that Judge  
9 Sansone suggested is not sufficient to cure the harm that the  
10 city was concerned about.

11           I think that is my end. Thank you, Your Honor,  
12 for your patience.

13           THE COURT: Thank you.

14           MR. MIHET: Your Honor, could I have three minutes  
15 to address a couple of points?

16           THE COURT: You may have three minutes.

17           MR. MIHET: Thank you, Your Honor.

18           Just very quickly, I don't know if I can have the  
19 document reader to show the Court -- let me just go back to  
20 the VGA.

21           With respect to the issue of burden, which I think  
22 is critical here, Mr. Williams suggested that because this  
23 isn't a cut-and-paste restriction that somehow the defendants  
24 don't have the burden.

25           First of all, we think we have established this is

1 a content-based restriction. *King*, their own case,  
2 establishes it. But the same argument was presented to the  
3 United States Supreme Court in *Gonzalez versus O Centro*  
4 *Espirita Benficiente Uniao do Vegetal*, the case that we cited  
5 in our brief that we filed on Sunday.

6           The Court will see in that case, in this paragraph  
7 that we have highlighted here, where exactly the same  
8 argument was tried there. And the Supreme Court says --  
9 quote -- The government argues that although it would bear  
10 the burden of demonstrating a compelling interest that's part  
11 of its affirmative defense at trial on the merits, the  
12 plaintiff should have borne the burden of disproving the  
13 asserted compelling interest at the hearing on the  
14 preliminary injunction.

15           This argument is foreclosed by our recent decision  
16 in *Ashcroft*. In *Ashcroft*, we affirmed the grant of a  
17 preliminary injunction in a case where the government had  
18 failed to show a likelihood of success under the compelling  
19 interest test. We reason that, as the government bears the  
20 burden of proof on the ultimate question of the challenge act  
21 constitutionality, respondents or the movants must be deemed  
22 likely to prevail unless the government has shown that  
23 respondent's proposed less restrictive alternatives are less  
24 effective than enforcing the act.

25           Now, here's where the Court addresses the argument

1 that Mr. Williams is making now, in the next paragraph. The  
2 government attempts to limit the rule announced in *Ashcroft*  
3 to content-based restrictions on speech, but that distinction  
4 is unavailing. The fact that *Ashcroft* involved such a  
5 restriction was the reason the government had the burden of  
6 proof at trial under the First Amendment, but in no way  
7 affected the Court's assessment of the consequences of having  
8 that burden for purposes of the preliminary injunction. Here  
9 the burden is placed squarely on the government by referam in  
10 the First Amendment.

11           Your Honor, irrespective of whether this is a  
12 content-based restriction or not -- and we believe firmly  
13 that it is -- it is the government that bears the burden of  
14 proof on narrow tailoring at trial under any level of  
15 scrutiny. Not just strict. Not intermediate. Not even  
16 rational basis.

17           Any level of scrutiny that applies, the government  
18 bears the burden of proof at trial. That much is clear.  
19 *Gonzalez* and *Ashcroft* say that those same burdens apply at  
20 the preliminary injunction stage.

21           With respect to *Casey* that was brought back up  
22 again, *Casey* involved abortion. Abortion is a procedure.  
23 The Court said, if you engage in a procedure like abortion,  
24 you can regulate the speech that goes along with that because  
25 it's only incidentally related to the procedure.

1           So here, if the city had banned shock therapy, the  
2 city could have said, well, you can't do shock therapy.  
3 That's conduct. And then my clients couldn't have said,  
4 well, but that also bans me from saying to the client, I'm  
5 now hooking you up to electrodes. How do you feel?

6           That speech is incidental to the shock therapy,  
7 and so, in that context, would have been much more like  
8 Planned Parenthood. But what we have here is not merely  
9 speech incidental to conduct. We have here the speech is the  
10 only so-called conduct.

11           I mean, again, what happens in these therapy  
12 sessions, the counselor talks to the client and the client  
13 says, I'm feeling this, and the counselor says, well, what  
14 makes you feel that? It's just talking back and forth.

15           There is not a manual of conversion therapy that  
16 is pulled out and says, okay, now we are going to apply  
17 procedure 2(B)9 and then --

18           THE COURT: There is a manual. I've seen it.  
19 It's in this record, that talks about approaches. It's not a  
20 manual, but anyway.

21           MR. MIHET: It's the APA report that's approaches  
22 to therapeutic, but what I'm --

23           THE COURT: Isn't there a -- maybe I dreamt it.  
24 There is sort of a manual of best practices for approaches,  
25 for this type of approach? No?

1 MR. MIHET: Well, I'm not sure what the Court is  
2 referring to.

3 THE COURT: I mean, I have boxes. I'll look for  
4 it again, but I thought there was some advice to  
5 practitioners about this.

6 MR. MIHET: All I can say is that the only  
7 practice involved here is speech.

8 THE COURT: Is speech. I got your point on that,  
9 and they dispute that and say this is a procedure.

10 MR. MIHET: But they haven't identified what that  
11 procedure is.

12 So *Wollschlaeger*, the en banc Eleventh Circuit,  
13 says that comparing or saying that speech is merely  
14 incidental to a doctor counseling is like saying that walking  
15 or running is incidental to ambulation.

16 THE COURT: *King* said it was speech.

17 MR. MIHET: Right.

18 Very quickly on the issue of consent, Florida law  
19 clearly allows minors to make --

20 THE COURT: I have all that. In fact, it's  
21 unconstitutional to determine that minors can't engage in  
22 informed consent, and you cite that case.

23 MR. MIHET: Correct.

24 Lastly, Miss Walbolt talked about treating kids  
25 with the approach that homosexuality is a mental disorder and

1 leads to suicidal thoughts and telling them that they should  
2 change leads to suicidal thoughts. That's not relevant to  
3 what my clients --

4 THE COURT: Well, your clients don't engage in  
5 that.

6 MR. MIHET: My clients don't believe homosexuality  
7 is a disorder and they don't believe that clients should  
8 change, but they want to facilitate the client centered and  
9 client driven.

10 THE COURT: I got all that.

11 MR. MIHET: I think that's it, Your Honor. Thank  
12 you.

13 THE COURT: Thank you.

14 MR. WILLIAMS: I'm just going to give you a cite,  
15 Judge.

16 THE COURT: Give it to me.

17 MR. WILLIAMS: The document that you were alluding  
18 to is document 142-1, "Practice Guidelines For The Treatment  
19 of Unwanted Same-Sex Attractions."

20 THE COURT: That's what I was referring to, and I  
21 read it in my caffeine-induced stupor last night.

22 MR. WILLIAMS: We have addressed that previously,  
23 so I will not re-address it three hours later.

24 Thank you for your patience.

25 THE COURT: So just a couple thoughts. If we ever

1 got to a trial -- put it in the way, way back recesses of  
2 your mind. I'm not going to do it if everybody thinks it's a  
3 bad idea. Maybe we should impanel an advisory jury. I don't  
4 think this is necessarily a jury trial, but I can do that.  
5 So just think about it.

6           Okay. Thank you. This is, I'm at the U.S. Open  
7 and I'm watching Sampras playing Lendl. It excites me. To  
8 me, it's such a professional honor to watch lawyers -- I  
9 mean, I see some lawyers that you just want to hold your nose  
10 and throw them all into the bar grievance committee. This is  
11 such a high level of legal practice. Thank you. Thank you.

12           I'll get the order out real soon on the motion to  
13 dismiss. I used to argue these cases. I argued one in  
14 Pinellas County and I would run down -- that was before  
15 electronic -- run down to the mailbox. Where is my order?  
16 Where is my order? Of course, it was a long time coming.

17           Do not check your e-mail wondering where the  
18 injunction order from Judge Jung is. That is not going to be  
19 something that's going to happen anytime real soon.

20           We have a Case Management Order. Please stick to  
21 it. We have discovery cutoff. I'm not going to let anybody  
22 get pinioned in a box if, you know, something runs out of a  
23 little bit of time. I'm not going to change those dates.  
24 You can file summary judgment motions, if everybody is okay,  
25 earlier.



UNITED STATES DISTRICT COURT )  
 )  
MIDDLE DISTRICT OF FLORIDA )

**REPORTER CERTIFICATE**

I, Scott N. Gamertsfelder, Official Court Reporter for the United States District Court, Middle District of Florida, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript from the stenographic notes taken by the undersigned in the matter of *ROBERT L. VAZZO, et al. vs. CITY OF TAMPA, FLORIDA*, Case No. 8:17-cv-2896-T-02AAS (Pages 1 through 103), and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

*/s/ Scott N. Gamertsfelder, RMR, FCRR*

*Official Court Reporter*

Date: March 12, 2019