UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Robert L. Vazzo, LMFT, et al.,

Plaintiffs,

v.

City of Tampa, Florida,

Defendant.
_____/

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

DISPOSITIVE MOTION

DEFENDANT CITY OF TAMPA'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, the City of Tampa, under Federal Rule of Civil Procedure 56, hereby files its Reply in Support of its Motion for Summary Judgment on Counts I, II, IV, VI, and VIII of Plaintiffs' First Amended Verified Complaint, which seek to invalidate the City's ban on practicing conversion therapy on minors, and in support states as follows:

INTRODUCTION

The record before this Court is clear: every major medical and mental health professional organization has warned that conversion therapy should not be performed on minors because it provides no benefits and puts them at risk of serious harms. This broad agreement within the medical community served as the basis for the Ordinance. And the City was entitled to rely on this overwhelming medical consensus in determining, in its legislative judgment, that prohibiting conversion therapy was necessary to protect a vulnerable class from this potentially life threatening treatment. Despite the evidence of harm and lack of any unique benefits Plaintiffs attack this medical consensus with their experts who contend that conversion therapy should, indeed, be practiced on minors.

Plaintiffs erroneously claim that the City cannot protect minors from conversion therapy until further research demonstrates *conclusive* evidence of harm, similar to that required to prove that a treatment works. But such exacting proof could only be obtained by means of studies that ethical practice prohibits due to the potential for harm to participants, which is why practitioners ceased performing such studies decades ago. The City need not wait for gold-standard causation studies that cannot ethically be attempted. The Constitution permits it to act now in order to protect minors on the basis of the abundant evidence of harm that already exists. This Court should afford substantial deference to the City's legislative determination that enacting the Ordinance was necessary to prevent an unacceptable risk of physical and mental harm to the City's youth and grant summary judgment on all counts. [1]

ARGUMENT

I. THE CITY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CONSTITUTIONAL CLAIMS BECAUSE THE MEDICAL CONSENSUS CONCERNING CONVERSION THERAPY CLEARLY SATISFIES CONSTITUTIONAL SCRUTINY.

Plaintiffs dismiss the medical consensus that conversion therapy is harmful to minors as mere "nose-counting." But that consensus is based on decades of observation and experience, including studies, clinical experience, and patient reports. (Doc. 190, ¶ 21.) As other courts assessing the validity of virtually identical laws have recognized, "this evidence is substantial." *King v. Governor of the State of New Jersey*, 767 F.3d 216, 238 (3d Cir. 2014); *see also Pickup v Brown*, 728 F.3d 1042, 1058 (9th Cir. 2013) (recognizing the overwhelming consensus . . . that SOCE was harmful and ineffective); *Otto v. City of Boca Raton, Fla.*, 353

[1] Plaintiffs' reference to the New York City law, which is much broader than Tampa's Ordinance, is misleading. New York City's law is not limited to either minors or licensed therapists. New York, NY, Ordinance 2018/022 (Dec. 31, 2017).

F. Supp. 3d 1237, 1262 (S.D. Fla. 2019) (noting "extensive credible evidence of the damage that conversion therapy inflicts" "coming from well-known research organizations and subject matter experts"); *Doyle v. Hogan*, Memorandum Opinion at 15, ECF No. 77, 1:19-cv-00190-DKC (Sept. 20, 2019) (finding that "the evidence provided in the legislation is more than adequate to indicate the potentially harmful effects of conducting conversion therapy on minors"). Despite that substantial evidence, Plaintiffs argue that definitive proof, supported by controlled randomized studies of causality, is required. That is not the law.

As the Supreme Court acknowledged in *F.C.C. v. Fox Television Stations, Inc.*, it is unreasonable to demand the performance of controlled studies in which children are intentionally exposed to potentially harmful effects in order to obtain conclusive proof of causation. 556 U.S. 502, 519 (2009) ("One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency."). The Supreme Court distinguished between requiring empirical data that can readily be obtained and insisting upon obtaining the unobtainable—double-blind studies of the harmful effects of exposure to profanity on children. *Id.* Yet this is precisely what Plaintiffs here insist is required. But, obviously, the First Amendment does not require that minors be intentionally subjected to dangerous mental health practices in order to conclusively prove harm.

Indeed, such studies intentionally subjecting individuals to potentially harmful effects such were, in fact, performed in the 1970s. Practitioners ceased performing such studies decades ago, however, for the obvious reason that purposefully subjecting youth to potentially

harmful effects in order to obtain conclusive proof of efficacy or harm is inconsistent with principles of ethical mental health practice. *See Otto,* 353 F. Supp. 3d at 1260-61 n.12.

In light of the abundant empirical evidence of harm—including reports of harm arising solely from talk therapy—the City is entitled to substantial deference. (Doc. 24-3, p. 459.) The Supreme Court has cautioned that courts are not to "reweigh the evidence *de novo*" or to replace the legislature's factual predictions with its own. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 211 (1997). Rather, this Court must determine whether the legislative conclusion was reasonable and supported by substantial evidence in the record. Because the City's conclusion is reasonable and supported by substantial evidence in the record, summary judgment is appropriate. *Id.*

II. THE CITY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CONSTITUTIONAL CLAIMS BECAUSE THE ORDINANCE SATISFIES ANY LEVEL OF CONSTITUTIONAL SCRUTINY.

As the City has demonstrated in its previous briefs, the Ordinance regulates a mental health treatment, not speech as such. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *Sorrell v. IMS Health Inc*., 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), and professionals are no exception to this rule, *see Ohralik*, supra, at 456, 98 S.Ct. 1912." *NIFLA v. Beccera*, 138 S. Ct. 2361, 2373 (2018). The Ordinance prevents licensed therapists from engaging in any form of conversion therapy with minors, whether administered by behavior modification, aversive therapies, medication, or verbal counseling. At most, it affects only the speech used to administer a course of treatment—not speech used to communicate a viewpoint or ideas. *See NIFLA* at 2374 (distinguishing between a regulation of medical treatment that incidentally

restricts speech and a law that restricts "speech as speech"). Because any restriction on speech is incidental, the Ordinance is subject only to rational basis review. *See NIFLA* (affirming the Court's prior holding in *Casey* that governments may regulate the practice of medicine, even when such regulation incidentally affect speech that is part of that practice).

Plaintiffs argue that these principles do not apply to them because they perform conversion therapy entirely through verbal therapy. But if that were true, then any regulation of counseling—or any other profession consisting largely of speech—would trigger strict scrutiny. *See Pickup*, 740 F.3d at 1229 ("Most, if not all, medical and mental health treatments require speech, but that does not give rise to a First Amendment argument when the state bans a particular treatment."). In *NIFLA*, the Court expressly noted that "longstanding torts for professional malpractice . . . fall within the traditional purview of state regulation of professional conduct," even though such torts often turn on the content of a professional's speech, such as whether a doctor correctly diagnosed an illness or whether a psychiatrist failed to warn a third party about an imminent threat. *Id*. at 2372 (citation omitted). Similarly, by regulating an unsafe treatment in order to protect minors from physical and emotional harm, the Ordinance likewise "falls within the traditional purview of state regulation of professional conduct." *Id*.

Just last week, the United States District Court for the District of Maryland agreed that "government regulations of professional practices that entail and incidentally burden speech receive deferential review" in upholding a Maryland statute which, in terms virtually identical to the Ordinance, prohibits licensed mental health professionals in that state from performing conversion therapy on minors. *Doyle v. Hogan*, 1:19-cv-00190-DKC at 17 (Sept. 20, 2019).

Like the Ordinance here, the court noted that the Maryland law "does not prohibit practitioners from engaging in any form of personal expression; they remain free to discuss, endorse, criticize, or recommend conversion therapy to their minor clients." *Id*. at 9. It is not directed at the "communicative aspects" of mental health treatment instead, it is directed at the act of providing a particular treatment that has no therapeutic benefit and puts minors at risk of serious harms. *Id*. at 10 (internal quotation marks and citations omitted).

The court in *Doyle* also agreed that such a law is, at most, subject to intermediate scrutiny. As the court in *Otto* recognized, "applying intermediate scrutiny to medical treatments that are effectuated through speech would strike the appropriate balance between recognizing that doctors maintain some freedom of speech within their offices, and acknowledging that *treatments* may be subject to significant regulation under the government's police powers." 353 F. Supp. 3d at 1256 (emphasis in original). Like the courts in *Otto* and *Doyle*, this Court should strike the appropriate balance and, at most, apply intermediate scrutiny.

Plaintiffs seek to extend the holding of *Reed v. Town of Gilbert*, __U.S. __, 135 S. Ct. 2218 (2015) to the regulation of licensed mental health professionals. But as the Supreme Court subsequently recognized in *NIFLA, Reed* does not alter the longstanding rule that the conduct of medical professionals, even if it incidentally involves speech, may be regulated " 'as part of the practice of medicine.' " *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992)). And *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs*, 703 F. App'x 929, 933 (11th Cir. 2017), similarly recognizes that the Supreme Court has been far less rigid

in applying strict scrutiny than Plaintiffs suggest. By enacting the Ordinance the City sought to protect minors from the harmful effects of a discredited mental health treatment that is associated with life-threatening harms—not to suppress any "message" conveyed by the practice of conversion therapy. Accordingly, the Ordinance is subject at most to intermediate scrutiny, which it readily survives.

III. THE CITY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' STATE LAW CLAIMS.

Plaintiffs' state law claims fare no better than their First Amendment claims. First, as the City's previous submissions demonstrate, since the Ordinance does not violate the Plaintiffs' right to speak, then it cannot as a matter of law violate the client's right to receive information, and the City is entitled to summary judgment as a matter of law. *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 155 (3d Cir. 2015). Second, the Ordinance does not violate the Plaintiffs' right to freedom of speech because the Ordinance regulates conduct, not speech, and in any event, the Ordinance survives any level of scrutiny, and therefore, does not violate the Florida Constitution's right to liberty. Third, Plaintiffs' claim that the Ordinance violates the Florida Religious Freedom and Restoration Act ("FRFRA") fails as a matter of law as the Ordinance does not substantially burden the free exercise of religion.

Finally, the City is entitled to summary judgment as a matter of law on Plaintiffs' claim that the City lacked authority under the Florida Constitution to enact the Ordinance.[2] Plaintiffs argue that the Florida Legislature impliedly preempted the area regulating mental health

[2] This Court adopted the Report and Recommendation at Doc. 148, which provided that the City's motion to dismiss the plaintiffs' preemption claim (Count VI) should be denied. It further provided that "The plaintiffs should be allowed to proceed on their implied-preemption theory—but not their express-preemption theory."

professionals. But Plaintiffs fail to show that the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and that strong public policy reasons exist for finding such an area to be preempted by the Legislature.

It has long been recognized that Florida municipalities possess broad authority to enact ordinances. *Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Fla.*, 380 F. Supp. 3d 1209, 1234 (M.D. Fla. 2019) (citing *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006)); *see also* Florida Constitution, Art. VIII, § 2(b); Fla. Stat. § 166.021(1), (3)(c), (4). Under its broad home rule powers, a "municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted by the State." *Id.* This Court has already ruled that the legislature has not expressly preempted the regulation of licensed mental health professionals. (Doc. 162.) While implied preemption may also be established when the state legislative scheme is so pervasive and the local legislation would present a danger of conflict with that pervasive scheme, as recognized by this court, Plaintiffs failed to allege a conflict of law claim in their amended complaint. (Doc. 149, p. 10.)

But, even if they had alleged a conflict claim, courts must be cautious to input an intent that prohibits "a local elected governing body from exercising its home rule powers." *D'Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017) (citation omitted). This is because the legislature knows how to expressly preempt an area of regulation. *See City of Hollywood v. Mulligan*, 934 So. 1238, 1245–46 (finding no express preemption in the Florida Contraband Forfeiture Act because the legislature removed previous statutory language that reserved power to regulate forfeiture to the state). Indeed, the Florida Legislature could easily have preempted the entire field of mental health counseling. But so far it has not. The Florida Legislature did

not do so even though mental health counseling is a profession the state legislature has the power to regulate under Florida Statute § 491.002. Moreover, Plaintiffs have failed (because they cannot) direct this Court to any caselaw in Florida that says that the Florida legislature has preempted regulation of mental health counseling.

The Supreme Court has recognized "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cty v. Automated Med Labs Inc*., 471 U.S. 707, (1985). And Florida explicitly authorizes municipalities to "exercise any power for municipal purposes except as otherwise provided by law." Fla. Const. art. 8 § 2(b). Florida Statutes § 456.003(2)(b) expressly authorizes municipalities to regulate professions for the preservation of health, safety, and welfare when "*[t]he public is not effectively protected by other means [such as] local ordinances*." *Id.* Because the Florida Legislature did not preempt the field, despite its ability to do so, the reluctance courts have in imputing intent, and the lack of caselaw finding that the legislature preempted the regulation of mental health professionals, this Court should find as a matter of law, that the City had the authority to enact the Ordinance.

CONCLUSION

Defendant, City of Tampa, respectfully requests that this Court grant summary judgment in its favor as to Count I; Count II, Count IV, Count VI, and Count VIII of the First Amended Complaint and such further relief as is necessary to protect the City's rights.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd 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
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