No. 19-10604

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT W. OTTO, PH.D. LMFT, individually and on behalf of his patients, and JULIE H. HAMILTON, PH.D., LMFT, individually and on behalf of her patients,
Plaintiffs–Appellants
v.
CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA
Defendants–Appellees

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Mathew D. Staver (Fla. 0701092)
Horatio G. Mihet (Fla. 026581)
Roger K. Gannam (Fla. 240450)
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
E-mail: court@lc.org

Attorneys for Plaintiffs–Appellants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants hereby certify that the following individuals and entities are known to have an interest in the outcome of this case:

Abbott, Daniel L.

American Association for Marriage and Family Therapy

American Psychological Association

Amunson, Jessica Ring

Carlton Fields Jorden Burt, P.A.

Chapuis, Emily L.

City of Boca Raton, Florida

Clemons, J. Tyler

Cole, Jamie A.

Dawson, James T.

Delery, Stuart F.

Dinielli, David C.

Dreier, Douglas C.

Dunlap, Aaron C.

Equality Florida Institute, Inc.,

Fahey, Rachel Marie

Flanigan, Anne R.

Florida Psychological Association

Gannam, Roger K.

Gibson, Dunn & Crutcher LLP

Gilfoyle, Nathalie F.P.

Hamilton, Julie H., Ph.D., LMFT

Hoch, Rand

Hvizd, Helene C.

Jenner & Block LLP

Liberty Counsel, Inc.

McCoy, Scott D.

Mihet, Horatio G.

Minter, Shannon P.

National Association of Social Workers

National Association of Social Workers Florida Chapter

National Center for Lesbian Rights

Otttaviano, Deanne M.

Otto, Robert W., Ph.D. LMFT

Palm Beach County, Florida

Palm Beach County Human Rights Council

Phan, Kim

Reinhart, Hon. Bruce E.

Rosenberg, Hon. Robin L.

SDG Counseling, LLC

Southern Poverty Law Center

Staver, Mathew D.

Stoll, Christopher F.

Sutton, Stacey K.

The Trevor Project

Walbolt, Sylvia H.

Weiss Serota Helfman Cole & Bierman, P.L.

Yasko, Jennifer A.

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

/s/ Roger K.Gannam
Roger K. Gannam
Attorney for Plaintiffs–Appellants

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INTRODUCTION

The Localities' respective answer briefs (the "City Brief" and "County Brief") fail to overcome the errors of the district court entitling Counselors' to relief, as shown in Counselors' initial brief (Counselors' "Brief"). Most notably, the Localities fail to make any convincing argument that their ordinances are not unconstitutional content- and viewpoint-based restrictions on Counselors' protected speech, subject to strict scrutiny. Nor do the Localities overcome the undisputed absence of empirical evidence of harm from so-called "conversion therapy" to justify the speech bans imposed by their ordinances, or their utter failure to narrowly tailor the ordinances as required by their strict scrutiny burden. For the reasons stated below, and for all of the reasons in Counselors' initial brief, this Court should reverse the district court's denial of Counselors' preliminary injunction motion.

ARGUMENT

I. THE ORDINANCES ARE UNCONSTITUTIONAL CONTENT-BASED SPEECH RESTRICTIONS DESPITE THE LOCALITIES' ATTEMPTS TO LABEL COUNSELORS' SPEECH "CONDUCT."

A. *Holder* Forecloses the Localities' Conduct-Not-Speech Rationale Because Counselors Want to Speak to Their Minor Clients, and Whether They May Do So Depends on What They Say.

The principal argument for both the Localities is that their respective ordinances regulate Counselors' "conduct," not speech, and therefore are subject to

minimal review for constitutionality. (City Br. at 16–24; Cnty. Br. at 28–30.) But the Supreme Court specifically rejected the Localities' conduct-not-speech rationale in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). (*Cf.* Br. at 39–42.) "The Government is wrong that the only thing actually at issue in this litigation is conduct . . . ." 561 U.S. at 27. "[Counselors] want to speak to [their minor clients], and whether they may do so under [the ordinances] depends on what they say." *Id.* If Counselors' speech "imparts a 'specific skill' or communicates advice derived from 'specialized knowledge'—for example, [strategies to reduce or eliminate unwanted same-sex attractions, or for gaining comfort with biological sex]—then it is barred." *See id.* "On the other hand, [Counselors'] speech is not barred if it imparts only general or unspecialized knowledge"—for example, that another professional can communicate such strategies to the client and that the client should seek out that other professional. *See id.*

Holder, thus, eviscerates the Localities' rationalization that the ordinances do not regulate speech because they allow Counselors to freely talk **about** and **recommend** "conversion therapy." (City Br. at 19–25, 35, 42; Cnty. Br. at 29, 33, 34, 38.) Under *Holder*, the Localities' seeming benevolence in tossing Counselors the table scraps of "general or unspecialized" speech cannot excuse the Localities' censoring what Counselors' want to say to help their clients.

Furthermore, the Localities define their prohibited "conversion therapy" so broadly that it is impossible (nor have they tried) to differentiate a Counselor's telling a client change is possible and potentially beneficial **as** "conversion therapy," from telling a client change is possible and potentially beneficial as a mere **recommendation of** "conversion therapy." For example, where a minor client is distressed by unwanted same-sex attractions, requests assistance to reduce those attractions, and then experiences relief from the distress through being told by a counselor that reduction of such attractions is possible, then how is the counselors' giving of that professional advice not an effort "to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex" as prohibited by the ordinances? (A-121-1 (City Ord.) at ECF 12; A-126-27 (Cnty. Ord.) at 6.) According to the ordinances and the Localities' officials, such counseling is prohibited if it affirms a client's goal to reduce or eliminate unwanted same-sex attractions. (A-121-9 at 260:11–262:12, 266:14-267:18; A-126-41 at 154:23–158:13.) And yet, a licensed counselor's mere recommendation of SOCE to the same client, by necessary implication, communicates the same thing—that change of unwanted same-sex attractions is possible and beneficial. Thus, the ordinances' ostensible safe harbor for talking about or recommending "conversion therapy" is farcical and insufficient to rescue the ordinances from their unconstitutional content-

based restrictions, and further reveals the hopeless vagueness of the ordinances in any event (Br. at 65–67; *infra* pt. III).

B. There Is No "Medical Procedure" Called "Conversion Therapy" Justifying the Ordinances' Speech Bans.

The Localities desperately try to recast Counselors' talk therapy as proscribable conduct by labelling "conversion therapy" a "medical procedure." (City Br. at 19–24; Cnty. Br. at 29–30.) Their entreaties for the Court to analyze the ordinances as restricting only medical procedures incidentally involving speech, however, suffer from a fatal fallacy: there is no "medical procedure" called "conversion therapy."

The record is clear[1] there is no singular or distinctive "procedure" called "conversion therapy" employed by Counselors. (*Cf.* Br. at 4–9.) Counselors do not

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[1] Contrary to the City's assertion, Counselors have not waived any aspect of the applicable standard of review of the trial court's factual findings. (City Br. at 14 n.6.) "[A]s our sister circuits have held, parties cannot waive the proper standard of review by failing to argue it." *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018) (internal quotation marks omitted); *see also United States v. Freeman*, 640 F.3d 180, 186 (6th Cir. 2011) (same); *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001) ("[T]he court, not the parties, must determine the standard of review, and therefore, it cannot be waived."); *United States v. Fonseca*, 744 F.3d 674, 682 (10th Cir. 2014) (same); *cf. Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1161 (11th Cir. 2018) (discussing "a standard of review that the court must independently assess"). In preliminary injunction matters involving First Amendment free speech claims, this Court's review of the district court's factual findings applicable to the constitutional question is *de novo*. *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198–99 (11th Cir. 2009).

call their counseling "conversion therapy," and do not know any professional who does. (A-121-7 176:4-22, 190:17-191:9; A-121-24 at 4; A-121-28 at 4.) Moreover, Counselors' verified complaint allegations, which the City expressly **accepts as true**[2] (and the County has not refuted), establish:

> [Counselors] do not begin counseling with any predetermined goals other than those that the clients themselves identify and set. . . .
>
> [Counselors] employ speech to help clients understand and identify their anxiety or confusion regarding their attractions, behaviors, or identity and then to help the client formulate the method of counseling that will most benefit that particular client.

(A-1 at ¶¶ 75–76.)

> [Counselors] help clients . . . by talking with them . . . .
>
> Speech is the only tool that [Counselors] use in their counseling with minors seeking to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity. The only thing that happens in their counseling sessions is speech. They sit down with their clients and talk to their clients about the clients' goals, objectives, religious beliefs, desires, and identity.

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[2] The City expressly accepts as true the allegations of Plaintiffs' Verified Complaint (A-1) for preliminary injunction purposes (City Opp'n Pls. Mot. Prelim. Inj., Doc. no. 83, at 2 n.2), and the County offers no evidence to contradict the verified allegations.

(A-1 at ¶¶ 74–75.) Every therapy session is unique, and Counselors do not perform any set procedure or apply any treatment formula. (A-121-7 at 27:23–28:10, 52:10–21, 66:1–2, 160:2–3; A-121-8 at 81:6–7; A-121-24 at 6; A-121-28 at 5–6.)

Even the ordinances' primary authority, the APA Report (eschewing the pejorative term "conversion therapy" used in the ordinances), explains that the term SOCE amalgamates various and diverse "methods (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) . . . regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved." (A-126-22 at 2 n.**.) Thus, the record is devoid of evidence of professional employing a "medical procedure" or any other "procedure" called "conversion therapy." Nor do the ordinances attempt to identify or define any such "procedure" as the target of their prohibitions. Instead, the ordinances indiscriminately ban any counseling that could facilitate a client's change goals, including voluntary talk therapy sought and initiated by a client, with no predetermined goals on the part of the counselor, and consisting solely of speech. (Br. at 9–12.)

Contrary to the Localities' arguments (City Br. at 16–24; County Br. at 28–29), the Supreme Court's opinion in *Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), left no room for classifying Counselors'

speech as "professional conduct . . . that . . . incidentally involves speech" to avoid First Amendment strict scrutiny of the ordinances. The Localities essentially argue that professionals have no First Amendment rights unless their speech is wholly unrelated to their professional practices.

Notably, as shown in Counselors' brief, the district court expressly disagreed. (Br. at 43.) The district court correctly concluded, "the ordinances, as applied to Plaintiffs, likely cannot be construed as regulating conduct only or as mere incidental burdens on speech in light of *Wollschlaeger*." (A-141 at 22.) The *NIFLA* Court did not create the First Amendment carve-out for professional conduct incidentally involving speech, but rather recognized its existence in Supreme Court precedents. 138 S. Ct. at 2372. As reasoned by the district court, *Wollschlaeger* had already foreclosed application of the conduct carve-out to the ordinances. (A-141 at 22.)

In *Wollschlaeger*, much like the Localities here, the government argued that "the First Amendment is not implicated because any effect on speech is merely incidental to the regulation of professional conduct." 848 F.3d at 1308. But, as do the ordinances here, the law in question "expressly limit[ed] the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict[ed] their ability to communicate and/or convey a message." *Id.* This Court had no doubt these restrictions "trigger First Amendment scrutiny. '**[S]peech is speech, and it must be**

analyzed as such for the purposes of the First Amendment.'" *Id.* (emphasis added) (quoting *King v. Governor of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014)). Indeed, "[w]hat the Supreme Court said in concluding its analysis in *Button* seems to **fit like a glove here**: A state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 439 (1963) (emphasis added)). "**Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation**." *Id.* at 1308 (emphasis added). "As noted earlier, characterizing speech as conduct is a dubious constitutional enterprise." *Id.* at 1309. As was true in both *NIFLA* and *Wollschlaeger*, Counselors here have demonstrated that their practices involve only speech.

The district court obviously rejected the City's unserious argument below that Counselors' talk therapy should be considered a "procedure," and therefore "conduct," akin to applying leeches to treat blood disorders or performing surgery without anesthesia. (A-129 at 197:3–13.) This Court, obviously, should likewise reject the Localities' comparisons of Counselor's talk therapy to an abortion procedure. (City Br. at 21–24; Cnty. Br. at 29.) They simply fail to identify any surgical or other physical act—no "procedure"—to which Counselors' prohibited talk therapy is merely incidental.

The *King* court considered the same argument:

> The parties agree that modern-day SOCE therapy, and that practiced by Plaintiffs in this case, is 'talk therapy' that is administered wholly through verbal communication. Though verbal communication is the quintessential form of 'speech' as that term is commonly understood, Defendants argue that these particular communications are 'conduct' and not 'speech' for purposes of the First Amendment because they are merely the 'tool' employed by therapists to administer treatment. Thus, the question we confront is whether verbal communications become 'conduct' when they are used as a vehicle for mental health treatment.

767 F.3d 216, 224 (3d Cir. 2014), *abrogated on other grounds by NIFLA*, 138 S. Ct. 2361 (2018). And the *King* court rejected it:

> "**We hold that these communications are 'speech' for purposes of the First Amendment**. Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized verbal or written communications as 'conduct' based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 177 L.Ed.2d 355 (2010)."

767 F.3d at 224–25 (emphasis added). "Given that the Supreme Court had no difficulty characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are 'conduct.'" *King*, 767 F.3d at 225. "To classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game.'" *King*, 767 F.3d at 228. "Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 228–29.

"Thus, we conclude that the verbal communications that occur during SOCE counseling are not 'conduct,' but rather 'speech' for purposes of the First Amendment." *Id.* at 229. (*Cf.* Br. at 39–42 (expounding, under *Holder*, district court's error in downgrading Counselors' speech based on its "function").)

The City's argument that this Court's *Wollschlaeger* decision "lends support" to the ordinances is unavailing. (City Br. at 19–20.) Although this Court distinguished features of California's SOCE ban, as upheld in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), from the FOPA provisions the Court held unconstitutional in *Wollschlaeger*, the Court unequivocally criticized the *Pickup* decision: "There are serious doubts about whether *Pickup* was correctly decided. As noted earlier, characterizing speech as conduct is a dubious constitutional enterprise." *Wollschlaeger*, 848 F.3d at 1309. This Court also observed the Supreme Court has never applied *Pickup*'s underlying rationale "to regulations which limit the speech of professionals to clients based on content." 848 F.3d at 1310. Nothing about this Court's disparagement of the upholding of California's SOCE ban in *Pickup* "lends support" to the ordinances. Thus, contrary to the City's assertion, no attentive reading of this Court's *Wollschlaeger* decision supports the ordinances under any level of scrutiny.

C. The Undisputed Absence of Empirical Evidence of Harm from "Conversion Therapy" Is Fatal to the Localities' Bid to Surmount Their High Narrow Tailoring Burden.

1. The APA Report Stands Uncontradicted in Exposing the Absence of Any Empirical Evidence of Harm from "Conversion Therapy."

The Localities' briefs do not achieve any contradiction of the recurring, unequivocal admissions of the 2009 APA Report—ostensibly a principal authority supporting their ordinances—that there is no empirical evidence of harm from "conversion therapy." (Br. at 13–14.) The City even cites verbatim (City Br. at 6) this fatal passage from the Report:

> [T]here is a **dearth of scientifically sound research on the safety of SOCE**. **Early and recent** research studies provide **no clear indication of the prevalence of harmful outcomes** among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because **no study to date of adequate scientific rigor** has been explicitly designed to do so. Thus, **we cannot conclude how likely it is that harm will occur from SOCE**.

(A-126-22 at 42 (emphasis added).)

2. The Localities Fail to Overcome Their Own Admissions That the Ordinances Are Not Supported by Any Empirical Evidence of Harm.

The Localities' briefs also fail to overcome their own unequivocal admissions that their ordinances are not based on any empirical evidence of harm from "conversion therapy." (Br. 14.) Despite the "overwhelming research" language in

their ordinances, both of the Localities confirmed through their Rule 30(b)(6) witnesses that the ordinances are not justified by any empirical research. The County said so concisely, albeit reluctantly:

> Q. Well, as you sit here today, are you able to identify a single empirical study since 2009 based upon [which] a causal attribution could be made between SOCE and harm?
>
> A. I can cite at least—I could cite a study that shows a lack of efficacy of conversion therapy.
>
> Q. That's great. But that's not my question.
>
> A. Then no.

(A-121-10 at 40:11–21.) By contrast, the City said so forthrightly and thoroughly:

> Q. Okay. How much more likely is an LGBT minor who undergoes Sexual Orientation or Gender Identity Change Efforts to experience depression versus an LGBT minor who does not undergo those kinds of efforts?
>
> A. I don't—I don't think that I can give you a good answer on that.
>
> Q. Okay. The City—
>
> A. I don't know.
>
> Q. The City doesn't know?
>
> A. No.
>
> Q. The City doesn't know whether it's five percent more likely, one percent more likely or zero point zero one percent more likely?
>
> A. That's correct.

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

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

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

A. That's correct.

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

A. That's correct.

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

A. That's correct.

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

A. The reports and information that was—that was attached to this ordinance, the ones that was relied upon for the ordinance, did not have any of those. Whether one exists or not, I don't think we've done any independent review of the literature or studies.

Q. And so—

A. So we do not know of any.

> Q. Okay. And so the City doesn't know the answer to the questions I just posed. And, because the City doesn't know of any study, the City would be unable to determine an answer to the question that I just posed, correct?
>
> . . . .
>
> THE WITNESS: If you're asking are we relying on any empirical studies, the answer is no.

(A-126-41 at 26:13–28:13.)

The County failed still further to undo its judicial admission that the County does not know whether "conversion therapy" causes harm, and actually relied on its ignorance of any causal connection to justify the breadth of the ordinance (Br. at 55–56):

> As I will show you in the . . . APA report, your Honor, **there have been no factors discovered about what types of therapy cause harm** and what types of therapies are going to lead to a benefit.
>
> **Because we don't know** the identifying factors of what about this person makes the therapy beneficial, **we don't know.**

(A-129 at 124:3–8 (emphasis added).) The County tries to downplay the admission early in its argument, but only succeeds in highlighting the devastating effect of the admission by erroneously characterizing it as nonbinding legal argument. (Cnty. Br. at 27–28.) The County, however, misapprehends the difference between mere argument of counsel, which is nonbinding, and a judicial admission of fact, which is binding. *See e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 377 (3d Cir.

2007), *as amended* (Oct. 12, 2007) (unequivocal statements of fact in judicial proceedings by party or its counsel are binding). It is now a matter of undisputed fact that the County does not know of any causal connection between harm and the ordinances' broadly defined "conversion therapy."

3. The Localities Do Not Address the Complete Absence of Any Evidence-Based Authority Addressing Gender Identity to Support the Ordinances.

As shown in Counselors' brief, the APA Report expressly excludes any coverage of gender identity, and none of the other Sources appearing in the ordinances' recitals contains any evidentiary support whatsoever for legislation banning any form of gender identity counseling. (Br. at 17–19.) To be sure, one of the Sources affirms the lack of empirical research on outcomes. (Br. at 17.) Neither of the Localities' briefs address this evidentiary failure. To be sure, the County's brief quotes the ordinance Sources' admissions of no evidence: "'**There is a lack of published research** on efforts to change gender identity among children and adolescents . . . .'" (Cnty. Br. at 8 (emphasis added).) And:

> **Given the lack of empirical evidence** from randomized, controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, **and longitudinal evidence that gender discordance persists in only a small minority of untreated cases arising in childhood, further research is needed on predictors of persistence and desistence of childhood gender discordance as well as the long-term risks and benefits of intervention** . . . .

(Cnty. Br. at 9 (emphasis added) (internal quotation marks omitted).)

4. The Localities' Legislative Records Provide No Description of Any Practice Identified as "Conversion Therapy" or Any Harm Purportedly Suffered.

Counselors' brief exposes the utter lack of evidence of harm in the Localities' respective legislative records of their ordinances. (Br. at 25–27.) In their briefs, the Localities point to nothing that can supplement their wholly inadequate records.

The City's brief merely parrots its ordinance's recitals identifying the Sources (City Br. at 4–8), none of which contain empirical evidence of harm (Br. at 12–25). This is not surprising, given that the City received no evidence whatsoever when considering its ordinance, relying instead on the bald assertions of the ordinances' activist proponent that "'conversion therapy'" is aversive and forced. (Br. at 25–27.)

The County's brief merely rehearses the approximately four hours of hearing time given to consideration of its ordinance (Cnty. Br. at 13–15), but without identifying any "evidence" of harm beyond nonspecific, anecdotal, multi-layered hearsay, primarily delivered by the activist (Br. at 25–27).

5. The Absence of Any Empirical Evidence of Harm from "Conversion Therapy" Forecloses Any Assertion of a Legitimate, Let Alone Compelling, Governmental Interest Justifying the Ordinances.

This absence of empirical evidence of harm, now beyond dispute, is an insurmountable obstacle to the Localities' narrow tailoring burdens. (Br. at 46–49,

53–54.) As shown in Counselors' brief, it is not Counselors burden to prove the effectiveness of Counselors' talk therapy, or of "conversion therapy" or SOCE in general; rather, it is the Localities' burden to show empirical or concrete evidence of harm justifying the ordinances. (Br. at 45–49.) Whatever **general** interest they may rightfully proclaim in the health and safety of minors in their jurisdictions, they have no legitimate—let alone compelling—interest in protecting minors from the merely speculative narrative of harm packaged by an activist and uncritically adopted by the Localities.

In its *Wollschlaeger* decision holding that provisions of FOPA did not satisfy even intermediate scrutiny, this Court explained that purported governmental interests "[a]t an abstract level of generality" are not enough to justify "restrict[ing] the speech of doctors and medical professionals on a certain subject." 848 F.3d at 1316. Thus, Florida's undoubted "substantial interest" in "regulat[ing] the medical profession in order to protect the public" was nonetheless not specific enough to justify a speech restriction on professionals where there was no evidence of a harm to be remedied beyond "six anecdotes." 848 F.3d at 1316. The Localities' legislative records are no better. (*See supra* pt. I.C.4.) Accordingly, they cannot satisfy the interest prong of their narrow tailoring burden.

Undeterred by its nonexistent legislative record of harm from "conversion therapy," the City makes the remarkable argument that "'[l]egislatures are entitled

to rely on the **empirical** judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject'" (City. Br. at 31 (modification in original) (emphasis added) (quoting *King*, 767 F.3d at 238)), and, "the First Amendment does not 'require that **empirical** data come accompanied by a surfeit of background information.'" (City Br. at 31 (emphasis added) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001)). The obvious problem with the City's argument, however, is that the City's legislative record contains **no** empirical evidence whatsoever, as was unequivocally admitted by its designee at his deposition. (A-126-41 at 26:13–28:13; *supra* pt. I.C.2.) If the record is clear about anything, it is that neither of the Localities considered or produced any empirical evidence whatsoever of harm from "conversion therapy" to justify their ordinances. Thus, cases discussing the relative strengths of actual empirical sources have no bearing whatsoever on the unempirical speculations underlying the Localities' ordinances.

D. The City's Unfounded Criticism of Counselors' Informed Consent Forms Nonetheless Admits the Ordinances Could Have Been Tailored to Require the "Conversion Therapy" Disclosures the Localities Deem Sufficient Instead of Banning Counselors' Speech.

The City departs momentarily from its conduct-not-speech script to criticize Counselors' informed consent forms, for not informing clients enough about the

"conversion therapy" harm narrative codified in the ordinances. (City Br. 10–11.) In so doing, however, the City concedes another narrow tailoring point—that regulation far short of a total ban could have served the City's purported interest in the harm narrative. Even the APA Report, on which the ordinances ostensibly rely, expressly endorses this approach:

> **In weighing the harm and benefit of SOCE, LMHP[3] can review with clients the evidence presented in this report. Research on harm from SOCE is limited**, and some of the research that exists suffers from methodological limitations that make broad and definitive conclusions difficult. . . .

(A-126-22 at 67 (emphasis added) (citations omitted).) An ordinance imposing specific informed consent disclosures, such as the APA Report's reasonable caution that "[r]esearch on harm from SOCE is limited," actually could claim support in the APA Report. Instead, the Localities' ordinances claim "overwhelming research," in contradiction to the APA Report, to justify their total bans. There was no "overwhelming research" on harm when the APA Report was written, and there was

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3 "LMHP" stands for "licensed mental health providers." (A-126-22 at 5.)

no "overwhelming research" on harm when the ordinances were enacted.[4] A specific informed consent requirement could be tailored to this reality; a total ban never could.

Moreover, the City's criticism of Counselors' informed consent procedures is unfounded. As the City has conceded (*see supra* p. 4), Counselors have never received any complaints or reports of harm from any minor or adult client receiving voluntary SOCE counseling from them (A-1 at ¶¶ 130, 147), despite state-level avenues for dissatisfied clients to complain about unethical, misleading, or harmful practices (A-1 ¶¶ 83–88; *cf.* Br. at 31–32). Thus, the Localities cannot meet their narrow tailoring burden by claiming Counselors' informed consent procedures are ineffective to prevent harm, nor can the Localities disprove that informed consent procedures and existing state regulation are effective to prevent any harm from "conversion therapy" supposed by the Localities. (*Cf.* Br. at 54–55.)

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[4] Even now, the newest "research" on harm remains underwhelming and discredits the Localities: "'**causal claims cannot be made**.'" (Plaintiffs-Appellants' Omnibus Response in Opposition to Prospective Amici's Motions for Leave to File Amicus Briefs at 1–3 (quoting Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts with LGB Adolescents: Implications for Young Adult Mental Health and Adjustment*, Journal of Homosexuality (2018), at 11–12).) (Equality Fla. Mot. 16–17, Addendum (ECF 35–49).)

E. The Localities Fail to Save the District Court from Its Error in Failing to Deem Counselors Likely to Prevail Due to the Localities' Failure to Carry Their Narrow Tailoring Burdens.

As shown in Counselors' brief (Br. at 51–53), they must be deemed likely to prevail on their First Amendment claims because the district court expressly found that "[i]t is not clear from the record at this stage that the ordinances are the 'least restrictive means' to protect minors . . . ." (A-141 at 50.) *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (holding plaintiff "must be deemed likely to prevail" upon government's failure to prove narrow tailoring at preliminary injunction stage). Although the district court had elsewhere seemed to acknowledge that the narrow tailoring burden belongs to the Localities at the preliminary injunction stage (A-141 at 42–43), the court nonetheless improperly yoked Counselors with the Localities' narrow tailoring burden, and counted the Localities' failures to convince the court on narrow tailoring as Counselors' failure, concluding, "Plaintiffs have not met their burden of demonstrating substantial likelihood of success on this point." (A-141 at 50.)

Neither of the Localities made any argument in its brief to respond to Counselors' argument that the district court was obligated to deem Counselors likely to prevail upon its finding that the Localities had not satisfied narrow tailoring. Thus, the Localities have abandoned any argument on this issue. *See Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001).

II. THE LOCALITIES FAILED TO OVERCOME THE ORDINANCES' UNCONSTITUTIONAL VIEWPOINT-BASED SPEECH RESTRICTIONS.

Counselors showed through extensive argument in their brief that the ordinances constitute unconstitutional viewpoint-based restrictions on Counselors' speech. (Br. at 59–64.) The Localities relatively short responses are unavailing (City Br. at 25–27; Cnty. Br. at 36–39), and except as provided below, Counselors rely on the arguments in their brief.

The City's argument that the ordinances' express allowance of "counseling that provides support and assistance to a person undergoing gender transition" is viewpoint-neutral (City Br. at 26–27) directly contradicts the record evidence. Under questioning at his deposition, the City's designee testified that affirming a gender "transition" that aligns a minor's gender with his or her biological sex violates the City's ordinance:

> Q. What about an adolescent -- so now we're talking about someone, you know, between thirteen and eighteen.
>
> A. Uh-huh.
>
> Q. Born as a female but has been identifying as a male for some time. Okay?
>
> A. Uh-huh.
>
> Q. **If that minor seeks therapeutic help in changing gender identity behaviors and expressions back to match her biological body, would the**

> **ordinance prohibit a therapist from providing talk therapy to assist with that identity change back?**
>
> A. I think that the same process we've talked about with the ten, the six and now the thirteen, fifteen, it's the same -- same ordinance; and it covers minors the same way.
>
> Q. Okay. **So the answer to the question is: Yes, the example I just gave would be conversion therapy prohibited by the ordinance?**
>
> A. **Yes**, I believe.
>
> . . . .
>
> Q. The City believes?
>
> A. Yes.

(A-126-41 at 172:11–173:8 (emphasis added).) It could not be clearer from the record that the City considers, and intends to enforce, its ordinance to allow a counselor to affirm a gender "transition" away from biological sex, but not back towards biological sex. The ordinance, therefore, unquestionable discriminates on the basis of viewpoint.

The County similarly argues that its ordinance "does not discriminate based on the direction of the intended change as to gender identity or sexual orientation." (County Br. at 37.) But like the City, the County testified through its designee (and author of the County's brief) that if an adolescent born female, but who identifies as a male for a time, seeks therapeutic help to change her gender identity back to female to align with her biological body, the County ordinance prohibits licensed therapists

from helping her. (A-121-9 at 268, lines 15–25.) and similarly directly contradicts the record testimony of its designee

III. THE LOCALITIES FAILED TO OVERCOME THE ORDINANCES' UNCONSTITUTIONAL VAGUENESS AND UNCONSTITUTIONAL IMPOSITION OF PRIOR RESTRAINTS.

The Localities responses (City Br. at 37–43; Cnty. Br. at 39–41) to Counselors' vagueness and prior restraint arguments (Br. at 64–67) do not merit reply, other than to show the Court that neither of the Localities addressed the vagueness issue arising from their respective inabilities of their officials to enforce their ordinances. (Br. at 66–67.) Laws that threaten First Amendment expression must "set out specific standards for those who apply it." *See Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). As shown by Counselors, and unrefuted by the Localities, the Localities' officials are neither qualified, trained, nor equipped to apply the broad and undefined terminology of the ordinances against the licensed professionals that the officials are supposed to regulate. (Br. at 9–12, 28–31, 66–67.)

IV. THE LOCALITIES FAILED TO REFUTE PLAINTIFFS' IRREPARABLE HARM FROM THE LOCALITIES' ULTRA VIRES ORDINANCES WHICH REGULATE A FIELD PREEMPTED TO THE STATE.

The Localities responses (City Br. at 43–46; Cnty. Br. at 42–43) to Counselors' *ultra vires* arguments (Br. at 67–68) do not merit reply, other than to show the Court that the City fails to show how Counselors' could possibly calculate the lost revenue from potential clients who never call or inquire with Counselors

because of the ordinances' prohibitions. Nor has the City shown how Counselors' injuries from the ordinances' interference with Counselors' therapeutic alliances with existing clients, such as loss of trust or goodwill, could possibly be compensable monetarily. Thus, the Localities have not demonstrated the absence of irreparable harm suffered by Counselors as a result of the *ultra vires* ordinances.

CONCLUSION

For the foregoing reasons, and those in Counselors' principal brief, the district court's denial of Counselors' motion for preliminary injunction was in error, and this Court should reverse.

Dated this July 15, 2019.

/s/ Roger K. Gannam
Mathew D. Staver (Fla. 0701092)
Horatio G. Mihet (Fla. 026581)
Roger K. Gannam (Fla. 240450)
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
E-mail: court@lc.org

Attorneys for Plaintiffs–Appellants

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DATED this July 15, 2019

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs–Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this July 15, 2019, a copy of the foregoing Motion was electronically filed through the Court's ECF system, and that I also provided a copy by e-mail to the following:

Attorneys for Defendant–Appellee
City of Boca Raton, Florida

Jamie A. Cole
jcole@wsh-law.com
Daniel L. Abbott
dabbott@wsh-law.com
Anne R. Flanigan
aflanigan@wsh-law.com
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
200 East Broward Boulevard
Suite 1900
Fort Lauderdale, FL 33301

Attorney for Defendant–Appellee
Palm Beach County, Florida

Helene C. Hvizd
hvizd@pbcgov.org
Senior Assistant County Attorney
Palm Beach County Attorney's Office
301 North Olive Avenue, Suite 601
West Palm Beach, FL 33401

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs–Appellants