

No. 19-14387

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, and SOLI
DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH
TAMPA BAY, individually and on behalf of its members, constituents and clients,

Plaintiffs–Appellees,

v.

CITY OF TAMPA, FLORIDA,

Defendant–Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

In Case No.: 8:17-cv-02896-T-02AAS before the Honorable William F, Jung

**PLAINTIFFS–APPELLEES’ RESPONSE IN OPPOSITION TO
DEFENDANT–APPELLANT’S MOTION FOR DISMISSAL AND
CANCELLATION OF ORAL ARGUMENT**

Mathew D. Staver (Fla. 0701092)
Horatio G. Mihet (Fla. 026581)
Roger K. Gannam (Fla. 240450)
Daniel J. Schmid (VA 84415)
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
E-mail: court@lc.org

Attorneys for Plaintiffs–Appellees

VAZZO, *etc., et al.* v. CITY OF TAMPA, FLORIDA

**PLAINTIFFS–APPELLEES’
CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Plaintiffs–Appellees hereby certify that the following individuals and entities are known to have an interest in the outcome of this case:

Alliance Defending Freedom	Florida State Representative Scott Plakon
The Alliance for Therapeutic Choice and Scientific Integrity	Florida State Representative Spencer Roach
Burr & Forman, LLP	Florida State Representative Anthony Sabatini
Bursch, John. J.	Florida State Representative Clay Yarborough
Carlton Fields Jordan Burt, PA	Florida State Senator Ben Albritton
City of Tampa	Florida State Senator Dennis Baxley
Clemons, J. Tyler	Florida State Senator Doug Broxson
Crampton, Stephen M.	Florida State Senator Kelli Stargel
Dinielli, David C.	Freedom of Conscience Defense Fund
Equality Florida Institute, Inc.	Gannam, Roger K.
Family Foundations Counseling, PLLC	Harvey, David E.
Florida State Representative Byron Donalds	Jonna, Paul M.
Florida State Representative Brett Hage	
Florida State Representative Stan McClain	

VAZZO, *etc., et al.* v. CITY OF TAMPA, FLORIDA

Jung, William F.	Price, Max R.
Liberty Counsel, Inc.	Richardson, Ursula D.
LiMandri, Charles S.	Robbins, Dana Lee
LiMandri & Jonna, LLP	Sansone, Amanda Arnold
Lindell Farson & Zebouni, P.A.	Schandevel, Christopher P.
Lindell, J. Michael	Schmid, Daniel J.
McAlister, Mary E.	Soli Deo Gloria International, Inc.
McCoy, Scott D.	Southern Poverty Law Center
Mihet, Horatio G.	Staver, Mathew D.
Minter, Shannon P.	Stoll, Christopher
National Center for Lesbian Rights	Trissell, Jeffrey M.
Piedra, Daniel J.	Vazzo, Robert L.
Porter, Brian C.	Walbolt, Sylvia H.
	Williams, Robert V.

No publicly traded company or corporation has an interest in the outcome of
this case.

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

**PLAINTIFFS–APPELLEES’ RESPONSE IN OPPOSITION TO
DEFENDANT–APPELLANT’S MOTION FOR DISMISSAL AND
CANCELLATION OF ORAL ARGUMENT**

Plaintiffs–Appellees, Robert L. Vazzo, LMFT and Soli Deo Gloria International, Inc. d/b/a New Hearts Outreach Tampa Bay, respond in opposition to Defendant–Appellant’s Motion for Dismissal and Cancellation of Oral Argument. With briefing fully completed, and oral argument scheduled on December 15, the City seeks dismissal of the appeal on mootness grounds, and because “continuation of its appeal would be futile” based on this Court’s recent decision in *Otto v. City of Boca Raton*, No. 19-10604, 2020 WL 6813994 (11th Cir. Nov. 20, 2020). (Mot. Dismiss 6.) This Court held in *Otto* that two South Florida counseling ban ordinances—nearly identical to Tampa’s ordinance at issue in this case—violate the First Amendment as content- and viewpoint-based speech restrictions. 2020 WL 6813994, at *1, 6. While the Court has “broad discretion to grant voluntary motions to dismiss,” such motions “may be denied in the interest of justice or fairness.” *Am. Auto. Mfrs. Ass’n v. Comm’r, Massachusetts Dept. of Env’tl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994). This Court should deny the City’s motion because the appeal is not moot, the motion comes too late in the proceedings, and the City’s strategic behavior does not merit the Court’s favorable discretion.

1. First, a voluntary motion to dismiss based on an “unsound argument of mootness” is due to be denied. *In re Nexium Antitrust Litig.*, 778 F.3d 1, 2 (1st Cir.

2015) (cleaned up). Appellees agree that *Otto* makes the outcome of this appeal on their First Amendment claims *inevitable*, but not *moot*. To be sure, *Otto* is a binding decision requiring affirmance of the district court’s summary judgment on First Amendment grounds, even though the district court passed on Appellees’ First Amendment challenges and invalidated Tampa’s ordinance on state preemption grounds.¹ See *Hallums v. Infinity Ins. Co.*, 945 F.3d 1144, 1148 (11th Cir. 2019) (“We may affirm a grant of summary judgment on any ground supported by the record.”). (Appellees’ Br. 57 (“[T]his Court can affirm the district court’s judgment . . . on any basis supported by the record, even if different from the basis of the district court’s decision.” (citing *Thompkins v. Lil’ Joe Records, Inc.*, 476 F.3d 1294,

¹ The Magistrate’s Report and Recommendation at the preliminary injunction stage held Tampa’s ordinance, like those in *Otto*, to be an unconstitutional speech restriction under the First Amendment. (R-149; Appellees’ Br. 3–5.) Appellees’ burden at that stage was showing a likelihood of success on the merits and irreparable harm. (R-149 at 1–2.) But the district court did not enter an order on the Report and Recommendation, and instead entered a summary judgment to which the preliminary injunction factors did not apply. (R-213; Appellees’ Br. 5.) Moreover, the district court decided the case on state preemption grounds and did not need to reach Appellees’ First Amendment claims. (R-213 at 2; Appellees’ Br. 5–6.) Thus, Appellees’ brief to this Court focused on the state preemption argument, but also urged affirmance on the alternative First Amendment grounds that were fully briefed and argued below. (Appellees’ Br. 57–58; R-213 at 7–8; R-194.) The *Otto* Court noted the different procedural postures between that case and this one, and correctly explained why it decided *Otto* under the First Amendment. See *Otto*, 2020 WL 6813994, at *11–12, n.13.

1303 (11th Cir. 2007)); Appellees' Br. 58 (citing substantial briefing of First Amendment issues before district court).)

To be sure, the *Otto* decision is binding on this panel. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) (“Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel’s holding is overruled by the Court sitting en banc or by the Supreme Court.”). However, there remains the possibility, if not the probability, that one or both defendants in *Otto* (City of Boca Raton and/or Palm Beach County) may petition this Court for rehearing or the Supreme Court for a writ of certiorari. The final disposition of such petitions could take months. Thus, dismissal of this appeal *without an opinion* is not warranted.

Otto does not moot Tampa’s appeal because *Otto* does not address the primary preemption question before the Court in this appeal. Indeed, as noted above, the *Otto* Court correctly ruled based on the First Amendment, and not on preemption. *See Otto*, 2020 WL at *11–12. Moreover, the City merely asserts mootness without argument or citation to authority, and therefore waived the argument. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 (11th Cir. 2007) (“perfunctory and underdeveloped argument” without citation to authority is waived). The Court

should deny the City's motion to dismiss because the City's mootness argument is unsound—indeed, it is waived.

2. Second, a voluntary motion to dismiss an appeal with unresolved issues, filed after the completion of briefing and on the eve of oral argument, should be denied. *See Dynamic 3D Geosolutions LLC v. Schlumberger Ltd. (Schlumberger N.V.)*, 837 F.3d 1280, 1284 (Fed. Cir. 2016) (denying voluntary motion to dismiss filed “[s]hortly before the scheduled oral argument”); *United States v. Hagerman*, 549 F.3d 536, 538 (7th Cir. 2008) (“In this case, with the appeal fully briefed and the merits free from doubt, we would be mistaken to grant the [voluntary] motion.”). The parties have completed briefing and a round of post-briefing motion practice. Oral argument is scheduled for December 15, already necessitating preparatory work. Thus, the Court should deny the City's motion to dismiss.

3. Third, “[o]ne good reason to exercise discretion against dismissal is to curtail strategic behavior.” *In re Nexium Antitrust Litig.*, 778 F.3d at 2 (quoting *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004)). “A party should not be able to manipulate the formation of precedent by dismissing an appeal.” *Id.* (cleaned up). The City's motion gives all appearances of a strategic move to evade this Court's review of the preemption question. Tampa jealously guards its “broad [home-rule] power to enact laws without any express grant from the State.” (City Br. 3.) This Court's affirmance on preemption grounds would address a major

argument pressed by the City, and would prevent the City from enacting other local counseling ordinances where the state has occupied the field. In light of the City's vigorous defense, that it has authority to intrude on counseling matters where the state has left no room for the City to regulate, if the Court dismisses this appeal the Court is likely to see the City again in some future case. *Cf. In re Nexium Antitrust Litig.*, 778 F.3d at 2 (“[Appellants] should not be able to circumvent this panel by dismissing an . . . appeal on an issue they can later press again before a different panel”). Such an attempt by Tampa is more than plausible given the City's strident animus towards Appellees' counseling viewpoint. (See Plaintiffs–Appellees' Motion to Strike Reply Brief of Appellant and for Sanctions 14–15 (“The City's disdain for Appellees is made apparent not only by its feints described above, but also by its extreme comparisons of Appellees to flat-earthers and Westboro Baptists.”).) Thus, the Court should deny the City's motion to dismiss as an improper attempt to evade review by strategic manipulation of the appellate process.

4. Along with dismissal of the appeal, the City seeks cancelation of the oral argument scheduled for December 15, just twelve days from now. (City Mot. 6.) As shown above, there are at least three reasons by why the Court should not dismiss the appeal, and therefore should proceed to its conclusion. The City declined to request oral argument in its opening brief (City Br. iii), but Appellees requested it (Appellees' Br. i) and have begun preparatory work. Thus, the Court should only

cancel the oral argument if the Court issues a ruling on the merits of the case. Mere dismissal without any ruling on either preemption or the First Amendment is not warranted.

5. Given that the Court's *Otto* decision dooms the City's case on Appellees' First Amendment claims, but leaves unresolved their preemption claims, Appellees request this Court to proceed with oral argument on the preemption claims, as they involve a matter of exceptional importance.² If the Court decides not to hold oral argument, and not to affirm the district court's judgment on preemption grounds, then the Court should at a minimum affirm the district court's judgment on the alternative First Amendment grounds under this Court's decision in *Otto*.

² In addition to Tampa's ordinance at issue in this case, and the Boca Raton and Palm Beach County ordinances at issue in *Otto*, twenty other Florida counties and municipalities have enacted similar counseling ban ordinances: Alachua County (Code Ch. 120); Bay Harbor Islands (Code § 23-5.2); Boynton Beach (Code Art. XIII); Broward County (Code Art. IX); Delray Beach (Code § 133.02); El Portal (Code Ch. 5.5); Fort Lauderdale (Code Art. IX); Gainesville (Code Art. IV); Greenacres (Code § 8-74); Key West (Code § 42-18); Lake Worth (Code Art. VII); Miami Beach (Code Art. VII); Miami (Code § 37-13); North Bay Village (Code Ch. 137); Oakland Park (Code Art. VIII); Riviera Beach (Code § 12-26); Tallahassee (Code Art. III); Wellington (Code Art. V); West Palm Beach (Code Art. V); Wilton Manors (Code Art. IV).

CONCLUSION

For all of the foregoing reasons, the Court should deny the City’s motion to dismiss, and either proceed with the scheduled oral argument on Appellees’ preemption claims, or affirm the judgment below on either preemption grounds or the alternative First Amendment grounds under this Court’s decision in *Otto*.

Dated this December 3, 2020.

/s/ Roger K. Gannam
Mathew D. Staver (Fla. 0701092)
Horatio G. Mihet (Fla. 026581)
Roger K. Gannam (Fla. 240450)
Daniel J. Schmid (VA 84415)
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
E-mail: court@lc.org

Attorneys for Plaintiffs–Appellees

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

CERTIFICATE OF SERVICE

I hereby certify that, on this December 3, 2020, a copy of the foregoing was electronically filed through the Court’s ECF system, which will effect service on the following parties and counsel of record:

David E. Harvey
Ursula D. Richardson
City of Tampa - City Attorney’s Office
315 E. Kennedy Blvd., 5th Floor
Tampa, FL 33602
David.Harvey@tampagov.net
Ursula.Richardson@tampagov.net
*Attorneys for Defendant–Appellant,
City of Tampa, Florida*

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