

No. 19-14387

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ROBERT L. VAZZO, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF TAMPA, FLORIDA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, No. 8:17-cv-02896

**FREEDOM OF CONSCIENCE DEFENSE FUND'S
MOTION FOR LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF PLAINTIFFS-APPELLEES
AND AFFIRMANCE**

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Amicus Curiae Freedom of Conscience Defense Fund moves for leave under Federal Rule of Appellate Procedure 29(a) and Eleventh Circuit Rule 29-2 to file the attached amicus brief in support of Plaintiffs-Appellees. All parties have consented to the filing of this brief.

The Defense Fund is a nonprofit civil rights organization dedicated to defending First Amendment liberties, including the freedoms of speech and religion. To that end, the Defense Fund's allied attorneys represent charities, businesses, and individuals threatened by government censorship and discrimination on the basis of their religious, philosophical, and professional views.

Amicus and its supporters are involved in this case to affirm that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.) Accordingly, the Defense Fund seeks to help this Court perform its essential role in protecting free speech from arbitrary exercises of government power. *See* Fed. R. App. Proc. 29(b)(1).

The attached brief offers the Court a critical perspective on the First Amendment issues at stake here, which should be relevant to the Court's consideration of why the City of Tampa's ban is unconstitutional. Specifically, this brief (1) expands on the free-speech arguments not fully briefed by the plaintiffs-appellees (*e.g.*, the

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First Amendment prohibits compelled *silence* as much as compelled speech); (2) raises additional legal arguments relevant to the First Amendment issues but not presented by the plaintiffs-appellees or considered by the lower court; and (3) explains why the Eleventh Circuit should, in its disposition of this appeal, adopt the Supreme Court's reasoning on professional speech and conduct in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

For these reasons, the Court should grant leave to file the attached amicus brief.

Dated February 28, 2020

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**CERTIFICATE OF INTERESTED PERSONS
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Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A) and Eleventh Circuit Rule 29(a), amicus curiae Freedom of Conscience Defense Fund has no parent corporation and issues no stock. Counsel for amicus also certify that the following individuals and entities have an interest in the outcome of this case:

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INTEREST OF THE AMICUS CURIAE²

The Freedom of Conscience Defense Fund is a nonprofit legal and policy organization dedicated to advancing and defending religious liberty and free speech. As part of its mission, the Defense Fund provides pro bono legal services for religious organizations, businesses, and individuals whose First Amendment rights are threatened by government hostility toward their religious and philosophical beliefs.

The Defense Fund has participated as amicus curiae in many cases in which the government punishes nonprofit organizations, businesses, and individuals who do not “pledge allegiance” to the prevailing state orthodoxy. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 220 (2013). It also has filed amicus briefs in support of the First Amendment rights of private healthcare institutions and professionals, particularly on issues involving sexual orientation and abortion.

This case concerns the Defense Fund because the City of Tampa’s ordinance violates the First Amendment right to be free from government censorship and discrimination. In granting summary judgment to the appellees, the District Court faith-

² Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, no party’s counsel authored the brief in whole or in part; no party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amicus curiae, its members, and its counsel—contributed money intended to fund preparing or submitting this brief.

fully applied the Supreme Court of Florida’s well-developed preemption jurisprudence. As an exercise of restraint, however, the lower court invoked the constitutional avoidance doctrine and did not reach the case’s First Amendment questions.³ Even so, the court noted that Tampa’s ordinance “instructs medical doctors, osteopathic doctors, psychologists, and licensed mental health counselors as to what they may and may not say within patient therapy.”⁴

Given the First Amendment issues at play, amicus believes that the lower court’s observation merits this Court’s consideration. So rather than repeating the appellees’ preemption arguments, this amicus brief will illuminate the Court’s perspective on this case’s free-speech issues and their potential implications. To that end, this brief explains why Tampa’s ordinance is a content- and viewpoint-based restriction of licensed counselors and therapists. It recommends that this Court apply longstanding Supreme Court precedent holding that content- and viewpoint-based laws regulating professional speech and conduct warrant strict scrutiny review when that conduct involves communicative messages. And it concludes by discussing why the counseling ban fails strict scrutiny.

³ On referral, the magistrate judge below recommended that the District Court grant the appellees’ preliminary injunction on First Amendment free-speech grounds because Tampa’s ordinance bans voluntary, speech-only therapy. (R-149 at 37-38.)

⁴ (R-213, Order Granting Pls.’ Mot. Summ. J. 18.)

STATEMENT OF THE ISSUE

Whether the City of Tampa’s SOCE-ban law, Tampa, Fla., Ordinance 2017-47 (2017), violates the First Amendment as applied to a licensed therapist who provides consensual, voluntary, and speech-only SOCE counseling.

SUMMARY OF THE ARGUMENT

The City of Tampa’s ordinance banning sexual orientation change efforts (commonly abbreviated as “SOCE”) is unconstitutional. “[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.” *Riley v. Nat’l Fed’n of the Blind of N. C., Inc.*, 487 U.S. 781, 796–97 (1988). The SOCE counseling ban is a content- and speaker-based restriction on the voluntary and consensual speech of licensed counselors, including Appellee Robert Vazzo. It applies only to the speech of licensed counselors and therapists, and only on the topic of SOCE. Because the ordinance is a content-based regulation that compels silence, it is subject to strict scrutiny.

Tampa contends that the ordinance passes constitutional muster because the ordinance regulates not speech but “professional” speech and conduct. In support, the City leans on two SOCE-ban cases in the Ninth and Third Circuits, in which those courts applied a more deferential standard of review. But the Supreme Court abrogated those decisions in *National Institute of Family & Life Advocates v. Becerra* [“*NIFLA*”], holding that “[s]peech is not unprotected merely because it is uttered by ‘professionals.’” 138 S. Ct. 2361 (2018). This Court should follow the Supreme

Court's holding in *NIFLA*, and it should affirm that laws like Tampa's that target consensual, voluntary speech between counselor and client must survive strict scrutiny.

Tampa cannot meet that exacting standard. The City contends that the ordinance advances a compelling interest in preventing physical and psychological harm to minors. But the City has identified no complaints of Tampa youth harmed by SOCE. Nor does the City's proffered "research" show a causal link between SOCE and harmful effects on children. On these points alone, the City's asserted interests cannot outweigh the First Amendment's speech protections.

Even if Tampa's interests were compelling enough to contravene the appellees' constitutional rights, the ordinance is not narrowly tailored to achieve those ends. Indeed, the ordinance's underinclusivity and overinclusivity raise serious doubts about whether the City is pursuing its asserted interest or is instead targeting disfavored speakers and viewpoints about sexual orientation and gender identity.

Although this appeal focuses on preemption issues, that does not prevent this Court from considering what is at the heart of this case—the freedom of speech. And because the lower court acknowledged but did not address the appellees' First Amendment claims, this Court should not leave those questions unanswered.

ARGUMENT

Under the First Amendment, the government “may not prohibit the dissemination of ideas that it disfavors.” *Knox v. Serv. Employees Int’l Union, Local 1000*, 567 U.S. 298, 309 (2012). Nor may it show “hostility—or favoritism—towards the underlying message expressed.” *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992). In fact, the “government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content.” *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1327 (11th Cir. 2017) (emphasis added) (quoting *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Accordingly, laws that “target speech based on its communicative content” are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

I. The ordinance is subject to strict scrutiny because it is a content-based law that targets SOCE counseling based on its topic and messages.

A law is a content-based speech restriction if it applies to particular speech because of the discussed topic or expressed message. *See Reed*, 135 S. Ct. at 2222. On its face, Tampa’s ordinance is a content- and speaker-based restriction on licensed therapists from offering “any counseling” with clients who want to talk about same-sex attraction or gender identity. *See Tampa, Fla., Ordinance 2017-47* at 4 (April 10, 2017) (codified as Tampa, Fla., Code of Ordinances §§ 14-310 to -313 (2019)); *see also*

R-213 at 48.⁵ The ordinance thus disfavors speech with a particular content—voluntary talk therapy about unwanted same-sex attraction and gender dysphoria. And it thus disfavors particular speakers—licensed counselors and therapists who help clients with their struggles with sexual orientation and gender identity. The facts indisputably confirm that the ordinance imposes a targeted, content-based burden on licensed therapists who help those seeking SOCE counseling.

Conversely, the ordinance does not ban a counselor from encouraging a boy to become a girl, nor from helping a girl to embrace her same-sex attraction. And it does not ban an *unlicensed* therapist from providing SOCE counseling, nor even an unqualified layperson. Thus, the counseling ban in both purpose and effect “goes even beyond mere content discrimination, to actual viewpoint discrimination.” *R.A.V.*, 505 at 391. This exemplifies a First Amendment free-speech violation calling for strict scrutiny.

II. The counseling ban also warrants strict scrutiny because the First Amendment prohibits Tampa from compelling a speaker’s silence on protected speech.

The First Amendment prohibits the government from enacting content-based laws that force a speaker to remain silent on protected speech and expression. Silencing speech that a speaker would otherwise say “necessarily alters the content of the speech” and is therefore “a content-based based regulation of speech.” *Riley v. Nat’l*

⁵ “R-___, at ___” refers to the record number and relevant page number(s) of documents filed in this Court.

Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796-797 (1988). In *Riley*, the Supreme Court struck down a state law that required professional solicitors of charitable donations to disclose financial information. 487 U.S. at 795. The Court held that laws mandating the content of speech were content-based regulations subject to strict scrutiny, *id.*, because the freedom of speech necessarily includes “both what to say and what not to say,” *id.* at 797.

Applied to this case, *Riley* stands for the proposition that Tampa’s ordinance may not compel silence merely because city leaders disagree with the content or message of SOCE counseling. Yet the facts show this is the very reason behind the ordinance. Indeed, Tampa’s officials made it clear they find SOCE counseling despicable.⁶ As a result, the City bars voluntary and consensual communication not because it wants a minor struggling with unwanted same-sex attraction to choose the most effective therapy, but because it does not want the minor to choose SOCE as a method of healing. That is not a basis for silencing speech. Instead, it is a basis for strict scrutiny.

⁶ (See R-133-2 at 26:21–32:6 (highlighting that the city council member who introduced the ordinance described SOCE as “torture”).)

III. In accord with *NIFLA*, this Court should reject Tampa’s misguided “professional speech and conduct” argument and affirm that strict scrutiny applies to anti-SOCE laws.

A. The City’s reliance on the Ninth and Third Circuits’ SOCE-ban decisions conflicts with *NIFLA*.

Throughout this litigation, Tampa has argued that its ordinance regulates “professional conduct,” which, the City contends, warrants a lower level of scrutiny. That argument is misguided for two main reasons. One, it relies on two Ninth and Third Circuit SOCE-ban opinions that the Supreme Court rejected—and abrogated—in *NIFLA*. Two, it strays from this Court’s professional-speech framework set forth in *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017).

The Ninth Circuit. In *Pickup v. Brown*, the Ninth Circuit rejected a First Amendment free-speech challenge to the State of California’s “conversion therapy” ban. 740 F.3d 1208 (9th Cir. 2014). The appellants, SOCE practitioners, argued that the law was a content-based speech restriction and thus warranted strict scrutiny. The Court disagreed. Instead, it concluded that the law passed First Amendment muster because it regulated “professional conduct, where the state’s power is great, even though such regulation may have an incidental effect on speech.” *Pickup*, 740 F.3d at 1229.

The Court went further, stating that the law did not even implicate the First Amendment because it targeted only “treatment,” which is merely conduct, and “the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech.” *Id.* In other words, the Ninth Circuit

concluded that because talk therapy is simply conduct, the First Amendment offers little protection. *See id.* at 1231.

The Third Circuit. The Third Circuit wrestled with the same issues in a similar SOCE-ban case. In *King v. Governor of New Jersey*, the Third Circuit disagreed with the Ninth Circuit by concluding that “verbal communication that occurs during SOCE counseling is speech that enjoys some degree of protection under the First Amendment.” 767 F.3d 216, 224 (3d Cir. 2014). The Court thus found that the SOCE statute was a content-based regulation of speech and not just a regulation of “conduct.” *See King*, 767 F.3d at 236 (noting that the law “discriminates on the basis of content”).

The Third Circuit nevertheless upheld the anti-SOCE counseling law under intermediate scrutiny. The Court reasoned that the law “warrants lesser protection,” *id.* at 232, because it regulated professional speech expressed while the counselor provides “personalized services to a client based on the professional’s expert knowledge.” *Id.* at 233 (concluding “that speech occurring as part of SOCE counseling is professional speech”). Thus, the Third Circuit concluded that as a category of speech, professional speech was subject to intermediate scrutiny.

In sum, both the Ninth and Third Circuit upheld anti-SOCE counseling statutes by reasoning that strict scrutiny was inapplicable and that speech expressed during a professional-client relationship was subject to lesser (*King*) or no (*Pickup*) First Amendment protection. The Ninth Circuit added that SOCE counseling did not

even involve speech because it is merely “conduct”—*e.g.*, “treatment.” *See Pickup*, 740 F.3d at 1229. Tampa relied on both these cases when enacting the statute.⁷ But then along came *NIFLA*.

The Supreme Court abrogates *Pickup* and *King*. In *NIFLA*, the Supreme Court held that a California law that forced pro-life crisis pregnancy centers to display objectionable notices was a content-based regulation of speech, and, under strict scrutiny, the law likely violated the First Amendment. 138 S. Ct. 2361, 2378 (2018). The Ninth Circuit had upheld the notice requirement, reasoning that although the law was content-based, it did not warrant strict scrutiny because it only regulated professional speech. *See Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 829 (9th Cir. 2016), *rev’d sub nom.*, *NIFLA*, 138 S. Ct. 2361 (2018).

The Supreme Court forcefully rejected that argument. Taking aim at the Ninth and Third Circuits’ decisions in *Pickup* and *King*, respectively, the Court stated that it has never “recognized ‘professional speech’ as a separate category of speech.” *NIFLA*, 138 S. Ct. at 2371. “Speech,” the Court noted, “is not unprotected merely because it is uttered by ‘professionals.’” *Id.* The Court did point out two circumstances where professional speech has lesser protection. One is compelled disclosure of “factual, noncontroversial information in their ‘commercial speech.’” *Id.* The other is professional conduct regulations that incidentally affect speech, such as factual disclosures through informed-consent mandates. *See id.* The Court found

⁷ *See* Tampa, Fla., Ordinance 2017-47 at 4.

(just like this case) that neither instance—commercial advertising and informed-consent laws regulating professional conduct—applied to the notice requirement. *See id.* at 2373.

That aside, the Court noted that its “precedents have long protected the First Amendment rights of professionals” and that “[t]he dangers associated with content-based regulations of speech are also present in the context of professional speech.” *Id.* at 2374. To be sure, the Court observed that “professional speech” is “a difficult category to define with precision,” *id.* at 2375, and it cautioned that labeling as “professionals” any business or individual that “involves personalized services and requires a professional license from the State” could, in effect, give governments “unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.” *Id.* Doing so, the Court noted, would give government agencies “a powerful tool to impose ‘invidious discrimination of disfavored subjects.’” *Id.* at 2375 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n. 19 (1993)).

B. This Court’s decision in *Wollschlaeger* lays the track for applying strict scrutiny to professional-speech restrictions.

This Court should follow the Supreme Court’s holding that “professional speech” is not “a separate category of speech that is subject to different rules.” *NI-FLA*, 138 S. Ct. at 2371 (citing negatively *King v. Governor of N.J.*, 767 F.3d 216 (2014), and *Pickup v. Brown*, 740 F.3d 1208 (2014)). In fact, this Court has already

laid the foundation to do so in *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017).

Wollschlaeger involved a Florida law that disciplined doctors who inquired into patients' firearm ownership, either orally or in writing, if asking would be irrelevant to patients' health and safety. A group of medical professionals sued, claiming in part that the law was a content-based speech restriction. The District Court agreed and enjoined the law. Florida appealed, arguing that the law was exempt from First Amendment scrutiny because it regulated professional conduct, not speech.

A divided panel of this Court upheld the challenged provisions of the law in three successive opinions. The first found that the law was a permissible regulation of professional conduct that only incidentally burdened speech. *See* 760 F.3d 1195, 1225 (11th Cir. 2014). The second found on reconsideration that the law was a regulation of "professional speech" subject to intermediate scrutiny. *See* 797 F.3d 859, 891-92 (11th Cir. 2015). Reconsidering that finding, the panel finally concluded that the law was a regulation of speech subject to strict scrutiny. *See* 814 F.3d 1159, 1190-92 (11th Cir. 2015); *see also Wollschlaeger*, 848 F.3d at 1301 (noting the cases).

This Court then agreed to rehear the case en banc. *See* 848 F.3d at 1301. Following Supreme Court precedent, this Court subjected the law to heightened scrutiny and found that the challenged provisions were impermissible content-based speech restrictions. *See id.* In reaching that decision, this Court's reasoning aligns with the Supreme Court's "professional speech and conduct" conclusion in *NIFLA*.

See NIFLA, 138 S. Ct at 2371. Like the *NIFLA* Court, the *Wollschlaeger* Court expressed “serious doubts” about the Ninth Circuit’s decision in *Pickup*, rejecting that court’s rational-basis review standard as well as noting that “characterizing speech as conduct is a dubious constitutional enterprise.” *Wollschlaeger*, 848 F.3d at 1309. It also acknowledged that the Supreme Court has applied heightened scrutiny to regulations restricting the speech of professionals. *See id.* at 1310. And then it went on to apply “heightened scrutiny” under the Supreme Court’s decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011). Although the Court did not apply strict scrutiny to Florida’s law, it noted that “[b]ecause these provisions fail to satisfy heightened scrutiny under *Sorrell*, they obviously would not withstand strict scrutiny.” *Wollschlaeger*, 848 F.3d at 1311.

C. Even if Tampa’s ordinance is directed at conduct, it is still subject to strict scrutiny because the targeted conduct is communicative.

Even if Tampa’s ordinance is mainly aimed at regulating conduct, it also extends to speech-only SOCE and, at a minimum, regulates conduct that is *communicative*.

The Supreme Court’s decision in *Holder v. Humanitarian Law Project* is instructive. 561 U.S. 1 (2010). In *Holder*, the Court addressed a pre-enforcement challenge to the federal material-support statute that criminalized providing “material support” to foreign terrorist organizations. *Id.* at 7-8, 10. The Court observed that

although the statute may have described “material support” as conduct, the plaintiffs in the case planned to provide “material support” through speech, which triggered First Amendment scrutiny. *Id.* at 27.

The government argued that the statute should nonetheless be subject to intermediate scrutiny “because it generally functions as a regulation of conduct.” *Id.* But the Supreme Court rejected that argument, noting that the plaintiffs’ unlawful “conduct” under the statute “consists of communicating a message”—that is, the plaintiffs intended to “provide material support” to the terrorist organizations “in the form of speech.” *Id.* The Court then concluded that because the statute was content-based, it was subject to strict scrutiny. *See id.*

Here, Appellant Robert Vazzo engages in voluntary, speech-only SOCE counseling. Even if the Court assumes that most SOCE counseling is performed through conduct and that the ban functions to regulate conduct, the ordinance is not automatically subject to intermediate review. As the Supreme Court made clear in *Holder*, a law directed at conduct is still suspect if the regulated conduct involves communicating a message. 561 U.S. at 28. So, even assuming without conceding that Tampa’s counseling ban is properly characterized as an ordinance regulating conduct, the ordinance is still suspect because it targets the communicative content and message during Mr. Vazzo’s SOCE speech counseling.

In the end, Tampa’s anti-SOCE counseling ban forbids the appellees from speaking a particular message and discussing specific topics, thereby altering the content of their speech. The ordinance is therefore a content-based regulation and must survive strict scrutiny. It cannot.

IV. The counseling ban fails strict scrutiny because it advances no interest compelling enough to justify violating the appellees’ free-speech rights.

Strict scrutiny is “the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). “[I]t is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest.” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (internal quotation marks omitted). This case is not one of them.

A. The City’s compelling interest in protecting minors is deflated by the lack of an actual problem.

Tampa offers one interest to justify the ordinance: “to protect the physical and psychological well-being of minors,” particularly from SOCE. Tampa, Fla., Ordinance 2017-47 § 14-310 (April 10, 2017). Protecting children from harm is no doubt a compelling government interest. To justify a speech restriction, however, the law must address a *real* problem in need of solving, and “the curtailment of free speech must be actually *necessary* to the solution.” *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011) (emphasis added). In other words, there must be an ongoing, verifiable problem of Tampa youth suffering harm—and the ban is the only way to address it.

Yet Tampa has never received a SOCE-related complaint.⁸ Nor did the City investigate whether any local harm from SOCE-related counseling actually existed before enacting the ordinance.⁹ Thus, the City has no evidence of the prevalence or gravity of the supposed SOCE counseling problem in Tampa. Indeed, the City has *no* proof of how any minor resident would suffer harm from speaking with a licensed therapist about SOCE.

Unable to prove an actual problem in the town limits, Tampa instead offered supposedly “overwhelming research” purportedly proving that SOCE harms children.¹⁰ But as the appellees persuasively point out, none of those studies shows a direct causal link between SOCE counseling and physical and psychological harm.¹¹ Thus, the “research” is not enough to survive strict scrutiny. To show a compelling interest, the government “must demonstrate that the recited harms are real, not merely conjectural.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).¹² Here, the City has shown no actual need for the legislation.

⁸ (See R-149 at 35 (citing R-132-1 at 8).)

⁹ (See R-133-2 at 41:3–22; R-140-1 at 19; R-138 at 45:10–48:9.)

¹⁰ (R-213 at 44–47.)

¹¹ (See, e.g., Answer Brief of Plaintiffs-Appellees at 13-30.)

¹² See, e.g., *Buehrle v. City of Key W.*, 813 F.3d 973, 979 (11th Cir. 2015) (observing that the government cannot “get away with shoddy data or reasoning” (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion))); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1268 (11th Cir. 2003) (noting that the government “must rely on at least some pre-enactment evidence” to justify the regulation).

B. The counseling ban is not narrowly tailored because it is both “wildly” underinclusive and overinclusive.

Even if Tampa can prove it has an interest compelling enough to violate the appellees’ First Amendment rights, it must prove that the ordinance is narrowly tailored to achieve that interest. That is, the means chosen must be neither “seriously underinclusive nor seriously overinclusive.” *Brown*, 464 U.S. at 2741-42. Here, the City’s counseling ban prohibits only licensed therapists and counselors from engaging in SOCE. And as the District Court observed, the ban applied “to no other persons such as ministers, lay providers, parents, unlicensed persons, etc.”¹³ By limiting its SOCE ban to just licensed therapists and counselors, the ordinance’s limited scope therefore suggests that it is “wildly underinclusive, raising serious doubts about whether the [City] is pursuing the interest it invokes or is instead disfavoring a particular speaker or viewpoint.” *Brown*, 564 U.S. at 131.¹⁴

The ordinance is also “overinclusive,” because it “encompasses more protected conduct than necessary to achieve its goal.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring). The stat-

¹³ (R-213, Order Granting Pls.’ Mot. Summ. J. at 6.)

¹⁴ Amicus is at a loss as to how the City could rationalize that a licensed therapist would cause greater harm to minors than an unlicensed layperson offering SOCE counseling.

utory language is riddled with broad and ambiguous terms that force SOCE counselors to guess at what they may or may not talk about with their clients. For example, the ban forbids Mr. Vazzo from talking with his clients about their religious beliefs, desires, and identities—if perchance those conversations touch upon unwanted same-sex attraction or gender dysphoria.¹⁵ It even forbids a counselor from simply answering questions a client has about unwanted same-sex attraction and gender confusion.¹⁶ And to be sure, the ordinance’s vagueness vests enforcement officials with such unbridled discretion on who or what must be punished that no conversation is immune from government intrusion.

Given (1) the heavy burden strict scrutiny imposes on the government, (2) the lack of evidence showing “actual harm” and a direct causal link between SOCE and harm to minors, and (3) the ordinance’s underinclusiveness and overinclusiveness, Tampa’s SOCE counseling ban cannot survive “the most demanding test known to constitutional law.” *Flores*, 521 U.S. at 534. In sum, because the ordinance is a content- and viewpoint-based restriction that compels silence, it fails strict scrutiny. The City has violated the appellees’ freedom of speech under the First Amendment.

¹⁵ (R-78 ¶ 62.)

¹⁶ (R-78 ¶ 65.)

CONCLUSION

The First Amendment teaches that the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). If that lesson is forgotten or cast aside, then First Amendment protections are diminished for all Americans. Accordingly, this Court should affirm the decision below on any and all available grounds, including the merits of the appellees’ free-speech claims.

Dated February 28, 2020

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DATED: February 28, 2020

/s/ J. Michael Lindell

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