UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO, LMFT, etc., et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 8:17-cv-2896-T-02AAS
v.	)	
	)	
CITY OF TAMPA, FLORIDA,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY, individually and on behalf of its members, constituents, and clients,[1] pursuant to Local Rule 3.01 and the Court's Case Management and Scheduling Order (D.183), file this memorandum of law in opposition to Defendant the City of Tampa's Motion for Summary Judgment (D.189).

[1] Plaintiff DAVID H. PICKUP, LMFT does not take part in this filing. (*See* D.188, Plaintiffs' Certification of Conference to Narrow Issues for Summary Judgment.)

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INTRODUCTION

"Corey Johnson, the City Council speaker, said that repealing New York's ban on conversion therapy was the 'most responsible, prudent course.'"
–New York Times[2]

"It is a smart move."
–Shannon Minter, Legal Director,
National Center for Lesbian Rights[3]

The City's Motion for Summary Judgment should be denied. Rather than acknowledge the Supreme Court's gutting of the *Pickup–King* foundation for its Ordinance, the City clings to its threadbare 'conduct-not-speech' arguments and persists in substituting political nose-counting for constitutional analysis. And in a further effort to avoid the constitutionally mandated scrutiny for its viewpoint- and conduct-based restrictions on Plaintiffs' speech, the City invokes for the first time the inapposite (and perhaps obsolete) "secondary effects doctrine." The City cannot show it is entitled to judgment as a matter of law, and the Court should deny its summary judgment motion.

Plaintiffs' legal arguments in support of their Motion for Summary Judgment (D.194, "Plaintiffs' MSJ"), including the legal arguments from their prior filings incorporated therein, sufficiently dispose of the City's key arguments in its Motion for Summary Judgment (D.189, "Tampa MSJ"). Plaintiffs herein focus primarily on the City's false premise that a "medical consensus" justifies its therapy ban, and the City's ongoing but equally unavailing attempts to minimize this Court's constitutional scrutiny of the Ordinance.

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[2] Jeffery C. Mays, *New York City Is Ending a Ban on Gay Conversion Therapy. Here's Why*, The New York Times (Sept. 12, 2019), https://www.nytimes.com/2019/09/12/nyregion/conversion-therapy-ban-nyc.html ("The move is a gambit designed to neutralize a federal lawsuit filed against the city by a conservative Christian legal organization; if the case were to be heard by the Supreme Court, advocates for the L.G.B.T. community fear that the panel could issue a ruling that could severely damage attempts to ban or curtail conversion therapy.").

[3] Joe Anuta, *Council set to repeal its conversion therapy ban in face of lawsuit*, Politico (Sept. 11, 2019, 5:04 PM), https://www.politico.com/states/new-york/city-hall/story/2019/09/11/council-set-to-repeal-its-conversion-therapy-ban-in-face-of-lawsuit-1183672.

ARGUMENT

I. TAMPA IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CONSTITUTIONAL CLAIMS BECAUSE NO "MEDICAL CONSENSUS" SATISFIES CONSTITUTIONAL SCRUTINY OF TAMPA'S THERAPY BAN.

A. Political Nose-Counting is Not a Substitute for the City's Constitutional Responsibility to Uphold the First Amendment Rights of Plaintiffs.

The persistent theme of the City's defense of its therapy ban Ordinance is that the ban is justified by a "medical consensus" against "conversion therapy." (*See, e.g.*, Tampa MSJ 1.) To be sure, the First Amendment does not restrict the positions, resolutions, or recommendations of private professional organizations. Such organizations are free to endorse or condemn any speech they want. But the government—here, the City of Tampa—is bound by the First Amendment, and the First Amendment prohibits Tampa's regulation of the viewpoint of professionals' speech, and prohibits the City's regulation of the content of professionals' speech absent a compelling interest and narrow tailoring. (Pls.' MSJ 2–7 (content), 16–21 (viewpoint).) And a compelling interest sufficient to justify regulating the content of speech must be specific and based on concrete or empirical evidence of harm to be stopped. (Pls.' MSJ 7–12.)

Tampa cannot satisfy the First Amendment by merely counting noses, even if the City calls the count a "medical consensus" or "overwhelming research." (Tampa MSJ 1–2; Ordinance, D.24-1, PageID 347.) Indeed, all of Tampa's appeals to "consensus" fail to overcome the undisputed absence of empirical or concrete evidence of harm caused by "conversion therapy." (Pls.' MSJ 7–12;[4] D.201, Plaintiffs' Statement of Disputed and Undisputed Facts in Opposition to Defendant's

[4] The argument heading in Plaintiffs' MSJ at page 7, "The City Cannot Satisfy Its Strict Scrutiny Burden Because It Cannot Show Either a Compelling Interest Supporting the Ordinance or that the Ordinance Is the Least Restrictive Means," appears as a body text sentence due to a formatting error. The heading should have been labeled as Argument part I.B.

Motion for Summary Judgment ("Plaintiffs' DF"), ¶¶ 3–5, 15–21, 28, 30–35, 39, 40.) The First Amendment does not allow the City simply to weigh the unempirical, anecdotal accounts of harm and benefit and decide which one wins:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

United States v. Stevens, 559 U.S. 460, 470 (2010).

B. Tampa's Exclusively Unempirical Legislative Judgments Are Not Entitled to Deference When Plaintiffs' First Amendment Rights Are at Stake.

As also shown in Plaintiffs' MSJ, the City is not entitled to legislative deference when making speech-restrictive determinations subject to the First Amendment. (Pls.' MSJ 7–8; D.114, Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss and Plaintiffs' Reply in Support of Their Renewed Motion for Preliminary Injunction (Plaintiffs' "MTD Resp./MPI Reply") at 16–21.) Thus, contrary to Tampa's plea (Tampa MSJ 3–4), its legislative reliance on "conclusory statements during the debates by proponents" and exclusively unempirical judgments is entitled to no deference whatsoever. *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989) ("'**Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake**.'" (emphasis added)).

Undeterred by its nonexistent legislative record of harm caused by "conversion therapy," the City makes the remarkable arguments that "[t]he quantum of **empirical** evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary," and 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'" (Tampa MSJ 3–4 (emphasis added) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000), and *Otto v. City of Boca Raton*, 335 F. Supp. 3d 137, 1262 (S.D. Fla. 2019), respectively).) The obvious problem with these arguments, however, is that the City's legislative record contains **no empirical evidence whatsoever**, as was admitted by the City's designee at his deposition. (Pls.' MSJ 9–10; Pls.' SUF ¶ 14; Pls.' DF ¶¶ 3–5, 15–21, 28, 30–35, 39, 40.) Cases discussing the relative strengths of actual empirical sources have no bearing on the unempirical anecdote and speculation underlying Tampa's ordinance.

II. TAMPA IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CONSTITUTIONAL CLAIMS BECAUSE TAMPA CANNOT LESSEN THIS COURT'S STRICT SCRUTINY OF ITS ORDINANCE.

Contrary to Tampa's arguments (Tampa MSJ 17–22), Plaintiffs have established that the Ordinance cannot survive strict scrutiny under either the compelling interest or narrow tailoring prongs. (Pls.' MSJ 7–16.) Nor can Tampa lessen this Court's scrutiny of the Ordinance by resorting to its worn-out 'conduct-not-speech' or "professional speech" arguments (Tampa MSJ 5–9), which Plaintiffs also dispatched in their summary judgment papers. (Pls.' MSJ 2–7.) Tampa's new argument under the "secondary effects doctrine" (Tampa MSJ 13–14) fares no better.

Tampa challenges subjecting its Ordinance to strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), by invoking the secondary effects doctrine through the unpublished Eleventh Circuit opinion in *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 703 Fed. App'x 929 (11th Cir. 2017).[5] As *Flanigan's* itself recognizes, however, the secondary effects doctrine is limited to "two strands of case law" addressing the zoning and public nudity aspects of

[5] "Unpublished opinions are not considered binding precedent . . . ." 11th Cir. Rule 36-2.

adult-entertainment ordinances. *Id.* at 933. Thus, the *Flanigan's* court's conclusion that *Reed* did not abrogate the secondary effects doctrine, *id.*at 934–35, has no bearing on Tampa's Ordinance, which is not an adult-entertainment ordinance. *Cf. Free Speech Coal., Inc. v. Attorney Gen.*, 825 F.3d 149, 161 (3d Cir. 2016) (recognizing "*if* the secondary effects doctrine survives, *Reed* counsels against expanding its application beyond the only context to which the Supreme Court has ever applied it: regulations affecting physical purveyors of adult sexually explicit content" (footnote omitted)). Thus, the status of the secondary effects doctrine notwithstanding, Tampa's Ordinance is subject to strict scrutiny as a content-based regulation of speech. (Pls.' MSJ 2–7; D.160, Plaintiffs' Consolidated Response in Opposition to Defendant, City of Tampa's Objections to Magistrate's Reports and Recommendations (Plaintiffs' "R&R Obj. Resp.") at 21–23; MTD Resp./MPI Reply 2–9.)

III. TAMPA IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' STATE LAW CLAIMS.

Tampa is not entitled to summary judgment of Plaintiffs' state law claims. (Tampa MSJ 22–25.) As shown in Plaintiffs' MSJ, Plaintiffs are entitled to summary judgment on their Florida implied preemption claim, which forecloses summary judgment for the City. (Pls.' MSJ 21–25.) Also, as Tampa recognizes, Plaintiffs' speech claims under Article I, Section 4 of the Florida Constitution are coextensive with Plaintiffs' federal speech claims. (Tampa MSJ 22–23.) Thus, Plaintiffs' entitlement to summary judgment on their First Amendment claims (*supra*; Pls.' MSJ 2–21), likewise entitles Plaintiffs to relief on their Florida speech claims, and forecloses summary judgment for Tampa on those claims. Finally, the Court already upheld Plaintiffs' pleading of their Florida RFRA claims (Order, D.162 (adopting D.148, Report and Recommendation)), which pleading was effected by verified complaint (FAVC, D.78). Tampa did not conduct discovery, has put forth no facts rebutting Plaintiffs' verified allegations, and has not identified undisputed facts

showing the City is entitled to judgment as a matter of law. Thus, Tampa is not entitled to summary judgment on Plaintiffs' Florida RFRA claims.

CONCLUSION

For all of the foregoing reasons, the Court should deny Tampa's Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this September 16, 2019, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Roger K. Gannam
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Attorney for Plaintiffs