

No. 19-10604

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-Appellees,

– 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. 18-80771
(HONORABLE ROBIN L. ROSENBERG)

**BRIEF OF *AMICI CURIAE* FLORIDA PSYCHOLOGICAL
ASSOCIATION AND THE FLORIDA CHAPTER OF THE
AMERICAN ACADEMY OF PEDIATRICS, INC. IN SUPPORT
OF DEFENDANTS-APPELLEES' PETITION FOR
REHEARING *EN BANC***

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *amici curiae* hereby certify that the following persons, including the trial judge, and all attorneys, persons, associations of persons, firms, partnerships, or corporations, have an interest in the outcome of this review:

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the proposed *amici curiae* hereby certify that they

have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: December 18, 2020

/s/ David S. Flugman

David S. Flugman

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<https://www.apa.org/ptsd-guideline/patients-and-families/psychotherapy>6, 7

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: whether strict scrutiny applies to limitations on sexual orientation change efforts, threatening all legislation regulating professional psychotherapeutic treatment.

Dated: December 18, 2020

/s/ David S. Flugman

David S. Flugman

Counsel for Amici Curiae

ISSUES MERITING *EN BANC* RECONSIDERATION

This case presents a question of exceptional importance: whether strict scrutiny applies to state regulation of psychotherapy.

STATEMENT OF FACTS

Amici agree with Appellees' statement of facts necessary to consideration of the issues.

IDENTITY & INTEREST OF *AMICI CURIAE*¹

Amici submit this brief to provide the Court with the perspective of counseling and children's health professionals, whose professional experience will help the Court to understand psychotherapy's role as mental health treatment rather than expressive speech, and the importance of maintaining professional standards in the provision of mental healthcare to children.

The Florida Psychological Association ("FPA") is the largest professional organization for psychologists in Florida, committed to advancing psychology as a science, profession, and means of promoting health and welfare, and to improving the qualifications and usefulness of psychologists through high standards of ethics,

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E). This brief is accompanied by a motion for leave to file. *See* 11th Cir. R. 29-3.

conduct, education, and achievement. Those aims are threatened by the panel majority's opinion, which incorrectly characterized psychotherapy as a forum for expressive speech, eliminated governments' authority to ensure compliance with professional norms, and permitted the continuance of practices rejected by decades of research.

The Florida Chapter of the American Academy of Pediatrics ("FCAAP") is a professional organization for pediatricians in the State of Florida dedicated to promoting the health and welfare of Florida's newborns, infants, children, adolescents, and young adults. FCAAP's mission of promoting the highest standards of healthcare for children and young adults is undermined by the panel majority's effectively exempting psychotherapy from regulation and authorizing a form of treatment that is medically unsound and dangerous to children.

SUMMARY OF ARGUMENT

The panel majority’s application of strict scrutiny to the regulation of psychotherapy, long recognized as medical treatment, is a precedent-setting error of extraordinary importance. In reversing the district court, the panel majority misconstrued psychotherapy as expressive speech. But as courts long have recognized, psychotherapy is *treatment*, based on scientific principles and directed at improving a patient’s mental health.

Applying strict scrutiny to regulation of psychotherapy constitutes a stark departure from precedent, impedes states and localities from protecting the public from dangerous practices, and would make regulation of psychotherapy nearly impossible.

This Court should grant rehearing *en banc* to correct the panel majority’s serious error.

ARGUMENT

I. The Panel Majority Mischaracterized Psychotherapy as Expressive Speech Rather Than Medical Treatment Subject to State Regulation

The panel majority applied strict scrutiny to the ban on Sexual Orientation Change Efforts (“SOCE”) based on the erroneous equation of psychotherapy with expressive speech, reciting the broad principle that it is inappropriate to engage in “the practice of relabeling controversial speech as conduct.” *Otto v. City of Boca*

Raton, No. 19-10604, 2020 WL 6813994, at *3 (11th Cir. Nov. 20, 2020); *see id.* at *7 (“What the governments call a ‘medical procedure’ consists—entirely—of words.”). The panel majority compounded that error by holding that the ban on SOCE was the result of “the local governments[’] disagree[ment] with the message, ideas, subject matter, and content of the words spoken during their clients’ therapy.” *Id.* at *3. Essentially, the panel majority held that any regulation of psychotherapy requires strict scrutiny, casting longstanding precedent into doubt and undermining any ability to regulate mental health treatment to protect the public.

But SOCE is a treatment, not “controversial speech,” and the mere fact that it is administered through words does not distinguish it from other medical and mental health treatments that similarly are regulated to protect patients from harm. State laws recognize that communications in a psychotherapy session are applications of scientific methods directed at improving a patient’s wellbeing. *See, e.g.*, Ala. Code § 34-8A-2(5) (defining “private practice of counseling” as “[r]endering or offering to render to individuals, groups, organizations, or the general public counseling services . . . involving the application of principles, methods, or procedures of the counseling profession”); Ga. Code Ann. § 43-10A-3(10) (defining “Professional Counseling” to include use of “counseling and psychotherapy to evaluate, diagnose, treat, and recommend a course of treatment for emotional and mental health problems and conditions, whether cognitive, behavioral, or affective”); Fla.

Stat. Ann. § 491.003(9) (defining the “practice of mental health counseling” as “the use of scientific and applied behavioral science theories, methods, and techniques for the purposes of describing, preventing, and treating undesired behavior and enhancing mental health”). A counselor’s statements are the execution of established scientific techniques for treating mental health conditions.

Professional organizations confirm that psychotherapy is a medical treatment. The American Psychological Association (“APA”) describes psychotherapy as “communication between patients and therapists that is intended to help people: find relief from emotional distress, . . . seek solutions to problems in their lives, . . . [and] modify ways of thinking and acting that are preventing them from working productively and enjoying personal relationships.” *What is Psychotherapy?*, Am. Psychological Ass’n (July 31, 2017), <https://www.apa.org/ptsd-guideline/patients-and-families/psychotherapy>. The APA notes specifically that “psychotherapy is devoted entirely to the patient’s welfare” and “focused solely on the patient’s needs for symptom relief, problem solutions or lifestyle changes.” *Id.* The American Psychiatric Association describes psychotherapy as “a way to help people with a broad variety of mental illnesses and emotional difficulties,” which “can help eliminate or control troubling symptoms so a person can function better and can increase well-being and healing.” *What is Psychotherapy?*, Am. Psychiatric Ass’n,

<https://www.psychiatry.org/patients-families/psychotherapy> (last visited Dec. 16, 2020).

Courts similarly recognize that psychotherapy is treatment, not expressive speech. *See Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2014) (holding that psychotherapy is “therapeutic, not symbolic”); *King v. Governor of New Jersey*, 767 F.3d 216, 233 (3d Cir. 2014) (“SOCE counselors provide specialized services to individual clients in the form of psychological practices and procedures designed to effect a change in the clients’ thought patterns and behaviors.”). Lower courts share this widespread understanding. *See, e.g., Lard v. Saul*, No. 19-cv-1829, 2020 WL 6827901 at *3 (N.D. Ala. Nov. 20, 2020) (claimant “underwent talk therapy” after which “his symptoms had improved” including his “anger issues”); *Hollingsworth v. Colvin*, No. 14-cv-02196, 2015 WL 8002469, at *8 (M.D. Fla. Dec. 7, 2015) (plaintiff “successfully treated with talk therapy” for “depression and suicide ideation”); *United States v. Richardson*, No. 08-cr-302, 2014 WL 6882284 at *4 (M.D. Fla. Dec. 4, 2014) (discussing whether “talk therapy” is a viable “alternative treatment” for defendant’s schizophrenia).

Respondents’ own arguments in this litigation embrace this understanding. Respondents conceded that the purpose of SOCE is not to communicate a certain viewpoint, but to “help their clients achieve their goals of reducing or eliminating

[same-sex attraction].” Plaintiffs’ Mot. For Preliminary Injunction at 2, *Otto v. City of Boca Raton*, No. 18-cv-80771 (S.D. Fla. June 22, 2018), ECF No. 8.

The panel majority’s failure to understand psychotherapy as professional treatment, rather than expressive speech, is a fundamental error that led to the improper application of strict scrutiny.

II. Applying Strict Scrutiny to Rules Governing Psychotherapeutic Treatment Destabilizes the Regulatory Framework for the Medical and Psychological Professions

By erroneously treating psychotherapy as expressive speech subject to strict scrutiny, the panel majority departed from settled law and undermined even the most basic, commonsense regulations on medical and psychological treatment.

A. This Court and the Supreme Court Have Long Recognized that Regulations of Medical Treatment Are Not Subject to Strict Scrutiny

As part of states’ power to “protect the public health, safety, and other valid interests[,] they have broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *see also, e.g., Betancur v. Fla. Dep’t of Health*, 296 F. App’x 761, 763 (11th Cir. 2008) (“States retain the police power to regulate professions, such as the practice of medicine.”). Recognizing that longstanding authority, the Supreme Court and this Court have declined to apply strict scrutiny in First Amendment challenges to regulations of medical and psychological treatments.

Most recently, in *National Institute of Family and Life Advocates v. Becerra*, (*NIFLA*), the Supreme Court reaffirmed that “States may regulate professional conduct, even though that conduct incidentally involves speech.” 138 S. Ct. 2361, 2372 (2018). In *NIFLA*, the Court distinguished between laws that regulate medical professionals’ communications with their patients *about* particular topics, and communications that are *part of* treatment. *Id.* at 2373–74. The Court determined that a law requiring licensed pregnancy centers to inform visitors about abortion services fell into the former category, because it was “not tied to a [medical] procedure at all,” but rather “regulate[d] speech as speech.” *Id.* at 2374. The Court explained, however, that strict scrutiny does not apply to regulations that “fall within the traditional purview of state regulation of professional conduct,” even if those laws impose burdens on speech. *Id.* at 2373 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). So, for example, medical professionals may be held liable for malpractice if they give unfounded medical advice, and states may impose detailed informed consent requirements without violating the First Amendment. *Id.*

Similarly, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court upheld a Pennsylvania law requiring that doctors inform their patients seeking an abortion about the nature of the procedure and the health risks of abortion and childbirth. *Id.* at 884. The Court declined to apply strict scrutiny, holding that “the physician’s First Amendment rights not to

speak are implicated . . . only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” *Id.* In *NIFLA*, the Court expressly reaffirmed that holding, emphasizing that “the law regulated speech only ‘as part of the *practice* of medicine.’” *NIFLA*, 138 S. Ct. at 2373 (quoting *Casey*, 505 U.S. at 884). The Court made clear that in assessing state regulation of medical professionals’ communications with patients, a court must distinguish between speech about a particular topic and speech that is part of treatment—an instruction the panel majority disregarded, *Otto*, 2020 WL 6813994, at *7.

Similarly, in *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1307 (11th Cir. 2017) (*en banc*), this Court distinguished between restrictions on professionals’ expressive speech and laws requiring adherence to professional treatment standards. *Id.* at 1308–10. Thus, while a prohibition on physicians asking their patients about firearms warranted strict scrutiny because it regulated “communications *about* medical treatment,” strict scrutiny would not apply to a law regulating the *application* of a particular therapy. *Id.* at 1309 (internal quotation marks and citation omitted).

This Court similarly has rejected First Amendment claims in cases involving statements by counseling students and government-employed psychotherapists. In *Keeton v. Anderson-Wiley*, this Court affirmed the denial of a preliminary injunction sought on First Amendment grounds by a counseling student at a Georgia public

university who was put on a remediation plan by the school after expressing her intent to refer gay and transgender patients to SOCE providers. 664 F.3d 865, 868–69 (11th Cir. 2011). This Court rejected the plaintiff’s free speech claim on the ground that her planned actions were “in violation of the [American Counseling Association] Code of Ethics.” *Id.* at 872. As this Court explained, “[w]hen someone voluntarily chooses to enter a profession, he or she must comply with its rules and ethical requirements.” *Id.* at 879; *see also, e.g., Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1293–94 (11th Cir. 2007) (affirming dismissal of claim by social work student terminated for suggesting that patients attend religious counseling); *United States v. Smith*, 502 F.2d 512, 518–19 (5th Cir. 1974) (affirming grant of summary judgment against claim by Veterans’ Administration psychologist who wore “peace pin” during counseling sessions).

Other circuits also have recognized that regulation of psychotherapeutic treatment is not subject to strict scrutiny. *See, e.g., Pickup*, 740 F.3d at 1229 (“Most, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment.”); *Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010) (“Simply because speech occurs does not exempt those who practice a profession from state regulation (including the imposition of disciplinary sanctions.)”); *Nat’l Ass’n for Advancement of Psychoanalysis v. Cal. Bd. of*

Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (“[T]he key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection.” (alteration omitted)); *cf.* *King*, 767 F.3d at 233 (A ban on SOCE “prohibits only a professional practice that is, in this instance, carried out through verbal communication.”).

The panel majority’s opinion places this circuit at odds with the Supreme Court, this Court’s own precedent, and every other circuit to have addressed the issue.

B. Applying Strict Scrutiny to Regulation of Psychotherapy Would Undermine States’ Authority to Regulate Mental Health Professions, With Dire Consequences

The panel majority’s deviation from precedent hinders governments’ ability to require professional standards that ensure safe and effective healthcare. Alabama, Florida, and Georgia—like every state—maintain mandatory professional standards of ethics and care for mental health providers. *See* Ala. Code § 34-8A-16(a)(2); Ala. Admin. Code r. 255-X-11-.01; Ala. Admin. Code r. 750-X-6-.02; Fla. Stat. Ann. § 456.072; Fla. Stat. Ann. § 491.009; Ga. Code Ann. § 43-10A-17; Ga. Comp. R. & Regs. § 135-7-.01 *et seq.*; Ga. Comp. R. & Regs. § 510-4-.01. Of necessity, those standards regulate words uttered in psychotherapy sessions. Under the logic of the panel majority, virtually all of them would be subject to strict scrutiny.

The panel majority's position prevents states and localities from forbidding dangerous, ineffective, or unethical psychotherapy practices. *See, e.g.*, Ala. Admin. Code r. 255-X-11-.01, Attach.1, SP-22 (requiring counselors to use "techniques, procedures and modalities that are grounded in an established theoretical, empirical, or scientific foundation"); Ga. Code. Ann. § 43-10A-17(a)(6); ("[U]nprofessional conduct shall also include any departure from, or the failure to conform to, the minimal standards of acceptable and prevailing practice of the specialty.").

States also will be constrained in preventing therapists from making misleading or deceptive statements to patients, *see* Fla. Stat. Ann. §§ 456.072(1)(a), 491.009(1)(l), in requiring counselors to disclose information about accepted and prevailing treatment alternatives, *see* Ga. Comp. R. & Regs. § 135-7-.01(2)(e), and even in preventing psychologists from conducting experimental treatment on patients without disclosure. *See* Fla. Stat. Ann. § 491.009(1)(q); Ala. Admin. Code r. 255-X-11-.01, Attach.1, G.2(b).

The threat extends to widely accepted state laws preventing mental health professionals from using therapy sessions to exert undue influence on patients. *See* Ala. Admin. Code r. 255-X-11-.01, Attach.1, A.6(a); Fla. Stat. Ann. § 456.072(1)(n); Ga. Comp. R. & Regs. § 135-7-.01(2)(a). The risk of psychotherapists exploiting their relationship with patients is obvious; but the panel majority's reasoning could prevent states from intervening to prevent counselors

from using psychological treatment as a tool of manipulation. Indeed, the panel majority's opinion calls into question even Florida's prohibition on a counselor "represent[ing] to the client that sexual contact by the psychotherapist is consistent with or part of the treatment of the client," Fla. Stat. Ann. § 491.0112.

CONCLUSION

This Court should not allow such a disruptive break with settled law to stand. The Court should grant rehearing *en banc*.

Dated: December 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation, as provided in Fed. R. App. P. 29(b)(4) and 11th Cir. R. 29-3, because, exclusive of the exempted portions of the brief, the brief contains 2,599 words.

2. This brief complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: December 18, 2020

/s/ David S. Flugman

David S. Flugman

Counsel for Amici Curiae

CERTIFICATES OF SERVICE & FILING

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on December 18, 2020.

Additionally, I certify that I filed the original plus fifteen copies of the foregoing with the Clerk of Court by Federal Express, addressed as follows:

Clerk of Court
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Service on all counsel will be made through the CM/ECF system.

Dated: December 18, 2020

/s/ David S. Flugman

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