

application. While the federal system allows numerous avenues of appeal, these avenues are not unlimited. Once a postconviction relief appeal is unsuccessful for an inmate, further appeal is not warranted absent new evidence or new appellate decisions that would alter the interpretation of the appellate arguments.

This case highlighted the balance that must be struck between providing an avenue for appeal without constraining the court system with endless litigation. The court acknowledged that the medical community's standards are ever-changing, yet this does not permit new litigation, nor does each prior decision need to be reviewed as a result of changing diagnostic standards.

Conversion Therapy for Minors

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Ordinances That Prohibit Therapists from Conducting Sexual Conversion Therapy with Juveniles Violate the First Amendment Right to Freedom of Speech

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Key words: First Amendment; gender; sexual orientation; minors; therapy; freedom of speech

In *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), two therapists appealed the district court's decision to deny preliminary injunction of the City of Boca Raton and Palm Beach County ordinances that proscribed licensed therapists from engaging in therapy with the goal of changing a minor's sexual orientation or gender identity or expression. The Eleventh Circuit Court of Appeals reversed and remanded.

Facts of the Case

In late 2017, Palm Beach County (Florida) and the City of Boca Raton (hereafter referred to as the County and the City, respectively) enacted ordinances

prohibiting therapists or counselors from practicing sexual orientation change efforts (SOCE) based on findings in the legislature that SOCE posed a significant health risk to minors. The County's and the City's ordinances barred therapists from treating minors with the goal of changing a minor's sexual orientation or gender identity or expression, but these ordinances specifically permitted therapy that supported and assisted individual minors undergoing gender transition.

Two licensed therapists (plaintiffs Dr. Robert W. Otto and Dr. Julie H. Hamilton) argued that the ordinances infringed on their First Amendment right to freedom of speech, as their therapy was solely based in speech. Prior to enactment of these ordinances, these therapists often treated patients for depression and anxiety, which they believed was secondary to distress from their sexuality or gender identity. Drs. Otto and Hamilton denied the ability to "change" a person's sexual orientation or gender identity; they contended that through speech-based therapy, motivated patients could decrease homosexual attraction and behavior as well as "gender identity confusion." They indicated that their therapy was voluntary and client-directed. Otto and Hamilton described these patients as typically having "sincerely held religious beliefs" that conflicted with homosexual orientation or gender identity that was incongruent with gender assigned at birth. The defendants (i.e., the County and the City) did not dispute that the plaintiffs' practices were comprised exclusively of speech, but the defendants maintained that SOCE posed a seriously increased risk of depression and suicide in minors.

The therapists sued to permanently enjoin enforcement of these ordinances; they moved for a preliminary injunction on the grounds that state law preempted the ordinances and that the ordinances violated the First Amendment protection of freedom of speech. The local governments countered that their only desire was to protect minors from the harm of that speech and that, as government entities, they have the power to limit this speech because they considered it professional speech and conduct. The District Court for the Southern District of Florida denied the motion. On the First Amendment claim, the district court found that the therapists failed to demonstrate a substantial likelihood of success on the merits. In addition, the district court found that even if the therapists could demonstrate a likelihood of

success on the merits of the state preemption claim, they could not demonstrate irreparable harm. Drs. Otto and Hamilton appealed.

Ruling and Reasoning

In a two-to-one decision, the Eleventh Circuit reversed and remanded the district court's rulings. As part of the decision, the court contended that the four requirements for preliminary injunction were met. The appeals court ruled that: the preliminary injunction had a substantial likelihood of succeeding based on the merits; as the ordinances violated the First Amendment, continued enforcement of these ordinances resulted in an "irreparable injury"; the potential injury to the plaintiffs outweighed the potential injury to the defendants the proposed injunction might cause; and the injunction, if issued, would not be adverse to the public interest.

The court held that since the ordinances discriminated based on the content of speech (i.e., the ordinances limited therapists from communicating a particular message), the ordinances are content-based restrictions that required the highest level of scrutiny, i.e., strict scrutiny. As the analysis required strict scrutiny, the appeals court had to consider whether these ordinances were "narrowly tailored to serve compelling state interests" (*Reed v. Town of Gilbert*, 576 U.S. 155 (2015), p 163). Although the Eleventh Circuit acknowledged that protecting children from physical or psychological harm was a compelling state interest, it held that the defendants failed to demonstrate that the ordinances were narrowly tailored to further a compelling government interest. The court held that defendants failed to demonstrate that purely speech-based SOCE caused harm to minors. The court said that the defendants' amici briefs offered mostly assertions and not evidence of harm to minors; they also stated that there was a lack of "rigorous recent prospective research" and that the available research showed "mixed views" regarding speech-based SOCE (i.e., some individuals perceived harm while some individuals perceived benefit). Based on this information, the Eleventh Circuit stated that "such equivocal conclusions" do not support the ordinances' satisfying strict scrutiny.

The Eleventh Circuit also rejected the defendants' claim that the therapists' speech was conduct-based rather than content-based. The court of appeals noted that the ordinances discriminated on the basis of

viewpoint, citing the exception to the ordinances that expressly permitted therapy to support and assist an individual minor undergoing gender transition.

Furthermore, the appeals court held that the defendants failed to demonstrate that the speech-based sexual conversion therapy was substantially conduct-based professional speech. The court of appeals noted that plaintiffs' therapy was not just carried out in part through speech, but it was entirely speech. The appeals court also rejected the district court's categorization of professional speech as deserving of less protection.

Having held that plaintiffs met the first requirement for a preliminary injunction (i.e., the preliminary injunction had a substantial likelihood of succeeding based on the merits), the Eleventh Circuit held that the remaining three requirements were met as a consequence of the court of appeal's holding on the merits. The court of appeals explained that because the ordinances were a "direct penalization" of protected speech, continuation of the ordinances even for "minimal periods of time" would be an "irreparable injury." Additionally, because the defendants are the government, the court said that the government and public interest have no legitimate interest in enforcing an unconstitutional ordinance.

The Eleventh Circuit acknowledged that its decision allows for speech that many individuals could find "concerning – even dangerous." But, it also contended that if speech restrictions in these ordinances stood, then the inverse of the ordinances would also stand. The appeals court stated that jurisdictions could enact ordinances prohibiting therapy validating an individual minor's homosexual orientation or gender transition. The court mentioned that if the therapists' perspective was not allowed in this case, then the defendants' perspective could be banned elsewhere. The Eleventh Circuit concluded that a government may not prohibit expression of ideas or thoughts just because society may not agree with it or find it offensive.

Dissent

In her dissent, Judge Martin contended that even under the test of strict scrutiny, the ordinances met the criteria of being narrowly tailored to further compelling government interests in protecting minors from harm from SOCE and to regulate professionals.

Judge Martin asserted that the majority incorrectly dismissed the “mountain of rigorous evidence” from various professional organizations, e.g., American Psychological Association, that SOCE was harmful to minors. She stated that since the ordinances allowed therapists to practice SOCE on adults, the ordinances were narrowly tailored and would have survived strict scrutiny. Justice Martin noted that the majority opinion invited unethical research in its demand for additional studies, which would be both harmful and futile. She said that the ordinances did not affect a therapist’s ability to discuss SOCE but rather limited a therapist’s ability to practice a form of medicine, i.e., speech therapy. Justice Martin concluded that the ordinances were constitutionally permissible restrictions of professional speech that did not violate the First Amendment.

Discussion

The Eleventh Circuit was the first federal circuit court of appeals to strike down a SOCE ban that applied to minors (*Harvard Law Review. Otto v. City of Boca Raton*: Eleventh Circuit invalidates minor conversion therapy bans. *Harvard L. Rev.* 2021;134: 2863-2870). Governments are constitutionally allowed to regulate professional speech that is itself part of the practice of medicine because such speech is not protected by the First Amendment. But, the Eleventh Circuit determined that speech-based SOCE for minors is content-based speech and thus is protected by the First Amendment despite acknowledging that speech-based SOCE can be harmful to minors.

This case is significant as it established, in the Eleventh Circuit, that ordinances prohibiting therapists from practicing therapy to change a minor’s sexual orientation or gender identity or expression are violations of the First Amendment right to freedom of speech. Because the court asserted that the government does not have a compelling interest to restrict speech in these ordinances, the potential harm to minors caused by such speech is outweighed by the potential harm from deprivation of the freedom of speech. The Eleventh Circuit has indirectly given therapists permission to conduct speech-based SOCE on minors. This ruling positioned the Eleventh Circuit Court of Appeals in opposition to several sister circuit courts of appeals who have upheld bans against SOCE therapy for minors. This ruling sets the stage for the U.S.

Supreme Court to determine the constitutionality of ordinances banning speech-based SOCE therapy for minors.

Peer-Review Protections within Hospital Credentialing and Privileging

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Hospital Credentialing Committee Records May Qualify for State and Federal Peer-Review Protections in Medical Negligence Lawsuit

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In *Leadbitter v. Keystone Anesthesia Consultants, Ltd.*, 256 A.3d 1164 (Pa. 2021), the Supreme Court of Pennsylvania ruled that portions of a hospital credentialing committee’s records may be protected from discovery in a medical negligence lawsuit under both state and federal protections for medical peer review.

Facts of the Case

After suffering multiple complications from orthopedic surgery in 2015, James Leadbitter and his spouse raised claims of medical negligence against his surgeon. They also claimed that the hospital’s credentialing and privileging process for his surgeon was inadequate, and the hospital should have known that the surgeon was not qualified to perform this surgery. The Leadbitters requested the surgeon’s complete credentialing and privileging file, and the hospital released records of their credentialing committee’s review of the surgeon’s objective credentials (such as degrees, licensure, and board certification). The hospital responded that the credentialing committee also considered “peer review” of the physician’s past