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 IN SUPPORT OF DEFENDANTS–APPELLEES' PETITION FOR REHEARING EN BANC

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.

Alachua County, Florida

American Association for Marriage and Family Therapy

American Association of Suicidology

American Foundation for Suicide Prevention

American Psychological Association

Amunson, Jessica Ring

Barday, Shireen A.

Born Perfect

Broward County, Florida

Carlton Fields Jorden Burt, P.A.

Chapuis, Emily L.

City of Boca Raton, Florida

City of Boynton Beach, Florida

City of Cudahy, Wisconsin

City of Delray Beach, Florida

City of Duluth, Minnesota

City of East Lansing, Michigan

City of Fort Lauderdale, Florida

City of Gainesville, Florida

City of Greenacres, Florida

City of Kent, Ohio

City of Lake Worth Beach, Florida

City of Miami Beach, Florida

City of Miami, Florida

City of Oakland Park, Florida

City of Riviera Beach, Florida

City of Saint Louis, Missouri

City of Saint Paul, Minnesota

City of South Miami, Florida

City of Tallahassee, Florida

City of West Palm Beach, Florida

City of Wilton Manors, 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

Flanigan, Anne R.

Florida Chapter of the American Academy of Pediatrics, Inc.

Florida Psychological Association

Florida State Representative Michael Grieco

Flugman, David S.

Gannam, Roger K.

Gibson, Dunn & Crutcher LLP

Gilfoyle, Nathalie F.P.

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

Hersh, Adam K.

Hoch, Rand

Hoverman, Abigail J.M.

Hvizd, Helene C.

Jenner & Block LLP

King & Spalding LLP

Liberty Counsel, Inc.

McCoy, Scott D.

McNulty, Kerri L.

Méndez, Victoria

Mihet, Horatio G.

Minter, Shannon P.

National Association of Social Workers

National Association of Social Workers Florida Chapter

National Center for Lesbian Rights

North Bay Village, Florida

Otttaviano, Deanne M.

Otto, Robert W., Ph.D. LMFT

Palm Beach County, Florida

Palm Beach County Human Rights Council

Paz, Rafael A.

Phan, Kim

Pima County, Arizona

Ray, Brent P.

Reinhart, Hon. Bruce E.

Rosenberg, Hon. Robin L.

Rosenwald, Robert F., Jr.

SDG Counseling, LLC

Selendy & Gay PLLC

Southern Poverty Law Center

Staver, Mathew D.

Stoll, Christopher F.

Sutton, Stacey K.

The Trevor Project

Town of Bay Harbor Islands, Florida

Trummel, Rachael M.

Walbolt, Sylvia H.

Weatherwax, Jordan L.

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, et al. ("Trevor Project"), The Florida Psychological Association, et al. ("FPA"), Born Perfect, and 25 Amici Curiae Cities and Counties ("Amici Cities") for leave to file amicus briefs in support of the joint petitions of Defendants–Appellees City of Boca Raton and County of Palm Beach (collectively, the "Localities") for rehearing en banc (the "Joint Petitions").[1] As shown below, proposed amici's briefs are neither useful nor proper.

Proposed amici merely rehash well-worn arguments already fully briefed by the parties and prior amici, and fully considered by the Panel. Indeed, The Trevor Project, the Florida Psychological Association, and the National Center for Lesbian Rights (now writing through its advocacy campaign Born Perfect) all previously filed amicus briefs at the merits stage, and The Trevor Project also filed an amicus brief in the district court. (Doc. 90.) But their persistence cannot be credited as merit, and the Court should disregard proposed amici's unhelpful briefs. They neither demonstrate "a precedent-setting error of exceptional importance" nor "direct conflict with precedent of the Supreme Court or of this circuit" to support rehearing

[1] No proposed amici argue in support of the Localities' alternative request for panel rehearing under Fed. R. App. P. 40(a)(2).

by the full Court. 11th Cir. R. 35-3; Fed. R. App. P. 35(a). Thus, proposed amici's motions should be denied.

ARGUMENT

I. PROPOSED AMICI'S MOTIONS SHOULD BE DENIED BECAUSE THEIR PROFFERED BRIEFS ARE NEITHER TIMELY NOR USEFUL TO THE COURT'S CONSIDERATION OF THE LOCALITIES' JOINT PETITIONS FOR REHEARING EN BANC.

Proposed amici's recycling of old arguments should be disregarded as unhelpful in considering the Joint Petitions. To be sure, 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). Moreover, amici 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), for the Court is "not helped by amicus curiae's expression of a strongly held view . . . but by being pointed to considerations germane to [the Court's] decision of the appeal that the parties for one reason or another have not brought to [the Court's] attention." *Id.* Indeed, amici fulfill their "classic role" by "drawing the court's attention to law that escaped consideration." *Miller-Wohl v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982); *see also United States v. Michigan*, 940

F.3d 143, 164–65 (6th Cir. 1991) (explaining amici's purpose is "to provide impartial information on matters of law about which there is doubt").

The role of amici is further limited in the narrow context of a petition for rehearing en banc because "[t]he decision to grant en banc review is always discretionary and disfavored." *Keohane v. Florida Dep't of Corr. Sec'y*, 981 F.3d 994, 995 (11th Cir. 2020) (Pryor, C.J., concurring in denial of rehearing en banc). Indeed, this Court's Rules specify that a petition for rehearing en banc

> is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional importance [or] a panel opinion that is allegedly in direct conflict with precedent of the Supreme Court or of this circuit. Alleged errors in a panel's determination . . . in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for en banc consideration.

11th Cir. R. 35-3; *see also* Fed. R. App. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered . . . .").

Thus, a proposed amicus brief in support of rehearing en banc is only timely and useful if it demonstrates—beyond the parties' abilities to brief and the Panel's ability to contemplate—"a precedent-setting error of exceptional importance" or a "direct conflict with precedent of the Supreme Court or of this circuit," but not if it merely complains of "[a]lleged errors in a panel's determination . . . in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's

misapplication of correct precedent to the facts of the case." None of the proposed amici's briefs satisfies the usefulness standard.

II. PROPOSED AMICI'S "CONDUCT NOT SPEECH" ARGUMENTS ARE NEITHER TIMELY NOR USEFUL BECAUSE THE SAME ARGUMENTS WERE ALWAYS CENTRAL TO THE LOCALITIES' DEFENSES OF THEIR ORDINANCES, WERE FULLY BRIEFED BY THE PARTIES AND PRIOR AMICI, AND WERE FULLY CONSIDERED AND REJECTED BY THE PANEL.

Proposed amici all argue that the Panel should not have held Localities' ordinances to violate Counselors' First Amendment rights because the ordinances regulate conduct and not speech. But proposed amici bring nothing on this point that escaped the parties' attention or the Panel's consideration. *See Otto v. City of Boca Raton*, 981 F.3d 854, 864–68 (11th Cir. 2020). Indeed, the Localities and their supporting amici on the merits (including some of the proposed amici here) made this their central argument to the Panel, and there is nothing new for proposed amici to cover now. Their briefing on this point should be rejected as entirely unnecessary.

To be sure, proposed amici's "sky-is-falling" arguments cannot be taken seriously because none of them even attempts meaningful engagement with the strict scrutiny standard they complain will undo all regulation of the counseling professions. Legitimate content-based regulation of counseling speech that is viewpoint neutral and narrowly tailored (i.e., the least restrictive means) to further a compelling interest (i.e., remediation of actual harm) may survive strict scrutiny. Proposed amici collectively and disingenuously pretend that the Panel's decision

says otherwise.[2] The Court does not need friends like these, and should disregard their proposed briefs.

III. PROPOSED AMICI'S CONTRIVED CONFLICTS WITH SUPREME COURT AND CIRCUIT PRECEDENTS ARE NOT USEFUL AND SHOULD BE DISREGARDED.

Proposed amici variously assert conflicts between the Panel decision and the Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) [hereinafter, *NIFLA*], this Court's en banc decision in *Wollschlaeger v. Florida*, 848 F.3d 1293 (11th Cir. 2017), and the counseling ban decisions in *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Once again, however, proposed amici bring nothing that escaped the parties' attention or the Panel's consideration. *See Otto*, 981 F.3d at 861–68 (discussing and applying *NIFLA*, *Wollschlaeger*, *King*,

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[2] In attempting to assign serious error to the Panel, proposed amici Born Perfect and Amici Cities overplay their hands, and egregiously misrepresent the Panel's holding as imposing a new standard "that controlled, double-blind studies are necessary to prove that a medical treatment is harmful before the state may prohibit that treatment." (Born Perfect Br. 3; Amici Cities Br. 10.) The Panel said no such thing. Rather, the Panel held the Localities' content- and viewpoint-based speech restrictions cannot satisfy strict scrutiny based solely on "[p]rofessional opinions and cultural attitudes" given the lack of **any empirical evidence** of harm they purport to remedy. 981 F.3d 868–870. The Panel also said, however, that the ordinances' viewpoint discrimination "problems may go beyond insufficient evidence," *id.* at 870 n.12, and therefore, "the ordinances could [not] necessarily be saved with just one more appropriately scoped, double-blind, peer-reviewed study." *Id.* Proposed amici's patent dishonesty on this point counsels against taking any part of their briefs seriously.

and *Pickup*). Moreover, because *NIFLA* abrogated *King* and *Pickup* on the very point proposed amici claim to be in conflict with the Panel's decision, there can be no conflict. *See Otto*, 981 F.3d at 867 ("*NIFLA* disapproved of both courts' willingness to 'except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny.'").

IV. PROPOSED AMICI'S FACTUAL ARGUMENTS EXCEED THE BOUNDARIES OF PROPER AMICUS INPUT.

"[A]n *amicus* who argues facts should rarely be welcomed . . . ." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Indeed, an amicus exceeds its role when it provides nothing more than a "highly partisan account of the facts." *Miller-Wohl*, 694 F.2d at 204; *see also New England Patriots Football Club, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (same). Moreover, under this Court's rehearing rules, factual arguments "are matters for rehearing before the panel but not for en banc consideration." 11th Cir. R. 35-3. Nevertheless, proposed amici attempt to flood the docket with untimely and misleading factual propositions to bolster (after the fact) the Localities' purported justifications for their ordinances. The Court should reject their attempts as neither timely nor useful.

The clearest example of improper factual argument comes from proposed amici Trevor Project's brief, which devotes eleven pages to arguing its partisan view of the facts, even new facts, and a mere afterthought paragraph to arguing conflict with other decisions. To be sure, Trevor Projects' assertion of new, purportedly

factual propositions is a flagrant violation of the standards for amici. *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 than an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented to the district court."); *Waste Mgmt.*, 162 F.R.D. at 36 ("An *amicus* cannot initiate, create, extend, or enlarge issues.").

More troubling, however, is Trevor Project's misrepresentation of the new "facts" it presents. For example, Trevor Project touts its own "2020 peer reviewed article in the American Journal of Public Health" as providing new documentation of harm from "conversion therapy." (Trevor Project Br. 5, n.3 (citing Amy E. Green et al., *Self-Reported Conversion Efforts and Suicidality Among US LGBTQ Youths and Young Adults, 2018*, 110 Am. J. Pub. Health 1221, 1224 (2020) [hereinafter Green]).) It takes little effort, however, to uncover the inherent unreliability, even dishonesty of Trevor Project's Green "study." The very first "authority" it cites is an

issue advocacy contrivance, cleverly disguised as science, which at least admits it cannot be cited for any causal conclusions:

> **Limitations** include its cross-sectional study design, which **precludes determination of causation**. It is possible that those with worse mental health or internalized transphobia may have been more likely to seek out conversion therapy rather than non-GICE therapy, suggesting that **conversion efforts themselves were not causative of these poor mental health outcomes**. . . .
>
> **We also lack data** regarding the degree to which GICE occurred (eg, duration, frequency, and forcefulness of GICE, as well as **what specific modalities were used**).

(Jack L. Turban et al., *Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults*, 77(1) JAMA Psychiatry 68, 75 (2020) [hereinafter Turban] (emphasis added) (cited in Green at 1221, 1222, 1225, 1226 n.1).) It did not take long for the Turban piece itself to be exposed:

> Rarely have researchers been so explicit about the political aims of their research. If this study is really "the first study" to show "adverse mental health outcomes" related to "conversion therapy," how can it be sufficient—even if it were high-quality—to justify government bans? And how could researchers have supported such bans prior to any study at all? Simple: it was never about science.

Mark Regnerus, *Does "Conversion Therapy" Hurt People Who Identify as Transgender? The New* JAMA Psychiatry *Study Cannot Tell Us*, The Public Discourse (Sept. 18, 2019), https://www.thepublicdiscourse.com/2019/09/57145/?fbclid=IwAR0bSZbhV0sw5g7NxvuWWHmZ4Wy5O33mV1kpyt1BkGiDlYhGX

J48jKa38rw (quoting Turban's public statement, "'We hope our findings contribute to ongoing legislative efforts to ban gender identity conversion efforts.'").

Unsurprisingly, Trevor Project's Green "study" suffers from the same low quality, cross sectional data limitation, and "thus, temporality cannot be determined." Green at 1225. In other words, just like in the Turban "investigation" Green cites, no causation of poor mental health outcomes can be attributed to "conversion therapy," even as expansively defined by Trevor Project to include unlicensed, aversive, coercive, and residential therapies not practiced by Counselors in this case. Green at 1221; *cf., e.g.*, *McKee v. United States*, 1:11-CV-2526-RGV, 2014 WL 11460475, at *6 (N.D. Ga. Jan. 15, 2014) ("**Correlation is not causation**, and as the Eleventh Circuit has held, the *post hoc ergo propter hoc* fallacy is not reliable enough to be allowed as expert testimony." (cleaned up) (bold emphasis added)), *aff'd*, 597 Fed. Appx. 625 (11th Cir. 2015); *Alabama Gas Corp. v. Gas Fitters Local Union No. 548 of United Ass'n, AFL-CIO-CLC*, 2:13-CV-580-WKW, 2014 WL 3655713, at *4 (M.D. Ala. July 23, 2014) ("It is axiomatic that correlation is not causation."), *aff'd*, 599 Fed. Appx. 382 (11th Cir. 2015); *Manuel v. Pepsi-Cola Co.*, 17 CIV. 7955 (PAE), 2018 WL 2269247, at *11 (S.D.N.Y. May 17, 2018) ("In law, as in science, '[c]orrelation is not causation.'" (modification in original) (quoting *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 173 (2003) (Kennedy, J., concurring in part and dissenting in part))), *aff'd,* 763 Fed. Appx. 108 (2d Cir. 2019);

Becerra v. Dr Pepper/Seven Up, Inc., 17-CV-05921-WHO, 2018 WL 1569697, at *6 (N.D. Cal. Mar. 30, 2018) ("But correlation is not causation, neither for purposes of science nor the law.").

Moreover, the Green "study" stacked the deck in favor of its desired outcome by carefully curating only online respondents who "were between 13 and 24 years of age" and "identified as LGBTQ" by specifically targeting "those who interacted with material deemed to be relevant to the LGBTQ community" on "2 social media platforms: Facebook and Instagram." Green at 1222. Thus, the Green "study" excluded **by design** any person who positively experienced change as a minor and never identified or no longer identifies as "LGBTQ." Furthermore, the Green "study" excluded respondents

> who responded no to the questions asking whether someone attempted to convince them to change their gender identity and whether someone attempted to convince them to change their sexual orientation but responded yes to having undergone "conversion or reparative therapy." It was assumed that these young people may not have understood the intended meaning of conversion or reparative therapy.

Green at 1222. Thus, on its face, the "study" is not only unreliable, but wholly inapplicable to the voluntary, client-centered counseling that Counselors provide, and that their minor clients seek and wish to receive. *See Otto*, 981 F.3d at 860. Trevor Project's Green intentionally disregarded the voices of such young people.

While Trevor Project and other proposed amici may desire to aid their ideological allies in the Localities with such misleading and inapposite factual

argument, "[t]he term 'amicus curiae' means friend of the court, not friend of a party." *Ryan*, 125 F.3d at 1063. And, this Court has previously stated the obvious: "Although 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 should reject proposed amici's unhelpful and dishonest friendship.

CONCLUSION

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

Dated this December 24, 2020.

/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 2,646 words.

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

CERTIFICATE OF SERVICE

I hereby certify that, on this December 24, 2020, 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
hhvizd@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