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AT THE CROSSROADS OF BUSINESS, GOVERNMENT & THE LAW

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October 22, 2019

VIA CM/ECF

Mr. David J. Smith  
Clerk of Court  
U.S. Court of Appeals for the Eleventh Circuit  
56 Forsyth St., N.W.  
Atlanta, GA 30303

RE: *Robert W. Otto et al. v. City of Boca Raton et al.*, No. 19-10604

Dear Mr. Smith,

I write to respond to the letter filed by Plaintiffs-Appellants under Federal Rule of Appellate Procedure 28(j), dated October 17, 2019, notifying the Court of *Vazzo v. City of Tampa*.

*Vazzo* does not have any bearing on the issues before this Court. Unlike the district court in this case, the *Vazzo* court did not address any federal constitutional issues. Rather, *Vazzo* permanently enjoined the enforcement of the City of Tampa's conversion therapy ordinance solely on the ground that it is invalid under the Florida state constitutional doctrine of implied preemption. *Vazzo* Order at 2, 41.

While Plaintiffs do allege that the City's Ordinance is invalid under the Florida state constitutional doctrine of implied preemption (App.-Vol:1-Tab:1 ¶¶ 266-81), the district court did not reach the merits of that claim. The district court held, instead, that Plaintiffs failed to establish any irreparable harm with respect to their implied preemption claim. App.-Vol:XI-Tab:141 at 58-60. Consequently, the district court did not determine whether Plaintiffs are substantially likely to succeed on the merits of that claim. *Id.* at 60. In contrast, the *Vazzo* court did not even discuss whether the plaintiffs in

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that case had made the requisite demonstration that they would suffer irreparable harm. *See Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1229 (11th Cir. 2017).

Moreover, Plaintiffs have not briefed the merits of their implied preemption claim to this Court. Instead, they assert only that the district court should have found irreparable harm. *See Plaintiffs' Br.* 67-68; *Reply Br.* 24-25. Accordingly, the merits of Plaintiffs' implied preemption claim is waived for purposes of this preliminary injunction appeal. *See United States v. Durham*, 795 F.3d 1329, 1330-31 (11th Cir. 2015) (en banc).

Plaintiffs mistakenly assert that *Vazzo*, in noting scientific uncertainty in the field of conversion therapy, supports their argument that the City's Ordinance is not narrowly tailored. As the City explains in its brief (at 28-36), the existence of scientific studies, and the City's reliance on extensive record evidence of such, is at most related to the government's compelling interest, and not whether the ordinance is narrowly tailored.

Respectfully submitted,

*/s/ Daniel L. Abbott*

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cc: All counsel by CM/ECF