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October 17, 2019

By CM/ECF Only
Mr. David J. Smith
Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth St., N.W.
Atlanta, GA 30303

RE: No. 19-10604, *Otto, et al. v. City of Boca Raton, Florida, et al.*
Rule 28(j) Response to Notice of Supplemental Authority

Dear Mr. Smith:

Plaintiffs–Appellants ("Counselors") respond to Defendant–Appellee Boca Raton's Rule 28(j) notice of the Memorandum Opinion in *Doyle v. Hogan*, No. 19-cv-0190 (D. Md. Sept. 20, 2019) (the "*Doyle* Opinion"), filed September 25, 2019.

The *Doyle* Opinion duplicates the dispositive error of the court below, purporting to recategorize a counselor's speech as "treatment" speech (*i.e.*, conduct), subject to merely intermediate scrutiny. (*Doyle* Op. 9–12.) As shown in Counselors' briefing (Br. 34–44; Reply Br. 1–4), however, such recategorization violates the Supreme Court's clear admonition against inventing categories of speech "subject to different rules" in order to except it "from the rule that content-based regulations of speech are subject to strict scrutiny." *Nat'l Inst. For Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) ("*NIFLA*"). As this Court had already recognized before *NIFLA*, "'speech is speech,'" and "characterizing speech as conduct is a dubious constitutional enterprise." *Wollschlaeger v. Florida*, 848 F.3d 1293,1308, 1309 (11th Cir. 2017).

Also like the court below, the *Doyle* Opinion compounds the error by concluding the Maryland ban satisfies narrow tailoring, based on the court's

conclusion that it "is bolstered by research indicating that conversion therapy is likely harmful to minors." (*Doyle* Op. 12–17.) As shown in Counselors' briefing (Br. 12–25, 53–57; Reply Br. 11–18), no research supports any causal attribution of harm to "conversion therapy" (Br. 13–14 ("'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.'")), and the subject ordinances cannot otherwise satisfy strict or intermediate scrutiny.

Finally, the *Doyle* Opinion's conclusion on vagueness (*Doyle* Op. 21–24) is inapposite because the record before this Court includes unrebutted evidence that the subject ordinances force both enforcement officials and covered professionals to guess at the ordinances' meaning and application. (Br. 65–67.) Moreover, the *Doyle* Opinion's vagueness conclusion is based on the faulty premise (*see supra*) that the Maryland law regulates conduct and not speech. (*Doyle* Op. 22.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this October 17, 2019, a copy of the foregoing was electronically filed through the Court's ECF system, which will effect service on the following counsel and parties of record:

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