IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

ROBERT W. OTTO, PH.D. LMFT, individually and on behalf of his patients, JULIE H. HAMILTON, PH.D., LMFT, individually and on behalf of her patients,	)	Civil Action No.: 9:18-cv-80771-RLR
Plaintiffs,	)	**INJUNCTIVE RELIEF SOUGHT**
v.	)	
CITY OF BOCA RATON, FLORIDA, and COUNTY OF PALM BEACH, FLORIDA,	)	
Defendants.	)	

PLAINTIFFS' ERRATA FOR
JOINT DISCOVERY MEMORNDUM
FOR AUGUST 28, 2018 DISCOVERY HEARING

Plaintiffs inadvertently filed the parties' Joint Discovery Memorandum for August 28, 2018 Discovery Hearing (DE 63) containing two errors, and therefore provide the Court the following errata:

Page 3, second full paragraph:

> Second, even where the legislative body "has indicated an intention to establish a civil penalty," a court must put ~~form over substance~~ substance over form and determine whether the law is punitive. *Id.* at 248–49.

Page 4, last paragraph:

> Moreover, ~~Plaintiffs~~ Defendants cannot negate the presence of irreparable harm by proving the existence of reparable or compensable harm.

For the Court's convenience, attached hereto as Exhibit A is a corrected version of the filing.

Respectfully submitted,

/s/ Roger K. Gannam
Mathew D. Staver (FL Bar 0701092)
Horatio G. Mihet (FL Bar 026581)
Roger K. Gannam (FL Bar 240450)
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Email: court@lc.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this August 27, 2018, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Roger K. Gannam
Roger K. Gannam

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

ROBERT W. OTTO, et al.,	)	Civil Action No.: 9:18-cv-80771-RLR
	)	
Plaintiffs,	)	**INJUNCTIVE RELIEF SOUGHT**
v.	)	
	)	
CITY OF BOCA RATON, FLORIDA, et al.,	)	
	)	
	)	
Defendants.	)	

[CORRECTED]
JOINT DISCOVERY MEMORANDUM
FOR AUGUST 28, 2018 DISCOVERY HEARING

Plaintiffs and Defendant County of Palm Beach, Florida, pursuant to the Court's Paperless Order of August 23, 2018 (DE 61), jointly submit this join discovery memorandum.

POSITION OF DEFENDANT PALM BEACH COUNTY

On August 20, 2018, Plaintiffs Julie Hamilton and Robert Otto served their objections and responses to Palm Beach County's ("County") preliminary injunction interrogatories. Attached as Exhibit "A" is Plaintiff Julie H. Hamilton's, PH.D., LMFT's Objections and Responses to the Preliminary Injunction Interrogatories of Defendant Palm Beach County. Attached as Exhibit "B" is Plaintiff Robert W. Otto's, PH.D., LMFT's Objections and Responses to the Preliminary Injunction Interrogatories of Defendant Palm Beach County. The County takes issue with Plaintiffs' responses and objections to the County's interrogatories and states the following:

INTERROGATORIES # 3, 4, 11, 12, 19-22

Plaintiffs make identical improper objections to the County's interrogatories 3, 4, 11, 12, 19-22 by invoking the Fifth Amendment privilege. Contrary to Plaintiffs' assertion, violation of the County's Ordinance 2017-046 ("Ordinance") is not a violation of a crime. DE 1-5. Section 6 of the Ordinance states that a violation will be prosecuted in the same manner as a misdemeanor pursuant to section 125.69, Florida Statutes, but the Ordinance does not specify that the offender would be guilty of a misdemeanor. See Op. Att'y Gen. Fla. 1995-25 (April 6, 1995) ("while the prosecution of code violations may be carried out in the same manner as the prosecution of a misdemeanor, the Legislature no longer characterizes such a violation as a misdemeanor"); Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002) (the prospect of *incarceration* makes violating an

ordinance a crime); §775.08(4), Fla. Stat. ("The term "crime" shall mean a felony or misdemeanor."). Furthermore, the only penalty for violation of the Ordinance is a civil penalty fine of $250.00 for the first violation and $500.00 for each repeat violation without any possibility or threat of imprisonment. "[T]he Fifth Amendment's privilege against self-incrimination 'permits a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future *criminal* proceedings.'" See Doe v. Epstein, 2009 U.S. Dist. LEXIS 139535, *9 (S.D. Fla. August 4, 2009) (Emphasis added). The privilege solely protects against giving testimony leading to the infliction of "penalties affixed to . . . *criminal* acts." Kastigar v. U.S., 406 U.S. 441, 454 (1972) (Emphasis added). Invoking the Fifth Amendment privilege requires a demonstration that answering the discovery requests would realistically and necessarily furnish a link in the chain of evidence needed to prove a crime against him. Doe, 2009 U.S. Dist. LEXIS at *19. (party must show a substantial and real threat of criminal prosecution). Therefore, Plaintiffs cannot invoke the Fifth Amendment privilege for fear of violating the Ordinance when violation of the Ordinance is not a crime and there is no threat of criminal prosecution.

Additionally, for interrogatories 20 and 21, Plaintiffs assert psychotherapist-patient privilege and states that too much patient identifying information would be disclosed by responding to the interrogatories. However, the County informed Plaintiffs' counsel via email and teleconference, on August 22, 2018, that the County would accept "Doe #" as a substitute for patient's initials; similar to Plaintiffs' responses in interrogatory 22, but Plaintiffs refused. Plaintiffs should provide the requested information with the "Doe #" substitute and any claims of privilege has been waived per Plaintiffs' response with "Doe #" information for interrogatory 22.

INTERROGATORY # 19

Plaintiffs object to interrogatory 19 on the basis that it is premature and not directed toward the harm that must be shown at the preliminary injunction hearing, irreparable harm. Plaintiffs claim that irreparable harm is established if they show a substantial likelihood of success on the merits of their First Amendment claims. The County takes two issues with this analysis. First, irreparable harm is only presumed with respect to a First Amendment violation if Plaintiffs establish "an imminent likelihood that pure speech will be chilled or prevented altogether." See Siegel v. LePore, 234 F.3d 1163, 1178 (11th Cir. 2000). Interrogatories 19-21 seek to determine

whether the passage of the Ordinance in fact chilled or prevented Plaintiffs from engaging in practices prohibited by the Ordinance. The County must be permitted to attempt to rebut Plaintiffs' claim of a presumptive irreparable harm.

Second, although Plaintiffs assert in their answers to interrogatory 19 that the alleged constitutional violation is the primary harm the lawsuit seeks to redress, they seek actual damages (DE 1, p. 58) and base their motion for preliminary injunction not only on the First Amendment but also on Florida statutes (DE 8, p. 17). Should this Court find no substantial likelihood of success on the merits of Plaintiffs' First Amendment Claims, but on other claims, a preliminary injunction still should not issue if the Court determines that Plaintiffs' harm is reparable. Interrogatory 19 aims to discover the Ordinance's financial impact upon Plaintiffs. The calculability of this impact, if any, and the "possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." See Sampson v. Murray, 415 U.S. 61, 90 (1974).

PLAINTIFFS' POSITION

INTERROGATORIES # 3, 4, 11, 12, 19-22

Plaintiffs' invocation of the Fifth Amendment privilege is necessary and appropriate because a violation of the Ordinance is in the nature of a crime, and the consequence of a violation is punitive. "[T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States v. Ward*, 448 U.S. 242, 248 (1980). This is a two-step inquiry. First, a court must determine whether the legislative body "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Id.* Second, even where the legislative body "has indicated an intention to establish a civil penalty," a court must put substance over form and determine whether the law is punitive. *Id.* at 248–49. Under either inquiry, the Ordinance is in the nature of a crime.

The County enacted the Ordinance expressly to be "prosecuted in the same manner as misdemeanors are prosecuted." (DE 1-5 at 6.) Moreover, violations are to be "punished" by monetary fines. (*Id.*) The County, by the Ordinance's plain language, has expressly "indicated . . . a preference" for a criminal label. Furthermore, even if the "misdemeanor" and "punish[]" language were ambiguous, the Ordinance provides no remedial or other purpose for collection of the monetary penalties which could evidence a purely civil intent.

The County's citation of *Op. Att'y Gen. Fla. 1995-25* (April 6, 1995) (copy attached hereto as Exhibit "C") is surprising, and borderline dishonest. Contrary to the County's argument, the opinion actually provides that counties **may** elect to invoke Fla. Stat. § 162.21 and designate certain ordinance violations as civil infractions with civil penalties, but it also provides that Fla. Stat. § 125.69 otherwise requires ordinance violations to be prosecuted in the same manner as misdemeanors. The County retained the misdemeanor language of Fla. Stat. § 125.69 in the Ordinance, and even cited to the statute as authority for its Code Enforcement Officers to enforce the Ordinance. (DE 1-5 at 6.) The County cannot now come to this Court and claim the Ordinance is civil when the County utterly failed to designate it as such to invoke the option of Flat. Stat. § 162.21.

INTERROGATORY # 19

The County's discovery requests are each designated as "Preliminary Injunction" requests. Accordingly, only discovery relating to Plaintiffs' and the County's respective preliminary injunction burdens is in view. While Plaintiffs have the burden of demonstrating irreparable harm at the preliminary injunction stage, Plaintiffs have no burden to demonstrate the absence of reparable or compensable harm. Moreover, Defendants cannot negate the presence of irreparable harm by proving the existence of reparable or compensable harm. Accordingly, the County's monetary damage discovery requests are premature.

Respectfully submitted,

/s/ Roger K. Gannam
Mathew D. Staver (FL Bar 0701092)
Horatio G. Mihet (FL Bar 026581)
Roger K. Gannam (FL Bar 240450)
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Email: court@lc.org
Attorneys for Plaintiffs

/s/ Rachel Fahey
Rachel Fahey (FL Bar 105734)
Primary Email: rfahey@pbcgov.org
Secondary Email: dfishel@pbcgov.org
Kim Phan, Esquire (FL Bar 026781)
Primary Email: kphan@pbcgov.org
Secondary Email: ldennis@pbcgov.org
PALM BEACH COUNTY ATTORNEY
Litigation Section
300 North Dixie Highway, Third Floor West
Palm Beach, Florida 33401
Phone: (561) 355-6337
Fax: (561) 355-4234
Attorneys for Defendant County of Palm Beach

CERTIFICATE OF SERVICE

I hereby certify that on this August 27, 2018, I caused a true and correct copy of the foregoing to be filed electronically with the Court's CM/ECF system. Service upon all counsel of record will be effectuated by the Court's electronic notification system.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs