

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

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, ) Civil Action No. 9:18-cv-80771-RLR  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
CITY OF BOCA RATON, FLORIDA, and )  
COUNTY OF PALM BEACH, FLORIDA, )  
 )  
Defendants. )

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**PLAINTIFFS’ MOTION TO LIFT STAY, ENTER PRELIMINARY INJUNCTION  
AND SET SCHEDULING CONFERENCE FOR MERITS LITIGATION**

**AND REQUEST FOR EXPEDITED CONSIDERATION**

Pursuant to this Court’s February 20, 2019 Order (dkt. 145) staying the case pending the resolution of Plaintiffs’ interlocutory appeal, Plaintiffs ROBERT W. OTTO, Ph.D., LMFT, individually and on behalf of his patients, and JULIE H. HAMILTON, individually and on behalf of her patients, hereby move this Court to lift the stay, enter a preliminary injunction consistent with the mandate of the Eleventh Circuit, and set a scheduling conference to establish discovery and dispositive motion deadlines for the merits litigation. In support, Plaintiffs show the Court as follows:

1) Following this Court’s denial of Plaintiffs’ Renewed Motion for Preliminary Injunction (dkt. 141), and Plaintiffs’ same-day Notice of an interlocutory appeal (dkt. 142), the Court entered an Order on February 20, 2019, staying this action pending the resolution of Plaintiffs’ appeal. (Dkt. 145). The Court indicated that “any party may move to lift the stay in this case.” (*Id.*)

2) On November 20, 2020, the Eleventh Circuit issued an opinion reversing this Court’s denial of a preliminary injunction. *See Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020). The Eleventh Circuit held, among other things, that the two ordinances challenged in this lawsuit “violate the First Amendment because they are content-based regulations of speech

that cannot survive strict scrutiny.” *Id.* at 859. The Court found that “the ordinances discriminate on the basis of content ... [and] [t]hey also discriminate on the basis of viewpoint,” and, as such, they are “an egregious form of content discrimination.” *Id.* at 864. The Eleventh Circuit also rejected this Court’s “proposed category of less protected speech, which [this Court] described as ‘professional speech.’” *Id.* at 866. And, the Eleventh Circuit rejected Defendants’ and this Court’s position that “evidence [of harm] is not necessary when the relevant professional organizations are united,” concluding that “[s]trict scrutiny cannot be satisfied by professional societies’ opposition to speech.” *Id.* at 869.

3) The Eleventh Circuit also held that the preliminary injunction requirement of irreparable harm is clearly met in this case, “[b]ecause the ordinances are an unconstitutional ‘direct penalization’ of protected speech, [and **their**] **continued enforcement, ‘for even minimal periods of time,’ constitutes a per se irreparable injury.**” *Id.* at 870 (emphasis added).

4) As a result of finding Defendants’ respective ordinances to be unconstitutional, the Eleventh Circuit reversed this Court’s denial of preliminary injunctive relief and “remand[ed] **for entry of a preliminary injunction consistent with this opinion.**” *Id.* at 872 (emphasis added).

5) Although this opinion was issued almost two years ago, it did not become effective until last Friday, July 29, 2022, when the Eleventh Circuit finally issued its mandate. (Dkt. 149). This is because Defendants filed a petition for en banc rehearing, which was not denied by the Eleventh Circuit until July 20, 2022. *See Otto v. City of Boca Raton, Fla.*, No. 19-10604, 2022 WL 2824907 (11th Cir. July 20, 2022).

6) Now that the Eleventh Circuit’s mandate has been issued, there remains no roadblock for this Court’s speedy entry of a preliminary injunction, as specifically directed by the Eleventh Circuit. As noted by the Eleventh Circuit, if Defendants’ unconstitutional ordinances are allowed to be enforced for “**even minimal periods of time**” – **that is even one additional day** – they will continue to cause Plaintiffs irreparable injury, per se. *Otto*, 981 F.3d at 870 (emphasis added). As the mandate has been on this Court’s docket already for six days, this Court should not allow Defendants to enforce their unconstitutional ordinances for a seventh day. Plaintiffs respectfully request that the Court enter a preliminary injunction in the following form, forthwith:

Consistent with the Eleventh Circuit's opinion in *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020), reh'g denied, No. 19-10604, 2022 WL 2824907 (11th Cir. July 20, 2022), Defendant City of Boca Raton, and its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them, are hereby enjoined from enforcing Ordinance 5407 pending the resolution of the merits of this action, and Defendant County of Palm Beach, Florida, and its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them, are hereby enjoined from enforcing Ordinance 2017-046 pending the resolution of the merits of this action.

7) The proposed injunction tracks the language of Fed. R. Civ. P. 65, and does no more than what the Eleventh Circuit has ordered. Because the Eleventh Circuit has specifically ordered that a preliminary injunction "consistent with this opinion" must be entered upon remand, this Court needs no further briefing or argument to enter the prescribed relief. Indeed, given the Eleventh Circuit's clear mandate, the entry of this relief is largely a ministerial act at this juncture, and should be issued expeditiously to avoid further irreparable harm.

8) Because Defendants have no chance of overcoming the constitutional infirmities in their ordinances identified by the Eleventh Circuit, there is no chance that Defendants will be "wrongfully enjoined or restrained," and therefore this Court should either waive the bond requirement of Fed. R. Civ. P. 65(c), or set a very low or nominal bond amount, not greater than \$100.

9) In addition to lifting the stay and entering a preliminary injunction, this Court should also set a scheduling conference to establish discovery and dispositive motion deadlines for the merits litigation, and the Court should direct the parties to meet and confer on such deadlines in advance of that scheduling conference.

10) Plaintiffs have requested a permanent injunction in their Complaint, as well as damages (dkt. 1), and they intend to expeditiously seek both in the merits stage of this litigation. Plaintiffs believe that, given the clear and binding pronouncements from the Eleventh Circuit, the merits litigation can be disposed of through summary judgment. And, in addition to the Eleventh Circuit's invalidation of Defendants' ordinances on First Amendment grounds, Plaintiffs note that this Court's sister district has invalidated a nearly identical ordinance in the City of Tampa on grounds of preemption under Florida law, because "Florida's substantive regulation of healthcare practices, modalities, and discipline is so pervasive that it occupies the entire field," and precludes localities from regulating the same space. *Vazzo v. City of Tampa*, 415 F. Supp. 3d 1087, 1107

(M.D. Fla. 2019). Therefore, Defendants' ordinances are doomed to fail on the merits as well, entitling Plaintiffs to permanent injunctive relief and damages. Plaintiffs respectfully request that a schedule be established to expeditiously bring this long-running case to its conclusion.

11) Prior to filing this motion, Plaintiffs' counsel attempted to confer with Defendants' counsel to determine if a streamlined resolution of this case on an agreed timetable may be possible in light of recent developments. As of the filing of this motion, Plaintiffs' email inquiries of July 30 and August 1 had not received a response from either Defendant's counsel. Plaintiffs will apprise the Court of any meet and confer sessions that may take place, and progress made (if any).

WHEREFORE, for good cause shown, Plaintiffs respectfully request that the Court: (1) lift the stay in this action; (2) enter a preliminary injunction consistent with the Eleventh Circuit's opinion, in the form proposed above; (3) set a scheduling conference to establish discovery and dispositive motion deadlines on Plaintiffs' remaining claims, including their claims for permanent injunctive relief and damages; (4) direct the parties to meet and confer in advance of the scheduling conference; and (5) provide such other and further relief as is just and proper. Because of the daily imposition of irreparable harm by Defendants' unconstitutional ordinances, Plaintiffs respectfully request the Court's expedited consideration of this motion.

DATED this August 4, 2022.

Respectfully submitted,

/s/ Horatio G. Mihet

Mathew D. Staver (Fla. 0701092)

Horatio G. Mihet (Fla. 026581)

Roger K. Gannam (Fla. 240450)

LIBERTY COUNSEL

P.O. Box 540774

Orlando, FL 32854

Phone: (407) 875-1776

E-mail: court@lc.org

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this August 4, 2022, 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/ Horatio G. Mihet  
Horatio G. Mihet  
*Attorney for Plaintiffs*