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

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients; DAVID H. PICKUP, 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,

v.

CITY OF TAMPA, FLORIDA;

Defendants.

No. 8:17-cv-02896-CEH-AAS

EQUALITY FLORIDA'S SUPPLEMENTAL AMICUS BRIEF

Amicus curiae Equality Florida Institute, Inc., submits this Supplemental Brief, as permitted by the Court.

I. CONVERSION THERAPY IS A SPECIFIC FORM OF MENTAL HEALTH TREATMENT, NOT A "CONVERSATION."

Far from being a mere "conversation," as Plaintiffs repeatedly characterized conversion therapy at the November 15 hearing, conversion therapy is a specific form of mental health treatment provided by licensed therapists to their clients in an attempt to "convert" their sexual orientation or gender identity. As its very name shows, "conversion therapy" is not an exchange of ideas or view points, but rather purports to be a legitimate therapeutic treatment to accomplish that change.

Indeed, conversion therapy is portrayed by its practitioners not as a mere "conversation," but rather as a mental health "treatment" that should be performed in accordance with "practice guidelines" they have prepared. *See* Nat'l Ass'n for Research & Therapy of Homosexuality, *Practice Guidelines for the Treatment of Unwanted Same-Sex Attractions and Behavior*, 2 J. Hum. Sexuality 5 (2010) (attached hereto as Ex. 1). Plaintiff Pickup was part of the group preparing these "practice guidelines" for this "treatment." *See* Ex. 1 at 38. The very fact that conversion therapists have developed a systemic protocol to guide the practice of conversion therapy belies Plaintiffs' contention that it is simply a mere conversation.

Notably, although Guideline 2 acknowledges that conversion therapy is not the only possible therapeutic approach, the Guidelines present mental health practitioners who only provide conversion therapy as legitimate therapists. The Guidelines themselves exclusively address the practice of conversion therapy that purports to reduce or eliminate same-sex attraction and provide "guidelines" for how to provide it.

Simply put, conversion therapy is a specific form of therapy intended to try to change a person's sexual orientation or gender identify, not to just have a talk about it. It proceeds on the baseline assumption that a young person having same-sex attraction can change his or her sexual orientation and that this mental health treatment by a licensed therapist can result in that conversion.

But, all of the leading medical and mental health professional organizations have concluded that conversion therapy is not only ineffective, it poses acute risks for children and adolescents. The sole purpose of Ordinance No. 2017-47 is to protect minors from the

serious harm posed by this discredited and dangerous mental health "treatment." *See* Tampa, Fla., Code of Ordinances § 14-311 (prohibiting "any counseling, practice or treatment performed with the goal of changing individual's sexual orientation or gender identity.") (emphasis added). The Ordinance does not "[p]revent mental health providers from expressing their views to patients, whether children or adults, about [conversion therapy], homosexuality, or any other topic." *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2014).

Thus, unlike the statute at issue in *Nat'l Inst. of Family and Life Advocates ("NIFLA") v. Becerra*, 138 S. Ct. 2361, 2374 (2018), the Ordinance does not regulate "speech as speech," but rather is directly tied to a particular "procedure" for mental health treatment, which the statute in *NIFLA* was not. If Plaintiffs were having a mere "conversation" with their patients about this therapy, rather than performing a "treatment" intended to change their same-sex attraction, the Ordinance would not reach their speech.

Plaintiffs' effort to frame this mental health therapy treatment as nothing more than pure speech for First Amendment purposes is meritless. If Plaintiffs were correct, all psychological counseling would be free from governmental regulation, including regulations to prevent harm to minors. Instead, there is widespread regulation of the mental health profession, which has long been held to lie squarely with the government's power to protect the health and well-being of the public. *See* Cory Page *et al.*, Behav. Health Workforce Res. Ctr., Univ. of Mich., *National Assessment of Scopes of Practice for the Behavioral Health Workforce* (state-by-state overview of regulation of mental health profession) (attached hereto as Ex. 2). State and local governments do not violate the First Amendment by regulating mental health treatments that are both ineffective and dangerous.

The Supreme Court has explicitly recognized that many regulations designed to protect the public from specific harms may incidentally restrict some speech, but that does not render them subject to heightened First Amendment review. *See, e.g., Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (State bar could constitutionally regulate lawyers' in-person solicitation of clients for pecuniary gain in circumstances likely to pose danger, as State does not lose power to regulate commercial activity deemed harmful to public merely because speech is a component of the activity).

In short: "That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *Nat. Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000). *See also NIFLA*, 138 S. Ct. at 2373 ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech . . . , and professionals are no exception to this rule.") (citation and internal quotation marks omitted).

II. RECENT STUDIES CONFIRM THE HARMS TO MINORS FROM CONVERSION THERAPY.

At the hearing, Plaintiffs claimed that the "state of the research today" is inconclusive as to the ineffectiveness and harm caused by conversion therapy. Hearing Trans. at 73:7-11, 75:5-15. To the contrary, the overwhelming weight of research performed over the years shows that attempts to change a person's sexual orientation are not only futile, but pose

serious harms, including increased suicidal ideation and serious depression. The City of Tampa relied on that scientific consensus in passing this Ordinance and, since then, the evidence confirming that consensus has grown even stronger.

A recent article published in the *Journal of Homosexuality* found that young people who experienced parent-initiated conversion therapy experienced "depression, suicidal thoughts, suicide attempts" and other problems. *See* Journal of Homosexuality, *Parent-Initiated Sexual Orientation Change Efforts With LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment* (2018) (attached hereto as Ex. 3); *see also* Psychology Today, *Gay Conversion Therapy Associated with Suicide Risk*, https://www.psychologytoday.com/us/blog/political-minds/201811/gay-conversion-therapy-associated-suicide-risk (last visited Nov. 28, 2018) (discussing study).

The study found that being subjected to conversion therapy during adolescence had a lasting negative impact on "multiple domains of functioning that affect self-care, wellbeing, and adjustment." *Id*. at 10. In particular, "attempts to change sexual orientation during adolescence were associated with elevated young adult depressive symptoms and suicidal behavior, and with lower levels of young adult life satisfaction, social support, and socioeconomic status." *Id*.

Although this recent research was published after the City enacted the Ordinance, it is fully consistent with the numerous earlier studies relied on by the City. As such, it is highly relevant to the balancing test this Court must perform as part of its injunction analysis: the serious and inseparable harm to minors that would be caused by enjoining enforcement of the

Ordinance far outweighs any interest Plaintiffs have in performing this particular type of mental health treatment for minors.

Plaintiffs devoted a substantial portion of the hearing to hypotheticals involving gender fluidity and shifting sexual attractions. But the Ordinance does not prohibit therapy that seeks to assist minors in exploring or understanding their sexual orientation or gender identity, whether fluid or not. Conversion therapy does not seek to engage in such exploration of sexuality or gender identity; it seeks to change it.

That *a priori* commitment to the premise that gay or transgender youth can and should change their sexual orientation or gender identity is the hallmark of conversion therapy, but it has been rejected by the leading medical and mental health organizations. This professional consensus recognizes that "[i]nterventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation . . . are coercive, can be harmful, and should not be part of behavioral health treatments." Substance Abuse & Mental Health Admin., *Ending Conversion Therapy: Support & Affirming LGBTQ Youth* 10 (2015) (emphasis supplied) (attached hereto as Ex. 4).

Just last month, the American Psychiatric Association stood by its 1998 position statement and reiterated its "strong opposition" to "any psychiatric treatment, such as 'reparative' or 'conversion therapy,' that is based on the assumption that homosexuality per se is a mental disorder is based on the a priori assumption that the patient should change his or her homosexual orientation." *See* American Psychiatric Association, *APA Reiterates Strong Opposition to Conversion Therapy*, https://www.psychiatry.org/newsroom/news-releases/apa-reiterates-strong-opposition-to-conversion-therapy (last visited Dec. 3, 2018). It

plainly does not believe the evidence of the harm caused by conversion therapy is inconclusive.

Plaintiffs additionally relied heavily at the hearing on a highly limited 2003 study by one college professor. The authoritative research since that time, which was discussed in our initial papers, confirms the harm to minors from conversion therapy that was the basis for the prohibition of such therapy by mental health counselors that was addressed by the Eleventh Circuit in *Keeton v. Cobb County Ga*, 2009 WL 212097 (11th Cir. 2009), in 2011.

III. NARROW TAILORING WAS NOT REQUIRED HERE, BUT THE ORDINANCE IS NARROWLY TAILORED.

At the hearing, Plaintiffs asserted that the decision in *McCullen v. Oakley*, 134 S. Ct. 2518 (2014), required the City to consider "less restrictive" alternatives before passing the Ordinance and established that the Ordinance must be enjoined if no such evaluation was conducted. That decision has no relevance whatsoever to this case.

The regulation struck down in *McCullen* was a "time, place, and manner" restriction that substantially burdened protected First Amendment speech in public forum protests against abortion. The Court held that restriction on speech was subject to the three-part test outlined in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), including the requirement that it must be "narrowly tailored to serve a significant governmental interest."

The record in *McCullen* established that although multiple states had passed measures aimed at controlling public protests of abortion at clinics, Massachusetts alone adopted no-protest "buffer zones" around abortion clinics. *Id.* at 2537. Since less restrictive alternatives were being used by other jurisdictions, the Supreme Court expressed "concern that the Commonwealth has too readily forgone options that could serve its interests just as well." *Id.*

There, the law was not narrowly tailored because it burdened "substantially more speech than necessary to achieve the Commonwealth's asserted interests."

This Ordinance does not restrict speech in a public forum and is therefore not even subject to the *Ward* test, which itself involved time, place, or manner restrictions concerning speech in a public forum. In contrast to protests taking place on the public sidewalks in *McCullen,* the provision of professional mental health treatment is not done in a public forum. The purpose of a therapist's speech in the context of this mental health treatment is not to express the therapist's views publicly, but rather to provide that treatment in a private setting to their patients.

Because the speech is part of the provision of treatment, it is subject to reasonable regulation as professional conduct. *NIFLA,* 138 S. Ct. at 2373. Accordingly, the "narrow tailoring" requirement applied to the regulation of speech in public forums in *McCullen* has no applicability to this entirely different case.

It bears emphasis that, at the time the City adopted this Ordinance, other governments had adopted almost identical measures to protect minors from the serious harm of conversion therapy. Any lesser restriction would not have eliminated that harm. In fact, those measures had been squarely upheld against First Amendment challenges by two federal courts of appeals, which found the regulations narrowly tailored. *See* Ordinance, *supra*, at 4 (citing *King v. Governor, N.J.*, 767 F.3d 216 (3d Cir. 2014); *Pickup*, 740 F.3d at 1208). Even if a narrow tailoring requirement applied here—which it does not—the Ordinance would satisfy it.

Plaintiffs further claimed at the hearing that the Ordinance is "under-inclusive" because it does not prohibit conversion counseling by religious leaders. That claim is equally meritless. States and localities have the authority—and the responsibility—to regulate licensed professionals to protect their residents from harm. *See Locke v. Shore*, 634 F.3d 1185, 1196 (11th Cir. 2011) ("States have a compelling interest in the practice of professions within their boundaries, and ... they have broad power to establish standards for licensing practitioners and regulating the practice of professions.") (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)).

By contrast, states and localities have much more limited constitutional authority to regulate the conduct of religious leaders and faith communities and have often exempted them from a wide variety of generally applicable laws. *See, e.g.*, *Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) (stating that the Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices" and listing examples); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199-200 (2012) (holding that the First Amendment precludes the application of employment discrimination laws to disputes between religious organizations and their ministers).

In any event, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (*citing R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)). "A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Id.* Indeed, "even

under strict scrutiny," the Supreme Court has upheld laws "that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.*

Finally, Plaintiffs argued strenuously at the hearing that the City could have accomplished its objectives by only banning "forced" conversion therapy for minors. But, such a limitation would leave many minors vulnerable, undermining the City's goal of protecting all youth from the serious harms caused by conversion therapy. Research shows that children and teenagers may "agree" to enter conversion therapy to please their parents or avoid family rejection. *See* Am. Psychological Ass'n, *Appropriate Therapeutic Responses to Sexual Orientation* 91 (2009) ("APA Report") at 45-46, 50-51 (attached hereto as Ex. 5). These minors may then become distraught when they are unable to change their sexual orientation—suffering the very harms the Ordinance seeks to prevent. *See id.*

Thus, the purpose of the Ordinance would be defeated by creating an exception for youth who "voluntarily" agree to undergo these practices. As the American Psychological Association has noted, therapy that attempts to change sexual orientation provides no benefits, while putting patients at risk of harm. As such, it would be inappropriate to apply an "informed consent" framework to permit conversion therapy for minors, just as it would be inappropriate to do so for a medication that provides no benefits, while causing serious potential harms.

CONCLUSION

Amicus Curiae Equality Florida respectfully ask that the Court grant the City's motion to dismiss Plaintiffs' amended complaint with prejudice and deny Plaintiffs' amended motion for a preliminary injunction.

Respectfully submitted,

/s/ *Sylvia Walbolt*
Sylvia H. Walbolt
Florida Bar No. 0033604
swalbolt@carltonfields.com
Brian C. Porter
Florida Bar No. 0120282
bporter@carltonfields.com
CARLTON FIELDS JORDEN BURT, P.A.
4221 W. Boy Scout Boulevard
Tampa, FL 33607-5780
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

Shannon Minter
sminter@nclrights.org
Christopher Stoll
cstoll@nclrights.org
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street
Suite 370
San Francisco, CA 94102
Telephone: (415) 392-6257

Scott D. McCoy
Florida Bar No. 1004965
scott.mccoy@splcenter.org
David C. Dinielli
david.dinielli@splcenter.org
J. Tyler Clemons
tyler.clemons@splcenter.org
SOUTHERN POVERTY LAW CENTER
106 East College Avenue
Tallahassee, FL 32301
Telephone: (850) 521-3042

Attorneys for Amicus Curiae Equality Florida Institute Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 3, 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/ *Sylvia Walbolt*
Attorney