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' MOTION TO LIFT STAY AND ENTER SUMMARY AFFIRMANCE

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No. 19-14387

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

The Alliance for Therapeutic Choice and Scientific Integrity

Burr & Forman, LLP

Bursch, John. J.

Carlton Fields Jorden Burt, PA

City of Tampa

Clemons, J. Tyler

Crampton, Stephen M.

Dinielli, David C.

Equality Florida Institute, Inc.

Family Foundations Counseling, PLLC

Florida State Representative Byron Donalds

Florida State Representative Brett Hage

Florida State Representative Stan McClain

Florida State Representative Scott Plakon

Florida State Representative Spencer Roach

Florida State Representative Anthony Sabatini

Florida State Representative Clay Yarborough

Florida State Senator Ben Albritton

Florida State Senator Dennis Baxley

Florida State Senator Doug Broxson

Florida State Senator Kelli Stargel

Freedom of Conscience Defense Fund

Gannam, Roger K.

Harvey, David E.

Jonna, Paul M.

Jung, William F.

Liberty Counsel, Inc.

LiMandri, Charles S.

LiMandri & Jonna, LLP

Lindell Farson & Zebouni, P.A.

Lindell, J. Michael

McAlister, Mary E.

McCoy, Scott D.

Mihet, Horatio G.

Minter, Shannon P.

National Center for Lesbian Rights

Piedra, Daniel J.

Porter, Brian C.

Price, Max R.

Richardson, Ursula D.

Robbins, Dana Lee

Sansone, Amanda Arnold

Schandevel, Christopher P.

Schmid, Daniel J.

Soli Deo Gloria International, Inc.

Southern Poverty Law Center

Staver, Mathew D.

Stoll, Christopher

Trissell, Jeffrey M.

Vazzo, Robert L.

Walbolt, Sylvia H.

Williams, Robert V.

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

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Plaintiffs–Appellees

PLAINTIFFS-APPELLEES' MOTION TO LIFT STAY AND ENTER SUMMARY AFFIRMANCE

Plaintiffs–Appellees, ROBERT L. VAZZO, LMFT and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY, pursuant to Fed. R. App. P. 27, respectfully move the Court for an order lifting the stay in this appeal and entering a summary affirmance of the decision below, pursuant to the binding decision of this Court in *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020). In support, Appellees show the Court as follows:

1. This appeal involves statutory and constitutional challenges to Ordinance 2017-47 (the "Ordinance") enacted by Defendant-Appellant City of Tampa, Florida ("City") on April 6, 2017, prohibiting protected, voluntary speech between therapists and their minor patients in the area of sexual orientation change efforts. (Appellees' Br. at 1-10). The district court entered summary judgment in favor of Appellees on state law preemption grounds, finding that the Ordinance was "preempted by the comprehensive Florida regulatory scheme for healthcare regulation," and the City lacked authority to enact the Ordinance. (R-213 at 2). The City filed this appeal.

2. After this appeal was fully briefed and after oral argument had already been scheduled (but before oral argument was held), the Eleventh Circuit decided the appeal in *Otto et. al. v. City of Boca Raton, et. al*. (Case No. 19-10604), concluding that two local ordinances which are essentially identical to the Ordinance

at issue in this appeal "violate the First Amendment because they are content-based regulations of speech that cannot survive strict scrutiny." *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020).

3. The City agrees and concedes that the two ordinances invalidated in *Otto* "**are essentially identical** to the City ordinance at issue" in this appeal. (City Motion for Dismissal and Cancellation of Oral Argument, filed Nov. 25, 2020 (emphasis added)). Previously, the City erroneously contended that, rather than dictating the outcome of this appeal (that is, affirmance of the district court's decision), *Otto* renders this appeal "moot." (*Id.*)

4. Appellees, however, have demonstrated that this Court's decision in *Otto* renders the outcome of this appeal **inevitable**, but not **moot**. (Appellees' Resp. to City Motion for Dismissal, filed December 3, 2020).

5. On December 8, 2020, a three-judge motion panel of this Court agreed with Appellees, and rejected the City's position:

> Regardless of whatever other issues this matter may raise, this case is ultimately governed by our recent decision in *Otto v. City of Boca Raton*, No. 19- 10604, ___ F.3d ___, 2020 WL 6813994 (11th Cir. 2020). **And *Otto* requires us to affirm the district court's decision in this case**. Our prior-precedent rule requires us to follow the precedent of earlier panels unless and until the prior precedent is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc. *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc).

(Order on City Motion for Dismissal, entered on December 8, 2020, at 2 (emphasis added)).

6. In the same Order, however, this Court noted that the mandate in *Otto* had not yet issued (*id.*), because the losing parties there had filed a petition for rehearing en banc, and this Court thus decided to cancel oral argument and "**HOLD THIS MATTER IN ABEYANCE** pending the issuance of the mandate in *Otto*." (*Id*. (emphasis and capitalization in original)).

7. On July 20, 2022, this Court denied the petition for rehearing en banc in *Otto*. *See Otto v. City of Boca Raton, Fla.*, No. 19-10604, 2022 WL 2824907 (11th Cir. July 20, 2022). The mandate in *Otto* issued on July 29, 2022.

8. With the mandate in *Otto* now having been issued, this Court should lift the stay in this case and allow it to proceed to its conclusion forthwith.

9. Moreover, since the City has already conceded that the ordinances at issue in *Otto* "are essentially identical to the City ordinance at issue" in this appeal (paragraph 3, *supra*), and since this Court has already concluded that "*Otto* requires us to affirm the district court's decision in this case" (paragraph 5, *supra*), upon lifting the stay of this appeal this Court should enter a summary affirmance of the district court's decision below, on the First Amendment grounds decided in *Otto*.

10. Indeed, even though the district court below premised its grant of summary judgment against the Ordinance on state preemption grounds, in their

response brief Appellees urged this Court to affirm the district court's decision on First Amendment grounds as well, under the well-established principle that "this Court can affirm the district court's judgment invalidating Tampa's counseling ban ordinance on any basis supported by the record, even if different from the basis of the district court's decision." (Appellees' Br. at 57-58, citing *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1303 (11th Cir. 2007)).

11. There are, therefore, no roadblocks to this Court lifting the stay in this appeal and affirming the district court's decision based upon the grounds stated in *Otto*. Indeed, the City's admission that the Ordinance here is "essentially identical" to those in *Otto*, and the motions panel's prior determination that *Otto* "requires" affirmance in this appeal, together mean that there is nothing left for this Court to deliberate, and that affirmance can be ordered in summary fashion.

12. Alternatively, if the Court concludes that summary affirmance is not appropriate notwithstanding the decision of the prior motions panel, upon lifting the stay the Court should schedule the appeal for oral argument at the earliest possible time.

13. Prior to filing this motion, Appellees' counsel attempted to confer with counsel for the City to ascertain the City's position on the relief sought herein. Despite several requests over the span of two and one-half weeks, Appellees have not received the City's position as of the filing of this motion.

WHEREFORE, for good cause shown, Appellees respectfully request that the Court enter an order lifting the stay in this appeal, and entering a summary affirmance of the lower court's decision pursuant to the binding decision of this Court in *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020). Alternatively, if the Court declines to issue a summary affirmance, Appellees respectfully request that upon lifting the stay, the Court schedule this matter for oral argument at the earliest possible time.

Dated this August 8, 2022.

/s/ Horatio G. Mihet

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 1,050 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Plaintiffs–Appellees

CERTIFICATE OF SERVICE

I hereby certify that, on this August 8, 2022, 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:

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