CASE NO. 19-14387

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
(Honorable William F. Jung)

BRIEF OF *AMICUS CURIAE* FAMILY FOUNDATIONS COUNSELING, PLLC, IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Family Foundations Counseling, PLLC, is a professional limited liability corporation near Tacoma, Washington. It has no parent corporation and no stockholders.

These individuals and entities are known to have an interest in the outcome of this case:

Judge William F. Jung, U.S. District Court Judge for the Middle District of Florida, Tampa Division

Magistrate Judge Amanda A. Sansone, U.S. District Court, Middle District of Florida, Tampa Division

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STATEMENT OF AMICUS CURIAE INTEREST[1]

Family Foundations Counseling, PLLC, is a group of Christian counselors near Tacoma, Washington, offering a variety of counseling services. Since 2002, Family Foundations has served more than 3,000 clients. Its counselors take a client-directed approach, meaning clients identify their needs and set their own goals for treatment, and counselors help clients work toward the goals they set for themselves.

Because of this client-directed approach, adults and minors with same-sex attractions and gender-identity issues specifically request Family Foundations' services. Some of these clients express a desire to change their behaviors, gender identity, or gender expression. Others express a desire to eliminate or reduce same-sex attractions. Family Foundations counselors come alongside these clients, using talk therapy to help them work toward their goals. And clients report positive, supportive, enriching, and productive counseling experiences.

Family Foundations opposes legislative efforts, like the City of Tampa's, to ban client-directed counseling for clients with same-sex attractions or gender identity issues. Clients—not legislators—should set their own goals for treatment, and counselors should be free to help their clients work toward those goals.

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[1] No counsel for a party wrote any part of this brief, and no one other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties consented to the filing of this brief.

STATEMENT OF THE ISSUES

1. Whether the district court erred in striking down a City of Tampa ordinance under the implied preemption doctrine and granting Plaintiffs' motion for summary judgment.

2. Whether this Court should affirm on the alternative ground that the ordinance violates Plaintiffs' freedom of speech under the First Amendment.

3. Whether this Court should affirm on the alternative ground that the ordinance is impermissibly vague under the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

The district court held that state law preempts the City of Tampa's ban on counseling clients toward certain prohibited goals. But this Court can affirm "on any ground that finds support in the record." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001) (cleaned up).

The problem is that the ban prohibits speech, and it cannot survive strict scrutiny even viewed broadly as a restriction based on content. *See* Mag.'s Rep. and Rec. 19–29; Freedom of Conscience Defense Fund Br. as *Amicus Curiae* 5–18. Worse yet, the ban goes further, prohibiting speech based on viewpoint, making the constitutional problem even more "blatant" and "egregious." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). The ban also leaves counselors "in the dark" about what speech is prohibited. *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1322 (11th Cir. 2017) (en banc). This Court should affirm on either of these alternative grounds.

ARGUMENT

I. The counseling ban violates Vazzo's freedom of speech.

A. Viewpoint-based restrictions on speech are blatantly unconstitutional and rarely—if ever—survive scrutiny.

The First Amendment "prohibits laws that abridge the freedom of speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. __ , 138 S. Ct. 2361, 2371 (2018). "When enforcing this prohibition," courts "distinguish between content-based and content-neutral regulations." *Id.* Content-based laws "target speech based on its communicative content" and are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. __ , 135 S. Ct. 2218, 2226 (2015). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation . . . is all the more blatant." *Rosenberger*, 515 U.S. at 829. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "Viewpoint discrimination is [] an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829.

Throughout history, the Supreme Court has reserved its strongest condemnation for restrictions that discriminate based on viewpoint: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). And "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *Id.*

"Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of free speech." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) (cleaned up). Thus, "it is not forward thinking to force individuals" to "foster[ ] public adherence to an ideological point of view they find unacceptable." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (cleaned up). On the contrary, that is the *modus operandi* of "authoritarian regimes," which are "relentless" in their "attempts to stifle free speech." *Id.* (Kennedy, J., concurring).

This Court has expressed similar disdain for viewpoint-based restrictions, labeling them "among governments' most insidious methods of eliminating unwelcome opinion." *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1248 (11th Cir. 2015). "As such, they warrant the greatest level of First Amendment protection." *Id.*

Viewpoint-based restrictions are such anathema to the First Amendment that the Supreme Court sometimes strikes them down without even conducting strict-scrutiny analysis. *E.g.*, *Iancu v. Brunetti*, 588 U.S. __ , 139 S. Ct. 2294, 2297, 2301–02 (2019) (viewpoint-based restriction "disfavors certain ideas" and "must be invalidated"); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001) (questioning "whether a State's interest in avoiding an Establishment Clause violation" could ever "justify viewpoint discrimination").

Following this logic, in *Minnesota Voters All. v. Mansky*, 585 U.S. __ , 138 S. Ct. 1876 (2018), the Court drew a line between content-based and viewpoint-based restrictions, explaining that the former "must satisfy strict scrutiny," while the latter are simply "prohibited." *Id.* at 1885.

Decisions like these have led some scholars to conclude that modern cases "establish a *per se* rule making the punishment of speech flatly unconstitutional if the penalty is based on the offensiveness or undesirability of the viewpoint expressed." Maura Douglas, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 728 n.9 (2018) (cleaned up) (quoting RODNEY A. SMOLLA, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 4:8 (2017)). As a result, "there can be *no* exceptions to the constitutional bar of viewpoint-based regulations." *Id.* at 728 (cleaned up) (quoting Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 109 (2007)). Even scholars who disagree and argue that "there is no per se rule of unconstitutionality for viewpoint discrimination" are forced to acknowledge that, "in recent Supreme Court cases," the Court has "taken the view that in a public forum viewpoint discrimination is absolutely prohibited." R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 402 (2019).

Then-Professor Elena Kagan once explained these positions as two sides of the same coin: "It is not so much that the Court formally uses two different standards for subject matter and viewpoint regulation; in most contexts, a strict scrutiny standard applies to content-based action of all kinds." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 444 (1996). "But the Court, when reviewing *subject-matter* restrictions, either may apply a purportedly strict standard less than strictly or may disdain to recognize the law as content based at all." *Id.* (emphasis added). "By contrast, the Court *almost always* rigorously reviews and then *invalidates* regulations based on viewpoint." *Id.* (emphasis added).

"Given [this] difficulty [in] meeting the strict scrutiny test, particularly for cases of viewpoint discrimination," the Court's occasional phrasing of the doctrine "in more absolutist terms" makes sense. Kelso, *supra*, at 402. "However, this anomaly makes little difference in practice, since the Court has *never* found strict scrutiny satisfied in a public forum, viewpoint discrimination case." *Id.* (emphasis added). "In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). The City of Tampa's counseling ban is viewpoint discriminatory on its face and in practice, and that reality is dispositive.

B. By banning speech that expresses a disfavored view, the counseling ban discriminates based on viewpoint.

Viewpoint discrimination exists "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. Put differently, the "government violates the First Amendment" when it silences a speaker "solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). A law that "reflects the Government's disapproval of a subset of messages it finds offensive" is the "essence of viewpoint discrimination." *Matal v. Tam*, 582 U.S. __ , 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring).

Here, the City prohibits "any counseling, practice or treatment" of minors performed from a particular viewpoint: the client's "goal of changing [their] sexual orientation or gender identity." TAMPA, FLA., CODE OF ORDINANCES § 14-311 (2019). At the same time, the City allows "counseling that provides *support* and *assistance* to a person undergoing gender transition or counseling that provides *acceptance*, *support*, and *understanding* of a person . . . as long as such counseling does not seek to change sexual orientation or gender identity." *Id.* (emphasis added).

In other words, while sexual orientation and gender identity are "otherwise includible subject[s]" for discussion, counselors who believe clients can make informed, healthy decisions to work to change their sexual orientation or gender identity may not espouse that point of view

through their counseling. *Cornelius*, 473 U.S. at 806.[2] Counselors who believe the opposite—that their clients' sexual orientation or gender identity should be accepted, supported, and affirmed regardless of the goals those clients set for themselves—are free to espouse that viewpoint. Under the First Amendment, the City "has no such authority to license one side of [the] debate" to counsel consistently with its beliefs, "while requiring the other" to shut up or shut down. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

This Court's decision in *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011), supports that conclusion, even though the City relied on it in its briefing below. Def.'s Mot. for Summ. J. at 14–15, ECF No. 189. In *Keeton*, this Court rejected a counseling student's claim that university officials had discriminated against her based on her personal religious views on homosexuality. *Id.* at 872. Disagreeing, this Court accepted the district court's finding that the university had taken remedial action because the student had "expressed an intent to impose her personal religious views on her clients, in violation of the ACA Code of Ethics." *Id.*

[2] The City has argued that counselors still can "express [] their viewpoint *on* conversion therapy, sexual orientation, and gender identity," so long as the only counseling they provide affirms and supports the client's same-sex attractions and gender identity. Def.'s Resp. in Opp. to Mot. for Summ. J. at 17, ECF No. 198 (emphasis added). But this "protection" would be "empty, for the government could require [counselors] to affirm in one breath that which they deny in the next." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 (1986) (plurality).

That code required counselors to "support their [clients'] autonomy" and to "help them pursue their own goals." *Id.* at 874. Similarly, the curriculum required "all students not [to] impose their personal religious values on their clients, whether, for instance, they believe[d] that persons ought to be Christians rather than Muslims, Jews or atheists, or that homosexuality is moral or immoral." *Id.* Under those circumstances, this Court held that the university's "requirement that counselors not impose their values on clients," was "justified without reference to the content or viewpoint of the regulated speech." *Id.* (cleaned up).

The opposite is true here. Vazzo has no interest in imposing his personal views on clients. To the contrary, he "does not begin counseling with any predetermined goals other than those that the clients themselves identify and set," nor would he "engage in any counseling unless the client desires . . . and voluntarily consents to it." Vazzo's Br. at 8–9. Thus, the City is *not* merely enforcing a "requirement that counselors not impose their values on clients." *Keeton*, 664 F.3d at 874.

Instead, the City is imposing *its own* values on Vazzo's clients. And those values are one-sided: working toward a "goal of changing [one's] sexual orientation or gender identity" is prohibited—but "undergoing gender transition" *consistent with* one's gender identity merits "support and assistance." TAMPA CODE § 14-311. Counseling that provides "acceptance, support, and understanding" is allowed, but only if it "does not seek to change sexual orientation or gender identity." *Id.*

In other words, the City thinks it knows best when it comes to the goals a client should be allowed to set and pursue when dealing with important, personal issues like sexual orientation and gender identity. But the "point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *R.A.V.*, 505 U.S. at 392. Counselors help clients "make deeply personal decisions, and their candor is crucial." *Wollschlaeger*, 848 F.3d at 1328 (W. Pryor, J., concurring). "If anything," the counselor-client "relationship provides more justification for free speech, not less." *Id.*

All professionals, counselors included, "might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *NIFLA*, 138 S. Ct. at 2374–75. But "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and the people lose when the government is the one deciding which ideas should prevail." *Id.* at 2375 (cleaned up).

In short, the City's counseling ban is viewpoint-based because it allows a counselor to affirm a client's self-defined goals if they support a same-sex attraction or a gender identity *different than* the client's biological sex—while prohibiting the same counselor from affirming a different client's self-defined goals of reducing or eliminating same-sex attractions or pursuing a gender identity *consistent with* the client's biological sex. Whether on a *per se* basis or under strict scrutiny, Tampa's viewpoint-based ordinance is unconstitutional and must be struck down.

II. The counseling ban also is so vague that it violates Vazzo's due process right to know what speech is forbidden.

As Vazzo argued in the district court, the City's counseling ban is unconstitutional for a second reason: it "forces both those enforcing [it] and mental health professionals to guess at its meaning and differ as to its application." Pl.'s Mot. for Prelim. Inj. at 21, ECF No. 85. Thus, it is unconstitutionally vague. *Id.*; Pl.'s Mot. for Summ. J. at 21, ECF No. 194.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws violate the Due Process Clause in two ways. First, they deny citizens their right "to be informed as to what the State commands or forbids." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (cleaned up). Second, vague laws "may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Courts are especially concerned about vagueness when First Amendment rights are at stake because the "very existence" of vague restrictions can cause people "to refrain from engaging in constitutionally protected speech or expression." *Young v. Am. Mini Theaters*, 427 U.S. 50, 60 (1976). "Vague laws force potential speakers to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked, thus silencing more speech than intended." *Wollschlaeger*, 848 F.3d at 1320 (cleaned up). "Content-based regulations thus require a more stringent vagueness test." *Id.* (cleaned up). "Because

First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963).

The counseling ban fails that "more stringent" test. *Wollschlaeger*, 848 F.3d at 1320. Indeed, the ordinance has all the hallmarks of the "incomprehensibly vague" law the Court struck down in *Wollschlaeger*. 848 F.3d at 1319. There, this Court issued two separate majority opinions invalidating various provisions of a state statute that restricted speech "by doctors and medical professionals on the subject of firearm ownership." *Id.* at 1300. In its first opinion, the Court held that several provisions violated the First Amendment, expressing "serious doubts" about the "dubious constitutional enterprise" of "characterizing speech as conduct." *Id.* at 1309. That opinion rebuts the City's attempt to defend the counseling ban on its theory that it is regulating professional conduct. *See* Freedom of Conscience Defense Fund Br. as *Amicus Curiae* at 11–13.

The Court's second opinion, though, proves the City's counseling ban "also suffers from a second constitutional infirmity." *Wollschlaeger*, 848 F.3d at 1319. Florida's statute prohibited doctors from "unnecessarily harassing" their patients about firearm ownership. *Id.* But the state legislature had failed to define that phrase, so reasonable doctors were "thus left guessing" as to when their conversations crossed the line. *Id.* And "wrong guesses" yielded "severe consequences" under the statute, including disciplinary actions and possible fines. *Id.*

Specifically, it was "not clear whether what [was] 'unnecessary' [was] to be measured from the point of view of the doctor or the patient." *Id.* at 1321. "If the former," the Court wondered, "how is a doctor to know when the advice has become 'unnecessarily' harassing?" *Id.* And "how is a doctor to predict his patients' individual intolerances for hearing firearm-safety advice?" *Id.* at 1321–22. "These difficulties illuminate[d] the vagueness problem" before the Court. *Id.* at 1322. "Who is to know—and who is to decide—when good-faith persistence devolves into unnecessary harassment?" *Id.* "Without further guidance, doctors [were] left in the dark." *Id.* And "the risk of constitutional injury [was] simply too great." *Id.* at 1323. The same is true here.

The City's counseling ban prohibits "any counseling, practice or treatment [of minors] performed with the goal of changing an individual's sexual orientation or gender identity." TAMPA CODE § 14-311. But it does not define "sexual orientation" or "gender identity," making it impossible for counselors to know what "changing" either one might include. *Id.* Even the City's lawyer *tasked with enforcing* the ban could not define the term "gender identity" in the ordinance. Vazzo's Br. at 32.[3]

[3] The lawyer's confusion is not surprising: "gender identity" can mean many things, including identifying with the opposite sex, with both sexes, with neither sex, or with one sex while presenting as another sex. *See generally* Am. Psychological Ass'n, *Transgender People, Gender Identity and Gender Expression*, www.apa.org/topics/lgbt/transgender; Am. Psychiatric Ass'n DSM-5 451.

Thus, reasonable counselors are "left guessing" as to when their conversations with their clients cross the line. *Wollschlaeger*, 848 F.3d at 1319. And "wrong guesses" yield "severe consequences," *id.*, including a $1,000 fine for the first offense and $5,000 fines for each additional violation, TAMPA CODE § 14-313.

For example, if a client shares that he is only attracted to people of the same sex during one session, but then in a later session confides that more recently he has only felt attracted to people of the opposite sex, what is a counselor to do? May he affirm the client's heterosexual attractions? Or must he insist that the client is homosexual to avoid affirming a change in sexual orientation? May he suggest the client may be bisexual? Or would that, too, mean affirming a change in sexual orientation?

Similarly, what may a counselor say if a biologically male client expresses a belief that the client's gender identity is female because the client is attracted to men? May the counselor suggest that perhaps the client just has a homosexual orientation? Or would that violate the ban on counseling "with the goal of changing," TAMPA CODE § 14-311, the client's orientation or gender identity? "Without further guidance, [counselors] are left in the dark." *Wollschlaeger*, 848 F.3d at 1322.

Like the statute in *Wollschlaeger*, the counseling ban also is "not clear whether" its prohibition is "to be measured from the point of view of the [counselor] or the [client]." 848 F.3d at 1321. The ordinance bans counseling "with the goal of changing an individual's sexual orientation

or gender identity." TAMPA CODE § 14-311. But whose goal? If the client's, as it should be, "how is a [counselor] to know" when the client has set goals that run afoul of the ordinance? *Wollschlaeger*, 848 F.3d at 1321. And "how is [he] to predict his [clients'] individual" interpretations of the many conversations that occur during counseling? *Id.*

"In this quintessential First Amendment area, the State may not hinge liability on [phrases] so ambiguous in nature." *Id.* at 1323. "And it most certainly may not do so when devastating consequences attach to potential violations." *Id.* Counselors "can choose silence and self-censorship," or they can "proceed with their speech and potentially face punishment according to the arbitrary whims" of enforcement officials who are "wholly unrestrained by clear . . . guidelines." *Id.* "Because of the [counseling ban's] undeniable ambiguity, the risk of constitutional injury is simply too great." *Id.* For this additional reason, then, the ban violates "the command of the First Amendment." *Id.* This Court should affirm.

CONCLUSION

"If 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 or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. And any time the government regulates speech, it must do so "with narrow specificity," *Button*, 371 U.S. at 433, to avoid "silencing more speech than intended," *Wollschlaeger*, 848 F.3d at 1320.

The City's counseling ban is unconstitutionally viewpoint-based and impermissibly vague. The Court should affirm the district court's decision on either of these grounds.

Respectfully submitted,

Dated: March 5, 2020 By: */s/ John J. Bursch*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,720 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f)

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Dated: March 5, 2020 By: */s/ John J. Bursch*
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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, a true and accurate copy of this brief was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to all parties and counsel of record.

I further certify mailing 7 paper copies of the brief to the Clerk of Court via the United States Postal Service (USPS).

Dated: March 5, 2020 By: */s/ John J. Bursch*
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