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 REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant, the City of Boca Raton ("City"), files this its Reply in support of its Motion to Dismiss [ECF No. 183] (the "Motion") the Amended Complaint (the "Complaint"), filed by Plaintiffs, Robert W. Otto ("Otto") and Julie H. Hamilton ("Hamilton") (collectively, "Plaintiffs").

I. HAMILTON LACKS STANDING TO SUE THE CITY.

As contended in the Motion, unlike Otto's allegation 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. Accordingly, the Complaint fails to allege any causal connection between Hamilton's alleged injury and the Ordinance. To the extent Hamilton asserts claims against the City, she lacks standing to do so, and her claims should be dismissed.

The Response, after admonishing the City that "evidentiary contentions" are not properly considered in connection with a motion to dismiss (Response at p. 2), *makes no effort whatsoever to defend the adequacy of the Complaint.* Instead, Plaintiff's seek to avoid dismissal based upon Hamilton's purported *testimony*. Response at p. 16. But plaintiffs are no more entitled than defendants to stray beyond the allegations of a complaint with regard to motions to dismiss. *Long v. Satz*, 181 F.3d 1275, 1278-79 (11th Cir. 1999). Since Hamilton makes no attempt to defend the adequacy of her standing allegations against the City, her claims should be dismissed.

The Response's secondary contention: that Hamilton's failure to properly allege that she has been affected by the Ordinance does not deprive this Court of subject matter jurisdiction under Rule 12(b)(1) (Response at p. 17), is true as far as it goes. However, since she has not alleged a claim against the City upon which relief can be granted, her claim should be dismissed under Rule 12(b)(6). *See, e.g., Sutter v. Hilton Garden Inns Management, LLC*, 2017 WL 933769, *2 (M.D. Fla. 2017) ("Even if [plaintiff] invokes subject-,matter jurisdiction, the action warrants dismissal under Rule 12(b)(6) because the complaint fails to state a claim…").

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

The *entirety* of the Motion's comment with regard to Count I was that "[t]he City acknowledges that this contention has been rejected by the Eleventh Circuit. The City reasserts its arguments here in order to avoid waiver." Motion at p. 4. The Response characterizes this

innocuous comment as the City "*still* doggedly and stubbornly insist[ing that] its Ordinance passes First Amendment muster." Response at p. 24 (emphasis in original). This shows the depths to which Plaintiffs will feign fear of future injury so as to continue litigating a case that, on the merits, has essentially already been resolved in the Plaintiff's favor.

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

Counselors who provide sexual orientation change effort (SOCE) therapy do not have the legal right to bring suit on behalf of their minor clients. This lack of third-party standing has been decided in virtually every case that has considered the issue, including *Otto v. City of Boca Raton et al*, 353 F.Supp.3d 1237, 1246-47 (S.D. Fla. 2019), *rev'd on other grounds*, 981 F.3d 854 (11th Cir. 2020),[1] *Tingley v. Ferguson*, 47 F.3d 1055, 1069 (9th Cir. 2022); *King v. Governor of the State of New Jersey*, 767 F.3d 216, 244 (3rd Cir. 2014), *abrogated on other grounds*, *Nat'l Inst. Of Family and Life Advoc. v. Becerra*, 138 S.Ct. 2361 (2018); *Chiles v. Salazar*, 2022 WL 17770837, *5-6 (D. Col. 2022); *Tingley v. Ferguson*, 557 F.Supp. 3d 1131, 1138 (W.D. WA. 2021); *Doyle v. Hogan*, 2019 WL 3500924, *9 (D. MD. 2019), *rev'd on other grounds*, 1 F.4th 249 (4th Cir. 2021); and *King v. Christie*, 981 F.Supp.2d 296, 311-12 (D. N.J. 2013).

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

a. Plaintiffs' Allegations Are Insufficient to State a Section 1983 Claim.

The Supreme Court has established strict limits 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). Rule 8, which allows plaintiffs some flexibility in how they present their claims, has been strictly applied in Section 1983 cases in the Eleventh Circuit. "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 v. Cnty. of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) ("Some factual detail in the pleadings is necessary to the adjudication

[1] The Complaint does not contain any materially different allegations with regard to Plaintiffs' purported third-party standing than did the (original) Complaint, and the Response does not suggest that there have been any changes in the law on third-party standing law since this Court's earlier opinion. Therefore, there is no reason to re-visit the issue.

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).

As noted in the Motion, the Complaint mentions 42 U.S.C. § 1983 only once: in a single paragraph[2] in the "jurisdiction and venue" section. The Response cynically dismisses this observation by noting that the referenced paragraph is incorporated into Counts I, II and III of the Complaint. Response at pp. 21-22.

However, while the referenced jurisdictional allegation indeed references Section 1983, it also references the First and Fourteenth Amendment to the United States Constitution, various provisions of the Florida Constitution, and two Florida Statutes. Complaint, ¶ 21. The entirety of this paragraph (along with all of the other general allegations) is incorporated into each Count of the Complaint. *See* Complaint, ¶¶ 226, 245, 253, 269, 288, 304, 319, 335, 345. Thus, for example, the reference to the "Florida Patient's Bill of Rights and Responsibilities" is made part of the Count III "Free Exercise of Religion" claim. More to the point, both the references to the Fourteenth Amendment and to Section 1983 are incorporated into the Count I "Right to Freedom of Speech under the First Amendment" claim. It is accordingly unclear from reading the Complaint whether Count I is a (direct) First Amendment violation claim or a Section 1983 claim based upon a purported First Amendment violation. Moreover, the Response does not dispute the legal truism that different remedies are available depending upon which of these theories the claim is based. Therefore, the Plaintiff's failure to specifically identify each claim and the appropriate respective relief therefor is fatal.

b. The Complaint's Prayer for Relief Fails to Comply with Rule 8 and Seeks Unavailable Relief.

None of the nine separate claims in the Complaint contains a separate prayer for relief. Instead, all demands for relief are incorporated into one, conclusory paragraph that includes prayers for relief for all nine counts. However, different remedies are available for the different theories alleged in the Complaint, and several of the requested remedies are unavailable under any particular count. The Motion argues (at pp. 6-7) that this is improper and justifies dismissal, but this argument is ignored in the Response.

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[2] The Motion misreferences the relevant paragraph as ¶ 18. The sole reference to Section 1983, in fact, appears in ¶ 21 of the Amended Complaint.

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

The Motion argues that the repealed Ordinance satisfied the rational basis review required by the First Amendment's Free Exercise Clause, which only requires that the Ordinance satisfy the "neutrality prong" and "general applicability prong" of review. Motion at pp. 7-8.

While the Response does not suggest a different standard of review, it claims that the Complaint sets forth causes of action because the Plaintiffs "felt" that their religious freedoms had been infringed upon. Response at p. 25. However, this argument is irrelevant because the correct standard evaluates whether the Ordinance was "motivated" by religious animus.

Without putting too fine a point on it, it appears that *no* court has *ever* permitted a "Free Exercise" challenge to a SOCE regulation to progress beyond the motion to dismiss stage. All such challenges have been dismissed. *See, e.g., Tingley*, 47 F.3d at 1085-1087; *King*, 767 F.3d at 242; *Welch v. Brown*, 834 F.3d 1041, 1047 (9th Cir. 2016); *Doe v. Governor of New Jersey*, 783 F.3d 150, 154-55 (3rd Cir. 2015); *Chiles*, 2022 WL 17770837 at *10-13 (D. Col. 2022); *Vazzo v. City of Tampa*, 2019 WL 1048294, * 11-12 (M.D. Fla. 2019).

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

As noted in the Motion, 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 the Ordinance is neither expressly nor impliedly preempted by any of the authorities cited by Plaintiff (or otherwise).

a. <u>The Ordinance Is Not Expressly Preempted.</u>

The Response makes no attempt to argue that the Ordinance was expressly preempted by Chapter 491, Florida Statutes (which regulates clinical, counseling, and psychotherapy services), or otherwise. Response at p. 27.

b. <u>The Ordinance Was Not Impliedly Preempted.</u>

1. *The Complaint does not sufficiently allege implied preemption.*

In the Response, Plaintiffs make only passing attempts to defend the allegations of the Complaint. Instead, Plaintiffs attempt to avoid dismissal by referencing comments allegedly made

by the County Attorney in the past (Response at p. 28, f.n. 5), and by making unsupported representations with regard to whether the Defendants otherwise regulated the practice of medicine (Response at p. 29). Again, such references are inappropriate in connection with a motion to dismiss.

It is true that a single judge in another federal district found preemption in *Vazzo v. City of Tampa*, 415 F.Supp. 3d 1087 (M.D. Fla. 2019). However, that decision remains pending on appeal and was, the City respectfully submits, wrongly decided. That decision is not binding on this Court, and should not be followed. The intent of Chapter 491 is threefold: (1) to make communications between the public and counselors privileged; (2) to protect the public from persons not qualified to practice counseling; and (3) to "establish[] minimum qualifications for entering into and remaining in the respective [mental health] professions." § 491.002, Fla. Stat. The types of therapy that a professional licensed pursuant to Chapter 491 may offer to minors are not regulated; Chapter 491 merely enumerates the qualifications required to provide mental health counseling, including certain subspecialties.[3] Like the challenged law in *Phantom of Clearwater, Inc. v. Pinellas Cty.*, Chapter 491 is a "relatively short chapter." 894 So. 2d at 1019 (holding a county's regulation of fireworks sales was not preempted by the state statute regulating the sale and use of fireworks). "It does not compare in length or substance to the uniform traffic laws or the statutory regulation of telecommunications," for example. *Id.*

The Florida legislature requires professionals in a variety of fields —from midwifery to pest control, attorneys to interior design—to obtain a license from the state and subjects such professionals to potential disciplinary actions. *See, e.g.*, § 467.006, 482.071, 454.021, 481.2131, Fla. Stat. Police officers, including those in *D'Agastino v. City of Miami*, 220 So.3d 410 (Fla. 2017) and *Miami-Dade County v. Dade County Police Benevolent Ass'n*, 154 So.3d 373 (Fla. App. 2014) are also members of a profession subject to qualifications and certifications by the Florida legislature, as are mental health counselors. *See* §§ 943.13, 943.1395, Fla. Stat. Like Chapter 491 and the City's Ordinance, however, the state's requirement that police officers obtain certain minimum qualifications does not preempt a local government's ability to ban certain law enforcement techniques or regulate the actions of their police officers. *D'Agastino*, 220 So. 3d at

[3] For example, Section 491.0143 ("Practice of sex therapy") states, "Only a person licensed by this chapter who meets the qualifications set by the board may hold herself or himself out as a sex therapist."

427; *see also Lake Hamilton Lakeshore Owners Ass'n v. Neidlinger*, 182 So. 3d 738, (Fla. Dist. Ct. App. 2015) (finding association's nuisance claims against airboat company were not impliedly preempted by the Florida Fish and Wildlife Conservation Commission's regulation of boating activities); *Hillsborough Cty. v. Fla. Restaurant Ass'n, Inc.*, 603 So. 2d 587 (Fla. Dist. Ct. App. 1992) (holding state statute regulating the service and sale of alcoholic beverages did not preempt county's ordinance requiring display of health warnings about alcoholic beverages).

2. *Plaintiff's Preemption Claim is Ripe for Resolution.*

The Response argues (at pp. 29-31) that preemption should not be determined on a motion to dismiss, relying upon cases that involved the *defense* of preemption, first raised in motions to dismiss. However, those cases are inapposite where, as here, the issue of preemption is the purported basis of a cause of action. In any event, the proposition is just wrong; it is a commonly accepted practice to dismiss claims due to conflict preemption at the motion to dismiss stage. "[C]laims are routinely dismissed due to conflict preemption at the motion to dismiss stage." *Tropical Paradise Resorts, LLC v. JBSHBM, LLC.*, 2019 WL 78983, *3 (S.D. Fla. 2019) (citations omitted).

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. In fact, the FPBRR specifically states that it cannot be used in any civil or administrative action and does not expand or limit any rights or remedies provided by other laws. § 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). The Response (at p. 32) relies upon cases interpreting statutes that *are silent with regard to remedies* to contend that Plaintiffs are a "special class" of individuals intended to benefit from the FPBRR. The reliance is misplaced. The FPBRR *expressly* provides that it may not be used to bring a private cause of action.

Additionally, even if it was possible to bring a cause of action under the FPBRR (which it is not), Plaintiffs' claim would still fail because Otto and Hamilton are not considered "heath care providers" under the FPBRR. The statute limits that phrase to "a physician licensed under chapter 458, an osteopathic physician licensed under 459, a podiatric physician licensed under chapter

461, or an advanced practice registered nurse registered under s. 464.0123" § 381.026(2)(c), Fla. Stat. Otto and Hamilton do not fit into any of these categories. The Response's suggestion that Plaintiffs are "health care practitioners" under a different statute - Section *456*.41(2)(b) (Response at p. 31) – concedes that Plaintiffs are *not* "health care practitioners" for purposes of the FPBRR, and Count VII should therefore be dismissed.

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

In Count VIII, the Complaint alleges violation of Florida's Religious Freedom Restoration Act ("RFRA") Fla. Stat., § 761.01, *et seq.* The Response agrees (at pp. 26-27) that, under RFRA, a claimant must make an initial showing that the challenged regulation places a "substantial burden" on one's ability to freely exercise religion, and that 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 Motion argues that, 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 freedom to do so. The Response confirms this fact. Plaintiffs do not allege that their religion requires them to provide professional mental health treatment *so as to change a child's sexual orientation*, which is the only activity that the repealed Ordinance prohibited. Therefore, Plaintiffs fail to allege facts that meet the threshold requirement in Count VIII of showing that the Ordinance places a "substantial burden" on their freedom to exercise their religion under RFRA, because the plain language of the Ordinance specifically permits the type of religious counseling that Plaintiffs purport to want to provide.

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

The Response does not dispute that a civil conspiracy complaint must adequately allege both: (a) a conspiracy motivated by discriminatory animus against an identifiable class; and (b) that the class discrimination was "invidious."

a. The Complaint Does Not Contain an Identifiable Class.

As noted in the Motion, the Complaint contains shifting and inconsistent allegations with regard to the class of persons against whom the City allegedly held some "animus." Motion at pp.

13-14. The Response (at p. 33) suggests that the class in question is "religion" itself and refers the Court to paragraphs 52, 53 and 348 of the Complaint as support. But paragraph 52 claims that the "class" is both those with "Plaintiff's Christian beliefs" and, inconsistently, those who provide "faith-based professional counseling." Paragraphs 53 and 348 of the Complaint do not discuss the "class" that was the subject to the City's "animus" at all. "Faith based professional counselors" is simply not an identifiable civil conspiracy "class." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) ("Whatever may be the precise meaning of a "class" for purposes of Griffin 's speculative extension of § 1985(3) beyond race, the term 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."). And even if it was assumed that "religion" could constitute a potential "class" for a civil conspiracy claim, the conclusory allegations of the Complaint are insufficient to support such a claim. *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). The Response does not contend otherwise.

b. The Complaint Does Not Adequately Allege Invidious Discrimination

As noted in the Motion (at p. 14), the Complaint itself affirmatively alleges that the Ordinance was advocated for by "a local LGBTQ activist organization" that promotes local "laws and policies providing equal rights, protections and benefits for the LGBTQ community." Complaint, ¶ 42. This directly contradicts the later unsupported contention in the Complaint that the Ordinance was motivated by animus against Christianity. The Response does not address this inconsistency.

X. THE REQUEST FOR PERMANENT INJUNCTION SHOULD BE DISMISSED.

Immediately upon the Eleventh Circuit's denial of the City's request for rehearing en banc, the City repealed the Ordinance, even doing so on an "emergency" basis. Since the Ordinance is no longer in effect, there is no need for a permanent injunction against its enforcement.

a. The Response argues against a red herring.

Despite the Response's argument to the contrary (at pp. 4-6), the Motion does not contend that this entire case is moot. Instead, the Motion argues that the request for a permanent injunction should be dismissed as moot.

b. Plaintiffs' defense of the requested permanent injunction is unavailing.

The Response purports to analyze the requested permanent injunction in light of the "voluntary cessation" of enforcement of the Ordinance. That very premise is flawed. The City did not "voluntarily" repeal the Ordinance in order to prevent a legal analysis of its validity (thereby reserving the right to re-enact it), but rather did so in response to the Eleventh Circuit's ruling that the Ordinance violated the free speech protections of the First Amendment. The City immediately recognized and complied with the Court's decision by repealing the Ordinance.

1. *The Repeal was Not a Strategic Move to Manipulate Jurisdiction.*

The Response cites to allegations in the Complaint suggesting that the City decided to repeal the Ordinance in order to limit the likelihood that the Ordinance might be deemed invalid by the U.S. Supreme Court, which would have invalidated SOCE prohibitions throughout the country. Response at pp. 7-9. If that was (part of) the City's reasoning, however, the City would hardly then be motivated to re-enact the Ordinance, which would result in legal challenges that could eventually reach the Supreme Court.

Not wanting to be the potential cause of invalidating SOCE regulations in effect in hundreds of jurisdictions throughout the United States, however, is not what the Eleventh Circuit meant by "voluntary cessation" so as to "manipulate jurisdiction." Instead, the court is concerned with defendants who temporarily cease offending practices *before they are adjudicated.* Here, the Eleventh Circuit entered an on-point, binding decision invalidating the Ordinance. To reenact the Ordinance without a change in law would be simply contemptuous of the court. The prompt repeal of the Ordinance shows that the City has no intention of behaving in this manner.

2. *The Voluntary Cessation Doctrine Requires a Change in Activity and Practice, Not a Change of Heart.*

The Response contends that certain of the City's elected officials continue to hold the belief that SOCE on minors is harmful, and that they are opposed to the practice. Response at pp. 9-11. Thus, according to the Response, the City has not had a "change of heart" with regard to the Ordinance. Response at pp. 9-11.

Plaintiffs again misunderstand the mootness analysis. The Eleventh Circuit decision does not compel the City's elected officials to change their views and support SOCE. In this context, having the requisite "change of heart" means agreeing to discontinue the activity and practice that has been deemed to violate rights: here, having in effect and enforcing an ordinance banning SOCE on minors. There is simply no basis to believe that the City will contemptuously ignore the on-point decision that invalidated the Ordinance by readopting it.

3. *The City has Maintained its Commitment to Not Violate the Law.*

The Response notes that the City has expressed "strong disagreement" with the Eleventh Circuit's opinion. Response at pp. 11-13. Once again, however, this fact actually supports, rather than undercuts, a finding of mootness. Even though the City Council "disagreed" with the decision of the panel, it promptly, unambiguously and completely repealed the Ordinance because it recognized the authority of the Eleventh Circuit. Expressing hope that the Eleventh Circuit or the Supreme Court will eventually recognize the validity of SOCE regulations is an acknowledgement by the City that it *cannot* ban SOCE on minors unless one of these courts takes action to allow it.

WHEREFORE, the City respectfully requests that the Court dismiss the Complaint and grant 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 January 6, 2023 on all counsel of record on the attached Service List.

Respectfully submitted,

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