

No. 19-10604

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ROBERT W. OTTO, PH.D. LMFT, individually and on behalf of his patients, and
JULIE H. HAMILTON, PH.D., LMFT, individually and on behalf of her patients,
Plaintiffs–Appellants

v.

CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA
Defendants–Appellees

On Appeal from the United States District Court
for the Southern District of Florida
In Case No. 9:18-cv-80771-RLR before the Honorable Robin L. Rosenberg

**PLAINTIFFS-APPELLANTS’ OMNIBUS RESPONSE
IN OPPOSITION TO PROSPECTIVE AMICI’S
MOTIONS FOR LEAVE TO FILE AMICUS BRIEFS**

Mathew D. Staver (Fla. 0701092)
Horatio G. Mihet (Fla. 026581)
Roger K. Gannam (Fla. 240450)
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
E-mail: court@lc.org

Attorneys for Plaintiffs–Appellants

No. 19-10604

OTTO, etc., et al. v. CITY OF BOCA RATON, etc., et al.

**PLAINTIFFS-APPELLANTS'
CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

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

Abbott, Daniel L.

American Association for Marriage and Family Therapy

American Psychological Association

Amunson, Jessica Ring

Carlton Fields Jordan Burt, P.A.

Chapuis, Emily L.

City of Boca Raton, Florida

Clemons, J. Tyler

Cole, Jamie A.

Dawson, James T.

Delery, Stuart F.

Dinielli, David C.

Dreier, Douglas C.

Dunlap, Aaron C.

Equality Florida Institute, Inc.,

Fahey, Rachel Marie

No. 19-10604

OTTO, *etc., et al.* v. CITY OF BOCA RATON, *etc., et al.*

Flanigan, Anne R.

Florida Psychological Association

Gannam, Roger K.

Gibson, Dunn & Crutcher LLP

Gilfoyle, Nathalie F.P.

Hamilton, Julie H., Ph.D., LMFT

Hoch, Rand

Hvzd, Helene C.

Jenner & Block LLP

Liberty Counsel, Inc.

McCoy, Scott D.

Mihet, Horatio G.

Minter, Shannon P.

National Association of Social Workers

National Association of Social Workers Florida Chapter

National Center for Lesbian Rights

Ottaviano, Deanne M.

Otto, Robert W., Ph.D. LMFT

Palm Beach County, Florida

Palm Beach County Human Rights Council

No. 19-10604

OTTO, *etc., et al.* v. CITY OF BOCA RATON, *etc., et al.*

Phan, Kim

Reinhart, Hon. Bruce E.

Rosenberg, Hon. Robin L.

SDG Counseling, LLC

Southern Poverty Law Center

Staver, Mathew D.

Stoll, Christopher F.

Sutton, Stacey K.

The Trevor Project

Walbolt, Sylvia H.

Weiss Serota Helfman Cole & Bierman, P.L.

Yasko, Jennifer A.

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–Appellants

INTRODUCTION

Plaintiffs-Appellants, Drs. Rob Otto and Julie Hamilton (collectively, “Counselors”), pursuant to Fed. R. App. P. 27(a)(3) and 11th Cir. R. 27-1, oppose the motions of The Trevor Project (“Trevor Project”), American Psychological Association, *et al.* (“APA”), and Equality Florida, *et al.* (“Equality Florida”) for leave to file amicus briefs in support of Defendants-Appellees City of Boca Raton and County of Palm Beach (collectively, the “Localities”). As shown below, prospective amici’s briefs are neither useful nor proper.

To be sure, Counselors’ prudence in requesting review of the proposed briefs as a condition to considering consent to filing is now beyond question. (Trevor Project Mot. 1; APA Mot. 1.¹) As predicted, prospective amici attempt to flood the Court with untimely and misleading factual propositions to bolster (after the fact) the Localities’ purported justifications for their ordinances. Particularly specious is Equality Florida’s breathless claim that “*more than sixty percent of youth subjected to conversion therapy attempted suicide.*” (Equality Fla. Mot. at 3.) Although

¹ Counselors communicated the same condition to Equality Florida although, unlike Trevor Project and APA, Equality Florida omitted the condition in representing to the Court merely that “Counsel for Plaintiffs-Appellees [sic] have not consented to the filing of this brief.” (Equality Fla. Mot 3.) In any event, all three prospective amici filed their motions with plenty of time on the clock during which Counselors’ counsel easily could have reviewed them and considered consent to their filing.

asserted without attribution in Equality Florida’s motion for leave, within its proposed brief Equality Florida attributes the disingenuous narrative to the article, Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts with LGB Adolescents: Implications for Young Adult Mental Health and Adjustment*, Journal of Homosexuality (2018). (Equality Fla. Mot. 16–17, Addendum (ECF 35–49).) Irrespective, however, of how Equality Florida wants to interpret the Ryan article, and of how the article itself presents its findings, the article was unequivocal about its “several limitations,” including the most important: “**causal claims cannot be made[!]**” (Ryan 11–12 (ECF 45–46).) A close second is the admission that only persons currently identifying as LGB were recruited to participate in the study. (*Id.*) Thus, the study excluded **by design** any person who positively experienced change as a minor and never identified as LGB or no longer identifies as LGB as an adult. Finally, the title of the article itself (*Parent-Initiated Sexual Orientation Change Efforts*) demonstrates that it is inapplicable to what Counselors do and wish to do in the Localities’ jurisdictions, which is to provide voluntary, client-centered counseling that their minor clients seek and wish to receive. (Brief of Plaintiffs-Appellants (“Brief”) at 4–9.) Thus, Equality Florida’s summary of the Ryan article, “It studied the very treatment the Ordinances prevents [sic] and **found** that this treatment **puts LGBT youth at a dramatically heightened risk** of depression and

suicidality” (Equality Fla. Mot. at 17), is patently dishonest and utterly useless to the Court.

As explained further below, prospective amici’s motions should be denied and their proposed briefs stricken from the record.

I. PROSPECTIVE AMICI’S MOTIONS SHOULD BE DENIED BECAUSE THE INFORMATION PROFFERED IS NOT USEFUL.

Whether to grant or refuse leave to amicus parties is a matter of the Court’s discretion, but the key consideration is whether the information offered is “timely and useful.” *Georgia Aquarium, Inc. v. Pritzker*, 135 F. Supp. 3d 1280, 1288 (N.D. Ga. 2015); *Waste Mgmt. of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995). Prospective amici’s briefs are not useful, and the Court should decline to accept their friendship.

Assuming the Localities’ respective ordinances are not viewpoint-based restrictions on speech and therefore unconstitutional *per se* (which they are), the Localities must still prove their content-based counseling bans were narrowly tailored to their purported government interests **when enacted**. (Br. at 34–51.) “There must be a ‘fit between the . . . ends and the means chosen to accomplish those ends.’” *Wollschlaeger v. Florida*, 848 F.3d 1293, 1312 (11th Cir. 2017) (quoting *Sorrell v. IMS Health*, 564 U.S. 552, 572 (2011)). But prospective amici offer no hint of a relevant connection to the Localities’ enactments, and proffer no information about what happened in their respective jurisdictions in connection with

their ordinances. Prospective amici certainly do not proffer any information about what alternatives to the counseling bans the Localities considered. Accordingly, the information prospective amici proffer is not useful, and therefore does not meet the basic threshold for an *amicus* filing.

A. Trevor Project’s Proposed Brief Is Not Helpful or Desirable.

To be sure, despite Trevor Project’s purported stature “as the nation’s largest [LGBTQ] youth crisis intervention and suicide prevention organization” (Trevor Project Mot. at 3), neither of the Localities in its Initial Disclosures identified any Trevor Project representative or constituent as a witness “likely to have discoverable information . . . that [it] may use to support its claims or defenses” under Rule 26(a)(1)(A)(i). Moreover, during the proceedings below, Boca Raton unequivocally informed Counselors that **no witnesses** were necessary or appropriate with regard to the claims currently asserted in the Complaint. Importantly, at no point in the district court proceedings did either of the Localities proffer any witness from Trevor Project, nor use any evidence submitted from such group.

Furthermore, Trevor Project’s offer of a “unique perspective” is unavailing. (Trevor Project Mot. at 3.) In light of the Localities’ unequivocal and strident condemnation of SOCE counseling and all its practitioners, purportedly (and identically) based on “overwhelming research” (Br. at 12), Trevor Project offers

nothing close to a “unique perspective.” Rather, Trevor Project offers only to pile on with more of the same. The Court does not need Trevor Project’s friendship.

B. Equality Florida’s Proposed Brief Is Not Helpful or Desirable.

1. Equality Florida’s Verbatim Recitation of Defendants’ “Overwhelming Research” Claims Are Not Useful.

Another hopeful *amicus*, Equality Florida, simply follows Trevor Project’s lead, and seeks to contribute the **same** “unique perspective” to the proceedings. (Equality Florida Mot. at 3 ¶ 5.) Indeed, Equality Florida asserts that it can demonstrate to the Court the “broad consensus” (*id.*), which is really nothing more than a verbatim restatement of Defendants’ oft-cited “overwhelming research” upon which the challenged ordinances were purportedly based. Because the Localities are already purporting to show the constitutional relevance of such “overwhelming research,” Equality Florida’s participation is duplicative, unnecessary, and unhelpful. Indeed, with the Localities, Trevor Project, and Equality Florida all purporting to demonstrate exactly the same thing to this Court, it is evident that the age-old adage rings true even with amici, “in judicial review, two’s company and three’s a crowd.” *Sch. Dist. of Wisconsin Dells v. Z.S. ex rel. Littlegeorge*, 295 F.3d 671, 674 (7th Cir. 2002).

Moreover, using loaded terms like “subjected to [conversion therapy]” (Equality Fla. Mot. at 3) misapprehends (or intentionally misrepresents) what this

case is about. Counselors do not seek to “subject” anyone to “conversion therapy,” especially as defined by Equality Florida as “a treatment that is aimed at one single predetermined outcome as the only acceptable outcome for the child” and “treatment, having the sole, avowed goal of *changing* a young person’s sexual orientation or gender identity” (Equality Fla. Mot. at 3–4). As the record shows, Counselors do not seek to “change” any client, but are open to facilitating purely voluntary, client-chosen goals to reduce or eliminate unwanted same-sex attractions, behaviors, or identity. (Br. at 4–9.) As the record further shows, even this response to voluntary, client-directed goals, with no predetermined goals or outcomes on the part of Counselors, is nonetheless prohibited “conversion therapy” under the Localities’ ordinances. (Br. at 9–12.) Thus, Equality Florida’s entire premise is false, and its proposed brief is therefore useless to the Court.

2. Equality Florida Cannot Satisfy Defendants’ Unquestioned Burden to Demonstrate Narrow Tailoring, so Its Positions on That Point Are Similarly Unhelpful.

The only other purportedly unique perspective that Equality Florida attempts to introduce to this Court is likewise of no relevance or help. Equality Florida states that it has a unique perspective on “why the Ordinances at issue in this appeal are narrowly tailored.” (Equality Florida Mot. at 3, ¶5). But, this perspective is of no use for at least three reasons: (a) it is the Localities’ burden to demonstrate that the ordinances are narrowly tailored, *see Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004)

(holding, on preliminary injunction motion, “**the burden is on the government** to prove that the proposed alternatives will not be as effective as the challenged statute” (emphasis added)), (b) amicus should not be permitted to present briefs that merely “duplicate the arguments made in the litigant’s briefs, in effect merely extending the length of the litigant’s brief,” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1999), and (c) the Court is “not helped by amicus curiae’s expression of a strongly held view . . . but by being pointed to considerations germane to our decision of the appeal that the parties for one reason or another have not brought to [the Court’s] attention.” *Id.* Equality Florida’s participation on this question of law on behalf of the Localities, which has been fully presented to the Court by the Localities, is unhelpful and should not be permitted.

C. APA’s Proposed Brief Is Not Helpful or Desirable.

APA submits to this Court that its participation is helpful and desirable because it is purportedly fulfilling “the classic role of amicus” by submitting information on “a case of general public interest.” (APA Mot. at 2 (citing *Miller-Wohl v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982))). Missing from the APA’s self-gratifying description of its classic role is *Miller-Wohl*’s statement that the “classic role” is to “draw[] the court’s attention to **law** that might otherwise escape consideration,” 694 F.3d at 204 (emphasis added); *see also United States v. Michigan*, 940 F.3d 143, 164-65 (6th Cir. 1991) (amici’s purpose is “to

provide **impartial information on matters of law** about which there is doubt” (emphasis added)). As is readily apparent from the APA’s brief, **there is no discussion of any law whatsoever – much less law that might have somehow escaped the Court’s attention.** In fact, what the APA seeks to introduce in its amicus brief is little more than a highly partisan and impermissible account of the facts. Such participation and advocacy exceed the traditional amicus function, even under the APA’s own cited authorities. *See Miller-Wohl*, 694 F.2d at 204 (holding amicus exceeds its classic role if it provides nothing more than a “highly partisan account of the facts”); *see also Funbus Sys., Inc. v. Cal. Pub. Utils. Comm’n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986) (noting amicus brief is not helpful and exceeds its function if it merely introduces a “highly partisan account of the facts”).

What little the APA does offer is really a verbatim recitation of the statements of the APA that are already in the record by virtue of the 2009 Report of American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (the “APA Report”). (APA Mot. at 2–3; Br. at 12–25, 53–55.) Indeed, the APA’s position on the issues of this appeal are already well-presented to this Court. (Br. at 12–25, 53–55.) Because its position is well-known and already before this Court, the APA’s participation is neither helpful nor desirable. Its motion should be denied.

II. PROSPECTIVE AMICI'S MOTIONS SHOULD BE DENIED BECAUSE FACTUAL ARGUMENT SHOULD NOT BE WELCOMED IN AN AMICUS FILING.

Prospective amici's motions should be denied for another reason: "[A]n *amicus* who argues facts should rarely be welcomed" *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). "An *amicus* cannot initiate, create, extend, or enlarge issues." *Waste Mgmt.*, 162 F.R.D. at 36. There is not even a suggestion that anything prospective amici have to say was considered by either of the Localities before enacting its counseling ban. If that was the case, the information would be in the Localities respective legislative records, and the Localities would be more than capable of presenting that information to the Court. Rather, under the guise of their purported unique perspectives, prospective amici are attempting to create an *ex post facto* evidentiary record to bolster Defendants' respective counseling ban enactments. The Court should see through and reject prospective amici's improper attempts.

Trevor Project, for its part, reveals that its amicus assistance will be based on the content of "confidential" (and presumably anonymous) telephone calls, instant messages, and text messages from its constituents. (Trevor Project Mot. at 3.) There is, of course, no indication that any of these unidentified communicants have a connection to Boca Raton or Palm Beach County, or received counseling from the Counselors. To be sure, neither of the Localities has identified a single individual

claiming to have been harmed by voluntary SOCE counseling in its jurisdiction. (Opening Br. at 25–27.) In any event, allowing Trevor Project to introduce anonymous hearsay “facts” would work a profound prejudice on Plaintiffs because Plaintiffs would have no opportunity to investigate or rebut such “facts.”

More importantly, however, the efforts of Trevor Project to expand a record on appeal is a flagrant violation of the role of amicus. *See, e.g., Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991) (“amicus curiae may not expand the scope of an appeal or implicate issues not presented to the district court”); *Evans v. Georgia Reg. Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (same); *West Alabama Women’s Ctr. v. Williamson*, 900 F.3d 1310, 1320 n.8 (11th Cir. 2018) (same); *see also Resident Council of Allen Parkway Vill. v. U.S. Dep’t of Housing and Urban Dev.*, 980 F.2d 1043, 1049 (5th Cir. 1993) (“We are constrained only by the rule that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented to the district court.”).

Similarly, the APA seeks to introduce additional statements concerning its own APA Report, which the Court has before it in this appeal, and presumably to “correct” some of the statements it does not like in its report. Indeed, the APA explicitly states that it wants to correct some of the Counselors’ “mischaracterizations of several of the Task Force’s key findings.” (APA Mot. at 4.) But, the APA Report speaks for itself. A *post hoc* attempt at revision of the Report’s

conclusions the APA now finds inconvenient is not the function of amici. Indeed, as this Court has said, “[a]lthough we welcome amicus curiae briefs that are helpful, **misstatements of facts are not helpful.**” *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 896 n.9 (11th Cir. 2011) (emphasis added). This Court has the APA report and is well suited to consider what it says. The APA’s attempt to bolster the shortcomings of the APA Report to aid the Localities in satisfying their constitutional burden in this matter is not acceptable or helpful. Indeed, “[t]he term ‘amicus curiae’ means friend of the court, not friend of a party.” *Ryan*, 125 F.3d at 1063. The APA seeks not to befriend this Court, but Defendants. Its partisan participation is unwelcome.

CONCLUSION

For the foregoing reasons, the motions of prospective amici should be denied and their briefs stricken from the record.

Dated this June 27, 2019.

/s/ Roger K. Gannam
Mathew D. Staver (Fla. 0701092)
Horatio G. Mihet (Fla. 026581)
Roger K. Gannam (Fla. 240450)
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
E-mail: court@lc.org

Attorneys for Plaintiffs–Appellants

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 2,541 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this June 27, 2019, a copy of the foregoing motion was electronically filed through the Court’s ECF system, which will effect service on the following counsel and parties of record:

*Attorneys for Defendant–Appellee
City of Boca Raton, Florida*

Jamie A. Cole
jcole@wsh-law.com
Daniel L. Abbott
dabbott@wsh-law.com
Anne R. Flanigan
aflanigan@wsh-law.com
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
200 East Broward Boulevard
Suite 1900
Fort Lauderdale, FL 33301

*Attorney for Defendant–Appellee
Palm Beach County, Florida*

Helene C. Hvizd
hvizd@pbcgov.org
Senior Assistant County Attorney
Palm Beach County Attorney’s Office
301 North Olive Avenue, Suite 601
West Palm Beach, FL 33401

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