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

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

BRIEF OF AMICUS CURIAE BORN PERFECT IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, amicus curiae Born Perfect hereby certifies that the following persons have an interest in the outcome of this appeal:

Abbott, Daniel L.

Alliance for Therapeutic Choice

American Association for Marriage and Family Therapy

American Psychological Association

Amunson, Jessica Ring

Berger, Mary Lou

Born Perfect

Carlton Fields Jorden 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

Flanigan, Anne R.

Florida Psychological Association

Gannam, Roger K.

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The Trevor Project

Thompson, Andy

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Walbolt, Sylvia H.

Weinroth, Robert S.

Weiss, Greg K.

Weiss Serota Helfman Cole & Bierman, P.L.

Yasko, Jennifer A.

No publicly traded corporation has an interest in the outcome of the case or appeal.

Dated: December 18, 2020

/s/ Brent P. Ray
Brent P. Ray
Counsel for Amicus Curiae Born Perfect

STATEMENT OF COUNSEL

I, Brent P. Ray, express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018)

F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502 (2009)

Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47 (2006)

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000)

Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995)

Edenfield v. Fane, 507 U.S. 761 (1993)

Goldfarb v. Va. State Bar, 421 U.S. 773 (1975)

Wollschlaeger v. Governor, Fla., 848 F.3d 1293 (11th Cir. 2017) (*en banc*)

Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

Whether the mental health treatment known as sexual orientation change efforts or conversion therapy is conduct, not expressive speech, and is therefore subject to reasonable regulation by state and local governments.

Whether state and local governments may rely on substantial scientific evidence and the consensus of professional medical organizations that a treatment is unsafe and should not be performed on minors to prohibit licensed therapists from performing the treatment on minors.

Dated: December 18, 2020

/s/ Brent P. Ray
Brent P. Ray
Counsel for Amicus Curiae Born Perfect

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STATEMENT OF THE ISSUES MERITING EN BANC CONSIDERATION

Amicus curiae Born Perfect agrees with Defendants-Appellees' statement of the issues meriting the Court's *en banc* consideration.

STATEMENT OF FACTS

Amicus curiae Born Perfect agrees with Defendants-Appellees' statement of the facts.

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Born Perfect is a nonprofit campaign founded by the National Center for Lesbian Rights in 2014 to end conversion therapy and raise awareness about the harm it causes to LGBT children and their families. Born Perfect supports conversion therapy survivors and educates about the harms caused by conversion therapy to minors. Born Perfect has a particular interest in ensuring that courts uphold laws protecting minors from this harmful treatment.

ARGUMENT AND AUTHORITIES

The Panel's opinion conflicts with governing precedent from the Supreme Court and this Court because it fails to recognize that the ordinances regulate a dangerous and discredited medical treatment performed by licensed therapists. Such

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[1] No parties' counsel authored this brief in whole or part. Neither the parties nor their counsel have contributed money intended to fund preparing or submitting this brief. No one other than the amicus curiae contributed money intended to fund preparing or submitting this brief.

treatments, even if performed entirely through verbal communication, constitute professional conduct subject to reasonable regulation in accordance with prevailing medical standards without implicating the First Amendment.

Psychotherapy, including conversion or sexual orientation change efforts ("SOCE") therapy, is a specific form of mental health treatment, not an expression of a therapist's opinions. The ordinances protect the therapist's ability to express his or her opinion regarding conversion therapy. The only thing the ordinances prohibit the therapist from doing is actually performing conversion therapy on a minor given the significant risk of harm. In concluding that conversion therapy may not be regulated like other unsafe medical treatments, the majority misinterprets controlling precedent.

The Panel's conclusion that ordinances barring conversion therapy on minors are content-based regulations of speech ignores the basic nature of psychotherapy. Psychotherapy is not an exchange of beliefs between the therapist and the patient; it is a medical treatment specifically designed to change the patient's mental condition.[2] And conversion therapists are not merely conversing or exchanging ideas with their patients. They are engaging in a treatment that seeks to change their patients' mental state by prescribing the patient undertake specific actions to change

[2] As noted in the dissent, "psychological therapy is itself a medical practice that is subject to evidence-based, peer-reviewed studies." Op. at 42 n.5.

their sexual orientation or gender identity. Such prescribed actions include dating members of the opposite sex, changing the way they dress, engaging in stereotypically masculine or feminine activities, and changing the way they interact with parents and family members. *See, e.g.*, Substance Abuse and Mental Health Servs. Admin., U.S. Dep't of HHS, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth*, 25 (Oct. 2015) (R. Vol. II at 38); Judith M. Glassgold, PsyD, et al., *Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, 22 (Aug. 2009) (R. Vol. I at 145).

Moreover, even if conversion therapy were expressive speech rather than professional conduct, the ordinances would satisfy any level of heightened scrutiny based on the professional consensus evidence in the record that conversion therapy harms minors, including because it significantly increases the risk of extreme harms like suicidality. The Panel failed to follow precedent in concluding otherwise.

The Panel's view that controlled, double-blind studies are necessary to prove that a medical treatment is harmful before the state may prohibit that treatment starkly departs from precedent. This proposed standard would require states 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 be prohibited. Under governing ethics rules, medical professionals cannot continue a study intended to show the safety and efficacy of a treatment after subjects

experience significant harm (at least until the cause is identified and the risk to other subjects is deemed low), let alone start a randomized controlled study intended to show that the treatment is harmful. Accordingly, the Panel's proposed standard would lead to an absurd and paradoxical result: the more harmful the practice, the less likely a controlled study could be performed to prove its harmfulness, thereby making it practically impossible for the government to obtain the empirical evidence necessary to justify regulation of the harmful practice. *En banc* review is needed to prevent the Panel's proposed standard from becoming precedent in this Circuit.

I. CONVERSION THERAPY IS A DANGEROUS AND DISCREDITED MENTAL HEALTH 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. Even when performed exclusively through words, conversion therapy is a (discredited and dangerous) medical treatment conducted to change the patient's mental state. The psychotherapist's words are not used to express ideas or opinions; they are used to achieve a clinical goal and, thus, constitute the core of the treatment itself.

"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*"]. This is what the ordinances do; they prevent licensed therapists from performing an ineffective and unsafe medical

treatment on minors because the treatment puts them at an unacceptably high risk of harm. The ordinances ban only the performance of conversion therapy treatment itself; they do not prevent therapists from expressing their ideas or opinions about conversion therapy, sexual orientation, or anything else to their patients or the public. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc) (distinguishing a Florida law prohibiting doctors from discussing firearms with patients from a California law prohibiting conversion therapy on minors because the latter 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*, 740 F.3d 1208, 1229 (9th Cir. 2014) (upholding California's conversion therapy ban because it barred only the actual provision of conversion therapy to patients and left providers free to discuss "the pros and cons of SOCE with their patients").

As noted above, the Panel's opinion conflicts with this Court's precedents regarding regulation of medical practice. In *Wollschlaeger*, this Court invalidated a Florida law prohibiting doctors from discussing firearm ownership with patients absent a specific medical reason "relevant to the patient's medical care." 848 F.3d at 1302-03. In so doing, this Court found that because the regulated conversations were not part of a specific medical treatment, the law did not regulate professional conduct or speech "incidental to the regulation of professional

conduct," and thus warranted heightened scrutiny. *Id.* at 1308. This Court expressly distinguished a law prohibiting doctors from discussing firearm ownership with patients from laws regulating medical treatment (like the ordinances here). As a result, *Wollschlaeger* militates against the Panel's holding that a law prohibiting unsafe medical treatment warrants heightened scrutiny merely because the primary modality of treatment is verbal communication.

Nor did *Wollschlaeger* modify this Court's decision in *Keeton v. Anderson-Wiley*, 664 F.3d 865, 871-76 (11th Cir. 2011), permitting a university to require counseling students to adhere to professional standards when treating patients. In so doing, this Court rejected the same argument advanced here by Plaintiffs-Appellants—that requiring a professional counselor to adhere to such professional standards when providing psychotherapy is a content-based restriction on protected speech. As this Court held, "[the plaintiff] 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 cautioned that its ruling did not alter 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, then [the ordinances] would not implicate the First Amendment at all." Op. at 7. For example, the First Amendment does not protect a doctor's negligent writing of a prescription or a psychotherapist's negligence in administering psychotherapy, even if such negligence is committed through words. *See*, *e.g.*, *Estate of Rotell v. Kuehnle*, 38 So.3d 783 (Fla. Ct. App. 2010).

Regulation of harmful mental health treatments does not warrant strict scrutiny simply because providers use words 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….") (internal citation omitted); *see also Pickup*, 740 F.3d at 1231 ("[T]o the extent that talk therapy implicates speech, it stands on the same First Amendment footing as other forms of medical … treatment."). It would otherwise

be virtually impossible for states to regulate the medical profession and protect the public from unsafe treatments. *NIFLA*, 138 S. Ct. at 2373 (explaining that it is "within the traditional purview" of state power to "regulat[e] 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 state's power to regulate professional conduct will be unduly impaired if prohibitions on harmful treatments are deemed to be content-based restrictions on speech, thereby triggering strict scrutiny.

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

Even if conversion therapy is analyzed as protected speech (it should not be), the ordinances would survive any level of heightened scrutiny because the record includes ample evidence that conversion therapy puts children at risk of serious harms. When denying Plaintiffs-Appellants' request for preliminary injunctive relief, the district court expressly relied upon the litany of studies, position papers from medical organizations, and other evidence from mental health professionals and community members demonstrating that conversion therapy is harmful to

children, including by increasing the risk of suicidality. *Otto v. Boca Raton*, 353 F. Supp. 3d 1237, 1258-62 (S.D. Fla. 2019).

The evidence upon which the district court relied is exactly the type of evidence that controlling precedent has found sufficient to demonstrate a compelling interest in protecting the public from a significant harm. *Wollschlaeger*, 848 F.3d at 1316 (recognizing that regulation may be permissible when supported by sufficient evidence that practitioner conduct involving speech is "medically inappropriate, ethically problematic, or practically ineffective"); *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…, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.") (internal citations omitted); *see also King v. Governor 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 much of the same conversion therapy research and position papers as here). Cases finding insufficient evidence of public harm involve drastically less support than 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) (invalidating anti-solicitation regulations for CPAs because no studies or anecdotal evidence existed to validate the state's fear that CPA advertising would endanger the public); *Wollschlaeger*, 848 F.3d at 1312-13 (finding "six anecdotes and nothing more" insufficient to justify law restricting doctors' conversations with patients about firearms).

Nevertheless, the Panel reversed the district court, concluding that the ordinances cannot survive strict scrutiny because of a purported lack of "appropriately scoped, double-blind, peer-reviewed" studies conclusively showing that conversion therapy harms children. Op. at 21-22, 23 n.12. In so doing, the Panel imposed an impossible and scientifically insupportable standard. Randomized studies of the type demanded by the Panel cannot be conducted because it would be unethical to subject children to conversion therapy to prove harm compared to a control group. *See* Glassgold et al. at 24, 42-43, 68, (R. Vol. I at 79, 97-98, 123) (explaining harm to research participants causing high dropout and concerns in the medical profession that conversion therapy is "unethical" and "inhumane").

Moreover, the Panel's assertion that evidence of harm from at least one such study would be required to justify the ordinances (and even that might not be enough), Op. at 23 n.12, sharply departs from controlling precedent. The Supreme

Court has repeatedly held that such studies are *not* required for states to take action to protect the health and safety of children. *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 519 (2009) ("There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts…, and others are shielded from all indecency."); *Playboy*, 529 U.S. 803, 822 ("This is not to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition."); *accord King*, 767 F.3d at 239.

The Panel's proposed standard would lead to absurd results. The more dangerous a medical treatment, the more difficult (if not impossible) it would be for the state to present the evidence demanded by the Panel to support regulation. This is because it would be nearly 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. As a result, the Panel's proposed standard imposes an evidentiary burden that would make it practically impossible for states to regulate the most harmful treatments. This Court should grant rehearing *en banc* to ensure that governments can perform their central power and obligation to protect children and the public from serious, imminent harm, based on the same standard of proof

that medical professionals themselves use in determining whether there is sufficient evidence of harm to determine to prohibit that particular treatment.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants-Appellees' petition for rehearing *en banc*.

DATED: December 18, 2020

Respectfully submitted,

BORN PERFECT CAMPAIGN

By: */s/ Brent P. Ray*
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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) and 11th Cir. R. 29-3, because, exclusive of the exempted portions of the brief, the brief contains 2,590 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 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/ Brent P. Ray
Brent P. Ray
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CERTIFICATE OF SERVICE

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 UPS Next-Day delivery, addressed as follows:

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