

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
for Middle District of Florida, Tampa Division
Case No. 8:17-CV-02896-T-02AAS

**BRIEF OF AMICUS CURIAE FLORIDA STATE SENATORS
BEN ALBRITTON, DENNIS BAXLEY, DOUG BROXSON, and KELLI
STARGEL, and REPRESENTATIVES BYRON DONALDS, BRETT HAGE,
STAN McCLAIN, SCOTT PLAKON, SPENCER ROACH, ANTHONY
SABATINI, and CLAY YARBOROUGH
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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**AMICI CURIAE FLORIDA LEGISLATORS'
CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Amici Curiae Florida Legislators hereby certify that the following individuals and entities are known to have an interest in the outcome of this case:

Albritton, Florida State Senator Ben

Baxley, Florida State Senator Dennis

Broxson, Florida State Senator Doug

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Donalds, Florida State Representative Byron

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Gannam, Roger K.

Hage, Florida State Representative Brett

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Yarborough, Florida State Representative Clay

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

/s/Mary E. McAlister
Mary E. McAlister

*One of the Attorneys for
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INTEREST OF AMICI CURIAE

Amici Curiae are Florida State legislators deeply concerned about the implications of Tampa's Ordinance 2017-47 ("the Ordinance"), purporting to ban "conversion therapy," on the Legislature's comprehensive and pervasive legislative scheme regulating licensed counseling professionals. The legal issues surrounding the implied preemption analysis are likewise of interest to Amici Curiae, especially in light of the repeated efforts by proponents of a ban on "conversion therapy" to pass such a ban statewide. Amici Curiae and others have rejected these bills on each occasion, and seek to ensure that the intent of the Legislature is understood and furthered in these proceedings.

Amicus Curiae have received the consent of all parties to file this brief.

SUMMARY OF ARGUMENT¹

The Florida legislature has extensively and comprehensively regulated the counseling and health professions for many years. On the other hand, as the district court correctly found, the City of Tampa “had never before substantively regulated and disciplined the practice of medicine, psychotherapy, or mental health treatment.” (*Vazzo v. City of Tampa*, __ F.3d __, 2019 WL 4919302 *4 (M.D. Fla. 2019)). Given the breadth and detail of the state legislative scheme, the lack of any express or implied authority for municipalities such as Tampa to regulate in these areas, and the serious danger of conflict with state regulation posed by the Tampa Ordinance, the doctrine of implied preemption should apply, and the decision of the district court awarding summary judgment to Vazzo should be upheld.

ARGUMENT

The parties do not appear to differ significantly with the district court’s articulation of the rules governing implied preemption. (*Vazzo*, 2019 WL 4919302 *7, Initial Br. of Appellant at 7-8, and Vazzo’s Answer Br. at 33-38). In a nutshell, “implied preemption occurs when the state legislative scheme is pervasive and the local legislation would present a danger of conflict with that pervasive scheme.”

¹ All parties have consented to the filing of this brief. No party has authored the brief in whole or in part, and no party or party’s counsel has contributed money to fund either the preparation or the submission of the brief.

D’Agastino v. City of Miami, 220 So.3d 410, 421 (Fla. 2017) (citing *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 885–86 (Fla. 2010)). “Preemption is implied when the legislative scheme is so pervasive as to virtually 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.” *Sarasota Alliance for Fair Elections*, 28 So.3d 880, 886 (internal quotation marks and citations omitted). All elements are satisfied here: the Florida legislature has erected a pervasive scheme to comprehensively regulate in the area; the Tampa Act presents a real danger of conflict with that scheme; and strong public policy reasons exist for finding the area preempted here.

I. FLORIDA’S REGULATION OF THE COUNSELING AND HEALTH PROFESSIONS IS PERVASIVE AND EVIDENCES AN INTENT TO PREEMPT THE AREA.

A. The Legislature has neither expressly nor impliedly granted authority to municipalities to regulate in this area.

As a threshold matter, the Legislature has not granted authority to municipalities to substantively regulate healthcare treatment or psychotherapy, as the district court rightly noted. (*Vazzo*, *9-10). Nor has the Legislature delegated some enforcement authority to municipalities like Tampa, in contrast to the situations in *Sarasota Alliance for Fair Elections*, *supra*, or *Phantom of Clearwater*,

Inc. v. Piniellas Cty, 894 So.2d 1011 (Fla. 2d DCA 2005), for example.² Instead, the Legislature and the Legislature alone has regulated healthcare and psychotherapy, as the district court correctly found.³

B. The District Court Appropriately Considered the Lack of any Express Grant of Authority in its Analysis.

Tampa mischaracterizes the district court's observations concerning the Legislature's lack of any express grant of authority to municipalities as an error in its analysis, claiming that the court "relied on the purported absence of express authorization" for its finding. (Appellant's Br. at 4, 9-10). Tampa is mistaken. The district court did not "rely on" the absence of express authorization as the ultimate basis for its holding. Rather, the district court merely applied the proper analytical

² In *Sarasota Alliance for Fair Elections*, although the Election Code itself was quite extensive, it specifically granted to local authorities "many aspects of the election process," such as "authority to create or change the voting precincts and to designate the polling places." 28 So.3d 880, 886-87. No such provision is contained in Florida's statutes.

In *Phantom of Clearwater*, the legislature expressly delegated enforcement of the sale of fireworks to local law enforcement officials. 894 So.2d 1011, 1018. "It is difficult for a court to imply preemption of the entire field of 'sale of fireworks' when the legislature affirmatively informs local government to act." *Id.* No such grant of authority or delegation exists here.

³³ Contrary to the City's contention, the Legislature's express grant of authority to municipalities to exclude medical marijuana dispensaries is of no moment here. (Appellant's Br. at 10-11 (citing Fla. Stat. § 381.986)). Those provisions fall outside the realm of the counseling professions, and at any rate the Legislature expressly preempted municipal regulation of medical marijuana except as expressly authorized. Fla. Stat. § 381.986(11).

framework to its review of the legislative scheme, as has been done in other cases. *See, e.g., Classy Cycles, Inc. v. Bay Cty, Fla.*, 201 So.3d 779 (Fla. 1st DCA 2016) (cited by district court). That is, in order to ascertain legislative intent to occupy the field, it was necessary for the court to consider first whether the Legislature had granted to municipalities even a limited role in regulating some part of the field.

Even a limited grant of authority to municipalities could play a significant if not determinative role in deciding whether the Legislature has impliedly preempted the field. *See, e.g., Vazzo*, *7 (“Additional cases considering implied preemption have considered whether the Florida Legislature via statute has delegated some enforcement or regulation to local government.”) (citing *Sarasota Alliance for Fair Elections*, 28 So.3d 880, 887-88, *Phantom of Clearwater*, 894 So.2d at 1011, and *Hillsborough County v. Florida Restaurant Ass’n, Inc.*, 603 So.2d 587 (Fla. 2d DCA 1992)). The complete absence of any delegation of even a minor role in regulating the healthcare practices, modalities, and discipline here is therefore a highly significant factor in determining whether the Legislature intended to preempt the field.

C. Implied Preemption Analysis Need not in All Cases Define the Field Narrowly.

The City is also mistaken in contending that implied preemption must be construed narrowly. (Appellant’s Br. at 13-14). The district court had no choice but to consider the broader area of “healthcare modalities and discipline” in this case

owing to the breadth of Tampa’s Ordinance. “The City of 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.” (*Vazzo*, *8). Thus, not to consider the broad field into which Tampa sought to intrude would be to perform an incomplete analysis. The district court was compelled to consider all the areas covered by the City’s Ordinance, and not a whit less. “The Ordinance outlaws some therapeutic speech in the fields of medicine, osteopathic medicine, psychology, and all types of licensed clinical counseling. In order to determine if the Florida regulatory apparatus shows the State intends to be the sole regulator of these fields, the Court must survey this Florida regulatory program.” (*Id.*, *11). Consequently, the district court was correct to define the area or field in question as broadly as Tampa’s Ordinance purported to reach.

D. The Florida Legislative Scheme Regulating Healthcare Modalities and Discipline is Pervasive.

1. The legislative scheme regulating healthcare modalities is pervasive.

The district court accurately described the Florida Legislature’s extensive and pervasive regulation of the counseling and health professions. In fact, the court went so far as to write: “To say that the State of Florida’s regime of healthcare regulations is vast is an understatement.” (*Id.*). “There seems nothing more regulated and addressed by the Florida legislative and administrative body than healthcare, and a

material part of this is mental health related.” (*Id.*). It is certainly true that the Legislature focuses an extraordinary amount of its time and efforts on healthcare, and that a significant part of that is mental health related. Arguably, the field of healthcare modalities and discipline is the most pervasive legislative scheme in the State.

As the district court explained and Vazzo amplified, the Legislature’s regulation of mental health providers is extensive, comprehensive, and pervasive. (*Vazzo*, *11-17; *Vazzo Answer Br.* at 39-44). From the 50 pages of regulations contained in Chapter 456, “Health Professions and Occupations: General Provisions,” to the “hundreds of practice specific statutes and administrative regulations” (*id.* at *11, n.12), the 37 pages of Chapter 458 entitled “Medical Practice,” the 143 pages of administrative regulations in Fla. Admin. Code beginning at Chapter 64B8-1.001, the 29 pages of Chapter 459 governing “Osteopathic Medicine, the 21 pages of Chapter 490 addressing “Psychological Services,” together with 31 pages of administrative regulations, the 13 pages of Chapter 491 entitled “Clinical, Counseling, and Psychotherapy Services, with another 45 pages of administrative regulations in Fla. Admin. Code 64B4, the sheer number of pages the Legislature has devoted to the regulation of the field underscores its pervasiveness. *Compare Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 (Fla. 2d DCA 2005) (noting that state statute at issue was only 3 pages

long and finding no implied preemption). The regulations detailed here amount to hundreds of pages of statutory and administrative regulations addressing countless specifics in the realm of mental health. There is little doubt that the Legislature's regulations are extensive and pervasive.

2. The legislative scheme regulating discipline is pervasive.

The City argues that the state statutes addressing discipline deal “largely” with licensure and not routine discipline, implying that they left room for the City to insinuate itself with non-licensure disciplinary measures. (Appellant's Br. at 13-17). The City is once again mistaken. Even if the state statutes do address licensure in detail – as they should – the City's argument ignores the fact that the statutes also include numerous provisions setting forth discipline for lesser matters than would require revocation or suspension of a license. Licensure is the gateway to the professions, but once a license is obtained, the State engages in comprehensive oversight and discipline of the practitioner.

For example, the City lists provisions in Chapter 458, governing medical doctors, that pertain to licensure. The City quoted subsection (3) of section 458.331, regarding discipline, to show that its standard of “the greater weight of the evidence” was in fact consistent with the statutory scheme for issues not involving licensure (contrary to the district court's finding). (Appellant's Br. at 17). But the City's argument why its ordinance is not inconsistent with the Legislature's comprehensive

scheme is contradicted by its own quotation, for it establishes that the Legislature has in fact created a disciplinary scheme that includes penalties that do not have anything to do with licensure. The City's quote began: "[i]n any administrative action against a physician **which does not involve revocation or suspension of license . . .**" (*Id.*) (emphasis added). The language carefully differentiates between those disciplinary provisions that do involve revocation or suspension of a license and those that do not. Those disciplinary provisions that do not involve licensure are therefore obviously included in the state's scheme.

The City also fails to mention section 458.327, which sets forth the penalty for certain criminal violations, many of which have nothing to do with licensure, or section 458.329, addressing sexual misconduct in the practice of medicine, or section 458.3295, regarding concerted efforts to refuse emergency room treatment to patients.

Similarly, in Chapter 459, governing Osteopaths, section 459.013 contains certain criminal violations; section 459.0141 prohibits sexual misconduct; and section 459.015 deals with grounds for disciplinary action. Subsection 459.015(1) states: "The following acts constitute grounds for denial of a license **or disciplinary action, . . .**" *Id.* (emphasis added). The specific grounds listed include failing to perform any statutory or legal obligation placed upon the practitioner (subsection (g)), giving false testimony (subsec. (h)), making deceptive, untrue, or fraudulent

representations (subsec. (m)), exercising influence on the patient or client in such a manner as to exploit the patient (subsec. (q)), and so forth. In short, the State's legislative scheme is plainly not limited to licensure issues. Rather, it is pervasive, including *both* licensure issues *and* non-licensure issues.

Similarly, in Chapter 491, section 491.009 deals with discipline. While it certainly does address grounds for denial of a license, it also provides for specific disciplinary actions unrelated to licensure. For instance, it prohibits false, deceptive, or misleading advertising; failing to perform any statutory or legal obligation; willfully making or filing a false report; and making misleading, deceptive, untrue, or fraudulent representations in the practice of one's profession. The Legislature thus intended the regulatory scheme governing discipline of the healthcare modalities to be comprehensive and pervasive, impliedly preempting municipal ordinances purporting to regulate in this field.

The same breadth of disciplinary regulations is present in the specific sections governing the other specialized areas of practice. This broad and extensive disciplinary scheme leaves no room for Tampa's intermeddling.

II. TAMPA'S ORDINANCE CREATES A DANGER OF CONFLICT WITH THE LEGISLATURE'S PERVASIVE REGULATORY SCHEME.

A. The Legislature's Repeated Rejection of a "Conversion Therapy" Ban Strongly Suggests an Intent to Continue to Allow the Type of Counseling Vazzo Practices.

Tampa's Ordinance not only intermeddles with the Legislature's pervasive regulatory scheme, but it also presents a danger of conflict with that scheme. The City argues that "[n]o conflict exists when a local government enacts an ordinance in an area where the state has declined to act." (Appellant's Br. at 30, citing *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008)). But the facts in *Phantom* were a far cry from those in the instant case. In *Phantom*, the statutory scheme at issue was simply silent on the specific subject matter addressed in the local ordinance. 3 So.3d at 315. There was no history, indeed no hint, that the legislature had even considered the particular matter. *Id.*

The situation here is dramatically different: not only has the Legislature considered the question of a ban on "conversion therapy," **it has repeatedly and resoundingly rejected such a ban every year since 2016**. In early September 2015, Representative David Richardson introduced a ban bill, HB137. *See* Florida Senate bill tracker (www.flsenate.gov/Tracker). Almost simultaneously, Senator Jeff Clemens introduced S258, a companion bill to HB137.⁴ *See* Jim Rosica, "Jeff

⁴ Although introduced in 2015, these bills were considered in the 2016 Session.

Clemens files Senate version of ‘conversion therapy’ ban,” Florida Politics (Sept. 11, 2015) (<https://floridapolitics.com/archives/190140-jeff-clemens-files-senate-version-of-conversion-therapy-ban>). Both bills died in committee.

In 2017, Representative Richardson again introduced a bill banning “conversion therapy,” HB273. Once again, Senator Clemens introduced a companion bill, S578, this time co-sponsored by Senator Linda Stewart. Once again, both bills died in committee. *See* Florida Senate bill tracker. In the 2018 Session, ban bill HB717 was introduced in the House by Representative Richardson, joined by a handful of other Representatives. In the Senate, Senator Clemens first introduced companion bill S68, but withdrew it, and Senator Jose Javier Rodriguez introduced S696 in its place. Both HB717 and S696 again died in committee. *Id.* In 2019, Representative Michael Grieco and others introduced the ban bill HB109 in the House, while Senator Rodriguez again introduced the identical bill in the Senate, S84. Once again, both bills died in committee. *Id.*

This year, yet another ban bill has been introduced in both the House and the Senate. HB41 was introduced by Representative Grieco, and S180 was introduced by Senator Rodriguez. As of the date of this brief, both bills were still pending. *Id.*

It can hardly be said that the subject of a “conversion therapy” ban has not been considered by the Legislature here, unlike the situation in *Phantom of Brevard*. And while the City contends that its ordinance cannot conflict with state law “where

the state has declined to act” (Appellant’s Br. at 30), the law is otherwise when the Legislature has repeatedly and resoundingly defeated bills raising the very same issue, year after year. In such a case, a legislative intent *against* such a measure may be inferred from its failure to pass the bills. *See, e.g., Tabler v. Board of Sup’rs of Fairfax County*, 221 Va. 200, 269 S.E.2d 358 (1980).

In *Tabler*, the Supreme Court of Virginia considered a challenge to a county’s authority to enact an ordinance purporting to require a minimum refund value on beverage containers. The circuit court held that the county had such authority and dismissed the complaint. 221 Va. at 201-202, 259 S.E.2d at 359. On appeal, the Virginia Supreme Court reversed. Deeming the question one of implied legislative authority, the court took special note of the fact that the legislature had rejected bills addressing the same subject matter: “The General Assembly’s actions in regard to proposed legislation concerning beverage containers indicate that the legislature did not intend to confer upon local governing bodies the power to set a minimum refund value for such containers.” 259 S.E.2d at 360.

The court observed that in the 1972 legislative session the legislature rejected two such bills, and in the 1974, 1975, and 1976 sessions the legislature again rejected similar bills. *Id.* Other amendments that would have granted counties such authority were also rejected. **“These actions by the General Assembly indicate clearly and unambiguously that the legislature did not intend to grant local governing**

bodies the power to regulate or prohibit the sale or use of disposable containers.” *Id.* at 361 (emphasis added).⁵ *Accord*, *W.M. Schlosser Co., Inc. v. School Bd. of Fairfax County, Va.*, 980 F.2d 253, 258 n.11 (4th Cir. 1992) (citing *Tabler*) (Dillon Rule case); *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 303–04, 631 A.2d 77, 89 (1993) (“If the General Assembly intended to change existing law governing the sale of cigarettes through vending machines, it certainly has had the opportunities to do so. **The failure to enact such measures ‘strongly suggests that there was no intent to allow local governments to enact different ... requirements.’**”) (quoting *Talbot County v. Skipper*, 329 Md. 481, 493, 620 A.2d 880, 886 (1993)); *Montgomery Cty. v. Complete Lawn Care, Inc.*, 240 Md. App. 664, 699, 207 A.3d 695, 716, *cert. denied sub nom. Goodman v. Montgomery Cty.*, 464 Md. 585, 212 A.3d 395 (2019) (“In implied preemption cases, **the repeated failure to enact contrary measures ‘strongly suggests’ that existing law does not embody those features.**”) (quoting *Allied Vending*).

“Conflict preemption occurs when a local law ‘prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law.’” *County Council of Prince George's County v. Chaney*

⁵ Although Virginia follows the Dillon Rule regarding municipal authority, that difference does not affect the rule announced in *Tabler* regarding the strong suggestion of legislative intent resulting from repeated rejection of a particular bill. The intent of the legislature is not governed by whether the Dillon Rule is in effect or not.

Enters. Ltd. P'ship, 454 Md. 514, 541 n. 19, 165 A.3d 379 (2017) (quoting *Talbot County v. Skipper*, *supra*, 329 Md. 481, 487 n. 4, 620 A.2d 880). The Legislature's uniform and repeated rejection of bans on "conversion therapy" strongly suggest an intent that client-directed, speech-only counseling such as Vazzo practices remain permissible throughout the State of Florida. Tampa's attempt to enact a ban on such counseling therefore conflicts with the legislative intent to permit it.

B. Tampa's Ordinance Presents a Danger of Conflict by Creating an Inconsistent Disciplinary Scheme.

Not only does the Tampa Ordinance present a danger of conflict with the Legislature's intent to allow the sort of counseling Vazzo and others engage in as it allows myriad other types of counseling and treatments, but it also presents a danger of conflict by creating disciplinary boards that are vastly different from those erected by the Legislature. "Tampa's divergent standard for punishing errant mental health therapy is relevant in the preemption analysis because it creates a danger of conflict with an area pervasively regulated, for which the Legislature has stated a policy of statewide uniformity." (*Vazzo*, 2019 WL 4919302 *13). As the district court correctly observed, "the Legislature intended a uniform system of discipline to run throughout the State." (*Vazzo*, *12). Tampa's system is anything but uniform.

The treatment of patients under the state scheme is "policed in great detail by the Department of Health and the professional disciplinary boards organized pursuant to the all-encompassing legislative scheme." (*Id.*, *10). Chapter 456 "sets

up an elaborate scheme to qualify, test, license, regulate, adjudicate, and discipline Florida professionals in each of the healthcare fields.” (*Id.*, *12). The state boards consist mainly of licensed professionals trained and experienced in the nuances and vagaries of the various professions and therefore able to understand and administer discipline in a measured and appropriate fashion.

Under the haphazard Tampa scheme, however, **not one** of those charged with enforcement is “skilled in mental health issues.” (*Id.*, *13). “In Tampa, the local ordinance reduces protections present in the statewide mechanism for investigating and disciplining healthcare providers. Tampa does not complement protections the State gives to healthcare providers; it reduces them.” (*Id.*). Tampa’s disciplinary boards consist of unqualified members meting out inconsistent punishment. This opposing scheme is particularly disconcerting to the Legislature because the statutes expressly state that the Legislature seeks “to facilitate **uniform** discipline” for acts violating the rules so carefully crafted. *E.g.*, Fla. Stat. § 459.015 (regulating osteopathic physicians) (emphasis added). The Tampa disciplinary rules may do many things, but one thing they do not do is facilitate uniform discipline in accordance with the legislative scheme. Such a scheme presents a grave danger of

conflict with the carefully crafted and detailed scheme developed by the Legislature.⁶

C. Tampa’s Ordinance Presents a Danger of Conflict with the State’s Appellate Remedies.

Yet another area of concern arises from the appellate remedies enshrined in Tampa’s Ordinance. As the district court found, “practitioners’ appellate remedies are also greatly lessened by Tampa.” (*Vazzo*, *12). Under Tampa’s ordinance, an appeal is not *de novo* and would simply be to the circuit court. (*Id.*) Under the state scheme, a practitioner is entitled to appeal directly to the District Courts of Appeal, “with a *de novo* review of statutory interpretation and a factual review upon ‘competent, substantial evidence.’” (*Id.*) (quoting Fla. Stat. § 120.68 and citing *Safirstein v. Dept. of Health, Bd. of Med.*, 271 So.3d 1178, 1180 (Fla. 3d DCA 2019)).

A practitioner required to deal with both the City’s appellate process and the State’s would face significant added expense, confusing and inconsistent standards of review, and a very real possibility of conflicting end results. Such a danger is unacceptable and indicative once again of a strong inference that the Legislature impliedly preempted the City’s authority to regulate in this area.

⁶ Nor does the fact that some professional associations with whom practitioners choose to join may discipline them violate the Legislature’s goal of uniformity, as the City argues. (Appellant’s Br. at 18-19). In fact, the statutes expressly allow such discipline. Fla. Stat. § 458.337(1), (2), (3).

CONCLUSION

For the foregoing reasons, the district court's award of summary judgment in favor of Vazzo should be affirmed.

Dated this 2d day of March, 2020.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 3,899 words.

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DATED this 2d of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this March 22, 2020, a copy of the foregoing was electronically filed through the Court's ECF system, which will effect service on the following parties and counsel of record:

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