

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.: <u>9:18-cv-80771-RLR</u>
)	
Plaintiffs,)	INJUNCTIVE RELIEF SOUGHT
v.)	
)	
CITY OF BOCA RATON, FLORIDA,)	
and COUNTY OF PALM BEACH,)	
FLORIDA,)	
)	
Defendants.)	

**PLAINTIFFS’ MEMORANDUM OF LAW IN OPPOSITION TO
THE TREVOR PROJECT’S MOTION FOR LEAVE TO FILE *AMICUS* BRIEF**

Plaintiffs, pursuant to Local Rule 7.01(c), file this memorandum of law in opposition to The Trevor Project’s Motion for Leave to File *Amicus* Brief (DE 57).

INTRODUCTION

The proposed *amicus* brief of The Trevor Project (“TTP”) would be neither useful nor timely. The critical issue before the Court on Plaintiffs’ preliminary injunction motion is whether Defendants’ respective counseling bans were constitutionally tailored to their asserted government interests **when enacted**. TTP’s outsider “perspective” on what Defendants could have, should have, or might have considered when enacting their counseling bans has no bearing whatsoever on the questions of Defendants’ actual constitutional tailoring (or complete lack thereof).

TTP’s motion should be denied also because TTP is attempting to put new purportedly factual matter before the Court to prop up Defendants’ case. TTP should not be allowed to introduce unverifiable “facts” into these tightly scheduled preliminary injunction proceedings. TTP’s motion makes clear that it will attempt to bolster Defendants’ legislative record after-the-fact with TTP’s own “data” and “research,” which Plaintiffs will have no opportunity to investigate, cross examine, or rebut. The Court should reject TTP’s attempt.

I. TTP'S MOTION SHOULD BE DENIED BECAUSE THE INFORMATION PROFFERED IS NOT TIMELY OR USEFUL.

Whether to grant or refuse leave to *amicus* parties is a matter of the Court's discretion, but the key consideration is whether the information offered is "timely and useful." *Georgia Aquarium, Inc. v. Pritzker*, 135 F. Supp. 3d 1280, 1288 (N.D. Ga. 2015); *Waste Mgmt. of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995). TTP's proposed brief is neither, and the Court should decline to accept it.

Assuming Boca Raton's and Palm Beach County's respective ordinances are not viewpoint-based restrictions on speech and therefore unconstitutional *per se* (which they are), Defendants must still prove their content-based counseling bans were narrowly tailored to their purported government interests **when enacted**. (Pls.' Mot. Prelim. Inj., DE8, at 3–15.) "There must be a 'fit between the . . . ends and the means chosen to accomplish those ends.'" *Wollschlaeger v. Florida*, 848 F.3d 1293, 1312 (11th Cir. 2017) (quoting *Sorrell v. IMS Health*, 564 U.S. 552, 572 (2011)). But TTP offers no hint of a relevant connection to Boca Raton's or Palm Beach County's enactments, and proffers no information about what happened in the localities in connection with their respective ordinances. TTP certainly does not proffer any information about what alternatives to the counseling bans Defendants considered. Accordingly, the information TTP proffers is not useful, and therefore does not meet the basic threshold for an *amicus* filing.

To be sure, despite TTP's purported stature "as the nation's largest [LGBTQ] youth crisis intervention and suicide prevention organization" (TTP Mot., DE 57, at 1), neither Defendant in its Initial Disclosures identified any TTP representative or constituent as a witnesses "likely to have discoverable information . . . that [it] may use to support its claims or defenses" under Rule 26(a)(1)(A)(i). Moreover, Boca Raton unequivocally informed Plaintiffs that **no witnesses** "are necessary or appropriate with regard to the claims currently asserted in the Complaint." (Def. City of Boca Raton's Init. Discs. (emphasis added), attached hereto as Exhibit A.) In light of this assertion, Boca Raton defies credibility with its more recent representation to the Court that TTP can provide helpful information.¹ (Boca Raton's Resp. TTP Mot., DE 65, at 1.)

¹ Boca Raton's assertion also concedes that the only relevant witness testimony would be testimony concerning the deliberation and enactment of its counseling ban:

The lawfulness of the challenged ordinance and alleged acts, practices and policies of the City can be determined from the face of Ordinance No. 5407 ("Ordinance") itself. Moreover, witness

Closely related to the constitutional uselessness of TTP's proffered information is its untimeliness. Not only is TTP's proposed *amicus* help untimely because it proffers information months after enactment of the counseling bans, but also because TTP's proposed briefing will disrupt the current preliminary injunction proceedings. Indeed, TTP's *amicus* motion has already disrupted the taut schedule for these proceedings, pulling Plaintiffs' counsel away from preparing for the depositions of Plaintiffs occurring on the two days following the accelerated response deadline. And Defendants' respective counsel have indicated to the Court that they are already stretched thin by the preliminary injunction proceedings and related discovery. (*See Palm Beach Cnty's Resp. Pls.' Disc. Mem.*, DE 28, at 2 (“[T]he County anticipated having limited time to accomplish each discrete task”); *Boca Raton's Mot. Ext. Time and Prot. Order*, DE 30, at 2 (“The City and its attorneys are devoting their available resources to the Motion for Preliminary Injunction and the discovery schedule in connection therewith.”).) Granting TTP's motion for leave to file an *amicus* brief will create the necessity for Plaintiffs to respond to that brief, further crowding an already crowded schedule.

Furthermore, TTP's offer of an “alternative viewpoint” is unavailing. (TTP Mot., DE 57, at 2.) In light of each Defendant's unequivocal and strident condemnation of SOCE counseling and all its practitioners, purportedly (and identically) based on “overwhelming research” (*Boca Raton Ord.*, DE 1-4, at 5; *Palm Beach Ord.*, DE 1-5, at 4), TTP offers nothing close to an “alternative viewpoint.” Rather, TTP offers only to pile on with more of the same. In these tightly scheduled proceedings, the Court does not need such a friend. Another hopeful *amicus*, Equality Florida, has already followed TTP's lead, and seeks to contribute the **same** “alternative viewpoint” to the proceedings. (*Mot. Appear Amicus*, DE 68, at 2, 3, 4.) Granting TTP's *amicus* motion will open the floodgates for “alternative viewpoints” which are hopelessly indistinguishable from the viewpoint being presented by Defendants as their justifying interest in enacting their respective ordinances. Additionally, if the Court allows these *amici*, the Court will have to allow the same number or more *amici* in support of Plaintiffs to obtain a truly “alternative viewpoint.”

testimony, either at trial or in discovery, would likely violate the legislative privilege, the deliberative process privilege, and the attorney-client privilege, amongst others.

(Ex. A, Def. City of Boca Raton's Init. Discs., at 1.)

II. TTP’S MOTION SHOULD BE DENIED BECAUSE FACTUAL ARGUMENT SHOULD NOT BE WELCOMED IN AN AMICUS FILING.

TTP’s motion should be denied for another reason: “[A]n *amicus* who argues facts should rarely be welcomed” *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). “An *amicus* cannot initiate, create, extend, or enlarge issues.” *Waste Mgmt.*, 162 F.R.D. at 36. There is not even a suggestion that anything TTP has to say was considered by either Defendant before enacting their respective counseling bans. If that was the case, the information would be in Defendants’ respective legislative records, and Defendants would be more than capable of presenting that information to the Court. Rather, under the guise of “perspective,” TTP is attempting to create an *ex post facto* evidentiary record to bolster Defendants’ respective counseling ban enactments. The Court should see through and reject TTP’s improper attempt.

TTP reveals that its *amicus* assistance will be based on the content of “confidential” (and presumably anonymous) telephone calls, instant messages, and text messages from its constituents. (TTP Mot., DE 57, at 2.) There is, of course, no indication that any of these unidentified communicants have a connection to Boca Raton or Palm Beach County, or received counseling from any Plaintiff. To be sure, neither Defendant has identified a single individual claiming to have been harmed by voluntary SOCE counseling in their respective jurisdictions. In any event, allowing TTP to introduce anonymous hearsay “facts” would work a profound prejudice on Plaintiffs because Plaintiffs would have no opportunity to investigate or rebut such “facts.” Defendants in this case were adamant that they could not meaningfully defend against Plaintiffs’ preliminary injunction motion without the opportunity to depose Plaintiffs and to thoroughly probe Plaintiffs’ evidence in pre-hearing discovery. Since the Court afforded Defendants this opportunity for discovery, it should now provide Plaintiffs the same safeguards.

CONCLUSION

TTP’s motion makes no showing that its “interest and perspective” were considered by Defendants before they enacted their respective ordinances. Moreover, TTP has not sent representatives to sit in on Plaintiffs’ depositions, or requested copies of Plaintiffs’ discovery responses, so there is no reason to expect TTP’s “interest and perspective” to be relevant to Boca Raton, Palm Beach County, or the counseling actually offered by Plaintiffs which it at issue in this case. For these and all of the foregoing reasons, TTP’s proposed *amicus* filing is not timely or useful and should be denied.

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 28, 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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:18-CV-80771-RLR

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,

Plaintiffs,

vs.

CITY OF BOCA RATON, FLORIDA,
and COUNTY OF PALM BEACH,
FLORIDA

Defendants.

_____ /

CITY OF BOCA RATON'S INITIAL DISCLOSURES

Defendant, City of Boca Raton ("City"), by and through undersigned counsel, pursuant to Rule 26(a)(1)(A), Federal Rules of Civil Procedure, serves its Initial Disclosures and states as follows:

Rule 26(a)(1)(A)(i) – WITNESS LIST

The City does not believe that any witnesses are necessary or appropriate with regard to the claims currently asserted in the Complaint. The lawfulness of the challenged ordinance and alleged acts, practices and policies of the City can be determined from the face of Ordinance No. 5407 ("Ordinance") itself. Moreover, witness testimony, either at trial or in discovery, would likely violate the legislative privilege, the deliberative process privilege, and the attorney-client privilege, amongst others.

EXHIBIT A

Rule 26(a)(1)(A)(ii) – DOCUMENT LIST

- 1) Documents related to the Ordinance, including the Ordinance itself, any drafts of the Ordinance, staff reports created in connection with the Ordinance (and documents cited therein), the minutes and recordings of the City Council’s meetings in which the Ordinance was considered, and any and all City files related to the Ordinance or with regard to the claims asserted in the Complaint.
- 2) The Model Conversion Therapy Ban Ordinance by the Palm Beach County Human Rights Council, and any and all scientific articles and studies cited therein.

Rule 26(a)(1)(A)(iii) – DAMAGES

The City has not asserted a claim for damages.

Rule 26(a)(1)(A)(iv) – INSURANCE

The City is self-insured. However, the City does have an excess insurance policy, which may or may not provide coverage for the claims asserted herein. A copy of the policy is available for inspection and copying.

The City reserves the right to supplement these Initial Disclosures as necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail on July 13, 2018 on all counsel of record on the attached Service List.

Respectfully submitted,

WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
Counsel for Defendant City of Boca Raton
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Telecopier: (954) 764-7770

By: /s/ Daniel L. Abbott
JAMIE A. COLE
Florida Bar No. 767573

Primary email: jcole@wsh-law.com
Secondary email: msaraff@wsh-law.com
DANIEL L. ABBOTT
Florida Bar No. 767115
Primary email: dabbott@wsh-law.com
Secondary email: pgrotto@wsh-law.com
ANNE R. FLANIGAN
Florida Bar No. 113889
Primary email: aflanigan@wsh-law.com
Secondary email: pgrotto@wsh-law.com

SERVICE LIST

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 18-CIV-80771-RLR**

Mathew Duane Staver, Esq.
Liberty Counsel
1053 Maitland Center Commons, 2nd Floor
Maitland, FL 32751-7214
Telephone: 800-671-1776
Facsimile: 407-875-0770
Email: mat@lc.org

Attorneys for Plaintiffs

Roger K. Gannam, Esq.
Liberty Counsel
PO Box 540774
Jacksonville, FL 32854
Telephone: 800-671-1776
Facsimile: 407-875-0770
Email: rgannam@lc.org

Attorneys for Plaintiffs

Horatio G. Mihet, Esq.
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854-0774
Telephone: 800-671-1776
Facsimile: 407-875-0770
Email: hmihet@lc.org

Attorneys for Plaintiffs

Jamie A. Cole, Esq.
Daniel L. Abbott, Esq.
Anne R. Flanigan, Esq.
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, FL 33301
Telephone: 954-763-4242
Facsimile: 954-764-7770
Emails: dabbott@wsh-law.com (primary)
pgrotto@wsh-law.com (secondary)
Emails: aflanigan@wsh-law.com (primary)
pgrotto@wsh-law.com. (secondary)

Attorneys for the Defendant, City of Boca Raton

Rachel Marie Fahey, Esq.
Palm Beach County Attorney's Office
300 N. Dixie Highway, Ste. 359
West Palm Beach, FL 33401
Telephone: 561-355-6337
Email: rFahey@pbcgov.org

Kim Ngoc Phan, Esq.
Palm Beach County Attorney's Office
300 N. Dixie Highway, Ste. 359
West Palm Beach, FL 33401
Telephone: 561-355-2529
Email: kphan@pbcgov.org

Attorneys for County of Palm Beach Florida