No. 19-14387

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY, individually and on behalf of its members, constituents and clients,

Plaintiffs–Appellees,

v.

CITY OF TAMPA, FLORIDA,

Defendant–Appellant

On Appeal from the United States District Court
for the Middle District of Florida
in Case No. 8:17-cv-02896-T-02AAS before the Honorable William F. Jung

ANSWER BRIEF OF PLAINTIFFS-APPELLEES

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No. 19-14387

VAZZO, *etc.*, *et al.* v. CITY OF TAMPA, FLORIDA

PLAINTIFFS-APPELLEES'
CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees hereby certify that the following individuals and entities are known to have an interest in the outcome of this case:

Burr & Forman, LLP

Carlton Fields Jorden Burt, PA

City of Tampa

Clemons, J. Tyler

Dana Lee Robbins

Dinielli, David C.

Equality Florida Institute, Inc.,

Gannam, Roger K.

Harvey, David E.

Jung, William F.

Liberty Counsel, Inc.

Porter, Brian C.

McCoy, Scott D.

Mihet, Horatio G.

Minter, Shannon P.

National Center for Lesbian Rights

No. 19-14387

VAZZO, *etc.*, *et al.* v. CITY OF TAMPA, FLORIDA

Porter, Brian C.

Richardson, Ursula D.

Sansone, Amanda Arnold

Schmid, Daniel J.

Soli Deo Gloria International, Inc.

Southern Poverty Law Center

Staver, Mathew D.

Stoll, Christopher

Vazzo, Robert L.

Walbolt, Sylvia H.

Williams, Robert V.

No publicly traded company or corporation has an interest in the outcome of this case.

/s/ Roger K.Gannam
Roger K. Gannam
Attorney for Plaintiffs–Appellees

APPELLEES' STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request that oral argument be permitted in this appeal because it would assist the Court in understanding and deciding the weighty state preemption principles on which the district court invalidated Appellant's municipal ordinance and on which the district court relied in passing on the question of the constitutionality of the ordinance's ban of protected speech.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

This appeal arises from the district court's entry of summary judgment for Plaintiffs–Appellees, Robert L. Vazzo, LMFT ("Vazzo"), and Soli Deo Gloria International, Inc. d/b/a New Hearts Outreach Tampa Bay ("New Hearts"), which invalidated the municipal ordinance passed by Defendant–Appellant, City of Tampa ("Tampa" or the "City") banning derisively labeled and chimerical "conversion therapy" for minors. In reality, the ordinance banned the voluntary, speech-only counseling provided by Vazzo, a Florida-licensed marriage and family therapist, for minors who seek and desire help with reducing or eliminating unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts. New Hearts provides referrals for the voluntary, speech-only counseling provided by Vazzo, sometimes called sexual orientation change efforts or "SOCE" counseling, and joined Vazzo in suing Tampa to challenge the validity of the ordinance on First Amendment and state preemption grounds, among other constitutional and statutory grounds. The district court invoked the principle of constitutional avoidance, passed on the constitutional questions, and invalidated the ordinance solely on state preemption grounds.

Tampa's brief throws up all it can against district court's thorough and comprehensive preemption analysis. None of it sticks. This Court should affirm the district court's judgment invalidating the ordinance.[1]

STATEMENT OF THE CASE

Pursuant to 11th Cir. R. 28-2, Vazzo and New Hearts provide a complete statement of the case, to supplement Tampa's abbreviated version (Initial Brief of Appellant ("Tampa Brief") at 1–3), as follows:

I. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW.

Vazzo and New Hearts challenged City of Tampa Ordinance 2017-47 as an unconstitutional infringement of their free speech under the First Amendment, and as an *ultra vires* municipal regulation in a field preempted to the State of Florida, and on other constitutional and statutory grounds. (R-78,[2] First Am. V. Compl., at 31–50 (Counts I–VIII); R-213, Order Granting Pls.' Mot. Summ. J., at 7–8, n.6.) Appellees also moved for a preliminary injunction against enforcement of the

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[1] This Court can affirm the lower court's invalidation of the ordinance on any basis supported by the record, even if different from the basis of the lower court's decision. *See Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1303 (11th Cir. 2007). Thus, the substantial First Amendment issues developed on the record below (*see* R-213 at 7–8) are necessarily before this Court in addition to the preemption issues. (*See infra* Argument pt. II.)

[2] Record materials are referenced by "R-[document number]" followed by the page or paragraph number.

ordinance on First Amendment free speech and state preemption grounds. (R-85, Pls.' Mot. Prelim. Inj.)

On referral, the magistrate judge below recommended granting the preliminary injunction on First Amendment free speech grounds. (R-149.) Specifically, the magistrate concluded that Tampa's ordinance was likely unconstitutional and should be enjoined insofar as it bans voluntary, speech-only therapy. (R-149 at 37–38.) In arriving at this result, the magistrate reached a number of conclusions:

- "Plaintiffs demonstrated a likelihood of success on their content-based-law claim" because "a communication during SOCE counseling is speech," Tampa's ordinance is a content-based restriction of that speech, and, under the Supreme Court's holding in *Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) [hereinafter *NIFLA*], and this Court's holding in *Wollschlaeger v. Florida*, 848 F.3d 1293 (11th Cir. 2017), Tampa's ordinance must be subjected to strict scrutiny. (R-149 at 21, 25–26.) Tampa's ordinance failed strict scrutiny for lack of narrow tailoring because "the City considered no lesser restrictions on mental health professionals' speech" and "the City considered no alternatives to its total ban on conversion therapy." (R-149 at 27–28.) In particular, Tampa failed to

consider "plausible alternatives" to the total ban, such as a more limited ban of only "involuntary SOCE counseling," and/or only "aversive conversion therapy techniques." (R-149 at 28–29.)

- "[P]laintiffs sufficiently demonstrated they are likely to succeed on the merits of their First Amendment claim that [Tampa's] Ordinance 2017-47 is viewpoint discrimination" because the "facts also sufficiently demonstrate the plaintiffs' claim that the City adopted Ordinance 2017-47 because the City disagreed with the viewpoint mental health counselors express during SOCE counseling." (R-149 at 29–30.) "[P]laintiffs similarly demonstrated they are likely to succeed on the merits of their claim that Ordinance 2017-47 is overbroad" because, given the law's viewpoint discrimination, "the plaintiffs are likely to prove that every application of the ordinance creates the risk ideas might be suppressed." (R-149 at 30–31.)
- "[P]laintiffs sufficiently demonstrated a likelihood of success on the merits of their claim that Ordinance 2017-47 is an unconstitutional prior restraint on the plaintiffs' free speech" because the law "restricts the plaintiffs' speech during SOCE counseling before they can express it." (R-149 at 31.)

- "[P]laintiffs sufficiently demonstrated a likelihood of success on the merits of their claim that Ordinance 2017-47 is unconstitutionally vague" because the law "authorizes and encourages discriminatory enforcement by code enforcement officers (who may or may not have any medical or mental health counseling training) against the viewpoints of mental health professionals who provide SOCE counseling." (R-149 at 31–32.)

The district judge received briefing and heard argument on Tampa's objections to the magistrate's recommendation (R-156, R-160, R-161), but ultimately did not resolve the objections. Instead, the district judge entered an order (the order on appeal) on the parties' cross-motions for summary judgment. (R-213.) Invoking "'the longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided,'" the court granted Appellees' motion for summary judgment and invalidated Tampa's counseling ban ordinance on state preemption grounds instead of the First Amendment grounds found meritorious by the magistrate:

> Following this policy, the Court turns first to Count VI, a preemption Count based upon Florida law. According to the City, the Ordinance regulates medical professionals and "part of the practice of medicine" within the City limits. Dkt. 189 at 17. The City is unaware of any child ever receiving proscribed SOCE in the City.1 The City has never before substantively regulated and disciplined the practice of medicine, psychotherapy, or mental health

> treatment within City limits. Nor does the City possess charter or home rule authority to do so. The City Ordinance is preempted by the comprehensive Florida regulatory scheme for healthcare regulation and discipline. Accordingly, the Court strikes the Ordinance under the implied preemption doctrine and grants the Plaintiffs' motion for summary judgment on Count VI.

(R-213 at 2 (citations and footnote omitted).)

II. FACTS.

A. City of Tampa Ordinance 2017-47.

City of Tampa Ordinance 2017-47 took effect on April 10, 2017. (R-78 ¶¶ 24–26.[3]) Section 5 of the ordinance states that "[i]t shall be unlawful for any Provider to practice conversion therapy efforts on any individual who is a minor regardless of whether the Provider receives monetary compensation in exchange for such services." (R-213 at 49.) Section 4 defines "conversion therapy efforts" as:

> **any counseling**, practice, or treatment performed **with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex**. Conversion therapy does not include counseling that provides assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and

[3] The City did not conduct discovery or otherwise adduce record facts to contradict the verified allegations of Plaintiffs' First Amended Verified Complaint (R-78).

> development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, **as long as such counseling does not seek to change sexual orientation or gender identity**.

(R-213 at 48 (emphasis added).) Each violation of the ordinance constitutes a separate offense and carries a $1,000.00 fine for the first offense and $2,000.00 for each and every subsequent violation. (R-213 at 49.)

A "Provider" subject to the ordinance is defined as

> any person who is **licensed by the State of Florida to provide professional counseling**, or who performs counseling as part of his or her professional training under chapters 456, 458. 459, 490 or 491 of the Florida Statutes . . . including but not limited to, medical practitioners, osteopathic practitioners, psychologists, psychotherapists, social workers, marriage and family therapists, and licensed counselors.

(R-213 at 49 (emphasis added).)

B. Appellee Robert L. Vazzo, LMFT.

Appellee Robert L. Vazzo, LMFT, is a marriage and family therapist and is licensed to practice mental health counseling in California, Florida, Nevada, and Ohio. (R-78 ¶ 100.) Vazzo specializes in SOCE (sexual orientation change efforts) counseling, including in the areas of unwanted same-sex attraction (SSA). (R-78 ¶ 102.) His practice includes approximately 17–25 clients each week, and ten percent of those clients are minors seeking SOCE counseling. (*Id.*)

Vazzo helps clients with their unwanted same-sex attractions, behaviors, and identities by talking with them about root causes, about gender roles and identities, and about their associated anxieties and confusion. (R-78 ¶ 62.) Speech is the only tool that Vazzo uses in his counseling with minors seeking to reduce or eliminate their unwanted SSA, behaviors, or identities. (R-78 ¶ 63.) The only thing that happens in their counseling sessions is speech. (*Id.*) Vazzo talks with his clients about the clients' goals, objectives, religious beliefs, desires, and identities. (*Id.*) Vazzo does not engage in aversive techniques, nor is he aware of any practitioner who engages in such techniques in providing SOCE counseling to minors. (R-78 ¶ 61.)

Vazzo does not begin counseling with any predetermined goals other than those that the clients themselves identify and set. (R-78 ¶ 64.) Vazzo employs speech to help clients understand and identify their anxieties or confusion regarding their attractions or identities, and then to help each client formulate the method of counseling that will most benefit the client. (R-78 ¶ 65.) Vazzo's counseling often focuses on helping parents heal wounds or frustrations with their child and to work on loving and accepting their child despite any challenges that arise from the child's unwanted same-sex attractions, behaviors, or identity. (R-78 ¶ 66.)

Many of Vazzo's clients who desire SOCE counseling profess to be Christians with a sincerely held religious belief that homosexuality is harmful and destructive

and therefore seek SOCE counseling to live a lifestyle in congruence with their faith and to conform their identities, attractions, and behaviors to their sincerely held religious beliefs. (R-78 ¶ 104.) Vazzo has never received any complaint or report of harm from any of his clients seeking and receiving SOCE counseling, including the many minors that he has counseled. (R-78 ¶ 105.) In fact, all of Vazzo's clients who have engaged in SOCE counseling for at least one year have experienced some degree of positive change with respect to their unwanted SSA. (*Id.*). **Vazzo does not coerce any client to engage in SOCE counseling and would never engage in any counseling unless the client desires such counseling and voluntarily consents to it.** (R-78 ¶ 106.)

Vazzo has had numerous clients in Florida, provides counseling to clients in Florida, and constantly receives inquiries from all over the State concerning SOCE counseling. (R-78 ¶ 108.) Prior to the district court's invalidation of Tampa's ordinance, Vazzo had been contacted by individuals in Tampa who desired to engage in SOCE counseling with Vazzo, including a fifteen-year-old minor client seeking SOCE counseling from Vazzo. (R-78 ¶¶ 109–110.) The minor client desired to receive SOCE counseling from a licensed professional counselor with expertise in this particular area. (*Id.*). The client struggled with unwanted SSA and desired to engage in SOCE counseling with Vazzo to reduce or eliminate the unwanted SSA. (R-78 ¶ 111.) Vazzo was prohibited from providing SOCE counseling because of

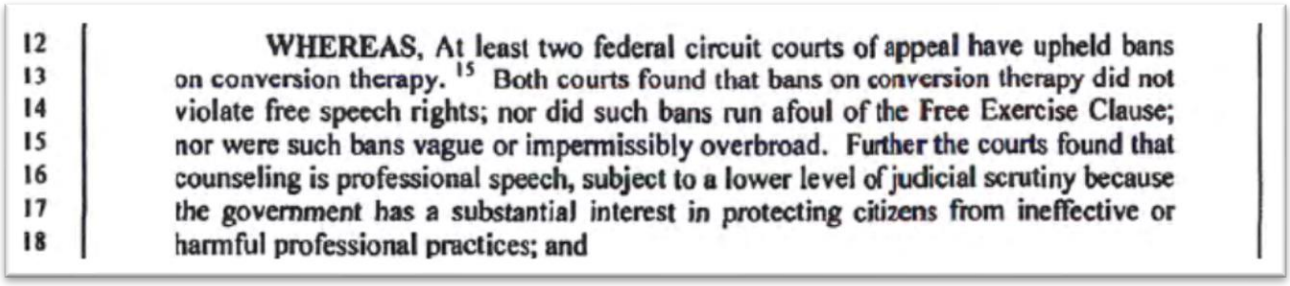
the ordinance, and his client was prohibited from receiving such counseling from a licensed professional. (R-78 ¶112.)

C. Appellee New Hearts.

New Hearts is a Christian, confidential healing and discipleship ministry fostering sexual and relational wholeness in people's lives through the hope of Jesus Christ. (R-78 ¶¶ 126, 130–31.) As part of its ministry, New Hearts offers referrals to individuals, including minors, who are struggling with unwanted SSA, but **only refers clients who desire and voluntarily consent to such counseling**. (R-78 ¶¶ 133–134.) Prior to its invalidation, the Tampa ordinance prohibited New Hearts from effectively providing for the needs of its clients because no licensed counselor in Tampa could provide SOCE counseling to minors who desired and voluntarily sought such counseling. (R-78 ¶ 135.) New Hearts also provides events and conferences at which its constituents, including minors, hear from licensed professionals concerning topics such as SSA and SOCE counseling, but Tampa's ordinance prevented New Hearts from hosting such events. (R-78 ¶¶ 136–143.)

D. Tampa Interprets the Ordinance to Prohibit *Speech*.

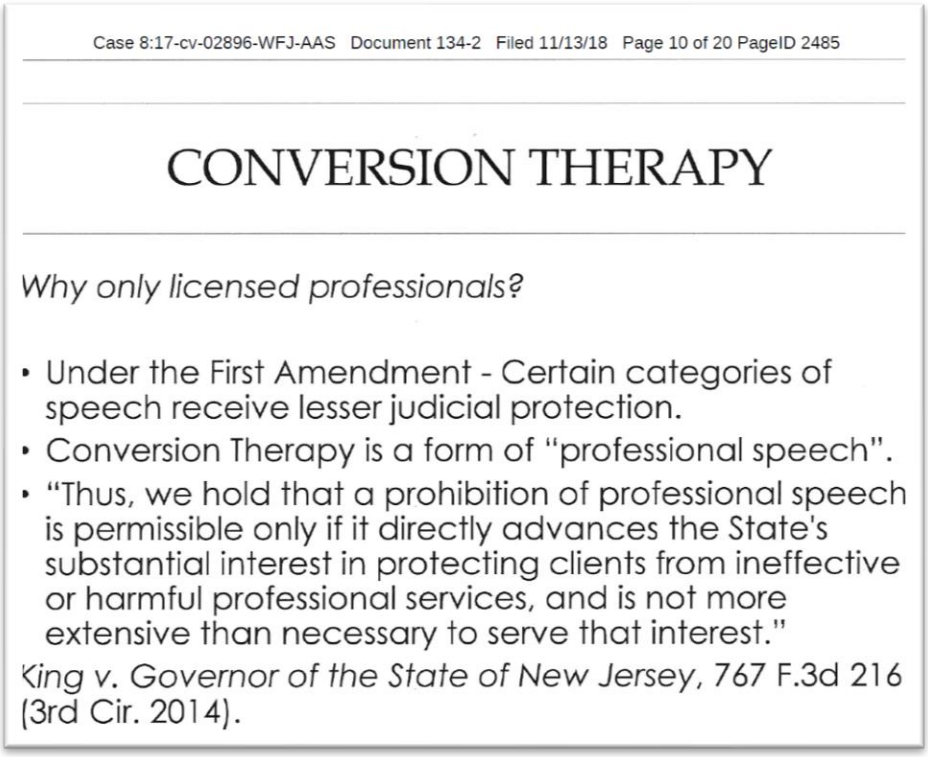
The City admitted its intention to censor **speech** through the ordinance, both in the text of the ordinance itself, and in the post-enactment enforcement training materials prepared by the City's attorney overseeing enforcement. (R-149 at 25–26.) First, the plain language of the ordinance targets counselors' speech:



WHEREAS, At least two federal circuit courts of appeal have upheld bans on conversion therapy. [15] Both courts found that bans on conversion therapy did not violate free speech rights; nor did such bans run afoul of the Free Exercise Clause; nor were such bans vague or impermissibly overbroad. Further the courts found that counseling is professional speech, subject to a lower level of judicial scrutiny because the government has a substantial interest in protecting citizens from ineffective or harmful professional practices; and

(R-213 at 47.[4]) Second, in the City's post-enactment training of its code officials responsible for enforcing the ordinance, the City's attorney responsible for enforcement confirmed the City's intent and interpretation of the ordinance to censor "professional speech":

[4] The "two federal circuit courts" which "found that counseling is professional speech, subject to a lower level of judicial scrutiny" according to this recital are *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014), and *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (9th Cir. 2014). (R-213 at 47, n.15.) On this point, both of the cases subsequently were abrogated by the Supreme Court in *Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) [hereinafter *NIFLA*].



Case 8:17-cv-02896-WFJ-AAS Document 134-2 Filed 11/13/18 Page 10 of 20 PageID 2485

CONVERSION THERAPY

Why only licensed professionals?

- Under the First Amendment - Certain categories of speech receive lesser judicial protection.
- Conversion Therapy is a form of "professional speech".
- "Thus, we hold that a prohibition of professional speech is permissible only if it directly advances the State's substantial interest in protecting clients from ineffective or harmful professional services, and is not more extensive than necessary to serve that interest."

King v. Governor of the State of New Jersey, 767 F.3d 216 (3rd Cir. 2014).

(R-134-2 at 10; R-133-3 at 95:24–96:13; R-140-1 at 16; R-138 at 32:7–34:16.)

The City interprets the ordinance to prohibit a counselor's adopting or affirming a client's goal to change sexual orientation or gender identity, even where the counselor did not initiate or predetermine the goal. (R-133-3 at 66:8–21; R-140-1 at 2; R-138 at 15:1–16:12.) The City interprets the ordinance to prohibit a therapist's encouraging a ten-year-old, biological boy, who has expressed a female gender identity, to embrace or align with his biological male gender role or identity. (R-133-1 at 95:2–17; R-140-1 at 20; R-138 at 52:13–65:4.) The City interprets the ordinance to punish a counselor's viewpoint that affirms a client's goal to change

sexual orientation or gender identity. (R-133-3 at 66:8–21; R-140-1 at 2; R-138 at 15:1–16:12.)

E. There Is No Legislative or Other Record of Complaints of Harm from SOCE in Tampa.

The City received no complaints of harm from "conversion therapy" or SOCE provided in Tampa. (R-149 at 35 (citing R-132-1 at 8); *see also* R-140-1 at 18; R-138 at 45:10–48:9.) In proposing and enacting the ordinance, **the City made no effort to investigate or otherwise determine whether any such complaints existed**. (R-133-2 at 41:3–22; R-140-1 at 19; R-138 at 45:10–48:9.) Furthermore, Vazzo has never received a complaint or report of harm from any client receiving SOCE counseling. (R-78 ¶ 105.)

F. The Ordinance is Not Supported by Empirical Evidence of Harm from "Conversion Therapy."[5]

1. Neither the City nor the APA Report Can Quantify Harm from "Conversion Therapy."

The ordinance itself claims justification in "overwhelming research," which refers exclusively to fourteen sources appearing in the ordinance's recitals. (R-213 at 44–47.) The sources cited (collectively, the "Sources") comprise various reports, statements, and position papers, including the 2009 Report of American Psychological Association Task Force on Appropriate Therapeutic Responses to

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[5] R-138 at 51:4–77:25.

Sexual Orientation [hereinafter APA Report]. (R-213 at 44–45, 45 n.3.) Some of the other Sources cite to the APA Report, but none of the other Sources updates or contradicts the conclusions in the APA Report. (*See*, *e.g.*, 25-5, Substance Abuse and Mental Health Services Administration (SAMHSA), *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (2015) [hereinafter SAMHSA Report], PageID 568 ("**No new studies have been published that would change the conclusions reached in the APA Taskforce's 2009 review**." (emphasis added)), PageID 569 ("**[N]o research demonstrating the harms of conversion therapy with gender minority youth has been published . . . .**" (emphasis added)); *see also* R-138 at 65:5–72:12; R-140-1 at 34–39.)

The APA Report discloses up front, and repeatedly throughout, that there is no empirical or other research supporting **any conclusions** regarding either efficacy

or harm from SOCE,[6] especially in children and adolescents. (R-134-17 at 3 ("[T]he recent SOCE research **cannot provide conclusions** regarding efficacy or safety . . . ."), 7 ("The research on SOCE **has not adequately assessed** efficacy and safety."), 37 ("These [recent] studies all use designs that **do not permit cause-and-effect attributions to be made**."), 42 ("[T]he recent studies **do not provide valid causal evidence** of the efficacy of SOCE **or of its harm** . . . ."), 42 ("[T]he nature of these studies **precludes causal attributions** for harm or benefit to SOCE . . . ."), 42 ("We conclude that there is a **dearth of scientifically sound research** on the safety of SOCE. . . . Thus, **we cannot conclude how likely it is that harm will occur** from SOCE."), 72 ("**There is a lack of published research on SOCE among children**."), 73 ("**We found no empirical research on adolescents who request**

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[6] The APA Report does not use the term "conversion therapy." Rather, the APA Report uses "the term *sexual orientation change efforts* (SOCE) to describe methods (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) that aim to change a person's same-sex sexual orientation to other-sex, regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved." (R-134-17 at 12 n.5.)The Task force chose the term SOCE over terms like "conversion therapy" because SOCE is more descriptive and specific, while "conversion therapy" is a lay term subject to misinterpretation and unintended connotations. (R-192-1 at 71:12–25.) The SOCE term was intended to refer to "efforts that have the a priori goal, prior to even meeting the client, that homosexuality should be changed or that sexual orientation should be changed," and practices that "attempted, a priori to seeing the client and listening to the client's concerns, that the client needed to eliminate or eradicate those feelings." (R-192-1 at 58:20–60:1.)

SOCE . . . ."), 90 ("**We concluded that research on SOCE . . . has not answered basic questions of whether it is safe or effective and for whom**."), 91 ("**[S]exual orientation issues in children are virtually unexamined**.") (all emphases added).)

The City's expert Judith M. Glassgold, Psy.D, was the Chair of the APA Task Force (the "Task Force") that authored the 2009 APA Report. (R-192-1 at 48:18–49:4.) The APA has not withdrawn or updated any part of the 2009 APA Report, and there is no part of it that Dr. Glassgold would no longer endorse. (R-192-1 at 95:24–96:25.)

The Task Force did not attempt to quantify the prevalence or likelihood of harm from SOCE as compared to psychotherapy in general because the research did not allow any such quantification. (R-192-1 at 104:25–111:24.) The City cannot in any way quantify the purported risk of harm it claims to be posed by "conversion therapy" or SOCE. (R-133-2 at 110:5–112:11 ("No, **nobody knows**."(emphasis added)); R-138 at 75:9–77:25.) Neither can the City's other expert, Norman Spack, M.D., quantify an increased risk of suicidality, depression, or any other poor mental health outcome from "conversion therapy" as compared to psychotherapy in general. (R-192-2 at 130:7–131:11.)

2. The APA Report Excludes Gender Identity Change Efforts, Which Similarly Lack Empirical Research.

The APA Report addressed only sexual orientation: "Due to our charge, we limited our review to sexual orientation and **did not address gender identity** . . . ." (R-134-17 at 9 (emphasis added).) Another Source cited by the ordinance, however, points to the same lack of empirical research on the outcomes of gender identity change efforts:

> Different clinical approaches have been advocated for childhood gender discordance. **Proposed goals of treatment include reducing the desire to be the other sex**, decreasing social ostracism, and reducing psychiatric comorbidity. **There have been no randomized controlled trials of any treatment**. . . .

(R-213 at 45, n.6; R-24-4, Stewart L. Adelson, *Practice Parameter on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, 51(9) J. Am. Acad. Child & Adolescent Psychiatry 957 (2012), https://www.jaacap.org/article/S0890-8567(12)00500-X/pdf [hereinafter AACAP Statement], PageID 521 (emphasis added) (footnote omitted).) Also:

> **Given the lack of empirical evidence** from randomized, controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, and longitudinal evidence that gender discordance persists in only a small minority of untreated cases arising in childhood, **further research is needed** on predictors of persistence and desistence of childhood gender discordance as well as the long-term risks and benefits of intervention . . . .

(R-24-4 PageID 522 (emphasis added).)

As with the APA Report, the AACAP Statement leaves discretion with licensed professionals to make an informed decision, with the patient, about the most appropriate treatment. (R-24-4 PageID 522 ("As an ethical guide to treatment, 'the clinician has an obligation to inform parents about the state of the empiric database' . . . ." (footnote omitted), PageID 524 ("The ultimate judgment regarding the care of a particular patient must be made by the clinician in light of all of the circumstances presented by the patient and that patient's family, the diagnostic and treatment options available, and other available resources.").)

The APA itself more recently addressed issues of gender identity and minors which were not included in the APA Report in its *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70(9) Am. Psychologist 832 (2015), https://www.apa.org/practice/guidelines/transgender.pdf [hereinafter APA TGNC Guidelines]. As a discussion separate from SOCE, these later Guidelines make the point that "[t]he constructs of gender identity and sexual orientation are theoretically and clinically distinct, even though professionals and nonprofessionals frequently conflate them." (R-135-1 PageID 2752.) Nonetheless, the APA recognized the same absence of research on gender identity change in children: "Due to the evidence that not all children persist in a TGNC identity into adolescence or adulthood, and because **no approach to working with TGNC**

children has been adequately, empirically validated, consensus does not exist regarding best practice with prepubertal children."[7] (*Id.* at PageID 2759 (emphasis added).) One distinct approach recognized by the APA "to address gender identity concerns in children" is an approach where "children are encouraged to embrace their given bodies and to align with their assigned gender roles." (*Id.*) And again, calling for more research, the APA concludes, "**It is hoped that future research** will offer improved guidance in this area of practice." (*Id.* (emphasis added) (citation omitted).)

Notwithstanding the APA's call for future research, however, the APA expressly sanctioned as **imperative** allowing a minor who has selected a gender identity different from his or her biological sex to choose to return:

> Emphasizing to parents the importance of allowing their child the freedom **to return to a gender identity that aligns with sex assigned at birth** or another gender identity at any point **cannot be overstated**, particularly given the research that suggests that not all young gender nonconforming children will ultimately express a gender identity different from that assigned at birth.

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[7] The City's expert Dr. Spack agrees with all premises and conclusions in this statement. (R-192-2 at 116:25–120:25; R-192-8.) The City's other expert, Dr. Glassgold, would modify the conclusion, but only slightly, to read, "consensus does not exist, but a trend towards consensus does exist." (R-192-1 at 158:13–159:24; R-192-8.)

(R-135-1 PageID 2760 (emphasis added).) The City's expert Dr. Spack agrees with this imperative. (R-192-2 at 123:1–17; R-192-8.)

Other literature by a research scientist favorably cited in the AACAP Statement positively advances treatment to assist children in fading "cross-gender identity" by the time they reach adolescence. (R-135-2, Heino F. L. Meyer-Bahlburg, *Gender Identity Disorder in Young Boys: A Parent- and Peer-Based Treatment Protocol*, 7 Clinical Psychol. and Psychiatry 360 (2002) [hereinafter Meyer-Bahlburg), at 361[8] ("We expect that we can diminish these problems if we are able to speed up the fading of the cross-gender identity which will typically happen in any case.") (cited by R-24-4 PageID 522 (n.100)); *see also* Meyer-Bahlburg 365 ("The specific goals we have for the boy are to develop a positive relationship with the father (or a father figure), positive relationships with other boys, gender-typical skills and habits, to fit into the male peer group or at least into a part of it, and to feel good about being a boy.").)[9]

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[8] The CM/ECF system did not affix the district court's official filing header information, including page numbering, to the Meyer-Bahlburg study at R-135-2. Thus, citations are to the study's original page numbering.

[9] Dr. Spack identified Dr. Meyer-Bahlburg as someone Dr. Spack "would trust with [standards of care for the health of transsexual, transgender, and gender-nonconforming people] -- with comments about children or adolescence." (R-192-2 at 75:25–76:22, 77:14–79:16, 82:14–83:12; R-192-12.)

3. The APA Report Commends a Client-Directed Approach to Counseling for Clients with Unwanted Same-Sex Attractions, Commends More Research on Voluntary SOCE, and Condemns Only Coercive Therapies.

In connection with its SOCE review and recommendations, the APA Report highlighted a problem with the sexual orientation terminology in the academic research:

> Recent studies of participants who have sought SOCE **do not adequately distinguish between sexual orientation and sexual orientation identity**. We concluded that the failure to distinguish these aspects of human sexuality has led SOCE research to obscure what actually can or cannot change in human sexuality. . . . **[S]ome individuals modified their sexual orientation identity** (e.g., individual or group membership and affiliation, self-labeling) **and other aspects of sexuality** (e.g., values and behavior). . . . **[I]ndividuals, through participating in SOCE, became skilled in ignoring or tolerating their same-sex attractions. Some individuals reported that they went on to lead outwardly heterosexual lives, developing a sexual relationship with an other-sex partner, and adopting a heterosexual identity**.

(R-134-17 at 3–4 (emphasis added).)

For adults desiring "**to change their sexual orientation** or their behavioral expression of their sexual orientation, or both," the APA reported that "adults perceive a benefit when they are provided with **client-centered** . . . approaches" involving "identity exploration and development," "**respect for the client's values, beliefs, and needs**," and "permission and opportunity to explore a wide range of

options . . . **without prioritizing a particular outcome**." (R-134-17 at 4.) The Task Force elaborated:

> Given that there is diversity in how individuals define and express their sexual orientation identity, an affirmative approach is supportive of clients' identity development **without an a priori treatment goal concerning how clients identify or live out their sexual orientation or spiritual beliefs**. This type of therapy . . . can be helpful to those who accept, reject, or are ambivalent about their same-sex attractions. **The treatment does not differ, although the outcome of the client's pathway to a sexual orientation identity does**.

(R-134-17 at 5 (emphasis added).) "For instance, the existing research indicates that possible outcomes of sexual orientation identity exploration **for those distressed by their sexual orientation** may be: LGB identities[,] **Heterosexual sexual orientation identity**[,] Disidentifying from LGB identities[, or] Not specifying an identity." (R-134-17 at 60 (emphasis added) (citations omitted).)

The affirmative approach endorsed by the APA Report, with no a priori treatment goal on the part of the therapist, can be applied to both "a client who experiences same-sex attraction and wants to . . . align attractions with a heterosexual identity and also to a client who experiences same-sex attraction and does not want to align with a heterosexual identity . . . ." (R-192-1 at 130:21.)

A key finding from the Task Force's review "is that those who participate in SOCE, **regardless of the intentions of these treatments**, and those who resolve their distress through other means, **may evolve during the course of their**

treatment in such areas as self awareness, self-concept, and identity." (R-134-17 at 66 (emphasis added); *id.* at 61 ("Given . . . that many scholars have found that **both religious identity and sexual orientation identity evolve**, it is important for LMHP to explore the development of religious identity and sexual orientation identity." (emphasis added) (citations omitted)).)

The Task Force identifies the **same essential framework** "for children and adolescents who present a desire to change either their sexual orientation or the behavioral expression of their sexual orientation, or both, or whose parent or guardian expresses a desire for the minor to change."[10] (R-134-17 at 5.) Specifically, for children and youth, "[s]ervices . . . should support and respect age-appropriate issues of **self-determination**; services should also be provided in the least restrictive setting that is clinically possible and should maximize self-determination. At a minimum, **the assent of the youth should be obtained, including whenever possible a developmentally appropriate informed consent to treatment**." (*Id.* (emphasis added).)

The Task Force also highlighted the ethical importance of client self-determination, encompassing "the ability to seek treatment, consent to treatment, and refuse treatment. **The informed consent process is one of the ways by which**

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[10] The APA Report defines "*adolescents* as individuals between the ages of 12 and 18 and children as individuals under age 12." (R-134-17 at 71 n.58.)

self-determination is maximized in psychotherapy." (R-134-17 at 68 (emphasis added); *see also id.* at 6 ("LMHP **maximize self-determination** by . . . providing effective psychotherapy that explores the client's assumptions and goals, without preconditions on the outcome [and] **permitting the client to decide the ultimate goal of how to self-identify and live out her or his sexual orientation**. . . . [T]herapy that increases the client's ability to cope, understand, acknowledge, and integrate sexual orientation concerns into **a self-chosen life** is the measured approach.").)

The Task Force viewed the concept of self-determination as equally important for minors: "It is now recognized that **adolescents are cognitively able to participate in some health care treatment decisions**, and such participation is helpful. [The APA] encourage[s] professionals to seek the assent of minor clients for treatment." (R-134-17 at 74 (emphasis added) (citations omitted); *see also id.* at 77 ("The ethical issues outlined [for adults] are also relevant to children and adolescents . . . .").)

In light of this strong self-determination ethic regarding youth, the Task Force "recommend[ed] that when it comes to treatment that purports to have an impact on sexual orientation, **LMHP assess the adolescent's ability to understand treatment options, provide developmentally appropriate informed consent to treatment, and, at a minimum, obtain the youth's assent to treatment.**" (*Id.* at

79 (emphasis added).) "[F]or children and adolescents who present a desire to change their sexual orientation or their behavioral expression of their sexual orientation, or both, or whose guardian expresses a desire for the minor to change," the Task Force recommended "**approaches [that] support children and youth in identity exploration and development without seeking predetermined outcomes**." (*Id.* at 79–80 (emphasis added).) "LMHP should strive to maximize autonomous decision making and self-determination and **avoid coercive and involuntary treatments**."[11] (*Id.* at 76 (emphasis added).) "The use of **inpatient and residential treatments** for SOCE is inconsistent with the recommendations of the field." (*Id.* at 74–75 (emphasis added).)

Apart from recommending against coercive, involuntary, and residential treatments, the Task Force **did not recommend the end of SOCE**. Rather, without empirical evidence of efficacy or harm, the Task Force merely recommended that clients not be lead to **expect** a change in sexual orientation through SOCE. (R-134-17 at 66.) Indeed, the Task Force cited literature expressly **cautioning against declining SOCE** therapy for a client who requests it:

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[11] The APA Report defines "*coercive treatments* as practices that compel or manipulate a child or adolescent to submit to treatment through the use of threats, intimidation, trickery, or some other form of pressure or force." (R-134-17 at 71 n.59.) It defines "*involuntary treatment* as that which is performed without the individual's consent or assent and which may be contrary to his or her expressed wishes." (*Id.* at 71 n.60.)

> LMHP who turn down a client's request for SOCE at the onset of treatment without exploring and understanding the many reasons why the client may wish to change may instill hopelessness in the client, who already may feel at a loss about viable options. . . . **[B]efore coming to a conclusion regarding treatment goals, LMHP should seek to validate the client's wish to reduce suffering and normalize the conflicts at the root of distress**, as well as create a therapeutic alliance that recognizes the issues important to the client.

(R-134-17 at 56 (emphasis added) (citation omitted).)

The Task Force also called for more research on SOCE. (R-134-17 at 90 ("Any future research should conform to best-practice standards for the design of efficacy research. Additionally, **research into harm and safety is essential**."), 91 ("**Future research** will have to better account for the motivations and beliefs of participants in SOCE."), 91 ("**This line of research should be continued and expanded to include conservatively religious youth and their families**.") (all emphases added).) The Task Force's call for future research implicitly rejected the suggestion by some that "SOCE should not be investigated or practiced until safety issues have been resolved." (*Id.* at 91.)

Given the absence of empirical evidence on SOCE outcomes, and the emphasis on client-centered approaches, the Task Force recommended that choosing SOCE counseling be given to the discretion of licensed mental health providers (LMHP):

> [The APA Ethics Code] establishes that psychologists aspire to provide services that maximize benefit and minimize harm. . . . When applying this principle in the context of providing interventions, **LMHP assess the risk of harm, weigh that risk with the potential benefits, and communicate this to clients through informed consent procedures** that aspire to provide the client with an understanding of potential risks and benefits that are accurate and unbiased. . . .
>
> In weighing the harm and benefit of SOCE, LMHP can review with clients the evidence presented in this report. Research on harm from SOCE is limited, and some of the research that exists suffers from methodological limitations that make broad and definitive conclusions difficult. . . .

(R-134-17 at 67 (emphasis added) (citations omitted); *see also id.* at 6 ("LMHP reduce potential harm and increase potential benefits by basing their scientific and professional judgments and actions on the most current and valid scientific evidence, such as the evidence provided in this report.").)

4. The APA Report Specifically Calls for Counselors to Respect and Consider the Religious Values of Individuals Desiring Counseling.

The Task Force highlighted the particular stress experienced by individuals of conservative religious faiths who "struggle to live life congruently with their religious beliefs," and that this stress "had mental health consequences." (R-134-17 at 46–47.) "Some conservatively religious individuals felt a need to change their sexual orientation because of the positive benefits that some individuals found from

religion . . . .” (*Id.* at 47.) It “**proposed an approach that respects religious values and welcomes all of the client’s actual and potential identities** by exploring conflicts and identities without preconceived outcomes. This approach does not prioritize one identity over another and **may aide a client in creating a sexual orientation identity consistent with religious values**.” (R-134-17 at 67 (emphasis added) (citation omitted).) “Although there are tensions between religious and scientific perspectives, the task force and other scholars do not view these perspectives as mutually exclusive.” (R-134-17 at 67 (citations omitted).)

5. No Study Since the 2009 APA Report Updates or Changes the Empirical Record.

None of the studies subsequent to the 2009 APA Report cited by Dr. Glassgold in her declaration or identified at her deposition updated the empirical record or contradicted the conclusions from APA Report on the lack of causal attribution of harm to SOCE (*see supra* pt. F.1), or the AACAP Statement and APA TGNC Guidelines on the absence of research and consensus on addressing gender identity concerns in minors (*see supra* pt. F.3), including the 2015 SAMHSA Report attached to Dr. Glassgold’s declaration as Exhibit C (with which she was personally involved) (R-25-5 PageID 568 (“**No new studies have been published that would change the conclusions reached in the APA Taskforce’s 2009 review**.” (emphasis added)), PageID 569 (“**[N]o research demonstrating the harms of conversion therapy with gender minority youth has been published . . . .**” (emphasis

added))), up to and including the most recent study Dr. Glassgold cited, published in 2018 by Caitlin Ryan, et al., *Parent-Initiated Sexual Orientation Change Efforts With LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, 67(2) J. Homosexuality 159 (R-142-3 Page ID 3234 ("**[C]ausal claims cannot be made.**" (emphasis added)). (R-192-1 at 134:18–155:5, 175:15–180:18; R-192-3 ¶ 17 at 7–8, 8 n.7, Ex. C (SAMHSA Rep.); R-192-4 to 192-7).)

The 2009 endocrine treatment guidelines Dr. Spack co-authored, which are attached as Exhibit B to his Declaration, apply to treatments that occur after a mental health professional first determines a minor presents with gender dysphoria or a condition indicating endocrine treatments. (R-192-2 at 46:2–46:23; 58:11–59:14, 69:23–71:14; R-192-11 PageID 6573–6596.) In Dr. Spack's opinion, **the assessment of "whether the kid is the real deal" must be performed by a mental health professional experienced in dealing with gender identity disorders**. (R-192-2 at 69:23–70:14.)

The endocrine guidelines recommend against social transition for prepubertal children who exhibit "cross-gender behavior, but not so much as to qualify as being transgender," because many of them will not persist with gender dysphoria or gender identity disorder after the onset of puberty. (R-192-2 at 71:19–74:16.) Dr. Spack believes it is important that "incredibly skillful psychologists" determine whether

children fit into this category, and that a non-psychologist without education beyond high school would not be able to make the determination. (R-192-2 at 74:17–75:19.)

The WPATH standards identified by Dr. Spack in his declaration endorse the view that "[o]ften with the help of psychotherapy, some individuals integrate their trans- or cross-gender feelings into the gender role they were assigned at birth and do not feel the need to feminize or masculinize their body." (R-192-2 at 75:25–76:22, 77:14–78:16, 83:15–84:6; R-192-11, 192-12).) Dr. Spack testified that this view applies to some prepubertal children. (R-192-2 at 85:19–86:11.) The WPATH standards also report that gender dysphoria persisted into adulthood for only 6–23% of prepubertal boys, and 12–27% of prepubertal girls, but that "[n]o formal prospective studies exist" for adolescents. (R-192-2 at 86–88:21; R-192-12).) Also, "formal epidemiologic studies on gender dysphoria in children, adolescents, and adults are lacking." (R-192-2 at 91:24–92:10; R-192-12).)

A 2015 article cited in Dr. Spack's declaration, that he co-authored, teaches there are complex issues of disagreement between "providers in the field" who "work in the best interest of the youth they serve," including:

> differing assumptions regarding whether early intervention with gender variant youth can encourage desistance, and whether that is an appropriate practice[;] . . . the age at which children (or adolescents) should be encouraged or permitted to socially transition; whether cross-sex hormones and surgery should be offered to youth, and if so, at what age; whether parental consent be required for these medical interventions; and whether

> mental health involvement be required, including psychological evaluation, prior to each stage of medical intervention.

(R-192-2 at 97:23–98:19, 109:20–111:12; R-192-15 at 11.) Dr. Spack agrees that "these complex issues of disagreement continue" in 2019. (*Id.*)

G. Tampa Did Not Tailor the Ordinance to Any Identified Interest or the Realities of SOCE Counseling.

The City Council Member who introduced the ordinance, Guido Maniscalco, desired to ban "torture" and other coercive therapy forced on unwilling minors, such as electroshock treatments and verbal and mental abuse. (R-133-2 at 26:21–32:6; R-134-6; R-138 at 38:22–44:25.) But the City did not consider any alternatives to the ordinance's total ban. (R-149 at 28; *see also* R-133-2 at 100:14–102:9 ("**We never debated anything else** because we specifically wanted the complete ban." (emphasis added)); R-140-1 at 43–45; R-138 at 78:1–82:11.)

H. Tampa Code Officials Are Not Qualified or Equipped to Enforce the Ordinance's Counseling Ban.

The City's code enforcement officials tasked with enforcing the ordinance need only a high school diploma or equivalent for the position, and received no training in marriage and family therapy or mental health counseling. (R-133-1 at 19:24–20:25; R-140-2 at 2; R-138 at 85:15–88:14.) The officials are not trained to distinguish "conversion therapy" from other therapy, or qualified to tell the difference between "sexual orientation" and "gender identity," or how to know, for

example, whether a child experiencing gender confusion has transitioned to a cross-gender identity or is still exploring the possibility. (R-133-1 at 69:16–70:7, 79:17–80:8, 100:12–101:25; R-140-2 at 3, 5–7; R-138 at 88:15–89:11, 89:23–92:21.) Tampa code officials do not enforce any other ordinances regulating the therapies offered by mental health professionals, and have no experience or expertise in enforcing such regulations. (R-133-1 at 71:15–72:9; R-133-3 at 111:13–25; R-140-2 at 21–22; R-138 at 98:11–113:14.) Nonetheless, code officials must know what the ordinance prohibits in order to enforce it, and to fulfill their responsibilities to issue notices of violation. (R-133-1 at 25:8–11, 77:7–10; R-140-2 at 4, 8; R-138 at 89:12–22, 92:22–93:7.)

Tampa code officials were instructed to refer all potential "conversion therapy" cases to the City's legal department for handling. (R-133-1 at 24:10–25; R-134-2 at 15; R-140-2 at 9–11; R-138 at 93:8–95:14.) The City's lawyer responsible for overseeing "conversion therapy" enforcement, however, could not define the term "gender identity" as used in the ordinance, and would have looked to the dictionary to interpret the ordinance. (R-133-3 at 67:20–68:17; R-140-2 at 12; R-138 at 95:15–97:12.) The ultimate trier of ordinance violations would have been a City-appointed special master, but the City did not know whether any special master on its roster is a licensed mental health practitioner, and the City had no plans to

appoint a special master with those credentials. (R-133-3 at 104:9–16; R-140-2 at 13; R-138 at 97:13–98:10.)

III. STANDARD OF REVIEW.

This Court reviews a grant of "'summary judgment de novo, applying the same legal standards used by the district court." *Yarbrough v. Decatur Hous. Auth.*, 941 F.3d 1022, 1026 (11th Cir. 2019).

SUMMARY OF THE ARGUMENT

The district court's judgment invalidating Tampa's counseling ban ordinance under the doctrine of implied preemption should be affirmed because the entire field of regulating the practices and discipline of Florida-licensed counseling professionals is impliedly preempted to the state, under the standards set forth by the Florida Supreme Court in *D'Agostino v. City of Miami*, 220 So. 3d 410 (2017). Florida's pervasive regulatory scheme in this field evidences an intent by the Legislature to preempt the field, and Tampa's counseling ban ordinance, which prohibits Florida-licensed counseling professionals from providing voluntary, speech-only counseling to minors who desire and seek such counseling to reduce or eliminate unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts, presents a danger of conflict with Florida's pervasive regulatory scheme and strong public policy favoring exclusive state authority in the field.

The judgment invalidating Tampa's counseling ban ordinance should also be affirmed because the ordinance violates the First Amendment free speech rights of Appellees, as they asserted below, and this Court can affirm the judgment on any basis present in the record, even if different from the district court's basis for its judgment. *See Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1303 (11th Cir. 2007).

ARGUMENT

I. THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE DISCIPLINARY REGULATION OF FLORIDA-LICENSED COUNSELING PROFESSIONALS IMPOSED BY TAMPA'S COUNSELING BAN IS PREEMPTED TO THE STATE.

A. Florida's Municipal Home Rule Powers are Subject to Implied Preemption Because They Are Constitutionally and Statutorily Subsidiary to the State Legislature's Superior Powers.

The district court below correctly held that the disciplinary regulation of Florida-licensed counseling and health professionals attempted by Tampa's counseling ban ordinance is preempted to the state. (R-213 at 2, 41.) The court reached its holding as the result of an extensive survey of Florida cases defining the state's doctrine of implied preemption (R-213 at 10–17), and correct application of the doctrine to Tampa's counseling ban ordinance (R-213 at 18–41). This Court should affirm the district court's holding.

The foundation of Florida's doctrine of implied preemption is the interplay between a Florida municipality's home rule legislative power and the superior state legislative power, as provided in Florida's Constitution and statutes:

> Generally speaking, the Florida Constitution authorizes and empowers municipalities to exist and conduct municipal powers except as otherwise provided by law . . . .
>
> Acting on its constitutional authority to address municipal powers, the Legislature clarified the powers of municipal government by enacting the Municipal Home Rule Powers Act . . . .

D'Agostino v. City of Miami, 220 So. 3d 410, 420 (2017). (citing Art. VIII, § 2(b), Fla. Const., and Fla. Stat. § 166.021 [hereinafter MHRPA]). Despite the generally broad grant of municipal legislative power by the Florida Constitution and statutes, however, the power to legislate on certain subjects can be preempted to the state by state legislation. *Id.* And, "because the Legislature is ultimately superior to local government under the Florida Constitution, preemption can arise even where there is no specifically preclusive language." *Id.* at 421. Thus,

> implied preemption occurs when the state legislative scheme is pervasive and the local legislation would present a danger of conflict with that pervasive scheme. In other words, preemption is implied when the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area or field of operation, and where strong public policy reasons exist for finding such an area or field to be preempted by the Legislature.

Id. (citation omitted).

In the opening disquisition of Tampa's brief, citing to cases and commentaries largely predating the Florida Supreme Court's 2017 reaffirmation of implied preemption in *D'Agostino*, the City revels in the power granted it by the MHRPA, and openly expresses its municipal dissatisfaction with the implied preemption doctrine. (Tampa Br. 4–9.) Tampa reluctantly admits, however, as it must, that implied preemption remains the law in Florida. (Tampa Br. 7–8.) Furthermore, Tampa's dislike notwithstanding, Florida courts have readily invoked implied preemption where warranted by legislative intent. *See, e.g., D'Agostino*, 220 So. 3d 423 (holding portion of municipal scheme for disciplinary investigations of police officers impliedly preempted by pervasive state regulatory scheme occupying same field: "Although implied preemption involving a municipality's home rule powers may be disfavored, we must carefully consider the intent of the Legislature with regard to preemptive operation . . . .").

Contrary to Tampa's push to limit application of the doctrine, the field impliedly preempted to the state need not be defined narrowly. (Tampa Br. 13–19.) The case cited by Tampa for support, *Pinellas Cnty. v. City Largo*, 964 So. 2d 847 (Fla. 2d DCA 2007), does not hold that the impliedly preempted field "must" be narrowly defined. Rather, the *Pinellas Cnty.* court recognized, as did the district court below (R-213 at 14), that the impliedly preempted field "is **usually** a narrowly defined field, limited to the specific area where the Legislature has expressed their

will to be the sole regulator." 964 So. 2d at 853 (emphasis added) (internal quotation marks omitted). Thus, the field "must" be defined by the **legislative intent** evidenced by the pervasiveness and policy of the state legislative scheme, as opposed to any broader definition urged by a party asserting implied preemption. *See, e.g.*, *D'Agostino*, 220 So. 3d at 423 ("Although we agree with [the police officer] that [the statute] evinces an intent to implicitly preempt a field, the field is much more narrow than the expansive reading the officer desires."). Thus, the district court was not wrong to find implied preemption of the field of practice and discipline of Florida-licensed professionals as defined by the readily apparent pervasiveness and policy of the state regulatory scheme. (*See infra* pt. I.B.)

Tampa also misrepresents the district court's implied preemption analysis as being erroneously dependent on finding the absence of express grants of authority to municipalities. (Tampa Br. 9–13.) Contra Tampa's criticism, the district court exemplified the charge of the Florida Supreme Court to perform implied preemption analysis with reference "'to the provisions of the whole law, and . . . its object and policy.'" *D'Agostino*, 220 So. 3d at 421 (quoting *Sarasota Alliance for Fair Elections v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). (R-213 at 12.) Thus, as the district court surveyed Florida's pervasive regulation of counseling professionals, which clearly implies the Legislature's intention to occupy the field, the court dutifully inquired whether, at any point, the Legislature indicated an intention not to

occupy the field by expressly ceding regulatory authority to municipalities. (R-213 at 26–41; R-213 at 27 n.12 ("Florida courts have looked to whether the statutes provide a specific grant of authority to local governing bodies when evaluating whether there is implied preemption.").) And the district court found no such express grant of authority to counter the Legislature's otherwise clearly manifested intention to occupy the field: "Neither Chapter 456 nor other statutes or State regulations provide any opening or suggestion that municipal regulation should supplement the State's comprehensive healthcare coverage." (R-213 at 28.) Accordingly, the district court's implied preemption analysis properly depended on the Legislature's intent to occupy the field of licensed counselor regulation, as evidenced by a pervasive regulatory scheme, and properly considered the absence of express grants of authority secondarily—as confirmation of the Legislature's otherwise clear intention.

B. The Pervasive State Legislative Scheme Regulating the Practice and Discipline of Florida-Licensed Counseling Professionals Evidences an Intent to Preempt the Field to the State.

1. The Counseling Professionals Tampa Seeks to Censor are Already Subject to Pervasive State Regulations Establishing Uniformity of Licensure and Discipline.

The district court properly concluded that the Florida Legislature, by pervasive state regulation, has evidenced an intent to preempt the field of regulating

healthcare practices, modalities, and discipline to the state. (R-213 at 2, 41.) Specifically, and most importantly in this case, the district court comprehensively demonstrated that the Legislature "intended a uniform system of discipline to run throughout the State." (R-213 at 29.) Tampa's brief makes no case to displace this conclusion.

Florida regulation of licensed mental health providers is pervasive. Florida Statutes Chapter 456 sets forth the general provisions related to the regulation and licensure of health professions and occupations. Specifically, in Fla. Stat. § 456.003(2)(b) the Legislature identified the absence of local regulation as a justification for the State to authorize the **State** Department of Health to establish boards and regulatory bodies to ensure that such professions are regulated to protect the health, safety and welfare of the public:

> (2) The Legislature further believes that such **professions shall be regulated** only for the preservation of the health, safety, and welfare of the public **under the police powers of the state**. Such professions shall be regulated when:
>
> . . . .
>
> (b) **The public is not effectively protected by other means, including, but not limited to**, other state statutes, **local ordinances**, or federal legislation.

Fla. Stat. § 456.003. This statement of legislative intent justifies the state's entry into, and occupation of, the field of health professional regulation, because no preexisting local ordinances were there to protect the public. "The statutory reference to the

absence of local ordinances explains the pervasive legislative scheme created by the Legislature which clearly occupies the field." (R-213 at 27 n.12.)

Florida Statutes Chapter 491 more specifically regulates professionals in clinical social work, marriage and family therapy, and mental health counseling, such as Appellee Vazzo, and is illustrative of the pervasiveness of Florida's regulation of licensed counseling professionals. For example, Fla. Stat. § 491.003 defines the "'practice of marriage and family therapy,'" identifies who "[m]arriage and family therapy may be rendered to," and restricts the "use of specific methods, techniques, or modalities within the practice of marriage and family therapy . . . to marriage and family therapists appropriately trained in the use of such methods, techniques, or modalities." Fla. Stat. § 491.003(8). The section similarly regulates the practices of clinical social work and mental health counseling.

Section 491.004 creates within the State Department of Health the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (the "State Board") composed of nine members, six of which must be licensed professionals in the three practice fields. Fla. Stat. § 491.004(1), (2). The section also grants rulemaking authority to the Board to implement Chapter 491. Fla. Stat. § 491.004(5).

Section 491.005 imposes licensure requirements for clinical social work, marriage and family therapy, and mental health counseling professionals, including

requirements for education, experience, passage of a "theory and practice examination," and "knowledge of the laws and rules governing the practice of clinical social work, marriage and family therapy, and mental health counseling." Fla. Stat. § 491.005(1), (3), (4).

Section 491.009 specifies grounds for discipline of licensed clinical social work, marriage and family therapy, and mental health counseling professionals, including "False, deceptive, or misleading advertising or obtaining a fee or other thing of value on the representation that beneficial results from any treatment will be guaranteed," and "Failing to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee, registered intern, or certificateholder is not qualified by training or experience." Fla. Stat. § 491.009(1)(d), (r).

Florida Administrative Code Subtitle 64B4 contains the rules implemented by the State Board to implement Fla. Stat. Ch. 491. For example, § 64B4-3.003 specifies the respective "theory and practice" licensure examinations to be administered to social work, marriage and family therapy, and mental health counseling professionals, such as the "examination developed by the Examination Advisory Committee of the Association of Marital and Family Therapy Regulatory Board (AMFTRB)" for marriage and family therapists. F.A.C. § 64B4-3.003(2)(c).

Section 64B4-3.0035 additionally specifies how the three types of professionals "shall demonstrate knowledge of the laws and rules for licensure:"

> (1) An applicant shall complete an approved course consisting of a minimum of eight (8) hours which shall include the following subject areas:
>
> (a) Chapter 456, Part II, F.S., (Regulation of Professions and Occupations, General Provisions)
>
> (b) Chapter 90.503, F.S., (Psychotherapist-Patient Privilege)
>
> (c) Chapter 394, F.S., (Part I Florida Mental Health Act)
>
> (d) Chapter 397, F.S.
>
> (e) Chapters 415 and 39, F.S., (Protection from Abuse, Neglect and Exploitation)
>
> (f) Chapter 491, F.S., (Clinical, Counseling and Psychotherapy Services)
>
> (g) Chapter 64B4, F.A.C., (Rules of the Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling)
>
> (2) The laws and rules course must provide integration of the above subject areas into the competencies required for clinical practice and must include interactive discussion of clinical case examples applying the laws and rules that govern the appropriate clinical practice.

F.A.C. § 64B4-3.0035. No local regulations are mentioned in the extensive requirements for knowledge of the laws and rules, because there is no room for local ordinances in the state statutory scheme.

Section 64B4-5.001 provides for the determination of violations and imposition of discipline on the grounds provided by Fla. Stat. § 491.009, such as "False, deceptive, or misleading advertising or obtaining a fee or other thing of value on the representation that beneficial results from any treatment will be guaranteed," and "Failing to meet the MINIMUM standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee is not qualified by training or experience." F.A.C. § 64B4-5.001(1)(d), (s). Such determinations of violations and imposition of discipline against licensed social work, marriage and family therapy, and mental health counseling professionals are made by the State Board, six members of which are licensed professionals in the respective fields.

The foregoing state regulation of licensed counselors, including education, experience, licensure, practice, and discipline, administered by a state board of similarly licensed professionals, is pervasive, and implies an intent by the Florida Legislature to occupy the field to the exclusion of local regulation. As demonstrated by the district court below, the state's regulation of the other licensed counseling disciplines subjected to Tampa's ordinance are similarly pervasive, evidencing the same preemptive intent. (R-213 at 26–41 (surveying, in addition to the regulation of licensed counselors under Fla. Stat. ch. 491 and related regulations, the regulation

of medical doctors under ch. 458, osteopaths under ch. 459, and psychologists under ch. 490, and their respective related regulations).

2. Tampa Cannot Avoid Preemption by Feigning to Define a Specific Mode of Counseling Already Subsumed in the State's Pervasive Regulatory Scheme.

Tampa attempts to avoid the preemption of its ordinance by feigning to regulate a particular mode of counseling not specifically identified in the state's regulatory scheme. (Tampa Br. 22–23.) Specifically, Tampa claims, "the City enacted legislation to protect children from a specific harm in a realm where the State has failed to act altogether." (Tampa Br. 23.) Tampa's argument has no merit.

The proper pervasiveness inquiry is whether the State has "preempted **a particular subject area**," not one discrete form, mode, or goal of counseling. *See Sarasota Alliance*, 28 So. 3d at 886 (emphasis added). In this case, the district court correctly identified the subject area preempted as "Florida's substantive regulation of healthcare practices, modalities, and discipline." (R-213 at 41.) This state-occupied field of regulation subsumes **all** practices and modalities of the licensed counseling professions, with no exceptions for practices or modalities that municipalities seek to define for themselves or single out for purely local regulation and discipline. Were the rule otherwise, a municipality could invade any state-occupied field simply by sub-defining discreet matters or issues for regulation intended to be subsumed within pervasive legislation but not specifically identified.

Such a rule would undermine the superior state legislative power embodied in the implied preemption doctrine. Thus, in *Classy Cycles, Inc. v. Bay Cnty.*, 201 So. 3d 779 (Fla. 1st DCA 2016), the Florida appellate court held that Florida's pervasive regulation of motor vehicle insurance requirements preempted local ordinances imposing locally defined insurance requirements for "mopeds" and "motor scooters" even though Florida's legislative scheme did not include those vehicles. 201 So. 3d at 788; *cf. id.* at 789 n.13 ("[W]e do not read [the statute] so broadly as to allow for local governments to do whatever they want related to regulation of vehicles, as long as the ordinance is called an experiment.").

Furthermore, as the district court observed,

> it is apparent that the Florida statutes *already* provide the City with its desired protection against SOCE. The City and its experts adamantly assert that even non-aversive SOCE violates the prevailing treatment standard of care, and constitutes psychiatric, psychological, and counseling malpractice. This is the essence of the Ordinance. The present Florida legislative scheme already outlaws such professional behavior, and it is subject to statewide discipline.

(R-213 at 34–35 (footnote omitted).) The court made this observation in the context of the Florida statutes regulating counseling by medical doctors, but went on to note that Florida statutes applicable to the other counseling disciplines covered by Tampa's ordinance likewise already hold them to the prevailing standards of care.

(R-213 at 36–39.) Thus, Tampa's ordinance is "an attempt to regulate in an area well-covered by existing statutes." *Classy Cycles*, 201 So. 3d at 788.

To be sure, the Florida Legislature has repeatedly declined to add a statewide "conversion therapy" ban to its comprehensive regulation of the licensed counseling professions.[12] Just as the Legislature's declining to add insurance requirements for mopeds and motor scooters to Florida's pervasive motor vehicle insurance regulatory scheme did not invite local governments to enter the otherwise state-occupied field to regulate on those discreet matters, the Legislature's declining to add a "conversion therapy" ban to its pervasive licensed counseling regulatory scheme did not invite Tampa to enter the state-occupied field.

3. Tampa Cannot Avoid Preemption by Claiming a Superior Local Interest in Protecting Children.

The Court should reject Tampa's supposition that the City's interest in protecting children voids the superior legislative authority of the state embodied in the implied preemption doctrine. (Tampa Br. 19–23.) To be sure, Tampa cloaks its argument as an objection to the district court's consideration of whether "conversion

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[12] Proposed bills banning "conversion therapy" died in the Florida Legislature in 2016, 2017, 2018, and 2019. The text and legislative history of the Florida Senate versions of these bills, SB 258 (2016), SB 578 (2017), SB 68, 696 (2018), and SB 84 (2019), with links to the related Florida House versions, HB 137 (2016), HB 273 (2017), HB 717 (2018), and HB 109 (2019), are available at the Florida Senate bill tracker website, www.flsenate.gov/Tracker.

therapy" poses any unique risk to Tampa that could justify an exception to the state's otherwise comprehensive occupation of the field of licensed counselor regulation. (Tampa Br. 19–20.) Again, however, the City misrepresents the district court's analysis, feigning that the district court found implied preemption to be dependent on the absence of unique local regulatory concerns in the first instance. (Tampa Br. 19–20.) To the contrary, the district court merely recognized that, even where the state has specifically legislated in a particular field, some Florida courts "have found no implied preemption when the municipal ordinance is local in nature, or tied to a situation unique to the locale." (R-213 at 15–17.) In any event, the City then argues that its interest in protecting children need not be unique to Tampa to justify regulation to protect children. (Tampa Br. 21–22.)

Tampa's argument proves too little. As the district court correctly observed, Tampa does not have any unique interest in protecting children—from "conversion therapy" or anything else—that could justify Tampa's intrusion into the field of regulating state-licensed counselors that the Legislature clearly intended to occupy. (R-213 at 16–17.) In any event, Tampa demonstrates it is not up to the task of regulating the practice and discipline of licensed counselors by touting that "the City has determined ['conversion therapy'] to be harmful" (Tampa Br. 21), given the lack of any scientifically validated causal connection between SOCE and harm

acknowledged by the City's own experts. (R-213 at 31–33; *supra* Statement of the Case pt. II.F.)

C. Local Attempts to Regulate the State-Licensed Counseling Professions Present a Clear Danger of Conflict With Florida's Pervasive Regulatory Scheme and Strong Public Policy Favoring Patient's Rights and Informed Consent.

1. The District Court Properly Considered Florida's Strong Public Policy Favoring Patient's Rights and Informed Consent in the Danger of Conflict Analysis.

As shown above, Florida's regulation of the licensed counseling professions is so pervasive that the danger of conflict posed by Tampa's counseling ban ordinance is self-evident. Nevertheless, as also shown above, the district court took seriously the Florida Supreme Court's instruction to "look 'to the provisions of the whole law, and to its object and policy.'" *D'Agostino*, 220 So. 3d at 421. Thus, the court searched beyond Florida's specific regulation of the licensed counseling professions subjected to Tampa's ordinance, and identified "five areas of Florida healthcare law that the Tampa Ordinance seeks to occupy or partly alter," further illuminating the danger of conflict with the pervasive "State law and policy already resid[ing] in these areas broadly."

a. Florida's Broad Right of Privacy Under Article I, Section 23 of the Florida Constitution.

Florida's broad constitutional right of privacy, which applies to minors, provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life." (R-213 at 19–21.) The district court explained how Tampa's ordinance conflicts with this right:

> Nothing is more intimate, more private, and more sensitive, than a growing young man or woman talking to a mental health therapist about sex, gender, preferences, and conflicting feelings. The Ordinance inserts the City's code enforcers into the middle of this sensitive, intense and private moment. But this moment is already governed by Florida's very broad rights of privacy, something the Ordinance ignores.

(R-213 at 19.)

b. Florida's Policy of Parental Choice in Healthcare.

"The law in Florida is that, with very few exceptions, parents are responsible for selecting the manner of medical treatment received by their children, and this continues until age 18." (R-213 at 21 (footnote omitted).) When it comes to the voluntary, speech-only counseling sought by families from Vazzo and his peers, "[t]he Ordinance eliminates this longstanding parental right without discussion or exception—Florida already occupied this ground." (R-213 at 21.)

c. The Florida Patient's Bill of Rights.

"Besides impacting Florida privacy rights and rights to parental choice in healthcare, the Ordinance alters within the City a patient's rights under the Florida Patient's Bill of Rights and Responsibilities." (R-213 at 22.) "The Ordinance would appear to substitute the City's judgment for the judgment of the patient and practitioner, an express contradiction of what the Legislature requires in section 381.026(4)(d)(3)," which provides in pertinent part, "A patient has the right to access any mode of treatment that is, in his or her own judgment and the judgment of his or her health care practitioner, in the best interests of the patient, including complementary or alternative health care treatments."

d. Florida's Endorsement of Alternative Healthcare Options.

The Legislature's intent for all health professions, as expressed in Chapter 456 of the Florida Statutes, includes,

> that citizens be able to make informed choices **for any type** of health care they deem to be an effective option for treating human disease, pain, injury, deformity, or other physical or mental condition. It is the intent of the Legislature that citizens be able to choose from all health care options, including the prevailing or conventional treatment methods as well as other treatments designed to complement or substitute for the prevailing or conventional treatment methods.

Fla. Stat. § 456.41(1) (emphasis added). (R-213 at 22–23.) For practitioners, "[t]he only constraint is the applicable standard of care and proper treatment of patients,

both of which are set and are policed in great detail by the Department of Health and the professional disciplinary boards organized pursuant to the all-encompassing legislative scheme." (R-213 at 23.) "Although the State occupies this field by statute, the City Ordinance seeks to override this legislative intent: there will be no patient choice or unrestricted practitioner discretion for SOCE in Tampa, notwithstanding what the Board of Medicine, the disciplinary bodies, or the relevant standard of care says." (R-213 at 23.)

e. Florida's well-Established Doctrine of Informed Consent.

"The Ordinance appears to impact the well-traveled Florida statutory doctrine of informed consent. For SOCE there will be no informed consent in Tampa although the Florida Legislature has set up a complete and developed scheme of informed consent." (R-213 at 24.) In addition to the statutory protection given the informed consent concept by the Legislature in Fla. Stat. § 766.103, the Florida Supreme Court has recognized that "'[t]he doctrine of informed consent is well recognized, has a long history, and is grounded in the common law and based in the concepts of bodily integrity and patient autonomy.'" (R-213 at 25 (modification in original) (quoting *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006).) The informed consent doctrine recognizes that '[t]here is a risk in all healthcare treatments, and . . . permits a patient to assume that risk as long as it is an informed fashion." (R-213 at 25.) "When the patient is denied the ability to exercise

or even consider informed consent, the patient's personal liberty suffers." (R-213 at 25.) Nevertheless, "[t]he Tampa Ordinance simply ignores this well-known and broad Florida concept of informed consent. The City Council has determined that SOCE is too dangerous for even a patient fully informed of all risks, who desires to proceed." (R-213 at 26.)

At the end of its thorough survey of the conflict dangers created by Tampa's ordinance with respect to these five areas of Florida healthcare law and policy, the district court concluded:

> All of these topics such as constitutional privacy rights, parental choice, patient choice as to treatment, and the availability of non-conventional or alternative treatments show that the Legislature has occupied entirely the very wide healthcare swath, whether it is called "informed consent" or "patient's rights." No room exists in this pervasive and uniform statewide program for the more than four-hundred Florida municipalities to regulate where legislative intent resides so broadly.

(R-213 at 26.)

Tampa attempts to avoid the clearly evident danger of conflict posed by its ordinance by importing inapposite conflict principles from outside the preemption realm. (Tampa Br. 23–31.) The Court should reject Tampa's attempt. Contrary to Tampa's assertion, implied preemption does not depend on a showing that a local enactment directly conflicts with a state enactment such that "'one must violate one provision in order to comply with the other.'" (Tampa Br. 24 (quoting *Sarasota*

Alliance, 28 So.3d at 888).) Wholly apart from the doctrine of implied preemption, such direct conflict is "a separate and distinct way for a local enactment to be inconsistent with state law." *D'Agostino*, 220 So. 3d at 421 n.8 (citing *Sarasota Alliance*, 28 So. 3d at 885–86)). Thus, a municipal law that actually and directly conflicts with a state law is invalid, no matter the depth or breadth—the pervasiveness—of the state law coverage of the subject. But where the state has pervasively regulated a field, evidencing an intent and strong public policy against municipal intrusion, implied preemption is realized upon a mere danger of conflict by a municipal enactment in the state-occupied field. As shown above, the danger of the Tampa counseling ban's conflicting with Florida's pervasive regulation of the practices and discipline of state-licensed counseling professionals is clear and present, and the district court correctly identified and evaluated that danger of conflict in holding Tampa's counseling ban preempted. Indeed, the Tampa ordinance prohibits that which the Florida Legislature permits. Just outside the City's boundaries, licensed counselors are free to offer voluntary, speech-only SOCE counseling, but inside the City's border the same counselors are silenced and punished by fines. And rather than being overseen by professionals in the administrative agencies guided by specific law and administrative codes, they are under the thumb of a non-skilled city code official with only a high school diploma

or its equivalent who has absolutely no standards to guide the process. The conflict could not be more real or direct.

2. Tampa Code Enforcement Officials Lack the Necessary Training and Expertise to Enforce Professional Regulations Against Licensed Counselors, Which Are Enforced at the State Level by Boards of Similarly Licensed Professionals.

Tampa's counseling ban ordinance presents still another danger of conflict with Florida's pervasive regulation of licensed counselors: Tampa's code officials are objectively ill-equipped to investigate and make determinations about appropriate mental health therapeutic practices. The City's code enforcement officials tasked with enforcing the ordinance need only a high school diploma or equivalent, and received no training in marriage and family therapy or mental health counseling. (*Supra* Statement of the Case pt. II.H.) Code officials must know what the ordinance prohibits in order to enforce it, and to fulfill their responsibilities to issue notices of violation. (*Id.*) But the officials are not trained to distinguish "conversion therapy" from other therapy, or qualified to tell the difference between "sexual orientation" and "gender identity," or how to know, for example, whether a child experiencing gender confusion has transitioned to a cross-gender identity or is still exploring the possibility. (*Id.*) Tampa code officials do not enforce any other ordinances regulating the therapies offered by mental health professionals, and have no experience or expertise in enforcing such regulations. (*Id.*)

Moreover, there is no evidence of any trained or qualified professional upstream from code enforcement personnel to preside over a final determination, such as a board of professional standards, or even a single reviewing professional with appropriate training or licensure. Tampa code officials were instructed to refer all potential "conversion therapy" cases to the City's legal department for handling. (*Id.*) The City's lawyer responsible for overseeing "conversion therapy" enforcement, however, could not define the term "gender identity" as used in the ordinance, and would have looked to the dictionary to interpret the ordinance. (*Id.*) The ultimate trier of ordinance violations would have been a City-appointed special master, but the City did not know whether any special master on its roster is a licensed mental health practitioner, and the City had no plans to appoint a special master with those credentials. (*Id.*) Such a fatally flawed process undermines and conflicts with the strong public policy of the state favoring expertise in all disciplinary investigations and determinations involving licensed mental health professionals, as reflected in the statutes and regulations requiring similarly licensed peers to make such investigations and determinations. (R-213 at 28–31.)

To be sure, the testimony of the City's expert Dr. Spack illustrates the utter incompatibility of code enforcers with the regulation of mental health professionals. According to Dr. Spack, there is a "frustrating group" he sees "that calls themselves gender queer," and he calls them "gender fluid":

> **It's a person who doesn't commit to being either male or female. But that may take different—manifest, for example, it could be someone who just sees themselves somewhere in the spectrum and it changes from day-to-day, and someone who sees themselves very much male one day and very much female the next**.
>
> . . . .
>
> **The thing I don't know, and I wouldn't be able to tell you**—I don't know if I'll live long enough to find out—is how do these people end up? **Are they on a path towards one or the other or not?**

(R-192-2 at 38:6–40:13 (emphasis added).) When asked whether "gender fluid" could be categorized as a gender identity, Dr. Spack answered, "If it's ill defined and especially moving, a moving target, I would call it a form of gender identity." (R-192-2 at 39:25–40:8.) If Dr. Spack could not easily determine the gender identity of a "gender fluid" person, or whether "they [are] on a path towards one or the other or not," then no Tampa code official is qualified to make that determination for purposes of determining whether a change of gender identity is being attempted.

As another illustration, the guidelines on gender identity issues lauded by Dr. Spack recommend against transition for prepubertal children who exhibit "cross-gender behavior, but not so much as to qualify as being transgender," and Dr. Spack testified that the determination of whether the child qualifies as being transgender must be made by "incredibly skillful psychologists" and not non-psychologists without education beyond high school:

> Q . . . . Would a non-psychologist, let's say a person with a high school diploma, for example, be able to make that determination that you described?
>
> A **No.**

(R-192-2 at 75:15–19 (emphasis added); *supra* Statement of the Case pt. II.H.)

The ordinance, however, allowed unlimited affirmation of this contra-indicated transition, while prohibiting counseling to help the child embrace or align with his or her biological sex if such alignment is construed as a change or attempted change of gender identity. The glaringly obvious problem, then, is that no Tampa code official or upstream adjudicator was qualified to make that determination. Moreover, the ordinance endorsed affirmation of contra-indicated transition in the direction of cross-gender identity, but prohibited affirmation in the other direction—towards biological gender identity—even though that is a recognized approach to alleviating gender dysphoria. (R-192-2 at 116:25–123:17, R-192-8.)

II. THE JUDGMENT SHOULD BE AFFIRMED BECAUSE TAMPA'S COUNSELING BAN ORDINANCE IS UNCONSTITUTIONAL UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

Although the district court passed on Appellees' First Amendment claims below (R-213 at 2, 7–8), this Court can affirm the district court's judgment invalidating Tampa's counseling ban ordinance on any basis supported by the record, even if different from the basis of the district court's decision. *See Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1303 (11th Cir. 2007). Thus, the substantial

First Amendment issues developed on the record below (*see* R-213 at 7–8) are necessarily before this Court in addition to the preemption issues.

The magistrate's Report and Recommendation concluding that Tampa's ordinance should have been preliminarily enjoined on First Amendment grounds is summarized above (*see supra* Statement of the Case pt. I), and it succinctly sets forth the First Amendment grounds for invalidating the ordinance. Space limitations, however, prohibit Appellees from fully briefing their First Amendment claims here. But, in addition to the full briefing on the issue below (*e.g.*, R-194 at 2–21; R-205), Appellees commend to the Court the complete First Amendment briefing in a case also before this Court, *Otto v. Boca Raton*, No. 19-10604, in which two Florida-licensed counselors challenged two counseling ban ordinances from South Florida localities, which are nearly identical to Tampa's ordinance. (*Cf.* R-213 at 3, n.4.)

CONCLUSION

For all of the foregoing reasons, the district court's judgment invalidating Tampa's counseling ban ordinance should be affirmed.

Dated this February 21, 2020.

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DATED this February 21, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on this February 21, 2020, a copy of the foregoing was electronically filed through the Court's ECF system, which will effect service on the following parties and counsel of record:

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