

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE No. 19-10604-AA

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.

APPELLEE, CITY OF BOCA RATON'S RESPONSE IN OPPOSITION TO
APPELLANTS' MOTION TO EXPEDITE APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE No. 18-CV-80771-RLR

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

A. Certificate of Interested Persons

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellee, City of Boca Raton, certifies that the following persons and entities may have an interest in the outcome of this case:

Abbott, Daniel L.

Carlton Fields Jordan Burt, P.A.

City of Boca Raton, Florida

Cole, Jamie A.

Dreier, Douglas C.

Dunlap, Aaron C.

Equality Florida Institute, Inc.,

Fahey, Rachel Marie

Flanigan, Anne R.

Gannam, Roger K.

Gibson, Dunn & Crutcher LLP

Guedes, Edward G.

Hamilton, Julie H., Ph.D., LMFT

Hoch, Rand

Hvzd, Helene C.

Kay, Eric S.

Liberty Counsel, Inc.

Mihet, Horatio G.

Otto, Robert W., Ph.D. LMFT

Palm Beach County, Florida

Palm Beach County Human Rights Council

Phan, Kim

Reinhart, Bruce E., Magistrate Judge

Rosenberg, Robin L., Judge

SDG Counseling, LLC

Staver, Mathew D.

Sutton, Stacey K.

The Trevor Project

Walbolt, Sylvia H.

Weiss Serota Helfman Cole & Bierman, P.L.

Yasko, Jennifer A.

B. Corporate Disclosure Statement

This appeal involves a governmental defendant, City of Boca Raton, 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.

**APPELLEE’S RESPONSE IN
OPPOSITION TO MOTION TO EXPEDITE APPEAL**

Appellee, City of Boca Raton (“City”), responds in opposition to the Motion to Expedite Appeal (“Motion”), filed by Appellants, Robert W. Otto and Julie H. Hamilton (collectively, “Appellants”).

OVERVIEW

Appellants challenged the constitutionality of City Ordinance No. 5407 (“Ordinance”), enacted over eight months prior to the initiation of the action below.¹ The Ordinance bans the practice of “sexual orientation change efforts” or “conversion therapy” on minors by licensed therapists. The Motion seeks expedited review of the district court’s order denying Appellants’ motion for preliminary injunction (“Order”). The Motion fails to show good cause meriting expedited treatment of this appeal and should, therefore, be denied.

ARGUMENT

I. APPELLANTS HAVE NOT DEMONSTRATED GOOD CAUSE TO JUSTIFY EXPEDITING THE APPEAL.

This Circuit’s Local Rules require a movant to demonstrate good cause to expedite an appeal. 11th Cir. R. 27 I.O.P. 3. Appellants do not explain why this Court should accelerate the review of the denial of a preliminary injunction with

¹ Appellants also challenged a nearly identical ordinance enacted by the Appellee, Palm Beach County (“County”), on December 19, 2017.

respect to an ordinance that has been in effect more than a year and a half. Specifically, the City enacted the Ordinance on October 10, 2017. Order, at 7. Appellants, however, did not file the action below until June 13, 2018—more than eight months after City adopted the Ordinance.² See *Otto v. City of Boca Raton*, No. 18-cv-80771-RLR, DE 1 (S.D. Fla. June 13, 2018).

Additionally, the Motion fails to address the district court’s (correct) observation that the Ordinance does *not* prevent Appellants from (i) talking about conversation therapy or recommending conversation therapy for minors, whether publically or privately, (ii) advocating for this practice, or (iii) otherwise expressing their personal views regarding conversion therapy, homosexuality, or gender identity issues to patients. Order, at 43. Also exempted from the Ordinance are “members of the clergy or other religious leaders.” *Id.* at 8 (quoting the Ordinance). Only *licensed* providers are subject to the Ordinance. *Id.* Appellants are not prevented from referring minors to unlicensed persons, such as religious leaders. Order, 7. “The Ordinance does not restrict anyone’s conduct or speech outside of a formal therapy session.” *Id.* There is no reason or justification for expediting review of an ordinance that was not expeditiously challenged in the first instance, and which, if it affects speech at all, leaves Appellants such ample alternative

² Appellants also raised no opposition during the City’s consideration and enactment of the Ordinance at the relevant the City Council meetings.

channels of communication.

Appellants cite *Reshard v. Britt* in support of their good cause argument, the facts of which are distinguishable. 819 F.2d 1573 (11th Cir.), *vacated*, 831 F.2d 222 (11th Cir. 1987) (en banc). In *Reshard*, the Eleventh Circuit expedited the appeal after the district court denied the appellants the right to proceed *pro se* shortly before trial in their wrongful death case. The Court found expedition was merited because, absent such a ruling, the appellants would have been denied any effective redress of their right to proceed “personally in their own behalf” after the case was fully adjudicated.³ 819 F.2d at 1576. Here, Appellants face no such prejudice—the case has been stayed below pending this appellate review, *see* DE 145 (S.D. Fla. Feb. 20, 2019), and expediting this proceeding will serve no additional benefit to the Court or the Parties. Notably, Appellants—jointly with Appellees—sought the stay of the district court proceedings. *Id.* Appellants offer

³ Appellants also cite *Nat’l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam), which, following an injunction preventing individuals from marching with swastikas (among other anti-Semitic related activities), treated an application to the United States Supreme Court for a stay of the state trial court’s order as a petition for certiorari after the state appellate courts denied the application for a stay pending appeal. *Id.* at 44. Unlike here, the enjoined party sought direct appeal from the state supreme court, which was denied, thus delaying review of the injunction. *See Village of Skokie v. Nat’l Social Party of Am.*, 366 N.E.2d 347, 349 (Ill. App. Ct. 1977), *aff’d in part, rev’d in part*, 373 NE.2d 21 (Ill. 1978). Appellants face no such delay here and have, in fact, availed themselves of immediate appellate review.

no factual circumstances to merit expediting review of this appeal (and to wit, they cannot).

II. APPELLANTS' MOTION IS AN IMPROPER ATTEMPT TO BRIEF THE MERITS OF THEIR APPEAL, RATHER THAN TO DEMONSTRATE GOOD CAUSE FOR THE MOTION.

Curiously, Appellants devote a fraction of the Motion to arguing why their appeal should be expedited, most of which merely quotes distinguishable case law without identifying any factual grounds for good cause. The remainder of the Motion is devoted to the *merits* of the appeal and argument regarding why the district court purportedly erred. Not only is such commentary misplaced in a motion to expedite, Appellants misapprehend the district court's findings and overstate the scope of the Court's review on appeal. "The grant or denial of a preliminary injunction is a decision within the sound discretion of the district court." *Advice Interactive Group, LLC v. Web.com Group, Inc.*, 734 F. App'x 712, 714 (11th Cir. 2018) (quoting *Revette v. Int'l Ass'n of Bridge, Structural, and Ornamental Iron Workers*, 740 F.2d 892, 893 (11th Cir. 1984)). The scope of appellate review of such a decision is "very narrow," and the district court's decision will not be reversed unless "there is a clear abuse of discretion." *Id.* The alleged errors by the district court urged by Appellants' do not merit expediting this appeal, particularly given the limited scope of review before the Court. Notwithstanding Appellants' improper argument, the City nonetheless briefly

addresses the lack of merit of these claims.

1. *The district court analyzed the Ordinance under all three First Amendment standards of review and did not ignore precedent.*

Appellants' generalization of the district court's findings is inaccurate and ignores the extensive analysis in the Order. They first argue that the district court applied the wrong standard in reviewing the constitutionality of the ordinances. Motion at 9. However, this argument ignores the fact that—at the preliminary injunction stage—the question to be decided is whether Appellants demonstrated a substantial likelihood of success on the merits. *Allied Veterans of the World, Inc., Affiliate 67 v. Seminole Cty.*, 468 F. App'x 922, 923 (11th Cir. 2012) (“Whether the district court’s determination of [whether the ordinance regulates speech or conduct] is right or wrong, the record before us indicates no abuse of discretion in the denial of preliminary injunctive relief.”). Indeed, the district court analyzed the challenged ordinances under *all three possible standards of review* to determine whether Appellants demonstrated a substantial likelihood of success on the merits. Merely because the district court did not conclusively determine whether rational basis, intermediate scrutiny, or strict scrutiny controls, is not an abuse of discretion. Order at 54 (declining to announce a standard of review).

2. *The district court did not improperly shift the preliminary injunction burden.*

Appellants devote several pages of their Motion to claims that the district

court improperly shifted the preliminary injunction burden. Notably, Appellants fail to address how this argument demonstrates good cause to expedite the appeal (as it does not). Notwithstanding this red herring, the burden-shifting argument also fails substantively.

Appellants' argument assumes that the challenged ordinances are content-based and that strict scrutiny applies, which the district court did *not* explicitly find. Rather, the district court stated, "the ordinances also *arguably* are content-based," and declined to announce a standard of review at the preliminary injunction stage. Order at 4, 54 (emphasis added). Even if strict scrutiny was the sole lens through which the district court viewed the City's Ordinance, the district court clearly stated, "Defendants must also demonstrate that the ordinances are *the least restrictive* means to accomplish their objectives of limiting harmful SOCE^[4] therapeutic practices on minors." Order at 49. The district court placed the burden where it belongs for strict scrutiny, and Appellants' argument to the contrary ignores the plain language of the Order.

The City agrees that, *if* strict scrutiny applies to the Ordinance, Appellees "bear[] the burden of proof on the ultimate question of [the Ordinance's] constitutionality." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). This does not,

⁴ "SOCE" is an acronym for "sexual orientation change efforts," also known as "conversion therapy."

however, change well-settled law that “the burden of persuasion rests with the petitioner to show a substantial likelihood of success on the merits”—which Appellants failed to do—before this burden shifts to the government. *Ray v. Comm’r, Ala. Dep’t of Corr.*, 915 F.3d 689, 701 (11th Cir. 2019) (applying strict scrutiny to a stay of execution). Appellants’ premature attempt at briefing the merits of their appeal is not only misplaced, it also fails to demonstrate good cause to expedite the appeal. Accordingly, the City respectfully requests that the Court deny Appellants’ Motion.

Dated: March 4, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d) and 32(a)(7)(B) because it contains 1,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced type using Microsoft Word 2016 in Times New Roman 14.

/s/ Daniel L. Abbott
Daniel L. Abbott

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed through the Court's ECF System and served via Electronic Mail on March 4, 2019, on the following:

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