UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, and DAVID H. PICKUP, LMFT, individually and on behalf of his patients, Plaintiffs, v. CITY OF TAMPA, FLORIDA, Defendant, v. EQUALITY FLORIDA, Intervenor-Defendant (Motion Pending)	No. 8:17-cv-02896-CEH-AAS

PROPOSED INTERVENOR-DEFENDANT EQUALITY FLORIDA'S
AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

The City Council of Tampa, Florida, passed Ordinance No. 2017-47 ("the Ordinance") unanimously on April 6, 2017. It prohibits licensed mental heal

The only Eleventh Circuit case to address a similar regulation, *Keeton v Anderson ey*, 664 F.3d 865 (11th Cir. 2011), held that requiring a counseling student at a state university to comply with professional standards that prohibit the use of conversion therapy does not violate the First Amendment. The decision in *Keeton* is completely consistent with *P c up* and *K ng* and fully supports enforcement of the Ordinance here.

o sch aeger v Governor, 848 F.3d 1293 (11th Cir. 2017), which struck down a law that barred physicians from asking patients about gun ownership, is not to the contrary. In *o sch aeger*, the court recognized that there is a crucial difference between a professional regulation that incidentally burdens some protected speech, like the statutes in *P c up* and *K ng*, and a regulation that directly restricts the information and advice that professionals may give to their clients, like the statute prohibiting doctors from asking their patients about gun ownership or discussing its dangers. *Id*. at 1309. The court held that the statute could not survive intermediate scrutiny, especially in light of the almost complete absence of any evidence demonstrating that Florida gun owners required such protection. *Id*. at 1312.

Unlike the law in *o sch aeger* the Ordinance does not prohibit professional speech. The Ordinance regulates the provision of conversion therapy to minors. Its sole purpose is to protect minor patients from a harmful practice, and it specifies that therapists are free to "express[] their views to patients [and] recommend[] [conversion therapy] to patients." Ordinance, *supra*, at 4.

Like the government action in *Keeton*, the Ordinance has only an incidental impact on speech and does not prevent therapists from expressing their opinions. It is a valid exercise of the City's power to protect its residents from harm.

ARGUMENT

I. THE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT'S SPEECH CLAUSE

Under Eleventh Circuit precedent, the Ordinance should be assessed under rational basis review, like other regulations of professional activity that incidentally limit some speech while protecting the public from harmful professional practices. But even under the intermediate scrutiny applied to laws that directly regulate professional speech, the Ordinance easily passes muster. Neither the Supreme Court nor any federal court of appeal has ever applied strict scrutiny to such laws. Nonetheless, the harms caused by these therapy practices for minors are so great, and the Ordinance is so narrowly tailored to address them, that it would survive strict scrutiny.

A. The City Has Legislative Authority To Regulate Medical Practitioners In Order To Protect the Health and Well-being of Its Residents

Under well-settled law, the City has the legislative authority to protect the health of its residents by regulating the dangerous practice of conversion therapy**.** Indeed, "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *H sborough Cty v Auto ated Med Labs Inc* , 471 U.S. 707, 719 (1985). As the Supreme Court has explained, "[t]he promotion of safety of persons . . . is unquestionably at the core of the State's police power," which extends to "state and local governments." *Ke ey v Johnson*, 425 U.S. 238, 247 (1976).

Those police powers provide wide latitude to require health care professionals to adhere to medical standards, and those regulations are generally permissible so long as they are reasonable. *ee*, *e g.*,**S**

Keeton, 664 F.3d at 877 (holding that a state university counseling program may require counseling students to adhere to professional standards recognizing that conversion therapy is harmful and prohibiting counselors from imposing their personal religious views on clients). The Ordinance is just such a reasonable professional regulation.

The corollary of this principle is that patients do not have a constitutionally protected right to medically unsound treatment offered as a commercial service, and state-licensed therapists do not have a right to offer practices that are ineffective and unsafe. *ee e g* , *M tche v C ayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider."); *Ab ga A for Better Access to Deve op enta Drugs v von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (holding that there is no privacy right for terminally ill patients to access treatments whose safety had not yet been tested). As the D.C. Circuit has noted, "[n]o circuit court has acceded to an affirmative access claim." *Id* at 710 n.18.

B. The Ordinance Is Permissible Under the First Amendment As A Reasonable Regulation of Professional Conduct That At Most Only Incidentally Restricts Some Speech

Laws enacted pursuant to a state or locality's police power are generally entitled to "a presumption of legislative validity." *Ke ey*, 425 U.S. at 247. Moreover, as the Eleventh Circuit has repeatedly recognized, regulations that protect the public from harmful or unethical professional practices are generally subject only to rational basis review even when they incidentally restrict some speech.

"A statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the

particular inquiries, record keeping, or any other expression. To eliminate any doubt on that score, the Ordinance specifies that therapists are free to "express[] their views to patients [and] recommend[] [conversion therapy] to patients." Ordinance, *supra*, at 4. Because the Ordinance has at most only an incidental impact on professional speech, it is subject to ordinary rational basis review.

In *Dana s Ra road upp y v Attorney Genera* , 807 F.3d 1235 (11th Cir. 2015), the Eleventh Circuit similarly affirmed that professional or commercial regulations that have only an incidental impact on speech are assessed under rational basis review. The court applied heightened scrutiny to the unusual commercial regulation in that case, but it did so expressly because the law directly regulated *on y* speech, not conduct; it prevented merchants from using a particular word, but did not require them to change their behavior in any way. *ee d*. at 1251 ("We rule today only on a law that, though it purports to regulate commercial behavior, has the sole effect of banning merchants from uttering the word *surcharge*[.]").

The court stressed that its analysis of this unusual law should not be misconstrued as suggesting that ordinary commercial regulations that incidentally restrict some protected speech are subject to heightened scrutiny. "Laws that target real-world commercial activity need not fear First Amendment scrutiny. Such run-of-the-mill economic regulations will continue to be assessed under rational-basis review." *Id*. Here, the Ordinance targets real-world professional activity and seeks to protect youth from very real-world harms. Consequently, it should be assessed under rational basis review.

The Supreme Court also recently affirmed the critical distinction between (1) professional regulations that have only an incidental impact on speech and (2) laws that directly regulate professional speech. In *Express ons Ha r Des gn v chne der an*, 137 S. Ct. 1144

1. Tampa Has A Compelling Interest In Protecting Youth From Harm

The City's interest in "protecting the physical and psychological well-being of minors," Ordinance, *supra*, at 4, is not only substantial, but compelling. Governments have a compelling interest in the health and well-being of their citizens. *Go dfarb v a tate Bar*, 421 U.S. at 792; *atson v Mary and*, 218 U.S. at 176. That interest is at its height when the government seeks to protect minors, who often lack the capacity and resources to protect their own interests, and who are "especially vulnerable to [the] practices" barred by the Ordinance. *K ng*, 767 F.3d at 238.

To survive intermediate scrutiny, the professional regulation must be aimed at a harm that is real and not just conjectural. *o sch aeger*, 848 F.3d at 1316; *see a so urner Broad ys v FCC*, 512 U.S. 622, 664 (1994). The court does not review the legislature's empirical judgment *de novo*; rather, the court's task is to determine whether the legislature has "drawn reasonable inferences based on substantial evidence." *urner Broad ys v F C C*, 520 U.S. 180, 195 (1997). ng

suicidality, substance abuse, and unsafe health behaviors. *ee* Substance Abuse & Mental Health Servs. Admin., *End ng Convers on herapy upport ng and Aff r ng LGB Q Youth* 20–20 (2015) (hereinafter "SAMHSA Report").

As the Third Circuit correctly recognized in *K ng*:

> Legislatures are entitled to rely on the empirical judgments of independent

Plaintiffs' claim that existing ethical standards for these professionals render the Ordinance unnecessary also has no merit. The very fact that Plaintiffs still maintain that they are entitled to subject minors to conversion therapy demonstrates the compelling need for a specific prohibition.

D. Plaintiffs' Claim That The Ordinance Warrants Strict Scrutiny Has No Merit

> competent to work with all populations, and that all students not impose their personal religious values on their clients, whether, for instance, they believe that persons ought to be Christians rather than Muslims, Jews or atheists, or that homosexuality is moral or immoral. As such, [the school's] curriculum and the generally applicable rules of ethical conduct of the profession are not designed to suppress ideas or viewpoints but apply to all regardless of the particular viewpoint the counselor may possess.

Id at 874.

The Court explained that "Keeton remains free to express disagreement with ASU's curriculum and the ethical requirements of the ACA, but she cannot block the school's attempts to ensure that she abides by them if she wishes to participate in the clinical practicum, which involves one-on-one counseling, and graduate from the program." *Id.*

That analysis applies equally to the Ordinance here. The Ordinance is not designed to suppress any ideas or viewpoints, but rather applies to all licensed mental health professionals regardless of their particular viewpoints. Similarly, Plaintiffs remain free to express disagreement with the Ordinance and the professional standards that it enforces, but they cannot block the City's enforcement of those professional standards to protect Tampa youth.

Moreover, as the Third Circuit explained in *K ng*, doctors implicitly communicate a viewpoint any time they prescribe or apply a particular treatment for a patient. 767 F.3d at 237. If Plaintiffs' novel free speech arguments were correct, then any regulation of medical practice would be subject to strict scrutiny. *Id.* "Such a rule would unduly undermine the State's authority to regulate the practice of licensed professions." *Id.*; *see a so P c up*, 740 F.3d at 1229 (same). This Court should similarly reject Plaintiff's argument.

Plaintiffs also erroneously claim that *o sch aeger* "rejected the approach taken by" *P c up* and *K ng*. Dkt. 3 at 13. Plaintiffs place undue weight on a few sentences of dicta in the *o sch aeger* opinion expressing "serious doubts about whether *P c up* was correctly decided."

848 F.3d at 1309. Read in context, it is plain the court was troubled only by the *P c up* court's

In *Reed*, the Court considered a law that directly regulated outdoor signs based entirely on their content. Finding no compelling basis for those distinctions, the Court struck down the law under strict scrutiny. *Reed*, 135 S. Ct. at 2224–25.

But, as the Eleventh Circuit recently recognized (immediately after citing *Reed*), "the general rule that content-based restrictions trigger strict scrutiny is not absolute. Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of . . . the greater need for regulatory flexibility in those areas." *Dana s R R upp y*, 807 F.3d at 1246. That is certainly the case here.

any case, the claim has no merit. The Ordinance expressly permits therapists to talk with patients about conversion therapy and to share any information they wish. Ordinance, *supra*, at 4.

F. The Ordinance Is Not Unconstitutionally Vague

Even when a law regulates speech, it need not be absolutely clear or provide perfect guidance to survive a vagueness challenge. *ard v Roc Aga nst Rac s* , 491 U.S. 781, 794 (1989). It need only provide people with a reasonable opportunity to understand what conduct it prohibits. *H v Co orado*, 530 U.S. 703, 732 (2000). The Ordinance does so.

The Ordinance includes an extensive and precise definition of the conduct it does and does not prohibit. Ordinance, *supra*, at 4. Moreover, "conversion therapy" and "SOCE" are terms of art within the professional counseling community and describe a distinct practice in which Plaintiffs themselves claim to specialize. Dkt. 1 at 13, 15; *see a so K ng*, 767 F.3d at 241; *P c up v Brown*, 42 F. Supp. 3d 1347, 1363–64 (E.D. Cal. 2012) (quoting *n ted tates v e tzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993)).

Plaintiff Vazzo uses an "extensive informed consent form" with his patients that "outlines the nature of SOCE counseling" and "explains the controversial nature of SOCE counseling." Dkt. 1 at 67. Plaintiff Pickup "has particular expertise and experience in the area of SOCE counseling" an (c)4(o)-2(un)20undethe OCrdinansege.

Moreover, the law itself provides clarity about Plaintiffs' hypotheticals. *P c up*, 42 F. Supp. 3d at 1366 (California's law does not prohibit a therapist from merely mentioning conversion therapy, recommending a book on conversion therapy, or referring minors for conversion therapy); *K ng v Chr st e*, 981 F. Supp. 2d 296, 328 (D.N.J. 2013) (same analysis regarding New Jersey statute). That is even more clear here, where the Ordinance specifies that therapists are free to "express[s] their view to patients [and] recommend[] [conversion therapy] to patients." *Ord nance*, *supra*, at 4.

G. The Ordinance Is Not Unconstitutionally Overbroad

A speech regulation is overbroad only if "a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *n ted tates v tevens*, 559 U.S. 460, 473 (2010). Plaintiffs assert that the Ordinance is overbroad because it prohibits them from providing conversion therapy to minors even when minors and their parents request and consent to it. Dkt. 3 at 19.

But Plaintiffs fail to demonstrate how that renders the Ordinance unconstitutional. *ee G uc sberg*, 521 U.S. at 728 (holding there is no constitutional right to medical care the government has deemed harmful). Plaintiffs' overbreadth challenge is nothing more than a disagreement with the City's legislative determination, based on "overwhelming evidence," that informed consent is insufficient to protect minors from an inherently ineffective and dangerous practice. *ee K ng*, 767 F.3d at 241; *P c up*, 740 F.3d at 1235 (rejecting argument that California's law was overbroad given its "plainly legitimate sweep").

H. The Ordinance Is Not An Unconstitutional Prior Restraint

Finally, Plaintiffs' claim that the Ordinance is a prior restraint of expression has no merit. No health and safety regulation of this type has been evaluated as a prior restraint, and for good

reason: "[T]he regulations [the Supreme Court has] found invalid as prior restraints have had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *ard*, 491 U.S. at 795 n.5 (quoting *e Pro ot ons Ltd v Conrad*, 42.

therapy ban). Far from evincing hostility toward religion, the Ordinance creates an express exemption for religious leaders providing religious counseling. Tampa, Fla., Code of Ordinances § 14-311.

The fact that Plaintiffs or their minor clients' interest in such therapy may be driven by religious belief is not sufficient to impute religious animus to the City. *ee K ng*, 767 F.3d at 242–43. Indeed, aside from the conclusory assertion that the Ordinance "targets Plaintiffs' and their clients' beliefs," Dkt. 1 at 24, Plaintiffs allege no facts to prove that the Ordinance was motivated by impermissible animus and therefore have failed to state a valid Free Exercise claim. *ee Keeton*, 664 F.3d at 1380 (finding no free exercise violation where plaintiff "has not established that [the challenged regulation] is aimed at particular religious practices"); *e ch*, 834 F.3d at 1047 (same).

III. THE ORDINANCE DOES NOT VIOLATE FLORIDA'S CONSTITUTIONAL LIBERTY OF SPEECH CLAUSE

The protections of Section 4 of Article I of the Florida Constitution, which prohibits laws "passed to restrain or abridge the liberty of speech," Fla. Const. art. I § 4, are coextensive with those afforded by the First Amendment. *Caf Erot ca v F a Dep t of ransp* , 830 So. 2d 181, 183 (Fla. Dist. App. Ct. 2002). Thus, the Ordinance does not violate Florida's Liberty of Speech Clause for the same reasons that it does not violate the First Amendment's Speech Clause.

IV. THE ORDINANCE DOES NOT VIOLATE FLORIDA'S CONSTITUTIONAL "RIGHT TO FREE EXERCISE AND ENJOYMENT OF RELIGION" CLAUSE OR FLORIDA'S RELIGIOUS FREEDOM RESTORATION ACT

Article I of the Florida Constitution forbids laws "prohibiting or penalizing the free exercise [of religion]" but also specifies that "[r]eligious freedom shall not justify practices inconsistent with public morals, peace or safety." Fla. Const. art. I § 3. This plain language

provides less protection than that provided by the First Amendment. *arner v C ty of Boca Raton*, 267 F.3d 1223, 1226 n.3 (11th Cir. 2001).

arner thus rejected the argument that the Florida Constitution requires strict scrutiny of any law that burdens religious practice. *Id* at 1226 & n.3. Here, because conversion therapy is a practice "inconsistent with public safety," it falls squarely within the list of practices expressly excluded from the Florida Constitution's protection. *ee* Fla. Const. art. I § 3.

Plaintiffs have also failed to state a valid claim under Florida's Religious Freedom Restoration Act of 1998 (FRFRA), Fla. Stat. §§ 761.01–.061. Plaintiffs have failed to allege facts that meet the threshold requirement of showing that the

The only portion of Chapter 491 that even arguably touches the same subject matter as the Ordinance is Section 491.009, which enumerates several offenses that could result in discipline for providers—including primarily the denial or revocation of their licenses. That the Legislature did not intend this list to be exhaustive is evidenced by its declared intent to "assist the public in making informed choices of [mental health] services by establishing *n u* qualifications for entering into and remaining in the respective professions." Fla. Stat. § 491.002.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 12, 2018, the foregoing was electronically filed with the Clerk of Court by using the CM/ECF system, which will also send a notice of electronic filing to all counsel of record.

/s/ *y v a a bo t*
Attorney