

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

Robert L. Vazzo, LMFT, et al.,

Case No. 8:17-cv-02896-WFJ-AAS

Plaintiffs,  
v.

City of Tampa, Florida,

Defendant.

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**DEFENDANT CITY OF TAMPA’S MOTION TO STRIKE PORTIONS OF  
PLAINTIFFS’ STATEMENT OF UNDISPUTED FACTS AND  
INCORPORATED MEMORANDUM OF LAW**

Defendant, City of Tampa (the “City”), under Federal Rules of Civil Procedure 56(e) and Rule 12(f), by and through counsel, respectfully moves this Court to enter an order striking portions of Plaintiffs’ Statement of Undisputed Facts in Support of Motion for Summary Judgment (Doc. 193) (“Plaintiffs’ Statement”), and states in support as follows:

**BACKGROUND**

1. On August 26, 2019, Plaintiffs filed their Motion for Summary Judgment and Motion to Exclude Certain Opinions of Defendant’s Expert and Incorporated Memorandum of Law (Doc. 194) (“Plaintiffs’ Motion for Summary Judgment”), and Plaintiffs’ Statement.
2. In support of Plaintiffs’ Statement, Plaintiffs’ rely upon their First Amended Verified Complaint (Doc. 78) (“FAVC”).
3. As set forth below, the following FAVC cites in Plaintiffs’ Statement do not satisfy the requirements of Federal Rule of Civil Procedure 56 because they are treated as the

functional equivalent of an affidavit in support of Plaintiffs' Motion for Summary Judgment and present impermissible arguments, beliefs, speculations, and conclusions.

### MEMORANDUM OF LAW

#### **I. This Court Should Treat the Amended Verified Complaint as the Functional Equivalent of an Affidavit.**

In support of Plaintiffs' Motion for Summary Judgment, Plaintiffs rely heavily on the allegations in their amended verified complaint. But a verified complaint is treated as the functional equivalent of an affidavit for summary judgment and must satisfy Federal Rule of Civil Procedure 56. *Herrington v. Spruill*, 07-80089-CIV, 2008 WL 2688062, at n. 4 (S.D. Fla. June 8, 2008) (citing *Sheinkopf v. Stone*, 927 F.2d 1259, 1262 (1st Cir. 1991) (“[w]e think the better rule is that a verified complaint ought to be treated as the functional equivalent of an affidavit to the extent that it satisfies the standards explicated in Rule 56(e)”). Federal Rule of Civil Procedure 56(c) provides for the procedures for supporting factual positions and provides that “[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56.<sup>1</sup> “Affidavits setting forth inadmissible hearsay and conclusory and argumentative affidavits that are not based on specific facts will be excluded.” *J.V. by Ortiz v. Seminole County Sch. Bd.*, 604CV1889ORL28JGG, 2007 WL 9719327, at \*1 (M.D. Fla. Mar. 21, 2007) (citing *Johnson v. Scotty's, Inc.*, 119 F. Supp. 2d 1276, 1281 (M.D. Fla. 2000)).

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<sup>1</sup> 2010 Advisory Committee notes provides that Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Fed. R. Civ. P. 56.

Here, Robert L. Vazzo, David H. Pickup, and Mark L. Culligan each verified the amended complaint. (Doc. 78, p. 54-56.) As such, the verified complaint may be treated as the functional equivalent of affidavit in support of Plaintiffs' Motion for Summary Judgment. Because the amended verified complaint is the functional equivalent to an affidavit under Federal Rule of Civil Procedure 56, for the following reasons portions of the Plaintiffs' Statement should be stricken.

**II. Portions of Plaintiffs' Statement Should Be Stricken As Impermissible Assertions of Factual and Legal Conclusions.**

Portions of Plaintiffs' Statement should be stricken as it relies upon ultimate or conclusory facts and conclusions of law. Ultimate or conclusory facts and conclusions of law cannot be relied upon in motions for summary judgment and supporting affidavits, and such impermissible argument, opinions, beliefs, and conclusions based on a party's knowledge should be stricken. *See Gwynn v. Rabco Leasing, Inc.*, 8:09-CV-2093-T-23TGW, 2010 WL 11507683, at \*1—2 (M.D. Fla. Dec. 13, 2010) (“[t]hus, ultimate or conclusory facts and conclusions of law, as well as statements made on belief or ‘on information and belief,’ cannot be utilized on a summary-judgment motion”) (citing 10B Wright, Miller, Kane, Federal Practice and Procedure § 2738 (3d ed.); 27A Federal Procedure § 62:658)). “An affidavit must be stricken when it is a conclusory argument rather than a statement of fact ... [w]hen an affidavit does not meet the requirements of Rule 56(e) of the Fed.R.Civ.P., it should be stricken.” *Interfase Mktg., Inc. v. Pioneer Techs. Grp., Inc.*, No. 91-572-CIV-T-17A, 1993 WL 229601, at \*2 (M.D. Fla. June 23, 1993). “Rule 56(e) also requires information submitted, both in support of and in opposition to summary judgment, to be admissible in evidence.” *Johnson v. Scotty's, Inc.*, 119 F. Supp. 2d 1276, 1281 (M.D. Fla. 2000) (internal citations

omitted). Further, this Court’s own judicial preferences prohibits the use of legal argument in the statement of undisputed material facts. *See* Hon. William F. Jung’s Judicial Preferences for *Motions for Summary Judgment* (“[l]egal argument should not be included in the statement of undisputed material facts.”).

Here, Plaintiffs’ Statement seeks to incorporate by reference Plaintiffs’ amended verified complaint, which includes irrelevant or impermissible arguments, beliefs, speculations, and conclusions under Federal Rules of Civil Procedure 56.<sup>2</sup> Plaintiffs’ Statement includes impermissible allegations two main paragraphs—paragraph 4 and paragraph 7. Paragraph 4 of Plaintiffs’ Statement provides that:

Vazzo does not begin counseling with any predetermined goals other than those that the clients themselves identify and set. (FAVC ¶ 64.) Vazzo employs speech to help clients understand and identify their anxieties or confusion regarding their attractions or identities, and then to help each client formulate the method of counseling that will most benefit the client. (FAVC ¶ 65.) Vazzo’s counseling often focuses on helping parents heal wounds or frustrations with their child and to work on loving and accepting their child despite any challenges that arise from the child’s unwanted same-sex attractions, behaviors, or identity. (FAVC ¶ 66.)

Paragraph 7 make thirty-five bare references to FAVC as undisputed facts. Paragraph 7 provides: “Vazzo and New Hearts also assert as undisputed facts the verified allegations at FAVC 67–71, 88, 90, 93–97, 126, 130, 131, 133, 134–143, 151–153, 155–159, 164.” Also, Paragraph 7 of Plaintiffs’ Statement includes a footnote alleging that “The City did not conduct discovery or otherwise adduce record facts to contradict the verified allegations of Plaintiffs’ First Amended Verified Complaint (Dkt. 78).” Whether the City conducted discovery is immaterial to Plaintiffs’ impermissible attempt to incorporate, by mere reference only,

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<sup>2</sup> In its Answer and Affirmative Defenses to FAVC, the City has denied, in whole or in part, the FAVC allegations described herein. (Doc. 165.)

Plaintiffs' conclusory FAVC allegations. The specific FAVC cites in Plaintiffs' Statement from paragraph 4 and paragraph 7 that are impermissible are as follows, with emphasis added as to the conclusory portions of fact or law.

**i. The Following FAVC Cites in Plaintiffs' Statement are Impermissible Conclusory Statements, Including Conclusions as to Plaintiffs' Therapy Practice.**

64. Throughout the Ordinance, the position statements refer to SOCE counseling as that counseling with the single goal of changing an individual's sexual orientation or gender identity. But, Plaintiffs Vazzo and Pickup do not begin counseling with any predetermined goals other than those that the clients themselves identify and set. *This is consistent with the clients' fundamental right of self-determination.*

(Plaintiffs' Statement ¶ 4, FAVC ¶ 64.)

70. *The only relevant consideration in Vazzo's and Pickup's counseling is that same-sex attractions, behaviors, or identity are an adaption that the client has anxiety or distress over, and that the client seeks to eliminate that anxiety or distress.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 70.)

71. *This is the same relevant consideration in all forms of mental health counseling, and is true of many things that clients seek counseling for, including many that are not mental illnesses but that nevertheless impose great stress, anxiety, confusion, or grief on the client.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 71.)

90. *The Ordinance does not specify which clients would be classified as seeking to "change" and those that would merely be deemed conforming their behavior with their original "sexual orientation." As Vazzo's and Pickup's clients do not always immediately present wanting to "change," they are left to guess at which point any of their counseling practices would be deemed to constitute efforts to reduce or eliminate unwanted same-sex attractions.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 90.)

93. *The Ordinance also permits licensed counselors to provide counseling that provides “acceptance, support, and understanding” of a client’s unwanted same-sex attractions, behaviors, or identity. This presents another major source of confusion, uncertainty, and vagueness for Vazzo and Pickup.*

(Plaintiffs’ Statement ¶ 7, FAVC ¶ 93.)

94. *Under the Ordinance, it is impossible for Vazzo and Pickup to provide acceptance and support to a client who comes in for counseling and requests assistance in seeking to eliminate unwanted same-sex attractions, behaviors, or identity.*

(Plaintiffs’ Statement ¶ 7, FAVC ¶ 94.)

95. *Many of Vazzo’s and Pickup’s clients do not initially request counseling to specifically reduce or eliminate their unwanted same-sex attractions, behaviors, or identity, but instead want help and counseling to understand the sources, causes, and origins of their anxiety over such feelings.*

(Plaintiffs’ Statement ¶ 7, FAVC ¶ 95.)

96. *During the course of such counseling, and without ever specifically setting out to reduce or eliminate unwanted same-sex attractions, behaviors, or identity, many clients will experience a change in their sexual attractions, behaviors, or identity, and this is true despite never specifically seeking to experience such a change or elimination of their unwanted feelings.*

(Plaintiffs’ Statement ¶ 7, FAVC ¶ 96.)

97. *Vazzo and Pickup are left to guess at whether counseling simply discussing the confusion, anxiety, conflict, or stress a client feels about their unwanted same-sex attractions, behaviors, or identity, without specifically seeking to reduce or eliminate such feelings, runs afoul of the Ordinance’s prohibitions.*

(Plaintiffs’ Statement ¶ 7, FAVC ¶ 97.)

**ii. The Following FAVC Cites in Plaintiffs’ Statement are Impermissible Conclusory Statements, Including Conclusions as to Presumptions of the Ordinance at Issue.**

67. *The presumptions of the Ordinance that all such counseling from Vazzo and Pickup is premised on the notion that homosexuality is an illness, defect, or shortcoming does not accurately reflect Vazzo's and Pickup's practices, and it ignores the fact that Vazzo and Pickup seek to treat the anxiety and confusion that arises from a client's unwanted same-sex attractions, behaviors, or identity.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 67.)

68. *The presumption of the Ordinance that Vazzo and Pickup seek to "cure" a client of same-sex attractions are false, because Vazzo and Pickup seek only to assist a client with their stated desires and objectives in counseling, which sometime include reducing or eliminating the client's unwanted same-sex attractions.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 68.)

69. *The presumption of the Ordinance that SOCE counseling and Vazzo and Pickup view homosexuality as an "illness" does not reflect the truth of such counseling, and it ignores the point of mental health counseling in general.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 69.)

88. *The Ordinance prohibits Vazzo and Pickup under any circumstances from engaging in any practice that seeks to reduce or eliminate same-sex sexual attractions, behaviors, or identity. This prohibition is virtually impossible for Vazzo and Pickup to comply with because it is well understood in the mental health profession, and conceded by the City's own references, that sexual orientation and gender identity are difficult to define and encompass a number of factors, including behavior, practices, identity, attractions, sexual fantasy, romantic attractions, and erotic desires.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 88.)

141. *New Hearts Outreach desires to continue to offer such speakers at the Pastors and Counselors Luncheon, but cannot do so because the Ordinance prohibits licensed mental health counselors from providing such teaching and discussion to minors and their families in attendance.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 141.)

142. *Because a licensed counselor speaking at the Pastors and Counselors Luncheon would be engaging in efforts aimed at reducing or eliminating the unwanted same-sex attractions, behaviors, or identity of those in the*

*audience, including minors, such counselors would run afoul of the prohibitions of the Ordinance.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 142.)

143. *By prohibiting such discussion from licensed counselors, the Ordinance has diminished and hindered New Hearts Outreach's ability to effectively communicate its message to its constituents, and has chilled its ability to carry out its core mission of assisting those individuals who desire the hope that Jesus Christ offers them.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 143.)

**iii. The Following FAVC Cites in Plaintiffs' Statement are Impermissible Conclusory Statements, Including Conclusions and Irrelevant Statements as to Plaintiffs' Religious Beliefs.**

126. *New Hearts Outreach is a confidential healing and discipleship ministry fostering sexual and relational wholeness in people's lives through the hope of Jesus Christ.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 126.)

130. *New Hearts Outreach is dedicated to sharing the hope of the Gospel of love of Jesus Christ to those who choose to pursue sexual and relational wholeness.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 130.)

131. *New Hearts Outreach is an unapologetically Christian organization that has sincerely held religious beliefs founded on the Bible and its teachings.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 131.)

138. *In 2018, New Hearts Outreach's Pastors and Counselors Luncheon included father and son speakers who shared their testimony of how Jesus Christ changed the son's life and was able to redeem him and restore the relationship with his father.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 138.)

139. *New Hearts Outreach's Pastors and Counselors Luncheon involves speakers, such as those in 2018, who share Biblical teaching on sexuality*

*and offer expertise on reducing and/or eliminating unwanted same-sex attractions, behaviors, or identity.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 139.)

140. *New Hearts Outreach's Pastor and Counselors Luncheon has also frequently included licensed mental health counselors who provide teaching and discussion on helping individuals, including minors, from reducing and/or eliminating their unwanted same-sex attractions, behaviors, or identity.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 140.)

**iv. The following FAVC Cites in Plaintiffs' Statement are Impermissible Conclusory Statements, Including Conclusions as to Plaintiffs' Constitutional Rights.**

152. *Consistent with his First Amendment rights, Vazzo desires to advertise his counseling, including SOCE counseling, to clients and potential clients in the City, including minors. When he finishes his licensing requirements, Pickup desires to advertise his counseling, including SOCE counseling, to clients and potential clients in the City, including minors.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 152.)

153. *Consistent with his First Amendment rights, Vazzo desires to offer his counseling, including SOCE counseling, to clients and potential clients in the City, including minors. When he finishes his licensing requirements, Pickup desires to offer his counseling, including SOCE counseling, to clients and potential clients in the City, including minors.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 153.)

155. *Consistent with their First Amendment rights, Vazzo and Pickup would like to be able to inform religious leaders, organizations, and ministries that there is help from licensed mental health professionals with expertise in this area and that it is available to individuals desiring assistance in the area of unwanted same-sex attractions, behaviors, and identity.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 155.)

164. *Because of the Ordinance, New Hearts Outreach is unable to engage in constitutionally protected expression, invite licensed mental health counselors to speak at its Pastors and Counselors Luncheon, and is unable*

*to provide the referrals to licensed mental health counselors in Tampa that its clients desperately desire to receive.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 164.)

- v. The Following FAVC Cites are Impermissible Conclusory Statements, which Include the Counterfactual Allegation that the Prohibitions of the Ordinance Affect Adult Clients and Potential Clients, and not Just Minors as Provided in the Ordinance. (Doc. 24-1, p. 7.)**

157. *Because of the Ordinance, Vazzo and Pickup are prohibited from advertising SOCE counseling to clients and potential clients, including minors, in the City.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 157.)

158. *Because of the Ordinance, Vazzo and Pickup are prohibited from offering SOCE counseling to clients and potential clients, including minors, in the City.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 158.)

159. *Because of the Ordinance, Vazzo and Pickup are prohibited from engaging in SOCE counseling with clients and potential clients, including minors, in the City.*

(Plaintiffs' Statement ¶ 7, FAVC ¶ 159.)

### **CONCLUSION**

For the reasons stated above, the specified portions of Plaintiffs' Statement should be stricken and not considered in the Court's adjudication of Plaintiffs' Motion for Summary Judgment.

### **Rule 3.01(g) Certification**

Pursuant to Local Rule 3.01(g), undersigned counsel consulted with Plaintiffs' counsel, Roger Gannam, regarding this motion on September 16, 2019. Plaintiffs' counsel has indicated that he opposes this motion.

Respectfully submitted,

/s/ Robert V. Williams

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16th day of September, 2019, I caused a true and correct copy of the foregoing to be served via electronic mail on counsel for Plaintiff, Horatio G. Mihet (hmihet@lc.org), Roger Gannam (rgannam@lc.org), and Daniel J. Schmid (dscmid@lc.org).

/s/ Robert V. Williams

Attorney