UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 19-10604

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,

Appellants/Plaintiffs,

vs.

CITY OF BOCA RATON, FLORIDA and
COUNTY OF PALM BEACH, FLORIDA,

Appellees/Defendants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 18-80771-CIV-ROSENBERG

BRIEF OF 25 AMICI CURIAE CITIES AND COUNTIES IN SUPPORT OF CITY OF BOCA RATON AND COUNTY OF PALM BEACH'S JOINT PETITIONS FOR PANEL REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

ROBERT W. OTTO, PH.D, LMFT, et al. vs. CITY OF BOCA RATON, et al.
CASE NO.: 19-10604

Municipal Amici Curiae, by and through undersigned counsel, pursuant to the Eleventh Circuit Rule 26.1-1 states the following is an alphabetical list of the trial judge, attorneys, persons, firms, partnerships, and corporations with any known interest in the outcome of this appeal:

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Aguila, Raul J.

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Broward County, Florida

Carlton Fields Jorden Burt, P.A.

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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, Florida

City of Miami Beach, 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

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Reinhart, Bruce E., Magistrate Judge

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CORPORATE DISCLOSURE STATEMENT

Not applicable.

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STATEMENT OF THE ISSUE MERITING EN BANC CONSIDERATION

Amici assert that this case warrants rehearing en banc, because the panel opinion raises a question of exception importance to states and municipalities: whether legislative bodies may regulate *medical treatments* that put minors at an increased risk of suicidality and other serious harms.

INTEREST OF AMICI CURIAE[1]

The undersigned amici are comprised of Alachua County, Florida, Broward County, Florida, the City of Boynton Beach, Florida, the City of Cudahy, Wisconsin, the City of Delray Beach, Florida, the City of Duluth, Minnesota, the City of East Lansing, Michigan, the City of Fort Lauderdale, Florida, the City of Gainesville, Florida, the City of Greenacres, Florida, the City of Kent, Ohio, the City of Lake Worth Beach, Florida, the City of Miami Beach, Florida, the City of Miami, Florida, the City of Oakland Park, Florida, the City of Riviera Beach, Florida, the City of Saint Louis, Missouri, the City of Saint Paul, Minnesota, the City of South Miami, Florida, the City of Tallahassee, Florida, the City of West Palm Beach, Florida, the City of Wilton Manors, Florida, North Bay Village, Florida, Pima County, Arizona, and the Town of Bay Harbor Islands, Florida

[1] Counsel for the parties have not authored this brief, in whole or in part. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the amici curiae contributed money that was intended to fund preparing or submitting the brief.

(collectively, "Municipal Amici"), and Florida State Representative Michael Grieco.

All twenty-five (25) Municipal Amici have enacted ordinances that ban the licensed medical treatment of conversion therapy on minors. Municipal Amici have a particular interest in ensuring that courts uphold these laws, because the panel opinion calls into question the long-recognized ability of states and municipalities to regulate medical professions. The ordinances enacted by Municipal Amici protect minors from a specific medical treatment that is widely recognized as harmful to the health of minor patients. The panel opinion fails both to recognize government authority to regulate harmful medical treatments and to give appropriate deference to the substantial body of evidence that being subjected to conversion therapy puts minors at a dramatically increased risk of suicidality and other serious harms.

SUMMARY OF ARGUMENT

The panel opinion conflicts with governing precedent from the Supreme Court and this Court because it fails to recognize that the ordinances at issue here regulate a dangerous and discredited *medical treatment* performed by *licensed therapists*. Such treatments—even if performed *entirely* through speech—constitute professional conduct subject to reasonable regulation in accordance with prevailing medical standards, without implicating the First Amendment.

Psychotherapy, including conversion therapy or sexual orientation change efforts ("SOCE"), is a specific form of mental health treatment. The municipal ordinances at issue, as well as those of the Municipal Amici, expressly state that they apply only to the provision of *licensed medical treatment*, not to therapists' expressions of opinion. Instead, the only thing regulated is the provision of licensed mental health treatments aimed at changing a minor's sexual orientation—a form of treatment that creates a risk of extremely serious harms, including death by suicide. In concluding that the provision of this unsafe medical treatment by licensed medical professionals may not be regulated like any other unsafe medical treatment, the panel majority misinterprets controlling precedent.

The panel's conclusion that regulations of psychotherapy are content-based regulations of *speech* ignores the widely recognized fact that psychotherapy is medical treatment—which can only be conducted by a licensed mental health practitioner. Conversion therapy is a targeted medical treatment designed to change the patient's mental condition. Conversion therapy may include encouraging specific actions the client should undertake to change their same-sex attractions or identity, such as dating members of the opposite sex, changing the way they dress and interact with others, engaging in stereotypically masculine or feminine activities, and changing the way they interact with parents and other family members.

Even if the ordinances at issue and those of the Municipal Amici constituted a regulation of speech rather than professional conduct, they would satisfy any level of heightened scrutiny based on the overwhelming professional consensus and abundant evidence that conversion therapy puts minors at risk of serious harm. The panel opinion's insistence that a government must have multiple controlled, double-blind studies proving a medical treatment is harmful before the government may prohibit that treatment imposes a burden that neither this Court nor the Supreme Court has required. The panel opinion requires a government to produce studies that no ethical medical researcher would conduct and that are not permitted, much less required, for medical science to conclude that a treatment should not be performed.

ARGUMENT

I. CONVERSION THERAPY IS A DANGEROUS AND DISCREDITED MEDICAL TREATMENT, NOT EXPRESSIVE SPEECH.

Conversion therapy is a form of psychotherapy performed by licensed mental health practitioners with the goal of changing their patients' sexual orientation or gender identity. While sometimes performed exclusively through verbal communications, it is a nonetheless a medical treatment, conducted pursuant to a professional license.[2]

[2] With the recent proliferation of telehealth visits, which are accomplished virtually, it should be noted that the behavior of doctors when administering care

"States may regulate professional conduct, even though that conduct incidentally involves speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"). That is precisely what the ordinances at issue do. The ordinances ban *only* the performance of conversion therapy treatment itself; they do not prevent therapists from expressing their ideas or opinions about any related topic either to their patients or the public. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1310 (11th Cir. 2017) (en banc) (distinguishing a Florida law barring doctors from discussing firearms with their patients from a California law that, like the ordinances here, did not prevent therapists "from expressing their views to patients, whether children or adults, about [conversion therapy], homosexuality, or any other topic"); *Pickup v. Brown*, 728 F.3d 1042, 1055 (9th Cir. 2013) (holding that California's law applied exclusively to the actual provision of conversion therapy to a patient and left providers free to discuss "the pros and cons of SOCE with their patients").

The panel opinion conflicts with this Court's precedent on the regulation of medical practice. In *Wollschlaeger*, this Court found that doctors' conversations with patients about firearms were neither professional conduct nor speech "incidental to the regulation of professional conduct" and thus that any regulations of such conversations warranted heightened scrutiny. 848 F.3d at 1308. Relying

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through that platform, although comprised entirely of spoken advice to the patient, is no less medical treatment subject to regulation than any in-person treatment.

upon this finding, the Court invalidated a Florida law prohibiting doctors from discussing firearm ownership with patients in the absence of a specific medical reason "relevant to the patient's medical care" for doing so. *Id.* at 1302-03. Importantly, *Wollschlaeger* expressly distinguished such a law from regulations of medical *treatment.* As a result, *Wollschlaeger* militates against the panel opinion's holding that a law regulating an unsafe medical treatment warrants heightened scrutiny, merely because the treatment is accomplished through verbal communications.

Nor did *Wollschlaeger* reverse or modify this Court's decision in *Keeton v. Wiley*, 664 F.3d 865, 871-76 (11th Cir. 2011), which: (i) held a university could require counseling students to adhere to professional standards when treating patients, and (ii) expressly rejected the same argument advanced by the Plaintiffs-Appellants' here—that requiring a professional counselor to adhere to such professional standards when providing psychotherapy is a content and viewpoint-based restriction on protected speech. As this Court held, "this is not a case in which a forum was opened to a particular topic or expressive activity and disfavored views on that topic or forms of that activity were suppressed. Indeed, Keeton remains free to express disagreement with [the university]'s curriculum and the ethical requirements of the ACA, but she cannot block the school's attempts to ensure that she abides by them if she wishes to participate in the

clinical practicum, which involves one-on-one counseling." *Id.* at 974.

The panel's decision similarly conflicts with *NIFLA*'s holding that states may regulate medical treatment even if such treatment involves speech. There, the Supreme Court explained that a California law requiring pregnancy centers to provide information about state-funded abortion services was not a "regulation of professional conduct" because the required disclosures did "not facilitate informed consent to a medical procedure" and were "not tied to a procedure at all." *NIFLA*, 138 S. Ct. at 2373. The Supreme Court expressly cautioned that its ruling should not be construed as altering the longstanding rule that medical treatment *itself* may be regulated even when that treatment involves speech—as most medical treatments do. *Id.* at 2372-73.

The panel acknowledged that if conversion therapy is "non-expressive conduct, and not speech, [the ordinances] would not implicate the First Amendment at all." Op. at 7. For example, a doctor's negligent writing of a prescription for the wrong medication, or a psychotherapist's negligence in administering psychotherapy that causes harm to a patient, is not protected by the First Amendment, even though such negligence is committed entirely through words.

Regulation of harmful mental health treatments do not warrant strict scrutiny, simply because providers use verbal communications to treat their

patients. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("[I]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language."); *see also Pickup*, 728 F.3d at 1056 ("[T]o the extent that talk therapy implicates speech, it stands on the same First Amendment footing as other forms of medical . . . treatment."). To hold otherwise would make it all but impossible for governments to regulate the medical profession and to protect the public from ineffective and unsafe treatments. *NIFLA*, 138 S. Ct. at 2373 (explaining that it is "within the traditional purview" of state power to "regulate[] professional conduct") (internal citation omitted); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (holding States have "broad power to establish standards for licensing practitioners and regulating the practice of professions"). The power to regulate psychotherapy professionals will be thwarted if, as the panel majority found, regulation of specific harmful treatments is deemed to be viewpoint—and content-based restrictions of expressive speech, subjecting any such regulation to strict scrutiny.

II. THE PANEL MISINTERPRETS EVIDENCE REQUIRED OF PUBLIC HARM AND CREATES DANGEROUS PRECEDENT.

Even if conversion therapy is analyzed as protected speech, the ordinances would survive heightened scrutiny on the record presented. In denying preliminary injunctive relief, the district court expressly relied upon the litany of studies,

position papers from medical organizations, and evidence from mental health professionals and community members about the serious harms experienced by minor patients who undergo conversion therapy. *Otto v. Boca Raton*, 353 F. Supp. 3d 1237, 1258-62 (S.D. Fla. 2019). Despite this evidence, the panel reversed. In so doing, it held the municipalities to an impossible and scientifically invalid standard, observing that the absence of multiple controlled studies "proving" harm meant that the ordinances had not been adequately shown to "safeguard[] the physical and psychological well-being of minors." Op. at 21.

The evidence presented by Defendants-Appellees is exactly the type of record the Supreme Court has found sufficient to demonstrate a compelling interest in protecting the public from a harm. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) ("[I]n First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'") (citing *Burson v. Freeman*, 504 U.S. 191, 211 (1992)); *Wollschlaeger*, 848 F.3d at 1316 (suggesting regulation may be permissible when evidence establishes that practitioner conduct involving speech is "medically inappropriate, ethically problematic, or practically ineffective"); *accord King v. Governor of the State of N.J.*, 767 F.3d 216, 238 (3d Cir. 2014) ("Legislatures are entitled to rely on the empirical judgments of

independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject.") (considering the same research and position papers about conversion therapy).

Cases finding insufficient evidence of public harm involve drastically less support that in the record here. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000) (finding "conclusory statement from sponsor of the bill" insufficient); *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (striking down an anti-solicitation regulations for certified public accountants because no studies or anecdotal evidence existed to validate the State Board of Accountancy's fear that advertising would be a danger to the public); *Wollschlaeger*, 848 F.3d at 1312-13 (finding insufficient evidence to support a law restricting doctors' conversations with their patients about firearms where the Florida legislature had six anecdotes and "nothing more").

The panel majority improperly discounted the volume of record evidence, including multiple rigorous peer-reviewed studies finding that conversion therapy puts minors at a high risk of suicidality and other serous harms, and concluded that the ordinances cannot survive strict scrutiny because of the lack of "appropriately scoped, double-blind, peer-reviewed" studies "proving" that conversion therapy harms children. Op. at 21-22 & 23 n.12. That holding is based on a fundamental

misunderstanding of the strict prohibition against conducting randomized trials for the sole purpose of proving harm. Medical professionals cannot perform these types of studies on children precisely because cohort and control group studies have shown that conversion therapy puts children at risk of great harm. It would be unethical to subject a randomized group of children to conversion therapy in order to conclusively prove causation of harm. *See* Case No. 9:18-cv-80771-RLR Dkt. No. 1-6 at 33, 51, 76 (explaining harm experienced by research participants causing high dropout rates and concerns in the medical profession that conversion therapy treatments are "unethical" and "inhumane"). Yet the panel stated that evidence of harm from at least one such rigorous study would be required to justify the ordinances, and even that might not be enough. Op. at 23 n.12.

The standard proposed by the panel would lead to absurd results. The more dangerous a medical treatment, the more unlikely it would be that government could ever assemble the required evidence, because it would be difficult or impossible to find researchers willing to participate in such an unethical study, or to find study participants willing to intentionally expose their children to such treatments in order to establish whether they are harmed. As a result, the state would have to meet an effectively impossible evidentiary burden to protect patients from the most harmful treatments. The Court should grant rehearing *en banc* to clarify that this is not the appropriate evidentiary standard.

CONCLUSION

This Court should grant rehearing en banc, because the panel opinion fails to recognize the authority of states and municipalities to regulate licensed medical treatment to protect minor children from any such medical treatments that pose a substantial risk of harm to the patient and that lack any evidence of efficacy. Rehearing is also appropriate because the panel opinion conflicts with precedent from other circuits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B).

CERTIFICATE OF WORD COUNT

This brief contains 2,557 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 2020, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

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