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

REPLY 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 Jung, United States District Court Judge for the Middle District of Florida, Tampa Division

Magistrate Judge Amanda 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

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Robert V. Williams, Counsel for Appellant

Dana L. Robbins, Counsel for Appellant

Liberty Counsel, Inc., Counsel for Appellee

Horatio Mihet, Counsel for Appellees

Roger Gannam, Counsel for Appellees

Daniel Schmid, Counsel for Appellees

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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

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Southern Poverty Law Center, Counsel for Amicus Curiae Equality Florida

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The Alliance for Therapeutic Choice and Scientific Integrity, Amicus Curiae

Max R. Price, Counsel for Amicus Curiae The Alliance for Therapeutic Choice and Scientific Integrity

Freedom of Conscience Defense Fund, Amicus Curiae

Charles S. LiMandri, counsel for Amicus Curiae Freedom of Conscience Defense Fund

J. Michael Lindell, counsel for Amicus Curiae Freedom of Conscience Defense Fund

Florida State Senators/Representatives, Amicus Curiae:

a. Ben Albritton
b. Dennis Baxley
c. Doug Broxson
d. Kelli Stargel
e. Byron Donalds
f. Brett Hage
g. Stan McClain
h. Scott Plakon
i. Spencer Roach
j. Anthony Sabatini
k. Clay Yarborough

Stephen M. Crampton, counsel for Amicus Curiae State Senators/Representatives

Mary E. McAlister, counsel for Amicus Curiae State Senators/Representatives

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.

/s/ David E. Harvey
David E. Harvey
Attorney for Defendant-Appellant

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ARGUMENT

I. PLAINTIFFS' VERSION OF 'FACTS' IS A MISLEADING PORTRAYAL OF CONVERSION THERAPY

Given that Plaintiffs devote 27 pages of their Answer Brief to a resuscitation of so-called "Facts" (*see Answer Brief, pp. 6-32*), the City feels compelled to briefly address the narrative that Plaintiffs seek to present therein. While Plaintiffs seek to portray their counseling as neutral and client-driven, the reality is quite different.

Plaintiffs assert that the term 'conversion therapy' is a derisive moniker *(see Answer Brief, p. 1)*, but provide no reason for their taking offense to the label. Presumably, Plaintiffs do not dispute that the aim of the practice is to change (i.e., convert) their clients' sexual orientation: indeed, their preferred term—SOCE—is an acronym for 'sexual orientation change efforts.' *See Answer Brief, p. 7.* And, plainly, their desired change is a one-way street that travels only from gay to straight. Only that path arrives at Plaintiffs' desired destination—a cure for the 'disease' of homosexuality. And in Vazzo's view, the condition is not a trivial one: he puts individuals with same-sex attractions in the same category as pedophiles. *See Doc. 78, ¶102* ("Vazzo specializes in SOCE counseling, including the areas of unwanted same-sex attractions, pedophilia, hebephilia, ephebophilia, and tranvestic fetishism."). *See also id., ¶132* (describing gay people as sexually "challenged."). In fact, while taking offense to the term 'conversion therapy,' Plaintiffs' Complaint

endorses "authentic Reparative Therapy,"[1] which they acknowledge is a form of SOCE counseling. *See Doc. 78, ¶¶119-20.*

Conversion therapists like Vazzo attempt to change their gay clients because they view homosexuality as a deviancy that is caused by childhood trauma. *See Doc. 78, ¶¶116, 138.* This view is exemplified in the amicus brief filed in support of Plaintiffs by the Alliance for Therapeutic Choice and Scientific Integrity ("ATCSI"). ATCSI's brief boasts about the 'success stories' of three separate fifteen year-old boys who supposedly eliminated their same-sex attractions after undergoing "change-allowing counseling" which addressed the boys' strained relationships with their fathers. *See ATCSI Brief (filed March 3, 2020), pp. 14-27* ("[John Doe 1's] father had a difficult time conveying his love and support outwardly or expressing it verbally to John Doe 1"; "When he was a younger child, his father was not very involved in [John Doe 2's] life"; "John Doe 2's counselor explained that his lack of positive attention from his father and a desire to fit in with the women in his house were possibly the root causes of his unwanted same-sex attractions."; "John Doe 4 and his father did not have a very good relationship when he was growing up and did not develop a natural father-son bond."). Plaintiff's First Amended Complaint

[1] The portions of Plaintiffs' First Amended Complaint referencing 'Reparative Therapy' mention Dr. Joseph Nicolosi. *See Doc. 78, ¶¶119-121.* Dr. Nicolosi's website—which states that homosexuality "is an adaptation to trauma" and that "our bodies have made us for heterosexuality"—indicates that 'Reparative Therapy' is a registered trademark. *See www.josephnicolosi.com (last visited Mar. 18, 2020).*

likewise suggests that same-sex attractions are the result of "emotional and/or sexual abuse during childhood" or poor father-son relationships. *See Doc. 78, ¶¶116, 138.*

In their Answer Brief, Plaintiffs state that:

> Vazzo has never received any complaint or report of harm from any of his clients seeking and receiving SOCE counseling, including the many minors that he has counseled. In fact, all of Vazzo's clients who have engaged in SOCE counseling for at least one year have experienced some degree of positive change with respect to their unwanted same-sex attractions, behaviors, or identity.

Answer Brief, p. 9. The juxtaposition of these two sentences makes clear that, in Plaintiffs' view, the only possible harm to a minor undergoing SOCE would be if the minor was not able to repress his/her homosexual feelings. Conversely, partial or complete repression is deemed a "positive change." With respect to his long-term patients, Vazzo's claimed 100% 'success rate' means that all such clients ended up claiming to have been fully or partially "cured" of their homosexuality.

Plaintiffs devote several pages of their brief to discussion of the American Psychological Association's ("APA") view on conversion therapy, and suggest that Vazzo's practice is not inconsistent with the APA's position. *See Answer Brief, pp. 13-29.* Were that the case, Plaintiffs presumably would not have any objection to the Ordinance. The APA has concluded that "the appropriate application of affirmative therapeutic interventions for those who seek SOCE involves therapist ***acceptance, support, and understanding*** of clients and the facilitation of clients' active ***coping, social support, and identity exploration and development***..." Doc.

134-17 at p. 7 (emphasis added). Accordingly, the City's Ordinance explicitly allows "counseling that provides ***acceptance, support, and understanding*** of a person or facilitates a person's ***coping, social support, and development***..." Answer Brief, pp. 6-7 (citing Ordinance).

In other words, if the true aim of Vazzo's therapy was—as he claims—"to help clients understand and identify their anxieties or confusion regarding their attractions or identities," and to help parents "work on loving and accepting their child," (*see Answer Brief, p. 8*), the Ordinance would not preclude him from doing so.

Of course, contrary to Plaintiff's insinuation to the contrary, the APA, along with numerous other organizations in the field, has condemned the practice of conversion therapy. In this vein, the City commends to this Court the amicus brief filed in this matter by Equality Florida (filed on Dec. 27, 2019).

II. THE CITY'S ORDINANCE IS NOT IMPLIEDLY PREEMPTED TO THE STATE

In arguing that the Ordinance is impliedly preempted, Plaintiffs—like the district court—emphasize the Florida Supreme Court's decision in *D'Agastino v City of Miami,* 220 So.3d 410 (Fla. 2017). Relying on *D'Agastino*, Plaintiffs assert that Florida courts "readily invoke[]" the doctrine of implied preemption, and that when doing so, the impliedly preempted field need not be narrowly defined. *Answer Brief, p. 36.* To the contrary, Florida courts have recognized that implied preemption is

"severely restricted and strongly disfavored," *Exile v. Miami-Dade County*, 35 So.3d 118, 119 (Fla. 3d DCA 2010), and should be construed narrowly…" *D'Agastino*, 220 So.3d at 429 (J. Pariente, 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 Tallahassee Memorial Regional Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So.2d 826, 831 (Fla. 1st DCA 1996) ("The scope of [implied] preemption should also be limited to ***the specific area*** where the Legislature has expressed their will to be the sole regulator.") (emphasis added).

Indeed, the court's language in *D'Agastino* plainly refutes Plaintiffs' portrayal of the decision as supporting a broad and sweeping view of implied preemption. 220 So.3d at 427 ("the limited nature of our holding"; "our holding today is merely that…"); *id.* at 428 ("I concur because the majority opinion is narrowly written to find only one portion of the CIP ordinance preempted...") (Pariente, J., concurring).

Thus, while the plaintiff police officer in *D'Agastino* asserted that the preempted field was "the investigation of all complaints against law enforcement officers" (*id.* at 423), the court determined that a "much more narrow" field—specifically, "disciplinary investigations"—was the appropriately defined field. *Id.* at 423. In explaining its rationale for such decision, the Court listed the numerous references in the text of the relevant statute to "disciplinary action." *Id.* at 423-24 (citing to *Florida Statutes* §§112.532(1), 112.532(4)(a), 112.532(6), 112.533(2)(a),

and 112.535). Thus, *D'Agastino* simply does not support the view that "the entire field of regulating the practices and discipline of Florida-licensed counseling professionals is impliedly preempted to the state." *Answer Brief, p. 33.*

Likewise, and as noted in the City's initial brief, the text of the statutory authorities relied on by the district court repeatedly references 'licensing.' *See Initial Brief of Defendant-Appellant ("Initial Brief"), pp. 13-17.* Tellingly, the references included in Plaintiffs' Answer Brief do likewise. *See Answer Brief, p. 40* ("Section 491.005 imposes ***licensure requirements*** for clinical social work, marriage and family therapy, and mental health professionals…"); p. 41 ("For example, §64B4-3.003 specifies the respective "theory and practice" ***licensure examinations*** to be administered…"); p. 42 ("Section 64B4-3.0035 additionally specifies how the three types of professionals 'shall demonstrate knowledge of the laws and rules ***for licensure***.'").

In addition to *D'Agastino*, Plaintiffs seek to rely on *Classy Cycles, Inc. v. Bay Cnty.*, 201 So.3d 779 (Fla. 1st DCA 2016) ("Classy Cycles I"). *See Answer Brief, p. 45.* But *Classy Cycles I* involved Florida Statute §316.007, which expressly provides that "no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized." 210 So.2d at 785. Notably, the Florida legislature did not include any such provision in any of the statutory sections referenced by Plaintiffs or the district court.

Three years after deciding *Classy Cycles I*, the same court issued its decision in *Classy Cycles, Inc. v. Panama City Beach*, 2019 WL 5945495 (Fla. 1st DCA Nov. 13, 2019) ("Classy Cycles II"). *Classy Cycles II* involved a challenge to two city ordinances that prohibited motorized scooters. 12019 WL 5945495, *1. Rejecting the assertion that the ordinances were preempted by state law, the court held that the city "ha[d] the right to restrict a business from operating within the city when the undisputed facts demonstrate[d] that ***the restriction [was] for the safety of the city's citizens***…" *Id.* at *1 (emphasis added). The court went on to state:

> The trial court in this case found that the holding in *Classy Cycles* [*I*] was inapplicable because the ordinances at issue here do not address the actual operation of motor vehicles or disturb the uniformity of Florida's traffic laws. We agree with the trial court.

Id. at *6.

In support of its assertion that "Tampa's ordinance is an attempt to regulate in an area well-covered by existing statutes," Plaintiffs recite the district court's view that "the Florida statutes already provide the City with its desired protection against SOCE." *Answer Brief, pp. 45-46 (citing R-213 at 34-35).* Of course, the entire reason that Plaintiffs have challenged the Ordinance is because they recognize that the Ordinance is the only impediment to their resuming the dangerous practice of conversion therapy on minors and/or referring minors to such practitioners.

III. THE ORDINANCE IS NOT UNCONSTITUTIONAL UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

As noted by Plaintiffs, the district court did not rule on Plaintiff's First Amendment claims. *See Answer Brief, p. 57.* Nonetheless, Plaintiffs suggest that this Court can base its decision on freedom of speech grounds. *Id.* (citing *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1303 (11th Cir. 2007)). To the extent the Court is inclined to do so, the City refers the Court to the City's prior briefing on this issue.

To be sure, the First Amendment protects all views, and those who consider homosexuality as an evil to be eradicated have the right to express such view, just as those who are convinced the Earth is flat do. Indeed, the Supreme Court has specifically held that the First Amendment protects those who wish to express the sentiment that "God Hates Fags" or "Fags Doom Nations." *See Snyder v. Phelps*, 562 U.S. 443, 454, 131 S.Ct. 1207, 1216 (2011).

Significantly, Tampa's Ordinance does not say otherwise. The Ordinance does not prevent Plaintiffs from screaming from the rooftops that homosexuality is immoral and that conversion therapy is the only path towards salvation. The Ordinance does not even prohibit therapists like Vazzo from expressing their views on homosexuality and/or conversion therapy to their clients. The Ordinance only prohibits providers from attempting to change a minor's sexual orientation or gender identity, a practice which the City deems dangerous. As the City has previously

noted, Plaintiffs have conceded that therapy provided to a minor can be regulated where it poses a risk of serious harm to the minor, even when such therapy is rendered solely through speech. *See Initial Brief, pp. 25-26 (citing Doc. 226, 79:18-80:6).*

CONCLUSION

The district 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 March 18, 2020.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 2,002 words.
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DATED March 18, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed the foregoing 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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