NO.: 19-14387

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CITY OF TAMPA,

Defendant-Appellant,

v.

ROBERT L. VAZZO and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY,

Plaintiffs-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION
CASE NO.: 8:17-cv-02896-T-02AAS

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 28-1(b), Defendant-Appellant City of Tampa hereby states that the following individuals and entities are known to have an interest in the outcome of this case:

Judge William F. Jung, United States District Court Judge for the Middle District of Florida, Tampa Division

Magistrate Judge Amanda A. Sansone, United States District Court, Middle District of Florida, Tampa Division

City of Tampa, Appellant

Robert L. Vazzo, Appellee

Soli Deo Gloria International, Inc. d/b/a New Hearts Outreach Tampa Bay, Appellee

Equality Florida Institute, Inc., Amicus Curiae

David E. Harvey, Counsel for Appellant

Burr & Forman, LLP, Counsel for Appellant

Robert V. Williams, Counsel for Appellant

Dana L. Robbins, Counsel for Appellant

Liberty Counsel, Inc., Counsel for Appellees

Horatio Mihet, Counsel for Appellees

Roger Gannam, Counsel for Appellees

Daniel Schmid, Counsel for Appellees

Matthew Staver, Counsel for Appellees

National Center for Lesbian Rights, Counsel for Amicus Curiae Equality Florida

Shannon Minter, Counsel for Amicus Curiae Equality Florida

Chris Stoll, Counsel for Amicus Curiae Equality Florida

Carlton Fields, Counsel for Amicus Curiae Equality Florida

Sylvia H. Walbolt, Counsel for Amicus Curiae Equality Florida

Brian C. Porter, Counsel for Amicus Curiae Equality Florida

Southern Poverty Law Center, Counsel for Amicus Curiae Equality Florida

Scott D. McCoy, Counsel for Amicus Curiae Equality Florida

David C. Dinielli, Counsel for Amicus Curiae Equality Florida

J. Tyler Clemons, Amicus Curiae Equality Florida

Local governments within the State of Florida that have enacted an ordinance prohibiting conversion therapy, including:

a. City of Boca Raton
b. City of Boynton Beach
c. City of Delray Beach
d. City of Greenacres
e. City of Key West
f. City of Lake Worth
g. City of Miami
h. City of Miami Beach
i. City of North Bay Village
j. City of Oakland Park
k. Palm Beach County
l. City of Rivera Beach
m. Town of Bay Harbor Islands

n. Village of El Portal
o. Village of Wellington
p. City of West Palm Beach
q. City of Wilton Manors

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

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Defendant/Appellant CITY OF TAMPA believes that the issues raised in this appeal are straightforward and thus does not request oral argument.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. §1291, as this is an appeal from a final judgment of a district court. The trial court had jurisdiction pursuant to 28 U.S.C. §§1331, 1343, and 1367, as Plaintiffs-Appellees' Amended Complaint asserted violations of the United States Constitution, deprivation of civil rights, and supplemental state law claims. This appeal is filed timely, within 40 days after the date on which the record was deemed filed and pursuant to this Court's Memorandum dated November 20, 2019.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the trial court erred in striking a City of Tampa ("City") ordinance under the implied preemption doctrine and granting Plaintiffs-Appellees' Motion for Summary Judgment.

STATEMENT OF THE CASE

On April 6, 2017, Tampa's City Council enacted Ordinance 2017-47 ("Ordinance"). Then-Mayor Bob Buckhorn signed the Ordinance into law on April 10, 2017. The Ordinance notes that "being lesbian, gay, bisexual, transgender or gender nonconforming, or questioning (LGBT or LGBTQ) is not a mental disease, disorder or illness, deficiency, or shortcoming." [Doc. 213, PageID 7043]. The Ordinance thus makes it unlawful for any provider to practice conversion therapy—defined as "any counseling, practice, or treatment performed with the goal of

changing an individual's sexual orientation or gender identity"—on a minor regardless of whether the provider receives monetary compensation in exchange for such services. [Doc. 213, PageID 7047-48]. 'Provider' is defined to include any person licensed by the State to provide professional counseling or who performs counseling as part of his/her professional training. [Doc. 213, PageID 7048]. The Ordinance references several authorities in the mental health arena that oppose conversion therapy on the grounds that it is not only "ineffective," but "may put young people at risk of serious harm." [Doc. 213, PageID 7045]. Under the Ordinance, violators are subject to a monetary fine. [Doc. 213, PageID 7048].

Plaintiff Robert L. Vazzo is a marriage and family therapist licensed in Florida and elsewhere; Plaintiff Soli Deo Gloria International, Inc. d/b/a New Hearts Outreach Tampa Bay is a Christian ministry in Tampa that refers individuals to mental health professionals to receive conversion therapy. [Doc. 213, PageID 7005-06]. On June 12, 2018, Plaintiffs[1] filed their Amended Complaint in the Middle District of Florida, asserting that the Ordinance violates their constitutional rights to free speech and free exercise of religion. [Doc. 78, PageID 1385-86]. They also asserted that "[t]he Legislature of the State of Florida has pre-empted the field of disciplinary actions for licensed mental health professionals in Fla. Stat. Ann.

[1] David H. Pickup was also a named plaintiff in the Amended Complaint, but was subsequently dropped from the case. [Doc. 210].

§491.009 and the regulations promulgated thereunder, Fla. Admin. Code Ann. r. 64B-5001." [Doc. 78, PageID 1427]. Plaintiffs' Amended Complaint did not allege that the Ordinance was pre-empted by any other state statute or regulation.

Plaintiffs and the City separately moved for summary judgment. [Docs. 189 and 194]. The trial court held a hearing on the motions on September 24, 2019. Ten days later, on October 4, 2019, the Court entered an order granting summary judgment in favor of Plaintiffs on the basis of implied preemption. [Doc. 213]. The Court concluded "that the [Florida] Legislature has occupied entirely the very wide healthcare swath," and that that the Ordinance "creates a danger of conflict with the [Florida] Legislature's broad program for the healing arts in Florida." [Doc. 213, PageID 7025, 7040].

SUMMARY OF THE ARGUMENT

As shown below, Florida is a home-rule jurisdiction and municipalities like the City have broad power to enact laws without any express grant from the State. This power allows cities to legislate on a wide array of topics; they are not limited to addressing matters unique to their city or in subject areas in which their legislative bodies have personal expertise. In light of this framework, implied preemption is a strongly disfavored doctrine that may be invoked only in the rare circumstances where: (1) the State legislative scheme is so pervasive so as to evidence an intent to occupy the entire field; and (2) further regulation by a local government would

present a danger of conflict with that pervasive regulatory scheme. In assessing the applicability of implied preemption, courts should define such 'field' narrowly. Here, the trial court erred by: (1) finding that the City could not legislate in the area of healthcare without an affirmative grant of authority from the Florida Legislature; (2) failing to narrowly define the purportedly preempted field; (3) suggesting that the City may enact ordinances only when the issue involved is unique to the City; (4) misapprehending the 'danger of conflict' analysis; and (5) suggesting that City Council may enact ordinances only on topics in which the council members have expertise.

ARGUMENT

Standard of Review

This Court reviews a district court's grant of a motion for summary judgment *de novo*, "considering all of the evidence and the inferences it may yield in the light most favorable to the nonmoving party." *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005).

I. The Trial Court Erred by Suggesting that the City Needed a Grant of Authority from the State to Enact the Ordinance

The home rule power that all of Florida's municipalities presently enjoy has not always existed. As Florida's Supreme Court has noted:

> Article VIII, section 8, Florida Constitution of 1885, gave the [Florida] legislature the 'power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers,

> and to alter or amend the same at any time.' Thus, the municipalities were inherently powerless, absent a specific grant of power from the legislature.

Lake Worth Utilities Auth. v. City of Lake Worth, 468 So.2d 215, 217 (Fla. 1985). It was not until the Florida Constitution was amended in 1968 that Article VIII was revised to authorize local home rule powers. Article VIII, §2(b) now provides as follows:

> (b) POWERS. Municipalities shall have governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and ***may exercise any power*** for municipal purposes ***except as otherwise provided by law***. Each municipal legislative body shall be elective.

(Emphasis added).

Thus, "under the new language, all municipalities have governmental, corporate and proprietary powers unless provided otherwise by law, whereas under the 1885 Constitution, municipalities had only those powers expressly granted by law." *Lake Worth*, 468 So.2d at 217 (citing commentary to 1968 Florida Constitution by Talbot "Sandy" D'Alemberte). Florida's Supreme Court has recognized the broad nature of this grant of power to cities:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the legislature for further authorization.

State v. City of Sunrise, 354 So.2d 1206, 1209 (Fla. 1978).

In 1973, the Florida Legislature "clarified the scope of municipal home rule and expressed a legislative purpose to remove limitations on the exercise of home rule powers by enacting the Municipal Home Rule Powers Act ["MHRPA"], ch. 73-129 Laws of Fla. (codified at ch. 166, Fla. Stat. (1973))." *City of Miami Beach v. Rocio Corp.*, 404 So.2d 1066, 1067-68 (Fla. 3d DCA 1981). Section 166.021(1) of the MHRPA states that, pursuant to s. 2(b), Art. VIII of the State Constitution, "municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise ***any power*** for municipal purposes, except when ***expressly*** prohibited by law." (Emphasis added). This broad authorization is again noted in subsection (3) of the MHRPA, which provides as follows:

> (3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning ***any subject matter*** upon which the state Legislature may act, except:
>
> (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
>
> (b) Any subject ***expressly*** prohibited by the constitution;
>
> (c) Any subject ***expressly*** preempted to state or county government by the constitution or by general law; and
>
> (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

(Emphasis added). Under its plain language, then, the MHRPA provides that municipalities may enact legislation on any subject matter absent express language to the contrary in the constitution or general law.

Nonetheless, Florida courts created, and have continued to recognize, the doctrine of implied preemption. *See D'Agastino v. City of Miami*, 220 So.3d 410, 428 (Fla. 2017) (Pariente, J., concurring) ("Although the Home Rule Powers Act would appear to require a specific statement by the Legislature indicating its intent to preempt local regulation in a certain field, this Court has determined that preemption also occurs where it is clear that the Legislature has preempted the field or topic through statutes."); *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So.2d 1011, 1019 (Fla. 2d DCA 2005) ("Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.").

Under this judicially-created doctrine, "preemption is implied when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area or field of operation, and where strong public policy reasons exist for finding such an area or field to be preempted by the Legislature." *D'Agastino*, 220 So.3d at 421 (citation omitted). Additionally, implied preemption is applicable only "if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme." *Shand Teaching Hosp. &*

Clinics, Inc. v. Mercury Ins. Co. of Fla., 97 So.3d 204, 211 (Fla. 2012) (citations omitted).

Given that implied preemption appears to contravene the MHRPA, it is perhaps not surprising that some judges and legal commentators have expressed concern with the doctrine. *See, e.g., Hon. James R. Wolf and Sarah Harley Bolinder The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, Florida Bar Journal, June 2009 ("One of the most troublesome doctrines used to strike down local legislation is the doctrine of implied preemption."); *Tallahassee Mem'l Reg, Med. Ctr., Inc. v. Tallahassee Med. Ctr.*, 681 So.2d 826, 831 (Fla. 1st DCA 1996) (describing implied preemption as a "difficult concept").

Thus, while still recognized, the doctrine of implied preemption is "severely restricted and strongly disfavored" in Florida. *Exile v. Miami-Dade County*, 35 So.3d 118, 119 (Fla. 3d DCA 2010). Significantly, the Florida Supreme Court has recognized that:

> implied preemption should be construed narrowly to comport with the Home Rule Powers Act and the Florida Constitution. The test 'is not whether the Legislature has expressly authorized municipal power, but whether such power has been expressly prohibited.'

D'Agastino, 220 So.3d at 429 (Pariente, J., concurring) (quoting *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So.3d 924, 929-30 (Fla. 2013) (Perry, J., dissenting). *See also M&H Profit, Inc. v. City of Panama City*, 28 So.3d 71, 77 (Fla. 1st DCA 2009) (rejecting application of implied preemption, noting that "an interpretation of

state statutes which would impede the ability of local governments to protect the health and welfare of its citizens should be rejected unless the Legislature has clearly expressed the intent to limit or constrain local government action.").

Contrary to this framework, the trial court repeatedly relied on the purported absence of express authorization from the Florida Legislature in finding that the City's Ordinance was impliedly preempted. [See Doc. 213, PageID 7015 ("There is no grant of authority by the Florida Legislature to municipalities to substantively regulate healthcare treatment and discipline."); PageID 7016 ("there is no grant or delegation at all to localities."); and PageID 7027 ("This enabling statement of legislative intent omits any reference to municipal powers.")]. In other words, the trial court wrongly applied the pre-1968 framework (i.e., a municipality may not act absent affirmative authorization from the Legislature) rather than the post-1968 framework (i.e., a municipality may act unless prohibited by Legislature).

While the City was entitled to act even without any legislative directive, it is worth noting that the State has affirmatively indicated its intent that local governments be involved in their citizens' healthcare. To wit, the trial court noted that, pursuant to section 20.43(g)(2), *Florida Statutes*, one of the Department of Health's duties is to "[r]egulate health practitioners for the preservation of the health, safety, and welfare of the public." [Doc. 213, PageID 7026 (quoting Fla. Stat. §20.43(g)(2))]. What the trial court failed to note, however, is that section 20.43

explicitly recognizes that protecting citizens' health is a team effort, and that involvement from local governments and communities is critical. Indeed, the very first provision of section 20.43 states that "[t]he purpose of the Department of Health is to protect and promote the health of residents and visitors in the state through organized state and ***community efforts***, including cooperative ***agreements with counties***." (Emphasis added).

Like section 20.43, section 456.003, *Florida Statutes*, emphasizes that the purpose behind regulating health professions is to preserve "the health, safety, and welfare of the public." And also like section 20.43, section 456.003 makes explicit that local governments have a role in providing such protections:

> Such professions shall be regulated when ... [t]he public is not effectively protected by other means, including, but not limited to, other state statutes, ***local ordinances***, or federal legislation.

(Emphasis added). See also Fla. Stat. §205.042 (providing that "[t]he governing body of an incorporated municipality may levy, by appropriate resolution or ordinance, a business tax for the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction.").

Further evidence that the State does not seek to preclude municipal decision-making in the healthcare arena is seen in the Florida statute that recognizes marijuana as a treatment modality for qualifying medical conditions, including cancer, ALS, and Parkinson's disease. See Fla. Stat. §381.986. Section

381.986(11)(b)1 provides that "[a] county or municipality may, by ordinance, ban medical marijuana treatment center dispensing facilities from being located within the boundaries of that county or municipality." Pursuant to this provision, multiple local governments have, in fact, banned such facilities within their boundaries. For example, the town of Fort Myers Beach enacted such an ordinance in December 2017. See Town of Fort Myers Beach, Florida, Code of Ordinances, Ordinance 17-15, §34-1554.

Notably, nothing in Fort Myers Beach's ordinance prohibits a patient with a qualifying medical condition from receiving, within the town's limits, a 'Physician certification' verifying that marijuana is being prescribed to treat the applicable condition. The ordinance only prevents the patient from receiving that treatment at a dispensary within city limits. Thus, a patient with a qualifying condition can visit a qualified physician in Fort Myers Beach, and if that physician determines that the medical use of marijuana would likely outweigh the potential risks for the patient, the physician can issue a Physician certification, authorizing the patient to receive marijuana from a medical marijuana treatment center. However, because the town has banned dispensing facilities within its boundaries, the patient would have to go outside the town's boundaries to receive the treatment from a dispensing facility.

Likewise, Tampa's Ordinance does not prohibit a minor from visiting a therapist in Tampa to deal with any issues relating to sexual orientation or gender

identity. The therapist may not only counsel the minor on these topics, but may also express any views he/she may have and even recommend that the minor undergo conversion therapy.[2] Tampa's ordinance, like Fort Myers Beach's, only prohibits the minor from actually receiving the recommended "treatment" within the City's limits.

It should be noted that cities are allowed to ban medical marijuana dispensing facilities within their boundaries even though the State statute expressly contemplates the need for marijuana treatment centers "to ensure reasonable statewide accessibility and availability as necessary for qualified patients," i.e., those with serious medical conditions. Fla. Stat. §381.986(8)(a). If a city can ban the dispensing of medical marijuana to adults afflicted with actual medical conditions like cancer and ALS, it can certainly ban a dubious practice aimed only at "converting" gay or transgendered children.

The trial court noted that the City has an ordinance on pain management clinics, but asserted that such ordinance "says nothing substantively about treatment [or the] practice of pain management." [Doc. 213, PageID 7017, n. 7]. That ordinance, in fact, requires such clinics to "maintain the diagnostic equipment ***to diagnose and treat patients*** complaining of chronic pain as provided for by the

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[2] See Doc. 213, PageID 7046 ("WHEREAS, the City does not intend to prevent mental health providers from … expressing their views to patients [or] recommending [conversion therapy] to patients…")

appropriate standard of care." City of Tampa Code, §6-258(c)(5) (emphasis added). It also mandates that such clinics be operated by a licensed physician; dictates the days and hours during which the practice may operate; and prohibits the practice from employing individuals with drug-related felony convictions. Id., §§6-255; 6-258(c)(3); 6-258(c)(4); 6-256(c)(4)(e). Thus, if a pain management provider wishes to operate outside those parameters, it must do so outside the City limits.

II. The Trial Court Erred by Failing to Narrowly Define the 'Field'

As noted, implied preemption is a disfavored remedy in Florida. Thus, in determining whether the State occupies a given field, the 'field' must be "narrowly defined, limited to the specific area where the Legislature has expressed their will to be the sole regulator." *Pinellas Cty. v. Largo*, 964 So.2d 847, 853 (Fla. 2d DCA 2007). Thus, in the *D'Agastino* case relied on by the trial court, while the plaintiff police officer argued that section 112.533, *Florida Statutes*, preempted the investigation of all complaints against law enforcement officers by any entity other than the employing agency, the court held that the field preempted by the statute "[was] much more narrow than the expansive reading the officer desire[d]." 220 So.3d at 423.

Conversely, the trial court here failed to define a narrow field. Instead, the court deemed the preempted field to be "the Legislature's ***broad*** program for the healing arts in Florida." [Doc. 213, PageID 7040 (emphasis added); see also Doc.

213, PageID 7025 ("the Legislature has occupied entirely the ***very wide*** healthcare swath…") (emphasis added)]. In defining the field so vastly, the trial court referenced several practitioner-specific provisions in Florida statutes. [Doc. 213, PageID 7033-40 (discussing Chapters 458, 459, 490, and 491, *Florida Statutes*)]. An examination of these statutes reveals that for purposes of implied preemption analysis, an appropriately narrowed field would be defined as the minimum requirements needed to obtain/maintain licensure as a healthcare professional in the State.

The first statutory chapter referenced by the trial court—Chapter 458—governs medical doctors. The Legislature's rationale for Chapter 458 is explicitly expressed in section 458.301, which states that "the primary legislative purpose in enacting this chapter is to ensure that every physician practicing in this state meets ***minimum requirements*** for safe practice." (Emphasis added). It goes on to include a "legislative intent that physicians who fall below ***minimum competency*** or who otherwise present a danger to the public shall be prohibited from practicing in this state." (Emphasis added). Practitioners who satisfy such minimum standards are given license to practice. Not surprisingly, the ensuing provisions in Chapter 458 relate largely to licensure/certification. See, e.g., Fla. Stat. §458.310 (entitled 'Restricted licenses'); §458.311 ('Licensure by examination); §458.313 ('Licensure

by endorsement'); §§458.3135 and 458.3137 (relating to 'temporary certificates'); §458.317 ('Limited licenses'); and §458.319 ('Renewal of license').

The next chapter mentioned by the trial court—Chapter 459—governs osteopathic physicians. Its stated purpose—found in section 459.001—is nearly identical to that in section 458.301:

> The primary legislative purpose in enacting this chapter is to ensure that every osteopathic physician practicing in this state meets ***minimum requirements*** for safe and effective practice. It is the legislative intent that osteopathic physicians who fall below ***minimum competency*** or who otherwise present a danger to the public shall be prohibited from practicing in this state.

(Emphasis added). Again, the provisions that follow focus on licensure/certification. See, e.g., Fla. Stat. §459.0055 ('General licensure requirements'); §459.0066 ('Expert witness certificate'); §459.0075 ('Limited licenses); §459.0076 ('Temporary certificate for practice in areas of critical need.').

Chapter 490 governs psychologists. The intent behind Chapter 490 is stated in section 490.002, and reflects the Legislature's desire to prevent "the practice of psychology and school psychology ***by unqualified persons***." (Emphasis added). The ensuing provisions focus primarily on the requirements necessary to obtain, renew, and maintain one's license. See, e.g., Fla. Stat. §490.005 (entitled "Licensure by examination"); §490.0051 ("Provisional licensure; requirements"); §490.006 ("Licensure by endorsement"); and §490.007 ("Renewal of license").

The final chapter referenced by the trial court—Chapter 491—is similar. Section 491.002, entitled 'Intent,' includes the Legislature's finding that "to further secure the health, safety, and welfare of the public and also to encourage professional cooperation among all qualified professionals, the Legislature must assist the public in making informed choices of such services by ***establishing minimum qualifications for entering into and remaining in the respective professions***." (Emphasis added). Consistent with this intent, the ensuing provisions center on licensure. See, e.g., Fla. Stat. §491.0046 ('Provisional license; requirements'); §491.005 ('Licensure by examination'); §491.0057 ('Dual licensure as a marriage and family therapist'); §491.006 ('Licensure or certification by endorsement'); and §491.007 ('Renewal of license, registration, or certificate').

Each of the four chapters referenced by the trial court includes a provision identifying acts that "constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2)." See Fla. Stat. §§458.331, 459.015, 490.009, and 491.009. Not surprisingly, the first three penalties identified under section 456.072(2) relate to licensure:

(a) Refusal to certify, or to certify with restrictions, an application for license;
(b) Suspension or permanent revocation of a license;
(c) Restriction of practice or license

Thus, the focus of Florida's statutes that regulate the health professions is establishing minimum requirements that such professionals must satisfy to receive,

and maintain, their State licensure. Using that narrowly-defined field, the City's Ordinance—which bars a specific practice that the City believes to be a danger to the welfare of its minor citizens but does not speak in any way to licensure—is not impliedly preempted.

Asserting that disciplinary proceedings against practitioners brought pursuant to Florida statutes are governed by a 'clear and convincing' evidentiary standard, the trial court found that the Ordinance's 'greater weight of the evidence' standard was contrary to section 120.57(1)(j), *Florida Statutes*. [Doc. 213, PageID 7029]. In fact, because the Ordinance does not impact a practitioner's licensure, the 'greater weight of the evidence' standard is entirely consistent with state statutes. Section 120.57(1)(j) states that "[f]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings…" Likewise, section 458.331(3), *Florida Statutes*, provides that "[i]n any administrative action against a physician which does not involve revocation or suspension of license, the division shall have the burden, by the greater weight of the evidence, to establish the existence of grounds for disciplinary action. The division shall establish grounds for revocation or suspension of license by clear and convincing evidence." *See also Ferris v. Turlington*, 510 So.2d 292, 294 (Fla. 1987) (holding that "the revocation of a professional license is of sufficient gravity and magnitude to warrant a standard of proof greater than a mere preponderance of the evidence" and that "where the

proceedings implicate the loss of livelihood, an elevated standard is necessary to protect the rights and interests of the accused."); *Vetter v. Dept. of Bus. & Prof. Reg., Elec. Contractors' Lic. Bd.*, 920 So.2d 44, 47 (Fla. 2d DCA 2005) ("We construe the statute strictly because denying licensure, like revocation of an existing license, is penal in nature and constrains a citizen's ability to practice his trade or profession.")

Thus, while the trial court suggested that the Ordinance "creates two standards for therapy subject to discipline" depending on whether the conduct occurred inside or outside the City limits [Doc. 213, PageID 7029], it is, in fact, the State's statutory scheme that creates two standards, depending on whether or not the practitioner's licensure is at stake. Because the Ordinance does not implicate the practitioner's licensure, the Ordinance is not inconsistent with this statutory scheme.

While the State is the only body that can issue, suspend, or revoke a practitioner's license, there is nothing in Florida's statutory scheme to suggest that a healthcare provider can only be disciplined by the State. To the contrary, section 458.337, *Florida Statutes*, contemplates circumstances where a physician:

> Has been removed or suspended or has had any disciplinary action taken by his or her peers within any professional medical association, society, body, or professional standards review organization … whether or not such association, society, body, or organization is local, regional, state, national, or international in scope; or
> Has been disciplined by a licensed hospital, health maintenance organization, prepaid clinic, ambulatory surgical center, or nursing

> home or the medical staff of such [entity]…for any act that constitutes a violation of [Chapter 458].

Fla. Stat. §458.337(1)(a). Of course, certain egregious conduct—such as sexually assaulting a patient—would subject a provider to criminal charges as well. Thus, a single act could subject a provider to not only discipline against his/her license by the State, but also removal or suspension by a local medical association, loss of privileges by a hospital, discipline by an HMO, and criminal charges.

III. The Trial Court Erred by Suggesting that the City May Only Address Issues that are Unique to the City

In its Order, the trial court stated that "there is nothing local or unique to Tampa about [conversion therapy] that would suggest the statewide, uniform medical regulation regime should vary because of Tampa's peculiarities…" [Doc. 213, PageID 7015]. However, a municipal legislative body is not limited to addressing issues that exist only within its borders. As noted, cities may exercise any power for municipal purposes, except when expressly prohibited by law. Florida courts have long interpreted "municipal purposes" broadly. *See, e.g., State v. City of Jacksonville*, 50 So.2d 532, 535 (Fla. 1951) ("a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality."). *See also M&H Profit, Inc.*, 28 So.3d at 77 ("municipalities have broad home rule powers to protect the general health, morals, safety, and welfare of the residents of the municipality."); *Phantom of Clearwater, Inc.*, 894 So.2d at 1018

("Counties in Florida are given broad authority to enact ordinances."). Indeed, the United States Supreme Court has recognized that "the regulation of health and safety matters is primarily and historically a matter of local concern." *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 720 (U.S. 1985).

In *Hillsborough County v. Florida Restaurant Ass'n, Inc.*, the court addressed preemption in the context of a Hillsborough County ordinance mandating that vendors of alcohol conspicuously post a sign warning of the potential dangers of alcohol consumption, including addiction and intoxication. 603 So.2d 587 (Fla. 2d DCA 1992). Of course, such dangers are hardly unique to Hillsborough County. Nonetheless, the court found the ordinance was not expressly or impliedly preempted:

> Turning to the substantive issue of preemption to the state of any regulation touching on the sale of alcohol within food service establishments, we agree with the County that the state regulatory scheme is not so pervasive that the County has no room to act under its police powers.

Id. at 589.

Likewise, in *Edwards v. State*, 422 So.2d 84 (Fla. 2d DCA 1982), the petitioner challenged a Venice City ordinance that prohibited the possession of cannabis and cocaine by asserting that the Florida legislature had preempted the subject of drug abuse control. Referencing section 166.021(3)(c), *Florida Statutes*,

the court found that "neither the language of the legislative findings of fact nor the terminology of chapter 893, Florida Statutes (1981), expressly preempts the field of drug abuse control." *Id.* at 85. The court concluded that "[t]he City of Venice may, therefore, enact ordinances on that subject." *Id.*

Although the trial court recognized that "[i]mplied preemption is a disfavored remedy because cities have broad powers to address municipal concerns," it concluded that "substantive regulation of psychotherapy is a State, not a municipal concern." [Doc. 213, PageID 7015-16]. But this analysis confuses the point. The relevant City concern here is not the regulation of psychotherapy, but rather protecting children from a widely-discredited practice that the City has determined to be harmful. Indeed, as noted by the trial court, the Ordinance explicitly states: "The intent of this Ordinance is to protect the physical and psychological well-being of minors…" [Doc. 213, PageID 7003 (quoting Ordinance)].

Courts, both in Florida and elsewhere, have consistently recognized that the well-being of minors is a legitimate municipal concern. *See, e.g., State v. T.M.*, 832 So.2d 118, 120 (Fla. 2d DCA 2002) ("We recognize that the City does face the challenges of protecting juveniles from victimization…."); *Doe v. City of Palm Bay*, 169 So.3d 1211, 1215 (Fla. 5th DCA 2015) (finding that city ordinance aimed at limiting contact between sexual offenders and children was rationally related to the city's strong interest in protecting children); *City of Panora v. Simmons*, 445 N.W.2d

363, 370 (Iowa 1989) ("the City has a strong interest in protecting minors from the national epidemic of drugs"); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 266 (Alaska 2004) (finding that city had compelling interest in protecting minors from crime); *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998) ("the City's strong interest in fostering the welfare of children and protecting the youngest members of society from harm is well-established."); *Ray v. Goldsmith*, 400 N.E.2d 176, 178 (Ind. Ct. App. 1980) (noting that city ordinance concerning abandoned refrigerators was clearly "a safety measure designed to protect children."); *Music Plus Four, Inc. v. Barnet*, 114 Cal.App.3d 113, 130 (Cal. App. Ct. 1980) (holding that city ordinance prohibiting minors from locations where drug paraphernalia was sold was necessary to accomplish the compelling interest of protecting children from exploitation by those trafficking in drugs). Indeed, even Plaintiffs' counsel has conceded that the City has a legitimate interest in protecting the health and safety of minors. [Doc. 226, 111:23-112:4].[3]

Moreover, Florida courts have recognized that the doctrine of implied preemption does not invalidate local government legislation aimed at protecting children from harm even where the state has enacted similar legislation. *See Exile,* 35 So.3d at 119 (holding that provision of county code that prohibited convicted sex

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[3] References to the transcript (Doc. 226) refer to the transcript page and line number.

offenders from residing within 2,500 feet of a school was not impliedly preempted by state statute that included a less restrictive 1,000-foot buffer zone). Here, the case for implied preemption is even weaker, given that the City enacted legislation to protect children from a specific harm in a realm where the State has failed to act altogether. [See Doc. 78, Page ID 1428, ¶273 ("Ordinance 2017-47 prohibits licensed mental health professionals from practicing a type of mental health counseling ***that is not prohibited by the state***") (emphasis added)].

IV. The Trial Court Misapprehended the 'Danger of Conflict' Analysis

As noted, implied preemption should be found only when the local legislation would present the danger of conflict with the Legislature's pervasive regulatory scheme. *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010). The trial court found that "[b]ecause State law and policy already reside in these areas [of healthcare law], there is 'danger of conflict with that pervasive regulatory scheme.'" [Doc. 213, PageID 7018 (citing *Classy Cycles*, 201 So.3d 779, 788 (Fla. 1st DCA 2016))]. Again, the mere fact that both the state and local government legislate in the same area does not create a conflict. *See, e.g., Thomas v. State*, 614 So.2d 468, 470 (Fla. 1993) ("[M]unicipalities and the state may legislate concurrently in areas that are not expressly preempted by the state…"); *Thomas v. State*, 583 So.2d 336, 340 (Fla. 5th DCA 1991) ("The mere existence of

state regulations does not preclude a local authority from adding additional requirements as long as no conflict exists.").

"The test of conflict between a local government enactment and state law is whether one must violate one provision in order to comply with the other." *Sarasota Alliance,* 28 So.3d at 888 (citation omitted). "Where there is no direct conflict between [a local ordinance and a state statute], appellate courts should indulge every reasonable presumption in favor of an ordinance's constitutionality. Conflict does not exist simply because the ordinance is more stringent than the statute or regulates an area not covered by the statute." *City of Kissimmee v. Florida Retail Federation, Inc.*, 915 So.2d 205, 209 (Fla. 5th DCA 2005). *See also Rinzler v. Carson*, 262 So.2d 661, 668 (Fla. 1972) ("A municipality cannot forbid what the legislature has expressly licensed, authorized, or required, nor may it authorize what the legislature has expressly forbidden.")

Thus, to assess whether a danger of conflict exists, a comparison between the local legislation and the state legislative scheme is required. Yet, while broadly defining the legislative scheme to include the various healthcare practitioner state statutes referenced above, the trial court began its 'danger of conflict' analysis not by examining those statutes, but instead by discussing the right of privacy in the Florida Constitution. [See Doc. 213, PageID 7018-20]. Of course, the constitutional right of privacy is not part of a comprehensive legislative scheme, let alone a

'narrowly-defined' field. Moreover, contrary to the trial court's suggestion, the Ordinance does not prohibit "a growing young man or woman [from] talking to a mental health therapist about sex, gender, preferences, and conflicted feelings." [Doc. 213, PageID 7018].[4] And while the trial court found that "[t]he Florida Constitution's privacy amendment suggests that government should stay out of the therapy room," [Doc. 213, PageID 7019], both the trial court and Plaintiffs' counsel recognized that the right to privacy does not shield a practitioner who engages in "therapy" that endangers a minor child:

> THE COURT: He [referring to a hypothetical therapist] is saying you [referring to a hypothetical minor patient] feel you are unhappy with your mother. You feel like she is pushing you around. I want you to go home and just get a little knife and just as part of your therapy to create self-esteem, you're going to cut yourself. He's offering therapy, and we would all agree that the City or government could block that speech during the therapeutic session because its harmful, right?
> PLAINTIFF'S COUNSEL: The harm would be telling the client to harm herself.
> THE COURT: So you agree that the City can block that speech during therapy because its harmful.
> PLAINTIFF'S COUNSEL: I agree that that could be regulated, Your Honor, yes.

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[4] Specifically excluded from the Ordinance's definition of conversion therapy efforts is "counseling that provides assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and development … as long as such counseling does not seek to change sexual orientation or gender identity." [Doc. 213, PageID 7047].

[Doc. 226, 79:18-80:6]. Florida courts have recognized likewise. *See, e.g., State v. J.P.*, 907 So.2d 1101, 1112 (Fla. 2004) ("the cities' asserted compelling interest of preventing victimization of minors could outweigh the minors' privacy rights…"); *Jones v. State*, 640 So.2d 1084, 1087 (Fla. 1994) ("The rights of privacy that have been granted to minors do not vitiate the legislature's efforts and authority to protect minors from conduct of others.").

The trial court next discussed parental choice in healthcare, again referencing Florida's constitutional right to privacy. [Doc. 213, PageID 7020, n 11]. According to the trial court, parents—with "very few exceptions"—have the right to select their children's "medical treatment" but "[t]he Ordinance eliminates this longstanding parental right without discussion or exception…" [Doc. 213, PageID 7020]. As an initial matter, the City reiterates that a child who identifies as LGBTQ does not have a disease or sickness in need of "medical treatment." Additionally, the "very few exceptions" referenced by the trial court undeniably include circumstances where it is the parents' desired course of action that endangers the child. Indeed, in one of the cases cited by the trial court, Florida's high court specifically noted that parents' protection against state interference in childrearing was inapplicable "in cases where the child is threatened with harm." *D.M.T. v. T.M.H.*, 129 So.3d 320, 335 (Fla. 2013) (*citing Beagle v. Beagle*, 678 So.2d 1271, 1275-76 (Fla. 1996)). *See also State v.*

J.P., 907 So.2d 1101, 1114 (Fla. 2004) ("these parental rights are not absolute and the state as *parens patriae*, in certain situations, usurp parental control.").

More specifically, "[a]lthough parents enjoy a constitutionally protected interest in their family integrity, this interest is counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999) (citation omitted). *See also In re D.G.*, 970 So.2d 486 (Fla. 2d DCA 2007) (affirming that minor child could be ordered to undergo chemotherapy against mother's wishes); *J.V. v. State*, 516 So.2d 1133 (Fla 1st DCA 1987) ("a court may direct medical treatment to a minor child if a parent or guardian does not furnish the necessary services because of legitimate religious beliefs."). Thus, the City may take action to prevent parents who cannot accept their child's sexual orientation or gender identity from compelling the child to undergo efforts to 'convert' them. Indeed, the trial court acknowledged that one of the City's concerns in enacting the Ordinance was the scenario where a parent demands that his/her child undergo conversion therapy:

> [City Council members] are regular people with a sense of the city, and they concluded that when mom marches that 17-year-old into therapy and says, you need to—we tried to pray away the gay. Now I want you to therapy away the gay, Mr. Therapist. The 17-year-old is telling me that he's gay. That can't happen in our family. Okay. That's the therapy that were going for and here is your, you know, $80 an hour to

> do it. The City…has determined in their wisdom, and I'm not sure they're wrong, that that's harmful.

[Doc. 226, 80:11-21]. A city has an interest in protecting its youngest citizens from harm, and such interest is not invalidated just because the potential harm occurs in a therapy room and/or at the behest of the minor's parents.

In conducting its 'danger of conflict' analysis, the trial court next referenced section 381.026(4)(d)(3), *Florida Statutes*. This statutory provision states that a patient has the right to access any treatment deemed to be in his/her best interests "in accordance with the provisions of s. 456.41." In turn, section 456.41(1), Florida Statutes provides a legislative intent "that citizens be able to make informed choices for any type of health care they deem to be an effective option ***for treating human disease, pain, injury, deformity, or other physical or mental condition.***" (Emphasis added). By suggesting that this provision conflicts with the Ordinance, the trial court advanced the very mindset that the Ordinance is aimed at combating, i.e., that being gay or transgendered is a 'disease' or 'mental condition' that needs to be 'treated.' Indeed, the Ordinance is entirely consistent with section 381.026(4)(a)1, *Florida Statutes*, which provides that "[t]he individual dignity of a patient must be respected at all times and upon all occasions."

The trial court concluded that section 456.41 "gives practitioners great leeway to recommend 'any mode' of treatment 'without restriction.'" [Doc. 213, PageID 7022]. As noted, the Ordinance does not preclude a practitioner from recommending

conversion therapy. In any event, "[p]ursuant to police power, local governments may enact ordinances reasonably necessary for the protection of the public health, safety, welfare, or morals of their communities. If necessary, these ordinances may interfere with otherwise protected rights so long as the interference bears a reasonable relationship to the public need served." *Metropolitan Dade County Fair Housing and Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc.*, 511 So.2d 962, 965 (Fla. 1987).

The final statute that the trial court referenced in its 'danger of conflict' analysis was section 766.103, *Florida Statutes*, which relates to informed consent. As the trial court stated, the concept of informed consent "notes that some medical procedures have 'substantial risks and hazards inherent in the proposed treatment or procedures.'" [Doc. 213, PageID 7023 (quoting Fla. Stat. §766.103(3)(a)(2))]. Conversion therapy, however, is not a "medical procedure." In fact, because section 766.103 only governs physicians, dentists, advanced practice registered nurses, and physician assistants," it has no applicability to counselors like Mr. Vazzo. Fla. Stat., §166.103(3). *See also Cedars Medical Ctr., Inc. v. Ravelo*, 738 So.2d 362, 366 (Fla. 3d DCA 1999) ("Florida law confines liability for a failure to obtain informed consent to medical practitioners.").

Again, the proper test for ascertaining whether a local ordinance conflicts with state law is whether one must violate one provision in order to comply with the other.

Here, to comply with the Ordinance, a therapist like Mr. Vazzo need only avoid engaging in conversion therapy, and such avoidance would not violate any state statute. Likewise, there is no State statute that encourages or requires one to engage in conversion therapy and thus violate the Ordinance. Indeed, as the trial court noted, the Florida Legislature has considered banning conversion therapy but has chosen not to do so. [Doc. 213, PageID 7033]. No conflict exists when a local government enacts an ordinance in an area where the state has declined to act. *See, e.g., Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309, 315 (Fla. 2008) (finding no implied preemption given that "when enacting section 10 of its fireworks ordinance, the county simply chose to legislate in an area where the Legislature chose to remain silent.").

The trial court expressed concern that "the Tampa Ordinance covers only the 114 miles of city limits, leaving the substantive mental health therapy rules to vary depending [on] which of the 400 plus Florida municipalities' one is in..." [Doc. 213, PageID 7017-18]. However as the *Phantom* court noted:

> focusing on potential differences caused by varying local requirements confuses the issue. Because chapter 791 does not include an insurance coverage standard requirement, chapter 791 is not being applied disparately. In other words, ***a state statute is not being applied in a non-uniform manner when a locality enacts a regulation on a particular matter that is not addressed in the statute.*** The statute is being applied uniformly. It is the local ordinance that is creating any variance between counties.

Phantom, 3 So.3d at 315 (emphasis added). Likewise, the City here enacted an Ordinance on a particular matter—conversion therapy—not addressed in Florida's statutes.

V. The Trial Court Erred by Suggesting that City Council May Enact Ordinances Only on Topics in which its Members Have Expertise

Both during the hearing on the parties' motions for summary judgment and in its Order, the trial court suggested that a legislative body should not enact legislation on a topic unless its members have expertise in such field. [See Doc. 226, 44:2-3 ("The problem is none of them have any background in psychotherapy or counseling… I'm not sure one of them is learned in this field."); Doc. 213, PageID 7030 ("With due respect for the citizen legislators on the Tampa City Council, none are skilled in mental health issues.")]. Notably, the trial court did not cite to any authority for this view. As a practical matter, legislators cannot be expected to have skilled knowledge in all areas in which they legislate. It is for this reason that they rely on evidence from those with expertise in the relevant field.

Here, in determining that conversion therapy poses a danger to its minor citizens, Tampa's City Council relied on widespread evidence from a bevy of well-respected organizations with the appropriate expertise, including the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, and the Pan American Health Organization. [Doc. 213, PageID 7043-46].

CONCLUSION

For the foregoing reasons, the trial court erred in striking the Ordinance under the implied preemption doctrine and granting Plaintiff's motion for summary judgment, and this Court should reverse.

Dated this 23rd day of December 2019.

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DATED December 23, 2019.

s/David E. Harvey
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CERTIFICATE OF SERVICE

I, hereby certify that, on the 23rd day of December, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notice of electronic filing to all counsel of record, and that the foregoing was also sent via electronic mail to each of the following:

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