

**No. 19-10604**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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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*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
No. 9:18-cv-80771 (HON. ROBIN L. ROSENBERG)

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**BRIEF OF AMICI CURIAE, THE TREVOR PROJECT, INC.,  
AMERICAN FOUNDATION FOR SUICIDE PREVENTION, AND  
AMERICAN ASSOCIATION OF SUICIDOLOGY, IN SUPPORT  
OF DEFENDANTS-APPELLEES' 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, 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:

1. Abbott, Daniel L., Trial and Appellate Co-Counsel for Defendants-Appellees, City of Boca Raton, Florida
2. Alliance for Therapeutic Choice, Amicus in Support of Plaintiffs-Appellants
3. American Association of Suicidology, Amicus in Support of Defendants-Appellees
4. American Foundation for Suicide Prevention, Amicus in Support of Defendants-Appellees
5. Barday, Shireen A., Counsel for Amici in Support of Defendants-Appellees
6. Carlton Fields Jordan Burt, P.A., Counsel for Equality Florida Institute, Inc., Amicus in Support of Defendants-Appellees
7. City of Boca Raton, Florida, Defendant-Appellee
8. Cole, Jamie A., Trial Co-Counsel for Defendants-Appellees, City of Boca Raton, Florida

9. Dreier, Douglas C., Predecessor Counsel for The Trevor Project, Inc.,  
Amicus in Support of Defendants-Appellees
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22. Otto, Robert W., Ph.D. LMFT, Plaintiff-Appellant
23. Palm Beach County, Florida, Defendant-Appellee
24. Palm Beach County Human Rights Council
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26. Price, Max Richard, Counsel for Alliance for Therapeutic Choice, Amicus in  
Support of Plaintiffs-Appellants
27. Reinhart, Bruce E., United States Magistrate Judge
28. Rosenberg, Robin L., United States District Judge
29. SDG Counseling, LLC, Company of Plaintiff-Appellant Robert W. Otto,  
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30. Staver, Mathew D., Trial and Appellate Co-Counsel for Plaintiffs-Appellants
31. Sutton, Stacey K., Counsel for Equity Florida Institute, Inc., Amicus in  
Support of Defendants-Appellees
32. The Trevor Project, Inc., Amicus in Support of Defendants-Appellees
33. Walbolt, Sylvia H., Counsel for Equality Florida Institute, Inc., Amicus in  
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34. Weiss Serota Helfman Cole & Bierman, P.L., Counsel for Defendants-  
Appellees, City of Boca Raton, Florida

35. Yasko, Jennifer A., Counsel for Equality Florida Institute, Inc., Amicus in Support of Defendants-Appellees.

This appeal involves governmental defendants, City of Boca Raton and County of Palm Beach, which is a municipal corporation of the State of Florida.

There are no parent companies, subsidiaries, or affiliate companies that have issued shares to the public.

Dated: December 18, 2020

/s/ Shireen A. Barday

Shireen A. Barday

*Counsel for Amici Curiae*

## 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 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: *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (“*NIFLA*”); *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, State of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc); *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000); *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167 (11th Cir. 2002); *Wreal v. Amazon.com*, 840 F.3d 1244 (11th Cir. 2016); and *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th 2019).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: (1) whether strict scrutiny applies, effectively invalidating all legislation restricting SOCE therapy; (2) whether an appellate court may reweigh the evidence underlying the denial of a preliminary injunction.

Dated: December 18, 2020

/s/ Shireen A. Barday  
Shireen A. Barday  
*Counsel for Amici Curiae*

**TABLE OF CONTENTS**

	<b>Page(s)</b>
IDENTITY & INTEREST OF AMICI CURIAE.....	1
STATEMENT OF THE ISSUES MERITING EN BANC RECONSIDERATION	2
ARGUMENT & AUTHORITIES .....	3
I. THE ORDINANCES REDRESS SIGNIFICANT HARMS TO THE HEALTH AND SAFETY OF MINORS.....	4
A. SOCIAL SCIENCE OVERWHELMINGLY CONFIRMS THE SIGNIFICANT HARM OF CONVERSION THERAPY ON LGBTQ YOUTH, AND EVERY MAJOR MEDICAL AND MENTAL HEALTH ORGANIZATION HAS REJECTED CONVERSION THERAPY AS SCIENTIFICALLY UNSOUND, HARMFUL TO THE PATIENT, AND INEFFECTIVE AT CHANGING SEXUAL ORIENTATION, GENDER IDENTITY, OR GENDER EXPRESSION.....	5
B. THE PANEL, IN ASSESSING THE EVIDENCE OF THE HARM PRESENTED TO IT, DEALT WITH THE DATA IN A MANNER CONTRARY TO WHAT BOTH LAW AND SCIENCE REQUIRE. ....	9
CONCLUSION.....	12

**Cases**

*Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*,  
495 F.3d 695 (D.C. Cir. 2007) ..... 11

*King v. Governor of New Jersey*,  
767 F.3d 216 (3d Cir. 2014)..... 11, 12

*Pickup v. Brown*,  
740 F.3d 1208 (9th Cir. 2014) ..... 12

*United States v. Rutherford*,  
442 U.S. 544 (1979)..... 4

**Periodicals and Other Publications**

Am. Acad. Pediatrics, *Homosexuality and Adolescence*, 92 Pediatrics 631 (1993)..... 8

Am. Ass’n of Suicidology, *Research Division Statement on Evidence of Harm  
Regarding Conversion Therapy* ..... 10, 11

Am. Ass’n of Suicidology, *Suicidal Behavior Among Lesbian, Gay, Bisexual, and  
Transgender Youth Fact Sheet* (2019) ..... 6

Am. Found. for Suicide Prevention, *State Laws: Banning Conversion Therapy  
Practices* (2020)..... 5

Am. Psychiatric Ass’n, *Position Statement on Conversion Therapy and LGBTQ  
Patients* (2018)..... 8

Am. Psychol. Ass’n, *Report of the American Psychological Association Task  
Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009) ..... 9, 11

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 (2020) ..... 5

Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts With  
LGBT Adolescents: Implications for Young Adult Mental Health and  
Adjustment*, J. Homosexuality, Nov. 2018..... 7

*Conversion Therapy Bans*, Am. Found. for Suicide Prevention ..... 7

John R. Blosnich et al., *Sexual Orientation Change Efforts, Adverse Childhood  
Experiences, and Suicide Ideation and Attempt Among Sexual Minority  
Adults, United States, 2016–2018*, 110 Am. J. Pub. Health 1024 (2020)..... 6

Substance Abuse and Mental Health Services Administration, *Ending Conversion  
Therapy: Supporting and Affirming LGBTQ Youth* (2015) ..... 8

Sunnivie Brydum, *WATCH: U.S. Surgeon General Opposes Conversion Therapy*,  
Advocate (Apr. 10, 2015) .....8

The Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2020) .....6

**Rules**

11th Cir. R. 35-1 .....14

Fed. R. App. P. 29.....2

Fed. R. App. P. 32.....14

Fed. R. App. P. 35.....14

## **IDENTITY & INTEREST OF AMICI CURIAE**

The Trevor Project, Inc. (“The Trevor Project”) is the nation’s largest lesbian, gay, bisexual, transgender, queer, and questioning (“LGBTQ”) youth crisis intervention and suicide prevention organization. The Trevor Project offers the only accredited, free, and confidential phone, instant message, and text messaging crisis intervention services for LGBTQ youth, which are used by thousands of youth each month. Through analyzing data obtained from these services and national surveys, The Trevor Project produces innovative research that brings new knowledge, with clinical implications, to issues affecting LGBTQ youth.

The American Foundation for Suicide Prevention (“AFSP”) is dedicated to saving lives and bringing hope to those affected by suicide. In carrying out its mission, AFSP funds scientific research, educates the public about mental health and suicide prevention, advocates for public policies in mental health and suicide prevention, and supports survivors of suicide loss and those affected by suicide.

The American Association of Suicidology (“AAS”) is a nationally recognized organization comprised of public health and mental health professionals, researchers, suicide prevention and crisis intervention centers, survivors of suicide loss, attempt survivors, and others, that promotes the prevention of suicide through research, public awareness programs, education and training. In addition to advancing suicidology as a science—developing and disseminating scholarly

research on suicidology and suicide behaviors—AAS promotes public education and training for professionals and volunteers on suicide prevention and intervention.

Amici have a special interest in this litigation as well as familiarity and knowledge of the significant harms that LGBTQ youth endure as a result of conversion therapy. Amici are deeply concerned that the Panel’s opinion in this case will place minors at an increased and substantial risk of suicidality, a scientifically-proven risk inherent in conversion therapy. The Trevor Project works firsthand with LGBTQ youth who have endured these harmful practices—and understands the devastating effects that these therapies inflict, including an increased risk of suicide. Due to the increased and substantial risks of suicidality, AFSP and AAS advocate to end the practice of conversion therapy against minors through public policy advocacy. For these reasons, The Trevor Project, AFSP, and AAS have a substantial interest in supporting the enforcement of laws prohibiting the practice of conversion therapy against minors.

The authority of amici to file this brief in support of Defendants-Appellees’ Petition is pursuant to FRAP 29(a)(3) and the accompanying Motion for Leave to File.

**STATEMENT OF THE ISSUES MERITING EN BANC  
RECONSIDERATION**

This Case Warrants Rehearing Because It Presents a Question of Exceptional Importance: whether legislative bodies may protect minor children from medical

treatments that put minors at an increased risk of suicidality and other serious harms and that lack any evidence of efficacy.<sup>1</sup>

### **STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUES**

Amici curiae agree with Defendants-Appellants' statement of facts necessary to consideration of the issues.

### **ARGUMENT & AUTHORITIES**

The Panel's opinion merits rehearing both because conflicts with this Court's and Supreme Court precedent regarding the ability of state and local governments to regulate unsafe medical treatments, and because the question it presents is one of exceptional importance—whether legislative bodies may protect minor children from medical treatments that put minors at an increased risk of suicidality and other serious harms. Substantial evidence shows that children subjected to conversion therapy are at risk of great harm, including a serious increased risk of suicide, which has resulted in an overwhelming medical consensus that licensed mental health providers should not subject minor patients to conversion therapy under any

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<sup>1</sup> Amici agree with Boca Raton and Palm Beach County that the panel opinion warrants rehearing en banc because it conflicts with precedents from this Court and the Supreme Court regarding the ability of governments to regulate medical practice to protect public health and safety. In this brief, however, amici focus on the need for rehearing en banc in light of the exceptional importance of the question presented: whether legislative bodies may protect minor children from medical treatments that put minors at an increased risk of suicidality and other serious harms, and that lack any evidence of efficacy.

circumstances. The Panel’s dismissal of this medical consensus warrants rehearing en banc because of the exceptional importance of this issue in light of the seriousness of the harms associated with this treatment for minors: its holding that a government may not act to protect minors from a treatment that has been uniformly condemned as dangerous and ineffective by medical science is an unprecedented incursion on an area of traditional authority for local and state governments. Such an important issue warrants rehearing by the full Court.

**I. THE ORDINANCES REDRESS SIGNIFICANT HARMS TO THE HEALTH AND SAFETY OF MINORS.**

The ordinances at issue in this case regulate the practice of conversion therapy, through which therapists seek to impose a predetermined outcome with respect to a child’s sexual orientation or gender identity. Numerous rigorous, peer-reviewed studies have shown that conversion therapy is closely correlated with a dramatically increased risk of suicide in minors, as well as with other serious harms. The baseline scientific principle that a treatment “is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit,” *United States v. Rutherford*, 442 U.S. 544, 556 (1979), deems conversion therapy unsafe. This is why in the past twenty years, every leading medical and mental health organization has issued policy statements cautioning therapists and parents that conversion therapy is unsafe and should not be performed on minors.

**A. SOCIAL SCIENCE OVERWHELMINGLY CONFIRMS THE SIGNIFICANT HARM OF CONVERSION THERAPY ON LGBTQ YOUTH, AND EVERY MAJOR MEDICAL AND MENTAL HEALTH ORGANIZATION HAS REJECTED CONVERSION THERAPY AS SCIENTIFICALLY UNSOUND, HARMFUL TO THE PATIENT, AND INEFFECTIVE AT CHANGING SEXUAL ORIENTATION, GENDER IDENTITY, OR GENDER EXPRESSION.**

Recent peer-reviewed retrospective case-control studies confirm the devastating harms that conversion therapy inflicts upon LGBTQ youth. Conversion therapy harms LGBTQ youth “by invoking feelings of rejection, guilt, confusion, and shame, which in turn can contribute to decreased self-esteem, substance abuse, social withdrawal, depression, and anxiety.”<sup>2</sup> The Trevor Project documented these harmful results and others in its 2020 peer-reviewed article in the American Journal of Public Health (AJPH), reporting that LGBTQ youth who underwent conversion therapy were “*more than twice as likely to report having attempted suicide*” and more than 2.5 times as likely to report multiple suicide attempts in the past year compared to those who did not.<sup>3</sup> In July 2020, The Trevor Project released the results of a cross-sectional survey with over 40,000 LGBTQ individuals between the ages of

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<sup>2</sup> Am. Found. for Suicide Prevention, *State Laws: Banning Conversion Therapy Practices 2* (2020), <https://www.datocms-assets.com/12810/1592504833-conversion-therapy-issue-brief-6-18-20.pdf>.

<sup>3</sup> 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).

13 and 24 with representation from the United States.<sup>4</sup> Ten percent of these youth reported undergoing conversion therapy, a staggering proportion of whom were subjected to it as minors (78%).<sup>5</sup>

The results of this study are consistent with a substantial body of other rigorous, peer-reviewed research on the detrimental impact of conversion therapy on minors.<sup>6</sup> A 2020 study found that exposure to conversion therapy **doubled** the odds of lifetime suicidal ideation, increased the odds of planning to attempt suicide by 75%, and increased the odds of a suicide attempt with no or minor injury by 88% as compared with those who had not undergone conversion therapy.<sup>7</sup> A November 2018 study found that the rates of attempted suicide by LGBTQ young adults whose parents tried to change their sexual orientation during adolescence were **more than double** (48%) the rate of LGBTQ young adults who reported no conversion therapy

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<sup>4</sup> The Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf>.

<sup>5</sup> *Id.* at 1.

<sup>6</sup> *See, e.g.*, Am. Ass'n of Suicidology, *Suicidal Behavior Among Lesbian, Gay, Bisexual, and Transgender Youth Fact Sheet* (2019), <https://suicidology.org/wp-content/uploads/2019/07/Updated-LGBT-Fact-Sheet.pdf> (“[Y]outh who have undergone conversion therapy [are] more than twice as likely to attempt suicide as those who did not.”).

<sup>7</sup> John R. Blosnich et al., *Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults, United States, 2016–2018*, 110 *Am. J. Pub. Health* 1024, 1027 (2020).

experience (22%).<sup>8</sup> The study also found that these rates were nearly *triple* for LGBTQ youth who reported both home-based efforts to change their sexual orientation by parents and intervention efforts by therapists and religious leaders (63%).<sup>9</sup>

Every major medical and mental health organization has uniformly rejected conversion therapy as unsafe for minors. The American Foundation for Suicide Prevention (“AFSP”) has stated that “conversion therapy efforts are inappropriate and harmful therapeutic interventions” and “urges states to prohibit this discredited practice and protect LGBTQ youth.”<sup>10</sup> As the federal Substance Abuse and Mental Health Services Administration has cautioned, there is a “professional consensus that conversion therapy efforts are inappropriate” and that “none of the existing research supports the premise that mental or behavioral health interventions can alter gender

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<sup>8</sup> Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts With LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, J. Homosexuality, Nov. 2018, at 10.

<sup>9</sup> *Id.*

<sup>10</sup> *Conversion Therapy Bans*, Am. Found. for Suicide Prevention, <https://afsp.org/conversion-therapy-bans> (listing other professional medical organizations with similar policies) (last visited Dec. 17, 2020).

identity or sexual orientation.”<sup>11</sup> The U.S. Surgeon General has similarly warned that “[c]onversion therapy is not sound medical practice.”<sup>12</sup>

The professional consensus rejecting conversion therapy has been well established for over a decade. In 1993, the American Academy of Pediatrics took the position that “[t]herapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation.”<sup>13</sup> Since 1998, the American Psychiatric Association has “opposed any psychiatric treatment, such as ‘reparative’ or conversion therapy.”<sup>14</sup> And in 2009, an APA task force “found no evidence that providing any type of therapy in childhood can alter adult same-sex sexual

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<sup>11</sup> Substance Abuse and Mental Health Services Administration, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 1, 3 (2015), <https://store.samhsa.gov/product/Ending-Conversion-Therapy-Supporting-and-Affirming-LGBTQ-Youth/SMA15-4928>.

<sup>12</sup> Sunnive Brydum, *WATCH: U.S. Surgeon General Opposes Conversion Therapy*, Advocate (Apr. 10, 2015), <https://www.advocate.com/ex-gay-therapy/2015/04/10/watch-us-surgeon-general-opposes-conversion-therapy>.

<sup>13</sup> Am. Acad. Pediatrics, *Homosexuality and Adolescence*, 92 Pediatrics 631, 633 (1993).

<sup>14</sup> Am. Psychiatric Ass’n, *Position Statement on Conversion Therapy and LGBTQ Patients* (2018), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-Conversion-Therapy.pdf>.

orientation” and significant evidence that it “has the potential to be harmful.”<sup>15</sup> The task force concluded that it should not be performed on minors.<sup>16</sup>

**B. THE PANEL, IN ASSESSING THE EVIDENCE OF THE HARM PRESENTED TO IT, DEALT WITH THE DATA IN A MANNER CONTRARY TO WHAT BOTH LAW AND SCIENCE REQUIRE.**

The Panel opinion dangerously misstates the scientific standard for assessing when a particular treatment is harmful. The panel’s holding that evidence of harm is valid only if “proven” by randomized trials has no basis in medical science and contradicts the bedrock ethical principle barring researchers from subjecting human subjects to randomized trials designed to prove harm. Where, as here, cohort studies and control group studies have shown that a particular treatment is strongly associated with serious harms, it would be a gross violation of medical ethics to subject a control group of minor patients to that treatment. As the dissenting opinion correctly notes, “the very research the majority opinion seems to demand is ‘not ethically permissible’ to conduct.” Op. 39 (Martin, J., dissenting). The Panel opinion’s disregard for this well-established scientific and ethical standard sets a dangerous precedent.

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<sup>15</sup> Am. Psychol. Ass’n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

<sup>16</sup> *Id.* at 42.

The American Association for Suicidology (“AAS”) has directly addressed the erroneous argument—advanced by some conversion therapy proponents and adopted by the panel in this case—that licensed mental health providers should be permitted to subject minor patients to this dangerous treatment unless randomized trials “prove” that it is harmful. As the AAS has explained, this argument has no basis in medical science: “Evidence of harm can be shown through scientific means other than randomized trials—particularly in cases where engaging in such experimental research would increase the risk for suicidality.”<sup>17</sup> Specifically, “in the case of sexual orientation conversion therapy the evidence of harm has been shown in a systematic review (Przeworski, Peterson & Alexandra, 2020) and observational studies have documented increased suicide risk among sexual minority youth who were forced to participate in sexual orientation conversion efforts (see Ryan et al, 2019).”<sup>18</sup>

As the AAS further explains, the existence of this substantial and rigorous evidence of harm absolutely precludes the type of randomized trials that the panel erroneously held must be conducted in order to justify protecting minor patients from this practice: “Randomly assigning sexual minority youth to experience SOCE

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<sup>17</sup> Am. Ass’n of Suicidology, *Research Division Statement on Evidence of Harm Regarding Conversion Therapy*, <https://suicidology.org/conversion-therapy-statement/>.

<sup>18</sup> *Id.*

would violate minimum acceptable standards for risk to subjects in research studies, and would violate the research ethics for all disciplines.”<sup>19</sup>

The Panel opinion wrongly dismissed scientifically rigorous, valid, and peer-reviewed evidence that conversion therapy causes harm solely because the research done on this issue since the 1980s has not taken the form of randomized studies. But as the American Psychological Association explained in a report submitted to this Court in a similar case, cited in *Br. of Amici Curiae Equality Florida Institute, et al.* at 10, *Vazzo v. City of Tampa*, No. 19-14387 (11th Cir. Dec. 27, 2019), responsible professionals stopped conducting double-blind studies on conversion therapy after initial studies documented serious negative effects.<sup>20</sup> As the dissenting opinion in this case correctly stated, to continue to conduct such research on minor children poses a grave risk to study participants and is unethical.

Similarly, when a pharmaceutical company conducts randomized trials to seek approval for a treatment, evidence of serious harm will stop the trial. *See Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 698 (D.C. Cir. 2007) (noting that “[a]t any time during the clinical trials, a drug sponsor is required to notify the FDA” of any serious and unexpected adverse event

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<sup>19</sup> *Id.*

<sup>20</sup> *See also* APA Task Force Report, *supra* at 42 (“High dropout rates [of participants] characterize early treatment studies and may be an indicator that research participants experience these treatments as harmful.”).

and the FDA may order a clinical hold if safety so warrants); *accord*, *King v. Governor of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014) (“[A] state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm.”).

The Panel’s decision also conflicts with its sister circuits, which have uniformly acknowledged the substantial evidence and overwhelming medical consensus that conversion therapy is harmful to children. In *King*, the Third Circuit found that “[t]he legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm.” *Id.* at 238. The Ninth Circuit similarly concluded, in *Pickup v. Brown*, that “the overwhelming consensus” from the evidence presented to the California legislature was that conversion therapy “was harmful and ineffective.” 740 F.3d 1208, 1232 (9th Cir. 2014).

## CONCLUSION

For the reasons stated above, rehearing en banc is warranted.

Respectfully submitted,

DATED: December 18, 2020

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation, as provided in Fed. R. App. P. 35(b)(2) and 11th Cir. R. 35-1, because, exclusive of the exempted portions of the petition, the petition contains 2,530 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/ Shireen A. Barday

Shireen A. Barday

*Counsel for Amici Curiae*

### **CERTIFICATES OF 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 will file the original plus fifteen copies of the foregoing with the Clerk of Court by Federal Express, addressed as follows:

Clerk of Court  
United States Court of Appeals for the Eleventh Circuit  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

I will file these copies via Federal Express within seven days as explained in the attached Notice of Amici Curiae's Inability to Contemporaneously File Paper Copies of Amicus Brief in Support of Petition for Rehearing En Banc.

Dated: December 18, 2020

/s/ Shireen A. Barday  
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