

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:18-CV-80771-RLR

ROBERT W. OTTO, PH.D. LMFT,
individually and on behalf of his patients,
JULIE H. HAMILTON, PH.D., LMFT.
individually and on behalf of her patients,

Plaintiffs,

vs.

CITY OF BOCA RATON, FLORIDA,
and COUNTY OF PALM BEACH,
FLORIDA

Defendants.

_____ /

**DEFENDANT, CITY OF BOCA RATON'S MOTION TO
DISMISS AND INCORPORATED MEMORANDUM OF LAW**

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), Defendant, City of Boca Raton (“City”), moves for entry of an order dismissing the Amended Complaint [ECF No. 182] (the “Complaint”), filed by Plaintiffs, Robert W. Otto (“Otto”) and Julie H. Hamilton (“Hamilton”) (collectively, “Plaintiffs”) and submits its Memorandum of Law in support of its Motion.

OVERVIEW

On October 10, 2017, the City passed Ordinance No. 5407 (“Ordinance”), which prohibited Sexual Orientation Change Efforts (“SOCE”)—treatment performed with the goal of changing an individual’s sexual orientation or gender identity—on minors within City limits. *See* Ordinance, ECF No. 182-1, 6:10-14.^{1 2} The Ordinance:

[did] not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders.

Id. at 4:21-24. Clergy and other religious leaders, moreover, were exempt from the Ordinance and were allowed to provide guidance and counseling to minors, so long as it was not performed under the guise of licensed mental health therapy. *Id.* at 6:26-7:3.

Defendant, Palm Beach County (“County”) passed a similar (albeit, not identical) ordinance. *See* ECF No. 182-2.

After the Eleventh Circuit reversed this Court’s order denying a preliminary injunction and denied the defendants’ motion for rehearing *en banc* on July 20, 2022, the City repealed the Ordinance on an emergency basis on August 5, 2022, ECF No. 182, ¶ 59, and permanently repealed the Ordinance on August 23, 2022. ECF No. 182, ¶ 71.

The Complaint alleges that the Plaintiffs are licensed marriage and family therapists who provide SOCE to minors. Complaint, ECF No. 182, ¶¶ 166; 170; 184; 186.³ Plaintiffs have “sincerely held religious beliefs that same-sex sexual attractions, behaviors, or identity are wrong.” Compl., ¶ 339.

¹ When considering a motion to dismiss, courts should examine “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice[.]” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

² Hereinafter cited as “Ordinance, page: line.”

³ Hereinafter cited as “Compl., ¶ __.”

The Complaint asserts the same causes of action against both the City and the County, as follows: Count I, violation of freedom of speech under the First Amendment; Count II, violation of Plaintiffs' clients' right to receive information under the First Amendment; Count III, violation of Plaintiffs' freedom of religion under the First Amendment; Count IV, violation of Florida's constitutional right to free speech; Count V, violation of Florida's constitutional right to freedom of religion; Count VI, the Ordinance was *ultra vires* because the Ordinance is preempted under Article VIII, Sections 1(g) and 2(b), Florida Const.; Count VII, violation of the Florida Patient's Bill of Rights and Responsibilities; Count VIII, violation of the Florida Religious Freedom Restoration Act, § 761.01, Fla. Stat., *et seq.*; and Count IX, conspiracy to violate civil rights, 42 U.S.C. § 1985(3).

The City moves to dismiss the Complaint both based on a lack of standing, pursuant to Fed. R. Civ. P. 12(b)(1), and based upon the failure of the Complaint to state a claim, Fed. R. Civ. P. 12(b)(6). With regard to standing, Hamilton individually lacks standing to sue the City. In addition, Plaintiffs lack standing to assert the rights of third-parties as alleged in Count II.

Plaintiffs' constitutional claims in Counts I-V, moreover, fail to state claims upon which relief can be granted. At the outset, the Complaint fails to meet the well-settled pleading requirements of Rule 8, Fed. R. Civ. P. If they seek recovery through 42 U.S.C. § 1983, the Complaint fails to meet the strict pleading requirements applicable to such actions. Plaintiffs' prayer for relief is improper and seeks damages that are not available remedies to Plaintiffs' alleged constitutional violations. If those claims seek direct compensation for alleged violations of the Constitution, they fail as a matter of law. Substantively, based upon the applicable standard of review, the Ordinance withstands First Amendment scrutiny on its face.

Count VI fails because the Ordinance is neither expressly nor impliedly preempted by Florida state law. The Florida Patient Bill of Rights, Count VII, does not provide Plaintiffs with a cause of action, and this claim must, therefore, be dismissed. Count VIII, a claim pursuant to Florida's Religious Freedom Restoration Act, fails to meet the pleading standard required to state a claim. Count IX fails to identify a proper identifiable class or invidious discrimination, allegations required to properly state a conspiracy claim. Finally, the City's repeal of the Ordinance renders moot the Complaint's request for entry of a permanent injunction, and that request should therefore also be dismissed.

MEMORANDUM OF LAW⁴

I. HAMILTON LACKS STANDING TO SUE THE CITY.

Article III, § 2 of the U.S. Constitution provides that a federal court may only decide a “case” or “controversy.” Art. III, § 2, U.S. Const.; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). In other words, a plaintiff must present a justiciable question to be properly before a federal court. Standing presents a threshold jurisdictional question -- whether a court may consider the merits of a dispute. *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006) (*citing Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005); *Nat’l Adver. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005)). Because a federal court does not have jurisdiction over a matter if the plaintiff lacks standing, questions of justiciability are properly brought pursuant to Fed. R. Civ. P. 12(b)(1). It is, therefore, a plaintiff’s burden to satisfy three constitutional prerequisites of standing: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61.

The Complaint challenges the validity of two separate (and now repealed) ordinances, promulgated by two different governmental entities (Palm Beach County, the “County,” and the City), both of which prohibited Sexual Orientation Change Efforts (“SOCE”) for minors—(1) the City’s Ordinance, which was applicable only within City limits [ECF No. 1-4]; and (2) the County’s ordinance [ECF No. 1-5], which was applicable throughout the County, unless a municipality within the County had “adopted an ordinance in conflict.” ECF No. 1-5, 6:6-8. While Otto alleges that he maintains a counseling practice in the City (Compl., ¶ 169), Hamilton makes no such claim. Rather, she merely alleges that she practices therapy “in Palm Beach County.” Compl., ¶ 184. In fact, Hamilton’s factual allegations regarding the cause of her alleged injuries address only the County’s ordinance and not the (City’s) Ordinance (Compl., ¶¶ 199-205).⁵ Accordingly, the Complaint fails to allege any causal connection between the Ordinance and

⁴ The relevant facts are derived from the Complaint, and for the purposes of this Motion only, are accepted as true.

⁵ The Complaint contains comingled allegations (in ¶¶ 202-225) contending that Hamilton and Otto were affected by the City Ordinance and the County’s ordinance. Because the only *specific, factual* allegation that Hamilton makes is that the cause of her alleged injuries is only the County’s ordinance and not the City’s Ordinance, it appears that the comingled allegations contend that *an* ordinance has caused each of the Plaintiffs damages, rather than alleging that *both* ordinances (the City’s and the County’s) have damaged *both* of the Plaintiffs.

Hamilton's alleged injury. *Lujan*, 504 U.S. at 560-61 (requiring a causal connection for Article III standing). To the extent Hamilton asserts claims against the City, she lacks standing to do so, and her claims should be dismissed.

II. COUNT I SHOULD BE DISMISSED BECAUSE THE ORDINANCE PROPERLY REGULATES CONDUCT, RATHER THAN SPEECH, AND IS OTHERWISE CONSISTENT WITH FREE SPEECH UNDER THE FIRST AMENDMENT.

The City acknowledges that this contention has been rejected by the Eleventh Circuit. The City reasserts its arguments here in order to avoid waiver.

III. COUNT II SHOULD BE DISMISSED BECAUSE OTTO AND HAMILTON LACK THIRD-PARTY STANDING.

Plaintiffs (Otto and Hamilton) allege in Count II that the Ordinance violated their minor clients' "right to receive information" under the First Amendment. However, generally speaking, "[i]t is a well-established tenet of standing that 'a litigant cannot rest a claim to relief on the legal rights or interests of third parties.'" *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 (3d Cir. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Courts will only recognize third-party standing:

provided three important criteria are satisfied: the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.'

Harris v. Evans, 20 F.3d 1118, 1112 (11th Cir. 1994) (quoting *Powers*, 499 U.S. at 411).

Here, the Complaint wholly fails to allege any of the elements necessary to obtain third-party standing. *See* Compl., ¶¶ 222-225; 245-252. A substantive review of the Complaint also reveals that Plaintiffs cannot meet the *Powers* factors. Specifically, there exists no apparent hindrance to the minor clients' ability to seek their own judicial relief. Indeed, no such hindrance is alleged.

Courts have universally rejected therapists' attempts to assert third-party standing when challenging SOCE bans for minors (as the Court should here) because, *inter alia*, the therapist could not meet the third-party standing factor demonstrating that the minor client faces obstacles that would prevent them from pursuing their own claims. *See, e.g., Tingley v. Ferguson*, 47 F.4th 1055, 1069-70 (9th Cir. 2022) (affirming order dismissing therapist's claims on behalf of his minor

clients in SOCE challenge); *Pickup, et al. v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (affirming in part dismissal of SOCE ban lawsuit brought by both therapist and minor children) *abrogated on other grounds by Nat'l Inst. of Family and Life Advoc. v. Becerra*, 138 S. Ct. 2361 (2018), *King v. Christie*, 981 F. Supp. 2d 296, 312 (D.N.J. 2013).

Because minors affected by SOCE regulations have, in fact, filed suit using pseudonyms, therapists' efforts to bring suit on behalf of their minor patients routinely meet with failure. Accordingly, no "obstacles" prevent the minors from exercising their purported rights directly. Because Plaintiffs have not (and cannot) allege a hindrance to their clients' ability to protect their own interests, a requirement for third-party standing, Count II should be dismissed, pursuant to Fed. R. Civ. P. 12(b)(1).⁶

IV. THE COMPLAINT FAILS TO COMPLY WITH THE REQUIREMENTS OF RULE 8, FED. R. CIV. P.

To survive a motion to dismiss, a complaint must contain a short and plain statement of the facts that show the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); *Kyle v. Chapman*, 208 F.3d 940, 944 (11th Cir.2000). A pleading under Rule 8 should give opposing parties fair notice of the nature of the claims and the bases or grounds for it. *Jones v. Moore*, No. 07-21154-CIV, 2008 WL 384557, at *2 (S.D. Fla. Feb. 11, 2008) (citing *Eidson v. Arenas*, 155 F.R.D. 215, 220 (M.D. Fla. 1994)). The Complaint fails to comply with Rule 8 in several respects and should, therefore, be dismissed.

a. Plaintiffs' Allegations Are Insufficient To State A Section 1983 Claim.

The Supreme Court has placed strict limitations on municipal liability under Section 1983. *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1329 (11th Cir. 2003); *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1993). "While Rule 8 allows a Plaintiff considerable leeway in framing its complaint, the Eleventh Circuit has tightened the application of Rule 8 with respect to § 1983 cases in an effort to identify meritless claims." *Jones*, 2008 WL 384557, at *2 (citing *GJR Investments*

⁶ The City also asserts that Plaintiffs fail to meet the first element of third-party standing: injury in fact. The alleged "injury" suffered by the minor clients is their inability to obtain SOCE "information" and "counseling." Compl., ¶¶ 222-224; 246-250. However, since the Ordinance never restricted access to "information" at all, and by its terms could not restrict access to "counseling" or "treatment" from non-therapists (such as religious counselors), no "injury in fact" was suffered by the Plaintiffs' minor clients. *Tingley*, 47 Fed.4th at 1069; *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 155 (3d Cir. 2015) (affirming dismissal of First Amendment complaint by minor children regarding SOCE ban for failure to state a claim).

v. Cnty. of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998) (“Some factual detail in the pleadings is necessary to the adjudication of § 1983 claims.”). A Section 1983 plaintiff must allege with specificity the facts that make out his claim. *See Wilson v. Strong*, 156 F.3d 1131, 1134 (11th Cir. 1998).

In its “invocation of jurisdiction,” the Complaint states that it “is brought pursuant to 42 U.S.C. § 1983.” Compl., ¶ 18. However, reference to this statute is conspicuously absent from the federal claims brought in Counts I, II, and III, which reference only the First Amendment.⁷ In fact, the words “Section 1983” (or § 1983) appear nowhere else in the Complaint other than its “invocation of jurisdiction.” *See Hearth, Inc. v. Dep’t of Public Welfare*, 617 F.2d 381 (5th Cir. 1980) (declining to “assume” plaintiff intended to assert a Section 1983 claim).⁸ Are Counts I, II and III intended to be Section 1983 claims? Or are these merely direct constitutional claims seeking declaratory and injunctive relief? If the latter, Plaintiffs are not entitled to the monetary damages they reference in the catch-all prayer for relief. *See* Compl., pp. 65-67, ¶¶ A-H. These are not mere trivialities, but rather critical questions—the answers to which have significant ramifications for the City’s defenses. Accordingly, the Complaint should be dismissed for failure to comply with Rule 8.

b. The Complaint’s Prayer For Relief Fails To Comply With Rule 8 And Seeks Unavailable Relief.

None of the Complaint’s nine, separate claims contains a separate prayer for relief. Rather, all demands for relief are incorporated into one, conclusory paragraph containing prayers for relief for all nine counts. Compl., ¶¶ A-H. However, Plaintiffs seek remedies (namely, damages) which are unavailable for (at least) some of the causes of action alleged in the Complaint. As noted, *supra*, the Complaint is wholly unclear as to whether Plaintiffs have asserted Section 1983 claims and which, if any, causes of action are intended as such. To the extent, however, Plaintiffs seek recovery for First Amendment violations in Counts I, II, and III, “[t]he First Amendment, standing alone, cannot be interpreted to require the payment of money for its alleged violation” *Johnson v. United States*, 17 F. App’x 964, 966 (Fed. Cir. 2001) (dismissing plaintiffs’ claims).

⁷ Count IX, the only other federal claim advanced in the Complaint, is expressly brought pursuant to 42 U.S.C. § 1985, rather than Section 1983.

⁸ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

This same principle applies to the Florida constitutional claims in Counts IV, V, and VI. “[N]o cause of action exists for money damages for a violation of a state constitutional right.” *Harris v. Jones*, No. 4:14cv454-RH/GRJ, 2015 WL 4668297 (N.D. Fla. Aug. 5, 2015) (citing *Depaola v. Davie*, 872 So. 2d 377, 380 (Fla. 4th DCA 2004); *Bradsheer v. Fla. Dep’t of Hwy Safety and Motor Veh.*, 20 So. 3d 915, 921 (Fla. 1st DCA 2009); *Corn v. Lauderdale Lakes*, 816 F.2d 1514, 1519 (11th Cir. 1987)). Accordingly, the Complaint should be dismissed for failure to request relief which can be granted by this Court, based on the Complaint’s failure to comply with Rule 8 and the “catch-all” prayer for relief.

V. THE COMPLAINT DOES NOT STATE CLAIMS FOR VIOLATION OF THE FREE EXERCISE OF RELIGION CLAUSE IN COUNTS III OR V.

Plaintiffs assert, in Count III, that the City’s Ordinance violated their religious rights under the Free Exercise Clause of the United States Constitution and, in Count V, under Article 1, Section 3 of the Florida Constitution. Florida courts apply the same analysis to Article 1, Section 3 claims as their federal counterpart in determining a law’s constitutionality. *Toca v. State*, 834 So. 2d 204, 207 (Fla. 2d DCA 2002).

Where a law is neutral and generally applicable, it need only satisfy a two-pronged rational basis review under the First Amendment’s Free Exercise Clause. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990); *Keeton v. Anderson-Wiely*, 664 F.3d, 865, 879 (11th Cir. 2011). “The neutrality [prong] asks whether ‘the object of a law is to infringe upon or restrict practices because of their religious motivation.’” *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533 (1993)). “The general applicability prong asks whether the government has ‘in a selective manner impose[d] burdens only on conduct motivated by religious belief.’” *Id.* (quoting *Hialeah*, 508 U.S. at 543).

Here, the City’s (now repealed) Ordinance was neutral because its object was to protect minors, not to restrict counseling *because* of alleged religious motivation. The Ordinance prohibited SOCE by licensed counselors based upon a finding that such therapy can cause significant psychological harm. Ordinance, 6:26-7:3. Indeed, the suggestion that the Ordinance “targeted” religion is belied by the fact that the Ordinance contained a specific exemption for religious counseling. *Id.* The object of the law, therefore, was not to “infringe upon or restrict practices” based on religion, but “to protect the physical and psychological well-being of minors.” *Id.* 6:3-4; *see Keeton*, 664 F.3d at 880 (finding the curriculum requirements neutral because it was adopted to comply with a professional code of ethics). *See also Tingley*, 47 F.4th at 1085 (rejecting

claim that a SOCE on minors ban violated the Free Exercise Clause because, *inter alia*, the law contained an exemption for religious counseling).

Additionally, the Ordinance was one of general applicability, applying to all mental health professionals licensed by the state. Ordinance, 6:21-26; *see Keeton*, 664 F.3d at 880 (noting the curriculum requirement passed muster because, *inter alia*, it was generally applicable to all students in the program). Unlike the religious counselors who were exempt from the Ordinance, the individuals subject to the Ordinance were only those who provide mental health therapy, pursuant to a professional license, not religious guidance or religious counsel. *Id.*; *Keeton*, 664 F.3d at 880 (“In seeking to evade the curricular requirement that she not impose her moral values on clients, [plaintiff] is looking for preferential, not equal, treatment.”); *Tingley*, 47 F.4th at 1088-89 (SOCE on minors ban was of “general applicability,” and accordingly in compliance with the Free Exercise Clause). The Ordinance is, therefore, neutral for purposes of the Free Exercise Clause, as it expressly exempts religious counseling, and generally applicable to all mental health professionals, and Plaintiffs have not stated a claim in Counts III or V under the United States or Florida constitutions.⁹

VI. PLAINTIFFS’ *ULTRA VIRES* CLAIM (COUNT VI) SHOULD BE DISMISSED BECAUSE THE ORDINANCE IS NOT PREEMPTED BY FLORIDA LAW.¹⁰

Plaintiffs claim in Count VI is that the City’s enactment of the Ordinance was *ultra vires* and in violation of Article VIII, § 2(b)¹¹, of the Florida Constitution¹² and § 166.021, Florida Statutes.¹³ Florida is a home rule state, and the Florida Constitution explicitly authorizes municipalities to “exercise any power for municipal purposes except as otherwise provided by Florida law.” Fla. Const. Art. 8 § 2(b). Count VI misunderstands the doctrine of preemption, and

⁹ In addition, insofar as Counts III and V are purported to be brought on behalf of Plaintiffs’ “clients,” those claims should be dismissed on standing grounds. *See* Section II, *supra*.

¹⁰ Plaintiffs use the term “*ultra vires*” apparently as a means of stating that the regulation of professional conduct is “preempted” by Florida law and, thus, beyond the City’s power to legislate.

¹¹ Article VIII, § 2(b) authorizes municipal home rule, allowing municipalities to “exercise any power for municipal purposes except as otherwise provided by law.” Art. VIII, § 2(b), Fla. Const.

¹² Count VI also references Article VIII, § 1(g), Fla. Const., which governs counties operating under county charters and is, thus, inapplicable to the claim against the City.

¹³ Section 166.021, Fla. Stat., recognizes that “the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except . . . [a]ny subject expressly prohibited by the constitution [and] . . . [a]ny subject expressly preempted to state or county government by the constitution or by general law.” § 166.021, Fla. Stat.

the Ordinance is neither expressly or impliedly preempted under any of Plaintiffs' cited authorities (or otherwise).

a. The Ordinance Is Not Expressly Preempted.

One type of constitutional preemption acknowledged in Florida, express preemption, requires a specific legislative statement that cannot be implied or inferred and must be accomplished by clear language from the Florida Legislature stating an intended preemption. *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010); *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006). “[T]he legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act” except “[a]ny subject expressly prohibit by the constitution or “[a]ny subject expressly preempted to state or county government by the constitution or by general law.” § 166.021(3)(b)-(c), Fla. Stat.

Plaintiffs fail to cite any action by the Florida Legislature expressly preempting municipalities from enacting ordinances prohibiting SOCE for minors. To the extent Plaintiffs cite § 491, Title XXXII, Florida Statutes, or Section 64B4-5.001, Florida Administrative Code, as a source of preemption, neither law expressly preempts regulation of mental health professionals by local government.¹⁴ See Compl., ¶ 313; §§ 491.002-16, Fla. Stat.; § 64B4-5.001, Fla. Admin. Code.¹⁵ Accordingly, Florida law does not expressly preempt the Ordinance.¹⁶

b. The Ordinance Was Not Impliedly Preempted.

Implied preemption, on the other hand, occurs when “the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.” *D’Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017); *Browning*, 28 So. 3d at 886. In determining if implied

¹⁴ The Complaint incorrectly refers to “Fla. Admin. Code. Ann r. 64B-5001,” a rule that does not exist. Compl., ¶¶ 313-316. Rather, Section 64B4-5.001 provides the disciplinary guidelines for professionals licensed pursuant to § 491.002, Fla. Stat.

¹⁵ Section 491 merely regulates the licensing scheme for mental health professionals, “establishing minimum qualifications for entering into and remaining in” this field, and Section 64B4-5.001 of Florida’s Administrative Code codifies the disciplinary scheme for violations of Section 491. §§ 491.002-16, Fla. Stat.; § 64B4-5.001, Fla. Admin. Code.

¹⁶ Moreover, Plaintiffs’ passing reference to proposed legislation in the Florida Legislature is merely a red herring. Compl., ¶ 316. Whether the Legislature considered legislation relating to SOCE in the past is of no consequence here, nor is the Florida Legislature the sole regulator of mental health providers in Florida, based on the plain language Chapter 491, Title XXXII, Fla. Stat., as Plaintiffs incorrectly claim in Paragraph 316. Compl., ¶ 316.

preemption applies, the court must look ‘to the provisions of the whole law, and to its object and policy.’” *Browning*, 28 So. 3d at 886 (quoting *State v. Harden*, 938 So. 2d 486, 489 (Fla. 2006)). Findings of implied preemption are generally “disfavored,” and courts “must be careful and mindful in attempting to impute intent to the Legislature to preclude a local elected governing body from exercising its home rule powers.” *D’Agastino*, 220 So. 3d at 421, 423; *see also Exile v. Miami-Dade Cty.*, 35 So. 3d 118, 119 (Fla. 3d DCA 2010) (noting the “severely restricted and strongly disfavored doctrine of implied preemption”); *Randolph v. Family Network on Disabilities of Fla., Inc.*, No. 4:11-cv-555-RS-WCS, 2012 WL 71719 (M.D. Fla. Jan. 10, 2012) (upholding ordinance prohibiting discrimination based on sexual orientation and finding no implied preemption). *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 (“Florida courts are reluctant to conclude that a municipality is preempted from exercising its local powers in the absence of an express exemption, particularly in light of the ease with which the Florida Legislature can expressly preempt a local authority if intended.”) (citations omitted).

Even assuming, *arguendo*, that Plaintiffs’ claim is based on implied preemption (which they fail to specify), under this disfavored doctrine, a plain reading of Chapter 491 clearly shows that the City’s Ordinance is not impliedly preempted by said legislation. The intent of Chapter 491 is merely to “establish[] minimum qualification for entering into and remaining in the respective [mental health] professions”—clearly a licensing regulation detailing the requirements to obtain certain professional titles and specializations. § 491.002, Fla. Stat. The regulation of the types of therapy that a professional, licensed pursuant to Chapter 491, may offer to minors is not referenced in Chapter 491; merely the qualifications to provide such therapies. Thus, municipal regulation of SOCE for minors is clearly not an implied area of preemption. To wit, the Supreme Court has recognized that “the regulation of health and safety matters is primarily, and historically, a matter of local concern.” *Hillsborough Cty. v. Automated Med Labs Inc.*, 471 U.S. 707, 716 (1985) (emphasis in original); *see also Craig v. Boren*, 97 S. Ct. 451, 458 (1976) (“[T]he protection of public health and safety represents an important function of state and local governments.”).

Similarly, Section 456.003, Fla. Stat., which outlines the legislative intent for Florida’s professional regulation statutes, provides that the state may regulate professions for the preservation of health, safety, and welfare of the public when “[t]he public is not effectively protected by other means [such as] local ordinances.” § 456.003(2)(b), Fla. Stat. Both the precedential case law and Florida’s statutes show that municipalities can and should regulate

professions when appropriate, as the City did in the Ordinance. *See, e.g. Classy Cycles, Inc. v. Panama City Beach*, 301 So.3d 1046, 1055 (Fla. 1st DCA 2019) (while the State’s regulation of traffic is pervasive, an “ordinance[] simply regulat[ing] a business that is causing traffic congestion and unsafe congestion” is not impliedly preempted). Because neither the Florida Constitution nor general law addresses SOCE, there is no basis Plaintiffs’ claim that Florida law impliedly preempted the Ordinance.

VII. COUNT VII, THE PATIENT’S BILL OF RIGHTS CLAIM, FAILS TO STATE A CLAIM FOR RELIEF.

In Count VII, the Complaint alleges that the Ordinance violated the Florida Patient’s Bill of Rights and Responsibilities (“FPBRR”), § 381.026, Fla. Stat. However, the FPBRR does not provide a private right of action against the City. § 381.026(3), Fla. Stat. (“This section shall not be used for any purpose in any civil or administrative action and neither expands nor limits any rights or remedies provided under any other law.”) (emphasis added); *Langbehn v. Public Health Trust of Miami-Dade Cty.*, 661 F. Supp. 2d 1326, 1342-43 (S.D. Fla. 2009) (stating plaintiffs’ reliance on the FPBRR in support of their negligence per se claim was misplaced). “Given [the language in Section 381.026(3)], it is apparent [] that the statute is not meant to protect a particular class of people from a particular injury or risk of injury.” *Langbehn*, 611 F. Supp. 2d at 1343. Therefore, Plaintiffs cannot state a claim under the FPBRR because it does not provide them with a private right of action.

Additionally, even if a cause of action under the FPBRR could be found (though it cannot), Plaintiffs’ claim fails because Otto and Hamilton are not “health care providers” as defined by Section 381.026(2)(c), Fla. Stat. Contrary to the allegation that Plaintiffs are “health care practitioners” under the FPBRR (Compl., ¶ 284), the statute defines this term as “a physician licensed under chapter 458, an osteopathic physician licensed under 459, or a podiatric physician licensed under chapter 458.” § 381.026(2)(c), Fla. Stat. The Complaint does not allege that Plaintiffs are one of these licensed physicians. Section 456.41, Fla. Stat. (which sets forth the requirements to provide “complementary or alternative health care treatments”), upon which the Plaintiffs rely, is neither referenced nor otherwise incorporated into the FPBRR. *See Biddle v. Prison Health Servs., Inc.*, No. 09-20391-CIV, 2010 WL 11553188, at *2 (S. D. Fla. March 18, 2010) (stating that because the prison health service is not a “health care provider” as defined by the FPBRR, the plaintiff had no basis to compel disclosure of certain records pursuant to said

statute). Because Plaintiffs are not regulated or otherwise subject to the FPBRR, they cannot state a claim upon which relief may be granted in Count VII.

VIII. COUNT VIII, THE RELIGIOUS FREEDOM RESTORATION ACT CLAIM, SHOULD ALSO BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Count VIII alleges violation of Florida’s Religious Freedom Restoration Act (“RFRA”) Fla. Stat., § 761.01, *et seq.* Under RFRA, courts apply a strict scrutiny standard, as set forth in the statute, requiring an initial showing that the challenged regulation places a “substantial burden” on one’s free exercise of religion. §761.03, Fla. Stat.; *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004) (stating a “substantial burden” is one that “either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires). The Complaint alleges in Count VIII that the Ordinance violates Plaintiffs’ free exercise of religion by preventing their ability “to provide spiritual counsel,” based on their religious beliefs that homosexuality is wrong (despite Plaintiffs’ conflicting allegations that they are providing professional mental health counseling). Compl., ¶¶ 291, 340.

To the extent Plaintiffs seek to provide “spiritual counsel” and exercise their “sincerely held religious beliefs” regarding homosexuality, the plain language of the Ordinance clearly permitted them to do so and, thus, did not impose a substantial burden (or any burden) on their exercise of religion. In fact, the Ordinance clearly did not prevent Plaintiffs “from speaking to the public about SOCE; expressing their views to patients; [or] recommending SOCE to patients”. Ordinance, p. 4. Plaintiffs do not allege, moreover, that their religion requires them to provide professional mental health treatment so as to change a child’s sexual orientation. *See Freeman v. Dep’t of Hwy Safety & Motor Veh.*, 924 So. 2d 48, 56-57 (Fla. 5th DCA 2006) (finding that the DMV’s refusal to provide Muslim woman with an ID unless she removed her veil was not a substantial burden of religion because Islam permits women’s veils to be removed for government photos). Therefore, Plaintiffs fail to allege facts that meet the threshold requirement in Count VIII of showing that the Ordinance places a “substantial burden” on free exercise of religion, under RFRA because the plain language of the Ordinance specifically exempts religious counseling.

IX. COUNT VIII, ALLEGING A CONSPIRACY TO VIOLATE CIVIL RIGHTS, SHOULD ALSO BE DISMISSED.

Count VIII alleges a “conspiracy” to violate Plaintiffs’ civil rights, in violation of 42 U.S.C. Section 1985(3). In order to state such a claim, a complaint must plausibly allege, *inter alia*, that a defendant has conspired “for the purpose of depriving ... any person or class of persons of equal

protection of the laws, or equal privileges and immunities under the laws.” *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). Among the required allegations are that “some racial, or perhaps otherwise class-based, invidiously discriminatory animus” motivated the conspiracy. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 267-68 (1993). The animus standard requires that the defendant proceeded with his course of conduct “because of,” not merely in spite of, its adverse effects upon an identifiable group. *Id.* at 271-272. Thus, a complaint must adequately allege both that: (a) a conspiracy motivated by discriminatory animus against an identifiable class; and (b) that the class discrimination was “invidious.” The Complaint fails to meet this standard, and Count VIII should therefore be dismissed.

a. The Complaint Does Not Contain an Identifiable Class.

The Complaint does not reference an identifiable “class” that was subject to the City’s invidious discrimination, evidenced, in part, by the shifting and inconsistent allegations in the Complaint. At times, the alleged targets of the discrimination are the two Plaintiffs themselves: Otto and Hamilton. *See, e.g.*, Compl., ¶¶ 347 (alleging a conspiracy to deny Plaintiffs, specifically, their constitutional rights). At other times, the purported class subject to discrimination is a subset of “therapists,” or a subset of individuals with “faith.” *See, e.g.*, Compl., ¶ 41 (defendants conspired against “faith-based therapists who perform SOCE counseling”); Compl., ¶ 52 (defendants had animus against “faith-based professional counseling”). At still other times, the class that was allegedly subjected to invidious discrimination is purported to be (all) Christians. *See, e.g.*, Compl., ¶349 (alleging “discriminatory animus toward Plaintiffs’ religion”).

These first attempts at defining an identifiable “class” for purposes of alleging a “conspiracy” to violate Plaintiffs’ civil rights in violation of 42 U.S.C. Section 1985(3), fail as a matter of law. A class of “Plaintiffs” or “therapists who perform SOCE counseling” is simply another way of defining the “class” as “people regulated by the Ordinance.” No such “class” can be recognized:

[The term class] unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with. This definitional ploy would convert the statute into the ‘general federal tort law’ it was the very purpose of the animus requirement to avoid.

Bray, 506 U.S. at 269.

The incendiary claim that the City and others conspired to adopt the Ordinance based upon their animus against “Christians” fails as a matter of pleading¹⁷: there are no facts alleged in the Complaint that would support the contention. As noted above, the Complaint does (at times) make such conclusory allegations, but those contentions are insufficient to avoid dismissal. *See, e.g., Dean v. Warren*, 12 F.4th 1248, 1255-56 (11th Cir. 2021) (affirming dismissal of §1985(3) race-based conspiracy claim because allegation that defendants “engaged in the conspiracy against her because of her race” was an insufficient fact-based allegation); *Gibson-Carter v. Rape Crisis Center*, 2020 WL 2815122, *28 (S.D. Ga. 2020) (dismissing complaint because “the allegations are insufficient to plausibly indicate that the [defendant] or its board members themselves harbored an invidious discriminatory animus such that they conspired amongst themselves ... because [the plaintiff] was African-American). *See also McBride v. Guzina*, 2022 WL 111230, *6 (M.D. Fla. 2022) (In “conspiracy actions, courts have recognized that more than mere conclusory notice pleading is required”).

b. The Complaint Does Not Adequately Allege Invidious Discrimination

The only truly “factual” allegations regarding the City’s motivation in adopting the Ordinance (other than the legislative findings contained in the Ordinance, which belie any invidious discrimination claims) appear in paragraphs 41-52 of the Complaint. Far from showing an invidious animus against a religion, the Complaint affirmatively alleges that the Ordinance was advocated by “a local LGBTQ activist organization” seeking the adoption of local “laws and policies providing equal rights, protections and benefits for the LGBTQ community.” Complaint, ¶ 42. Thus, the Complaint affirmatively belies the unsupported (later) contention that the Ordinance was motivated by animus against Christianity by contending that the Ordinance was instead motivated by a desire to afford “equal rights and protections” for the LGBTQ community.

X. THE REQUEST FOR PERMANENT INJUNCTION SHOULD BE DISMISSED.

Following an evidentiary hearing on Plaintiffs’ motion for preliminary injunction [ECF No. 8], this Court denied said motion. [ECF No. 141]. Plaintiffs appealed, and the Eleventh Circuit reversed the order denying the preliminary injunction. The City (as well as the County) moved

¹⁷ The claim fails as a matter of law as well. The Eleventh Circuit has never “recognized that a religious group may serve as a protected class for purposes of the second element of a § 1985(3) claim.” *Jimenez v. Wize*, 644 Fed.Appx. 868, 874 (11th Cir. 2016).

for rehearing en banc, resulting in the withholding of the Eleventh Circuit's mandate. The Eleventh Circuit ultimately denied the request for rehearing en banc on July 20, 2022. On July 29, 2022, the Eleventh Circuit issued its mandate with instructions to this Court to enter a preliminary injunction enjoining enforcement of the challenged Ordinance consistent with the Eleventh Circuit's opinion. ECF No. 149.

However, on August 5, 2022, the City Council passed an Emergency Ordinance ("Emergency Ordinance"), which repealed the challenged Ordinance. [ECF No. 151] On that same date, the City held the first reading introducing Ordinance No. 5626, a non-emergency ordinance permanently repealing the challenged Ordinance. [ECF No. 153] Ordinance 5626 was finally approved and adopted on August 23, 2022, and the challenged Ordinance has now been fully and finally repealed [ECF No. 169]. Accordingly, no permanent injunction is necessary or should be entered enjoining the enforcement of the now-repealed Ordinance. The request in the Complaint (at p. 65) for a permanent injunction should accordingly be dismissed.

"[T]he Supreme Court has held that the repeal of or amendment to challenged legislation rendered moot a plaintiff's request for injunctive relief." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474 (1990) (holding that a Commerce Clause-based challenge to Florida banking statutes was rendered moot by amendments to the law); *Massachusetts v. Oakes*, 491 U.S. 576, 582–83 (1989) (holding that an overbreadth challenge to a child pornography law was rendered moot by amendment to the statute); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (*per curiam*) (holding that the challenge to a university regulation was moot because the regulation had been substantially amended); *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) (holding moot a constitutional challenge to a state statute governing the involuntary commitment of mentally ill minors, because the law had been replaced with a different statute); *Diffenderfer v. Cent. Baptist Church, Inc.*, 404 U.S. 412, 415 (1972) (holding moot a challenge to a Florida tax exemption for church property when the law had been repealed)). Government actors, moreover "carry a lesser burden than others when they have unambiguously terminated the challenged policy." *Rich v. Sec., Fla. Dep't. of Corr.*, 716 F.3d 525, 531 (11th Cir. 2013). Indeed, "governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities. *Coral Springs St. Sys., Inc.*, 371 F.3d at 1328-29.

The well-settled law recognizes only a limited exception to the mootness of a challenge to a repealed law: “if there is a substantial likelihood that the challenged statutory language will be reenacted.” *Id.* at 1329. No such substantial likelihood exists here (and none is alleged in the Complaint). There is no evidence that the Ordinance, or any challenged aspect thereof, will be reenacted in the future. The repealing Emergency Ordinance specifically sought “to ensure that the [SOCE] Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of [SOCE]),” thus, requiring immediate repeal of the challenged Ordinance. Both the Emergency Ordinance and non-emergency Ordinance No. 5626 contain explicit statements by the City Council that “based upon the decision of the Eleventh Circuit, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful.” *See* Emergency Ordinance, Section 3; Ordinance No. 5626, Section 2.

Indeed, since its enactment on October 10, 2017, the challenged Ordinance was never enforced against Plaintiffs (or any other practitioner of SOCE in the City). Plaintiffs, moreover, cannot meet the requisite elements for an injunction (i.e., a showing of irreparable harm), as the conduct at issue is no longer prohibited. There is simply no law in place the enforcement of which could be enjoined. Similarly, there is no need for a declaration of rights under a law that is no longer in effect. Accordingly, Plaintiffs’ demand for injunctive and declaratory relief is now moot, and the requests should be dismissed. WHEREFORE, because Plaintiffs lack standing and because their causes of action fail to state a claim, the City respectfully requests that the Court dismiss the Complaint and any further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail on November 10, 2022 on all counsel of record on the attached Service List.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 18-CIV-80771-RLR**

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