

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

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,

v.

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

Defendants.

**DEFENDANT, PALM BEACH COUNTY’S MOTION TO DISMISS AMENDED
COMPLAINT AND INCORPORATED MEMORANDUM OF LAW**

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant, Palm Beach County (“County”) moves for entry of an Order dismissing the Amended Complaint [ECF No. 182] filed by Plaintiffs, Robert W. Otto (Otto) and Julie H. Hamilton (Hamilton) (collectively, “Plaintiffs” or “Conversion Therapists”) in its entirety and submits its Memorandum of Law in support of its Motion.

OVERVIEW

Plaintiffs initiated this action to enjoin the County’s enforcement of Palm Beach County Code, Ordinance No. 2017-046, referred to as the “Prohibition of Conversion Therapy on Minors Ordinance.” (“Challenged Ordinance”). [ECF No. 1]. The Challenged Ordinance was passed on December 19, 2017, by the Palm Beach County Board of County Commissioners (PBCBCC), and banned providers from engaging in the practice of seeking to change the sexual orientation or gender identity (“conversion therapy,” “sexual orientation change efforts” or “SOCE”) of a

minor. Defendant the City of Boca Raton (Boca or City) passed a similar (though not identical) ordinance.¹

At the onset of these proceedings, the Plaintiffs moved for the issuance of a preliminary injunction, a request that was denied by this Court following an evidentiary hearing. [ECF No. 141]. Plaintiffs then filed an interlocutory appeal of this Court's Order to the United States District Court of Appeal for the Eleventh Circuit (Eleventh Circuit). On November 20, 2020, the Eleventh Circuit reversed the denial of the request for preliminary injunction, determining that the Challenged Ordinance violated the First Amendment. The Defendants moved for rehearing *en banc*, which was denied by the Eleventh Circuit on July 20, 2022. On 29, 2022, the Eleventh Circuit issued its mandate to this Court with instructions to this Court to enter a preliminary injunction enjoining enforcement of the Challenged Ordinances consistent with its Opinion (Mandate). [ECF No. 149].

Immediately after the Eleventh Circuit's denial of the Defendants' request for a rehearing *en banc*, and heeding the Court's Mandate, the County initiated the process of repealing the Challenged Ordinance. On August 23, 2022, PBCBCC unanimously passed Ordinance No. 2022-020, which permanently repealed the Challenged Ordinance (Repeal Ordinance). [ECF No. 174].² The Repeal Ordinance specifically references the Eleventh Circuit's opinion in *Otto v. City of Boca Raton Florida*, 931 F.3d 854 (11th Cir. 2020), *reh'g en banc den.*, 2022 WL 2824907 (July 20, 2022) and cites the Eleventh Circuit's holding that the Challenged Ordinance was violative of the First Amendment as grounds for the repeal. In the interim, while the County was following the statutorily mandated steps to repeal the Challenged Ordinance, the County Administrator advised

² Likewise, the City of Boca Raton permanently repealed the Challenged City Ordinance on August 23, 2022. [ECF No. 156.]

the Code Enforcement Division of the County's Planning and Zoning Department (which was tasked with enforcing the challenged ordinance) that the Ordinance would be repealed. [ECF No. 165.1].

Notwithstanding the County's permanent repeal of the Challenged Ordinance, on October 28, 2022, Plaintiffs filed their Amended Complaint for Declaratory Relief, a Permanent Injunction, and Damages (Amended Complaint). [ECF No. 182]. The Amended Complaint mirrors the Original Complaint in both the stated causes of action and the requested relief, and seeks to invalidate the already-repealed Ordinances based on various state and federal grounds.³ Plaintiffs also added a Count IX, which, like the remainder of the Counts is premised entirely on the now-repealed Ordinances ("Repealed Ordinances", and which alleges that the Defendants conspired with each other and with Rand Hoch, a citizen of Palm Beach County, and the Palm Beach County Human Rights Counsel to deny Plaintiffs' rights to free speech and freedom of religion by passing the Ordinances. [ECF No. 182].

Like the original Complaint, the Amended Complaint does not seek individual relief for each of the individual Counts. Instead, it contains a universal Prayer for Relief, nearly identical to the Prayer for Relief in the Original Complaint, in which the Plaintiffs request that this Court A) enter a permanent injunction prohibiting the Defendants from enforcing the Repealed Ordinances or any subsequent re-enactments of the Repealed Ordinances against the Plaintiffs or their clients; and B) enter Declaratory Judgment declaring that the Repealed Ordinances violated the various state and

³ The Amended Complaint asserted the same causes of action against both the County and the City as follows: Count I, violation of freedom of speech under the First Amendment; Count II, violation of the 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 Constitution; Count VII, violation of the Florida's Patient's Bill of Rights and Responsibilities; and Count VIII, violation of the Florida Religious Freedom Restoration Act, §761.01, Fla. Stat., et. seq. [ECF No. 182].

federal laws when passed, and that the Plaintiffs were wronged as the result. The Amended Complaint also contains a request for nominal and actual damages, and a request for attorneys' fees.

The County moves to dismiss the Amended Complaint based on lack of subject matter jurisdiction and standing under Fed. R. Civ. P. 12(b)(1), and under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

MEMORANDUM OF LAW

I. Motion to dismiss standard for lack of subject matter jurisdiction.

The County's motion to dismiss is based in part on Fed. R. Civ. P. 12(b)(1), which provides that the defense of "lack of jurisdiction over the subject matter" may "be made by motion." Furthermore, Rule 12(h)(3) provides that if the "court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." "Attacks on subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) come in two forms. 'Facial attacks' on the complaint require the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion. Factual attacks, on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (citations omitted). "Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction - its very power to hear the case - there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* The County's 12(b)(1) Motion is a factual challenge to the Amended Complaint.

For purposes of the County's 12(b)(6) Motion to Dismiss, the relevant facts are derived from the Amended Complaint, and for purposes of this Motion only, are accepted as true.

II. All Counts of the Plaintiffs' Amended Complaint are moot, and therefore cannot present a case or controversy under Article III of the United States Constitution. The case should therefore be dismissed, as this Court does not have subject matter jurisdiction.

a) Article III requirement for actual cases or controversies.

Article III of the U.S. Constitution limits federal courts to deciding "actual cases or controversies" *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). Article III requires that actual controversy be extant at all stages of review, not merely at the time complaint is filed. U.S.C.A. Const. Art. 3§2, cl.1; *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). *See also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477- 478 (1990) ("This case and controversies requirement subsists through all stages of federal judicial proceedings . . . it is not enough that a dispute was very much alive when suit was filed . . . [t]he parties must continue to have a personal stake in the outcome of the lawsuit.") (citations and quotations omitted). In the absence of a case or controversy, courts "have no business deciding legal disputes or expounding on law." *Already*, 568 U.S. 90 (citations and quotations omitted).

The Article III requirement of a case or controversy is a fundamental aspect of a federal court's jurisdiction. If a suit is moot, it cannot present an Article III case or controversy and the federal courts lack subject matter jurisdiction to entertain it. *See Seay Outdoor Advert., Inc. v. City of Mary Esther, Fla.*, 397 F.3d 943, 946 (11th Cir. 2005) (dismissing complaint seeking permanent injunction and damages pursuant to section 1983 due to mootness after finding that the offending code was replaced with a code that removed the "infirm provisions"); *Jews for Jesus, Inc. v. Hillsborough County Aviation Authority*, 162 F.3d 627, 628-29 (11th Cir. 1998) (holding that where the defendant stopped prohibiting the distribution of literature at the airport after suit was filed, the complaint for declaratory and injunctive relief should be dismissed for mootness);

National Advertising Co. v. City of Miami, 402 F.3d 1329, 1334-35 (11th Cir. 2005) (holding that Billboard advertising company's legal challenges to City's allegedly unconstitutional zoning ordinance were rendered moot by City's amendment of ordinance, regardless of City's reason for amendment.)

Plaintiffs' claims became moot when the County repealed the Challenged Ordinance. Because there is no longer an immediate or ongoing controversy to satisfy Article III's requirement, this Court lacks subject matter jurisdiction to entertain this case, and the Amended Complaint should be dismissed.⁴

b) Change in law renders constitutional challenges to the underlying statutes or ordinances moot.

Mootness can occur due to a change in circumstances, or, as in the present case, a repeal or change in the law. The principle that a change in law renders constitutional challenges to an underlying law moot is a principle well established in precedent from both the Eleventh Circuit, as well as the United States Supreme Court. As decisions discussed *infra* recognize, it would be purely hypothetical and advisory for a court to rule on the validity of a regulation that is no longer enforced and is no longer law.

The United States Supreme Court has routinely held that the repeal of, or amendment to challenged legislation rendered moot a plaintiff's request for declaratory and injunctive relief. *See, e.g., 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.*

⁴ As outlined herein, it is the County's position that the Amended Complaint should be dismissed in its entirety due to this Court's lack of subject matter jurisdiction. Accordingly, with the exception of the Conspiracy Claim of Count IX, the County will defer addressing the substantive flaws of each of the individual Counts under Fed. R. Civ. P. 12(b)(6) pending this Court's ruling on this Motion to Dismiss.

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, 414-15 (1972) (in holding moot a challenge to a Florida tax exemption for church property when the law had been repealed, stating that “[t]he case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law. . . . The only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. s 192.06(4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute had been repealed.”)

Similarly, the Eleventh Circuit has repeatedly held that a repeal of an allegedly unconstitutional statute or regulation moots legal challenges to the validity of the repealed legislation. *See e.g., Seay* 397 F.3d 943, 947; *City of Miami*, 402 F.3d 1334-1335. *See also Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004) (“When a subsequent law brings the existing controversy to an end, the case becomes moot and should be treated accordingly.”); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000) (“When an ordinance is repealed by the enactment of a superseding ordinance, then the superseding statute or regulation moots the case.”) (citing *Church of Scientology Flag. Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 605 (11th Cir. 1985)).

A case is moot when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief. *See Pacific Ins. Co. v. General Dev. Corp.*, 28 F.3d 1093, 1096 (11th Cir.1994). Here, when the Defendants repealed the

Challenged Ordinances, Plaintiffs lost their interest in a dispute of sufficient immediacy and reality as to afford them either declaratory or injunctive relief that they seek in their Amended Complaint. Therefore, any order granting Plaintiffs the declaratory relief they seek would amount to an impermissible advisory opinion.

Moreover, it is well recognized that a plaintiff cannot use a declaratory action to obtain a retrospective opinion that he was wrongly harmed by the defendant in the past. *See Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (per curiam) (concluding that appellee's claim for declaratory relief was moot where his “primary claim of a present interest in the controversy is that he will obtain emotional satisfaction from a ruling that his son's death was wrongful”); *Green v. Branson*, 108 F.3d 1296, 1299 (10th Cir.1997) (“This ‘legal interest’ [impacted by the litigation] must be more than simply the satisfaction of a declaration that a person was wronged.”)

The Plaintiffs’ request for injunctive relief is moot for the same reasons. Where a plaintiff requests injunctive relief, plaintiffs' susceptibility to continuing injury is of particular importance. “Past exposure to illegal conduct” is not enough. Any past injury must be accompanied by “continuing, present adverse effects.” *O’Shea v. Littleton*, 414 U.S. 495, 496 (1974). Moreover, the continued susceptibility to injury must be reasonably certain; a court will not entertain a claim for injunctive relief where the allegations take it into the area of speculation and conjecture. *Id. at* 497 (citations and quotations omitted). Here, past exposure to Repealed Ordinances do not amount to a present case or controversy to support injunctive relief, because the Plaintiffs cannot show any continuing and present adverse effects from the Repealed Ordinance.

For the foregoing reasons, the Plaintiffs’ Amended Complaint should be dismissed.

c) Exceptions to mootness not applicable.

Courts recognize two exceptions to the mootness doctrine where a case may remain subject to federal court jurisdiction notwithstanding the apparent extinguishment of a current case or controversy. However, neither of these exceptions applies in the instant matter.

The first involves disputes that are “capable of repetition, yet evading review.” *See Lewis v. Continental Bank Corp.* 494 U.S. 472, 481 (1990) (“We have permitted suits for prospective relief to go forward despite abatement of the underlying injury only in the exceptional circumstances . . . where the following two circumstances were simultaneously present: (1) the challenged action is in its duration too short to be litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaint party would be subjected to the same action again.”) (citations and quotations omitted).

Mooting this case would not run afoul of the “capable of repetition” exception because any hypothetical effort by the County to reinstate the Repealed Ordinance in the future would leave the Plaintiffs with ample time and opportunity to challenge said action. “In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff’s personal stake in the litigation continue throughout the entirety of the litigation.” *Sosna v. Iowa*, 95 S.Ct. 553, 558-559 (holding that though the named plaintiff no longer had a personal interest in the litigation once a one-year durational residency period had passed, the matter was not moot because the named plaintiff had been certified as the representative of members of a class in a class action suit). No such circumstance is present in the instant case. It is not the sort of action, which by reason of inherently short duration of the opportunity to remedy is likely forever to evade review. *See Lewis*, 494 U.S. 481. Furthermore, as will be discussed *infra*, the Challenged Ordinance was already subject to review by the Eleventh Circuit.

The second exception to mootness concerns “voluntary cessation” of the defendant's conduct. Under this exception, “voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed However, in general, the Supreme Court has declined to hold moot a challenge to a repealed law only when the law is reasonably likely to be reenacted or when it is replaced by another constitutionally suspect law.” *City of Sunrise*, 371 F.3d 1320, 1330. “Likewise, [the Eleventh Circuit] has repeatedly held that the doctrine of voluntary cessation does not apply in cases where challenged laws have been repealed unless there is some reason to believe that the law may be reenacted after dismissal of the suit.” *Id.* “In the absence of evidence indicating that the government intends to return to its prior legislative scheme, repeal of an allegedly offensive statute moots legal challenges to the validity of the statute.” *City of Miami*, 402 F.3d 1334. Furthermore, “[t]he determination whether discontinuance moots a case is apt to be affected by the distinction between public and private defendants. . . . Courts are more apt to trust public officials than private defendants to desist from future violations.” *City of Sunrise*, 371 F.3d 1320, 1330. “Governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.” *City of Miami*, 402 F.3d 1334.

The doctrine of “voluntary cessation” does not save this case from mootness. As a preliminary matter, this is not a case where the County “voluntarily” repealed the Challenged Ordinance to “evade judicial review.” To the contrary, the County repealed the Ordinance because of judicial review. Here, the constitutionality of the Ordinance was evaluated on the merits by the Eleventh Circuit in *Otto*, 981 F.3d 854. After the Eleventh Circuit found the Ordinance to be violative of the first Amendment, and that decision became final, the County heeded the Eleventh Circuit’s Mandate, and repealed the Ordinance. Should the County seek to re-enact the Repealed Ordinance

in the future, as the Plaintiffs hypothesize, it would be doing so contrary to the Eleventh Circuit's decision in *Otto*.

Next, assuming *arguendo* that County's repeal of the Challenged Ordinance could be construed as "voluntary," here, it is absolutely clear that the allegedly wrongful behavior cannot be reasonably expected to recur. First, the County, as a government entity, is entitled to presumption of not repeating the offending behavior. *See City of Sunrise* 371 F.3d 1320; *City of Miami*, 402 F.3d 1334. Second, there is no indication whatsoever that the County intends to reinstate the Repealed Ordinance in the future as to rebut the presumption. To the contrary, the reality is that the County has made good faith-efforts to rectify the conduct that gave rise to this litigation. If anything, the County's actions show that it acted in good faith when it heeded the Eleventh Circuit's Mandate, and expeditiously commenced the repeal of the Challenged Ordinance, cited to the Eleventh Circuit's decision in *Otto* in the Repeal Ordinance, and in the interim, instructed County employees to immediately cease enforcement of the Challenged Ordinance.

Once the repeal of the Challenged Ordinance has caused this Court's jurisdiction to be questioned, the Plaintiffs bear the burden of presenting affirmative evidence that their challenge is no longer moot. *See City of Miami*, 402 F.3d 1334. Plaintiffs have not presented any evidence to demonstrate that the County is planning to reinstate the Repealed Ordinance in the future. Mere speculation that the County may return to its previous ways is not a substitute for concrete evidence of said intentions. *See Id.*

Regardless, even then, the Plaintiffs would not be without redress because they can reinstate review with the courts. *See Jews for Jesus*, 162 F.3d at 630 ("We may, of course, be mistaken about the secret intentions of Tampa International Airport's officials. If they choose to reinstate their restrictive policies--or adopt similar ones--the courthouse door is open to Jews for Jesus to reinstate its lawsuit. Under such circumstances, the case would not be moot even if the airport again revoked

its policies in response to the lawsuit, because such “flip-flopping” would create a reasonable expectation that the airport would reinstate the challenged practice at the close of the lawsuit.”). *See also City of Miami*, 402 F.3d 1335 (“We are confident that the City does not contemplate returning to its prior zoning ordinance, given our strict disapproval of this type of governmental flip flopping.”) (citations and quotations omitted.)

Under these circumstances, the doctrine of the voluntary cessation does not save this action from a mootness determination.

d) Allowing this case to proceed would violate the established principle that the court should pass on deciding constitutional questions unless absolutely necessary.

In addition to the foregoing reasons for dismissing the Amended Complaint, allowing this case to proceed where the Challenged Ordinance has already been repealed would be in violation of the long-standing policy established by the United States Supreme Court of refusing to decide constitutional issues unless strictly necessary. *See Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 604–05 (11th Cir. 1985) (citing to *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-72, (1947) *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, (1944) and *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920)). A federal court should not reach constitutional issues unless “strictly necessary.” *Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979).

III. Issues with standing.

a) Otto lacks standing to challenge County’s Repealed Ordinance.

Plaintiff Otto lacks standing to sue the County because the Repealed Ordinance did not apply in Boca Raton where he practices. Standing “‘is the threshold question in every federal case’ . . . [and] ‘[i]n the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff’s [arguments].’” *In re Checking Account Overdraft Litigation*, 780 F.3d 1031,

1038 (11th Cir. 2015) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006)).

For a Plaintiff to have standing to bring suit in the federal court, “there must be a causal connection between the injury and the conduct complained of - the injury has to be ‘fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.’” *Doe v. Pryor*, 344 F. 3d 1282, 1285 (11th Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Otto fails this standing test because there is no causal connection between his alleged injury and the County’s Ordinance in that the County Ordinance did not apply in the City of Boca Raton where Otto practices. The County Ordinance applied “within the unincorporated areas of Palm Beach County, and in all municipalities that have not adopted an ordinance in conflict.” [ECF No. 182, Exh. B]. The City Ordinance conflicted with the County Ordinance in that the penalties were different. The City Ordinance provided that “[a]ny person that violates any provision of this article shall be subject to the civil penalty prescribed in section 1-16 [of the Boca Raton Code]. . . .” Section 1-16 of the Boca Raton Code provides for a fine “not exceeding \$500.00.” [ECF No. 182, Exh. A]. The County Ordinance, in contrast, penalized a first violation of the Ordinance with a fine of \$250.00 and a second violation with a fine of \$500.00. [ECF No. 182, Exh. B]. Because of this conflict as to the penalties imposed by the two ordinances, the City Ordinance was in conflict with the County Ordinance, and thus by the terms of the County Charter, it did not apply in Boca Raton. In summary, Otto lacks standing to sue Palm Beach County, on behalf of himself and his minor patients, because there is no causal connection between Otto’s alleged injury and the County Ordinance. Accordingly, Otto’s Amended Complaint against the County should be dismissed.

b) Plaintiffs lack standing to bring claims on behalf of patients.

Plaintiffs lack standing to bring claims on behalf of their patients because third-party

standing will not lie where the ability of the purported patient to protect his or her own interests is not hindered. “The fundamental prerequisite for standing is that the claimant have ‘a personal stake in the outcome of the controversy [such] as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.’” *Larsen*, 780 F.3d at 1038 (quoting *Warth*, 422 U.S. at 498-99 (quotation marks omitted)). A party “generally must assert his *own* legal rights and interest, and cannot rest his claim to relief on the legal rights or interest of third parties.” *Id.* at 1038 (quoting *Warth*, 422 U.S. at 499 (emphasis in original)).

An exception to this general rule allows for the grant of third party standing “if the party asserting the right has a close relationship with the person who actually possesses the right, and if the possessor of the right is somehow hindered in his ability to protect his own interests” *Id.* at 1038-39 (citing *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004)).

Plaintiffs fail to allege that their purported patients are in any way hindered in their ability to protect their own interests. The Amended Complaint is devoid of even a single allegation concerning their patients’ ability to protect their own interests. Moreover, as the *King* court noted, “the fact that minor clients have previously filed suit [to challenge similar laws] bolsters our conclusion that they are not sufficiently hindered in their ability to protect their own interest.” *King*, 767 F. 3d 216, 244 (3d Cir. 2014). Counts II, III, V, VII and VIII should be dismissed in so far as they assert claims on behalf of Plaintiffs’ patients.

IV. Count IX, alleging a conspiracy to violate civil rights, should also be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Count IX of Plaintiffs’ Amended Complaint alleges a “conspiracy” to violate Plaintiffs’ civil rights, in violation of 42 U.S.C. § 1985(3). 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). However, in the instant case, the Plaintiffs fail to allege a conspiracy to deprive the Plaintiffs of equal protection of the laws. The sole basis of Plaintiff's allegation of a "conspiracy" is that Palm Beach County, the City of Boca Raton, Rand Hoch, and the Palm Beach County Human Rights Council somehow allegedly conspired to deprive Plaintiffs of their constitutionally protected First Amendment rights to free speech.

However, on bountiful occasions, federal courts have specifically affirmed that § 1985(3) cannot serve as the basis for a lawsuit which claims a violation of free speech and expression. *See, e.g., Egan v. City of Aurora*, 291 F.2d 706 (7th Cir. 1961) (§ 1985(3) provides a right of action to a person deprived, by a conspiracy, of equal protection of laws, but it does not create cause of action based on conspiracy to deprive party of right to freedom of speech and assembly); *Africa v. Anderson*, 510 F. Supp. 28 (E.D. Pa. 1980), *affirmed*, 707 F.2d 1399 (3rd Cir. 1983) (§ 1985(3) is not addressed to conspiracies to infringe upon First Amendment rights); *Porter v. Bainbridge*, 405 F.Supp. 83 (S.D. Ind. 1975) (§ 1985(3) does not extend to conspiracies to deny rights of freedom of speech and assembly under the First Amendment); *accord, Oaks v. City of Fairhope*, 515 F.Supp. 1004 (S.D.Ala. 1981); *Feng v. Sandrik*, 636 F.Supp. 77 (N.D. Ill. 1986) (the scope of substantive rights protected through actions for conspiracy to deprive an individual of civil rights does not include those contained in the First Amendment).]

As outlined in *Griffin (supra)*, the Plaintiffs must identify themselves as: 1) members of a protected class; and 2) that the alleged conspiracy to deprive them of equal protection of the laws was motivated by animus toward that protected class. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993) (wherein the conspiracy was motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus"). This standard requires that the course of conduct by the defendant was engaged in *because of, not merely in spite of*, its adverse effects upon an identifiable group. *Id.* at 271-272. (emphasis added) Therefore, in order to maintain

a cause of action for conspiracy, Plaintiffs must allege both: (a) a conspiracy motivated by discriminatory animus against an identifiable class, and (b) that the class discrimination was “invidious.” Plaintiffs’ Amended Complaint fails to do either. As such, Plaintiffs’ conspiracy claim must be dismissed.

a) Plaintiffs’ Amended Complaint does not sufficiently allege plaintiffs are members of an identifiable protected class.

The Amended Complaint does not sufficiently allege that Plaintiffs were members of an identifiable protected “class” subject to the alleged invidious discrimination by the County, as evidenced by Plaintiffs’ meandering, inconsistent allegations in their Amended Complaint. At times, the two Plaintiffs claim themselves as alleged targets. *See, e.g.*, Amend. Compl., ¶ 347 (alleging a conspiracy to deny Plaintiffs, specifically, their constitutional rights to “equal enjoyment of their First Amendment right to free speech and free exercise of their sincerely held religious beliefs”). At other times, the purported targets are a subset of therapists, referred to by Plaintiffs as “faith-based professional therapists who perform SOCE counseling.” *See, e.g.*, Amend. Compl., ¶ 41; Amend. Compl., ¶ 52 (that defendants had animus against “faith-based professional counseling”). Yet, at other times, the class is purported to be Christians as a whole. *See, e.g.*, Amended Compl., ¶349 (alleging “discriminatory animus toward Plaintiffs’ religion”).

Put plainly, therapists are not an identifiable protected class, pursuant to federal law. Neither are therapists who perform SOCE counseling. Nor are “faith-based professional counselors” or any other subset of therapists Plaintiffs attempt to identify as their moving target of alleged conspiratorial discrimination in their Amended Complaint. Ultimately, Plaintiffs fail to articulate any legal basis for their alleged protected class status. Additionally, the County’s Repealed Ordinance itself clearly and unequivocally prohibited counseling which the County, based upon studies at its disposal (including the 2009 American Psychological Association “APA” Task Force

Report), *believed was harmful to certain LGBT children residing within its borders*. As such, it is clear that Plaintiffs' allegations do not sufficiently identify any of their ever-changing alleged class memberships as the target of discriminatory animus.

To the extent Plaintiffs allege Christians were the target of the Repealed Ordinance, all counseling practitioners/therapists engaging in SOCE counseling within the County were clearly subject to the same prohibition, whether Christian, Jewish, Muslim, or simply therapists performing said counseling without any apparent faith basis whatsoever. Further, whether the APA Report was scientifically sound or not, and whether the APA Report was misinterpreted or not, the Plaintiffs themselves admit that the APA Report formed the basis for the passage of the County's Repealed Ordinance, as outlined in greater detail below. As such, Plaintiffs fail to sufficiently plead that there was any conspiracy based on a particular animus directed at any of the purported "classes" named throughout Plaintiffs' Amended Complaint.

Further, Plaintiffs' attempts at defining a class simply 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 County and others conspired to adopt the Ordinance based upon their animus against "Christians" also fails as a matter of pleading. Plaintiffs allege no such facts which would support that contention. As noted above, the Amended Complaint does (at times)

make mere 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) Plaintiffs’ Amended Complaint does not sufficiently allege invidious discrimination by the County.

The only truly “factual allegations” regarding the County’s alleged motivation in adopting the Repealed Ordinance (other than the legislative findings contained in the Repealed Ordinance, which belie any invidious discrimination claims) appear in paragraphs 41 through 52 of the Amended Complaint. Far from showing any invidious animus against a religion, including but not limited to Christianity, the Amended Complaint affirmatively alleges that the Repealed Ordinance was advocated for by “a local LGBTQ activist organization” that claims to have been “responsible for the enactment of more than 160 laws and policies providing equal rights, protections and benefits for the LGBTQ community since 1990.” Amend. Compl., ¶ 42. Thus, the Amended Complaint belies the unsupported later contention that the Repealed Ordinance was motivated by animus against Christianity by contending that it was instead motivated by a desire to afford “equal rights, protections and benefits” for the LGBTQ community.

Further, Plaintiffs' Amended Complaint itself extensively discusses the 2009 American Psychological Association ("APA") Task Force Report as one of the primary bases upon which the County's Repealed Ordinance was predicated. *See* Amend. Compl., ¶¶ 82-99. Plaintiffs themselves admit in their Amended Complaint that the APA Report found there was "some" evidence of certain harm for some [recipients of SOCE counseling]." *See* Amend. Compl., ¶ 88. As incorporated in Plaintiffs' Amended Complaint, the County's Repealed Ordinance itself (ECF No. 182-2) was replete with specific references to the American Psychological Association ("APA") Report on SOCE Counseling (ECF No. 182-3). The subject report included an extensive analysis of positives, negatives, and outcomes regarding SOCE counseling, identifying varied societal beliefs regarding SOCE counseling or "conversion therapy," including religious beliefs of other non-Christian religious communities, such as Orthodox Jews and Muslims.

Oddly, Plaintiffs are implicitly attempting to conflate the County's motivation with the alleged motives of other non-party actors by claiming that certain "qualified conservative psychologists" were purportedly excluded from participation in the APA Task Force and Report due to partisanship and politicization. *See* Amend. Compl., ¶ 93. Even if accepted as true, Plaintiffs do not allege any County involvement with the 2009 APA Task Force study (because there was none). As such, any attempt to relate the County's passage of the Repealed Ordinance to the APA Task Force itself cannot be used to impute any alleged animus on the County. Further, Plaintiffs simultaneously claim the County's passage of the Repealed Ordinance was misguided due to misinterpretation of the APA findings in the Task Force Report. *See* Amend. Compl., ¶¶ 82 – 92. As such, Plaintiffs have failed to sufficiently allege that the County's motivation for passing the Repealed Ordinance was due to the invidious discriminatory animus required pursuant to § 1985(3) rather than out of a *bona fide* concern for the effect of SOCE counseling on LGBT youth in Palm Beach County. Therefore, Plaintiffs' conspiracy claim against the County must be dismissed.

WHEREFORE, the County asks this Court to dismiss Plaintiffs' Amended Complaint [ECF No. 182] in its entirety based on lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). If this Motion is denied, the County requests twenty-one days from the date of the Court's order to answer the Amended Complaint. The County seeks any and all other relief the Court deems just and proper.

Respectfully submitted this 10th day of November, 2022.

/s/ Eric L. Reichenberger

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the authorized CM/ECF filers.

/s/ Eric L. Reichenberger

Eric L. Reichenberger, Esquire
Florida Bar No. 86219