No. 19-10604

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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,
Plaintiffs–Appellants
v.
CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA
Defendants–Appellees

On Appeal from the United States District Court
for the Southern District of Florida
In Case No. 9:18-cv-80771-RLR before the Honorable Robin L. Rosenberg

PLAINTIFFS–APPELLANTS' MOTION TO THE MERITS PANEL TO ENFORCE MANDATE

*****TIME SENSITIVE*****

*****RELIEF REQUESTED BY THURSDAY, AUGUST 18, 2022*****

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–Appellants

No. 19-10604

OTTO, *etc., et al.* v. CITY OF BOCA RATON, *etc., et al.*

PLAINTIFFS–APPELLANTS'
CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

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

Abbott, Daniel L.

American Association for Marriage and Family Therapy

American Psychological Association

Amunson, Jessica Ring

Carlton Fields Jorden Burt, P.A.

Chapuis, Emily L.

City of Boca Raton, Florida

Clemons, J. Tyler

Cole, Jamie A.

Dawson, James T.

Delery, Stuart F.

Dinielli, David C.

Dreier, Douglas C.

Dunlap, Aaron C.

Equality Florida Institute, Inc.,

Fahey, Rachel Marie

Flanigan, Anne R.

Florida Psychological Association

Gannam, Roger K.

Gibson, Dunn & Crutcher LLP

Gilfoyle, Nathalie F.P.

Hamilton, Julie H., Ph.D., LMFT

Hoch, Rand

Hvizd, Helene C.

Jenner & Block LLP

Liberty Counsel, Inc.

McCoy, Scott D.

Mihet, Horatio G.

Minter, Shannon P.

National Association of Social Workers

National Association of Social Workers Florida Chapter

National Center for Lesbian Rights

Otttaviano, Deanne M.

Otto, Robert W., Ph.D. LMFT

Palm Beach County, Florida

Palm Beach County Human Rights Council

Phan, Kim

Reinhart, Hon. Bruce E.

Rosenberg, Hon. Robin L.

SDG Counseling, LLC

Southern Poverty Law Center

Staver, Mathew D.

Stoll, Christopher F.

Sutton, Stacey K.

The Trevor Project

Walbolt, Sylvia H.

Weiss Serota Helfman Cole & Bierman, P.L.

Yasko, Jennifer A.

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–Appellants

PLAINTIFFS–APPELLANTS' TIME SENSITIVE
MOTION TO THE MERITS PANEL[1] TO ENFORCE MANDATE

Plaintiffs–Appellants, ROBERT W. OTTO, Ph.D. LMFT and JULIE H. HAMILTON, Ph.D. LMFT (collectively, "Counselors"), pursuant to Fed. R. App. P. 27, 11th Cir. R. 27-1, and the Court's inherent authority to enforce its mandates, respectfully request the merits panel in this appeal to issue a further order necessary to enforce its mandate, and either to immediately enjoin the unconstitutional ordinances at issue in this appeal, or to direct the district court to enjoin them within twenty-four hours of this Court's order. The Court's clear mandate directing the district court to preliminarily enjoin the unconstitutional ordinances has been on the district court's docket for over two weeks. Even though this Court has already concluded that every day the unconstitutional ordinances remain in effect works a new, irreparable harm on Counselors, and even though this Court's clear mandate left nothing for the district court to examine or do besides entering a preliminary injunction consistent with this Court's decision, the district court has declined to enter the immediate relief mandated by the Court, and has indicated that it does not

[1] Counselors respectfully request that this motion be forwarded to, and decided by, the merits panel, pursuant to "[t]he power **of an original panel** to grant relief enforcing the terms of its earlier mandate [which] is clearly established . . . with respect to cases that have been remanded to a District Court for further proceedings." *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984) (emphasis added). *See also*, paragraph 34, *infra*.

intend to provide that relief on the prompt and expedited basis necessary to protect Counselors' fundamental rights from being further infringed each day the ordinances are not enjoined. Therefore, Counselors have no choice but to appeal to this Court for further, immediate relief to enforce its mandate.

A. This Court's Unambiguous Mandate Imposed a Clear Duty Upon the District Court to Enter a Preliminary Injunction Swiftly, to Prevent the Further Imposition of Daily Irreparable Harm Upon Counselors.

1. This appeal arises from the district court's denial of Counselors' motion for preliminary injunction in a First Amendment challenge to ordinances passed by Defendants–Appellees, City of Boca Raton ("City"), and County of Palm Beach ("County") (collectively, the "Localities"), which ban Counselors' speech-only, voluntary counseling for minors who desire help with reducing or eliminating unwanted same-sex attractions or gender confusion.

2. On November 20, 2020, this Court issued an opinion reversing the district court's denial of a preliminary injunction. *See Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020). The Court held, among other things, that the two ordinances facially "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.

3. In the same opinion, this Court also held that the requirement of irreparable harm is clearly met, "[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. This Court reversed the district 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 the Court's opinion was issued almost two years ago, it did not become effective until July 29, 2022, after the Court issued its mandate following its denial of the Localities' petition for en banc rehearing on July 20, 2022. *See Otto v. City of Boca Raton, Fla.*, No. 19-10604, 2022 WL 2824907 (11th Cir. July 20, 2022).

6. As a result, the unconstitutional ordinances that work daily irreparable harm upon Counselors have remained effective for **over three years** since Counselors first requested a preliminary injunction (P.I. Mot., dkt. 3, June 14, 2018), and for **twenty-one months** after this Court found that they were facially unconstitutional.

7. The district court was notified of this Court's mandate on July 29, 2022, the same day it was issued. (Dkt. 149). At that time, the district court had a clear

duty to enter a preliminary injunction "consistent with this [Court's] opinion," *Otto*, 981 F.3d at 872, without delay, and without further "review" or "examin[ation]." *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985) ("A trial court, upon receiving the mandate of an appellate court, **may not alter, amend, or examine the mandate**, or give any further relief or review, but **must enter an order in strict compliance with the mandate**." (emphasis added)).

8. Moreover, because this Court held that the "continued enforcement [of the unconstitutional ordinances] **for even minimal periods of time**, constitutes a **per se irreparable injury**," *Otto*, 981 F.3d at 870 (emphasis added), the district court also had an obligation to **swiftly** enter the preliminary injunction mandated by this Court, as expeditiously as possible to avoid further, daily irreparable harm. *See Piambino*, 757 F.2d at 1119 ("The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion, and the circumstances it embraces." (cleaned up)).

B. The District Court's Initial Delay in Entering the Preliminary Injunction, and Counselors' Follow-up Motion to Request Expedited Compliance With This Court's Mandate.

9. Notwithstanding its obligation to strictly and swiftly comply with this Court's mandate, as of the filing of this motion—**seventeen days** after the mandate was entered on the district court's docket—the district court has not complied.

10. On August 4, 2022, six days after this Court's mandate was issued, when the district court had not yet undertaken the simple, ministerial act of entering a preliminary injunction consistent with this Court's decision, Counselors filed a Motion to Lift Stay and Enter Preliminary Injunction (dkt. 150, attached hereto as **Exhibit A**). Counselors respectfully requested expedited consideration, noting this Court's clear mandate and its conclusions regarding daily, irreparable harm to Counselors. (*Id*. at ¶¶ 3–4 and p. 4.)

11. To ease the already minimal administrative burden on the district court in entering the straightforward injunction mandated by this Court, Counselors proposed a "plain vanilla" injunction to the district court, which merely and uncontroversially invokes this Court's decision and parrots the language of Fed. R. Civ. P. 65:

> 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.

(*Id*. at 2–3, ¶ 6).

C. The Localities' Attempt to Avoid the Consequences of This Court's Decision Through Sham "Emergencies" and Red-Herring, Patently Meritless "Mootness" Arguments.

12. Thereafter, the Localities embarked on a calculated course of political and legal maneuvering, in an "attempt[] to avoid the consequences of [this Court's] decision." *Piambino*, 757 F.2d at 1118.

13. The City argued that Counselors' claim for injunctive relief was suddenly "moot," because the City had declared a "public emergency" enabling it to pass an "emergency" repeal ordinance on less than 24-hours' notice. (*See* City's Suggestion of Mootness, dkt. 151; City's Reply Regarding Suggestion of Mootness, dkt. 153; City's Response to Counselors' Motion to Lift Stay and Enter Preliminary Injunction, dkt. 154; all attached hereto as composite **Exhibit B**).

14. Counselors pointed out that, under the City's own charter, the so-called "emergency" repeal ordinance was merely **temporary**, because it had **an automatic sunset of sixty days**, after which it would itself be **automatically repealed**, thereby reviving the City's unconstitutional ordinance. To permanently repeal its unconstitutional ordinance, the City would be required to introduce another ordinance in the regular legislative channels, provide multiple readings, allow for public comment, and ultimately take a vote of the City Council. And, to give any credence to the City's mootness argument, the City and the Court would be required to speculate how the City's independently elected representatives will ultimately

vote on such a future repeal ordinance. (*See* Counselors' Response to City's Suggestion of Mootness, dkt. 152; Counselors' First Reply in Support of Motion to Lift Stay and Enter Preliminary Injunction, dkt. 155; both attached hereto as composite **Exhibit C**).

15. Importantly, the City has **admitted** that its "emergency ordinance lasts sixty days," and that it becomes permanent only if future legislative action is adopted, **which is not guaranteed**. (City Response to Motion to Lift Stay and Enter Injunction, Exhibit B, dkt. 154, ¶¶ 3, 5) (discussing possible permanent future ordinance, "**if** adopted." (emphasis added)).

16. The County, on the other hand, did not bother with a declaration of a "public emergency" and an "emergency" repeal ordinance. Instead, the County entreated the district court to violate this Court's injunction mandate based merely upon its lawyers' unverified promise that the County would vote on a repeal ordinance on August 23, 2022. In so many words, the County asked the Court to speculate how the public comment to the proposed repeal ordinance would play out, and how the County's elected representatives will ultimately vote. The County anticipated a predetermined outcome at the August 23, 2022 vote, and that the repeal ordinance would become effective **on August 29, 2022—a full month after this Court's mandate was issued**. (*See* County's Response to Counselors' Motion to Lift Stay and Enter Preliminary Injunction, dkt. 156, attached hereto as **Exhibit D**).

17. Counselors once again pointed out that promises of **future** legislative action cannot **presently** moot injunctive relief, and that the district court could not wait several more weeks to see if the County's speculation about future political events would prove accurate, because the County's unconstitutional ordinance remained on the books and was imposing daily irreparable harm upon Counselors. (*See* Counselors' Second Reply in Support of Motion to Lift Stay and Enter Preliminary Injunction, dkt. 157, attached hereto as **Exhibit E**).

18. Indeed, the Localities' mootness arguments are red herrings, patently without merit, and should not have served to delay the district court's timely compliance with this Court's mandate. It has never been the law that promises of **future** legislative action are sufficient to **presently** moot injunctive relief. It is therefore no surprise that neither the City nor the County could provide **a single authority** to the district court to support their arguments that their unverified statements and speculation about how some future votes might play out can overcome the "**formidable burden** of showing that it is **absolutely clear** the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike*, 568 U.S. 85, 91 (2013) (emphasis added). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) ("voluntary cessation of a challenged practice does not moot a case unless subsequent events

make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur").

19. Instead, all authority is to the contrary. *See, e.g.*, *Desert Outdoor Advert. v. City of Oakland*, No. C 03-1078 MJJ, 2005 WL 147582, at *2 (N.D. Cal. Jan. 20, 2005) ("emergency" "temporary" ordinance repealing unconstitutional ordinance did not moot claim for injunctive relief against local government because "Oakland has provided no evidence that it will not re-enact the prior legislation **when the temporary term of the emergency ordinance expires**." (emphasis added)); *Landon v. City of Flint*, No. 16-11061, 2017 WL 345854, at *1–2 (E.D. Mich. Jan. 24, 2017) (emergency ordinance did not moot preliminary injunction because, *inter alia*, precisely like the City's "emergency" ordinance here, the emergency ordinance enacted by the City of Flint "according to its terms and the Flint City Charter, **expires sixty-one days after its enactment**, unless reenacted." (emphasis added)); *Bayou Fleet, Inc. v. Alexander*, No. Civ.A. 97–2205, 1997 WL 625492, at *1 (E.D. La. Oct. 7, 1997) ("The council adopted this Emergency Ordinance on October 6, 1997, to be effective immediately. Because the ordinance at issue is merely suspended and not revoked, the court finds that Bayou Fleet's challenge to the ordinance is not moot."); *S. Pac. Transp. Co. v. St. Charles Par. Police Jury*, 569 F. Supp. 1174, 1178 (E.D. La. 1983) ("Assuming arguendo that Emergency Ordinance 81–4–1 was validly enacted, I find that this fact does not render this case moot.")

20. Moreover, the City's declaration of a "public emergency," so that it could bypass the normal legislative channels and enact an "emergency" repeal ordinance before the district court could enter the preliminary injunction mandated by this Court, is ridiculous on its face, and a transparent sham to defeat jurisdiction. Having been content to run roughshod over Counselors' protected speech, and to outlaw their counseling practices **for the last five years**, the City now expects the district court, and this Court, to believe that—only when suddenly faced with an imminent injunction—the City now deems that "preventing the chilling of protected speech is an '**emergency affecting life, health, property, or the public peace**,' as described in Section 3.14 of the City Charter." (City's "Emergency" Repeal Ordinance, Exhibit B, dkt. 151-1 at 2, last "WHEREAS" (emphasis added)). As the old adage goes, "Give me a break!"

21. The very language of the "emergency" repeal ordinance betrays the City's true motive and intent. In it, the City declares its disagreement with this Court's decision invalidating the City's unconstitutional ordinance. (*Id*. at 1, last "WHEREAS" ("**the City disagrees with the [Eleventh Circuit's] decision**" (emphasis added)). And, in the same breath where it dutifully checks the obligatory "mootness" box with lip service to disclaiming any intention to re-enact its unconstitutional ordinance, the City actually makes clear its intent to reenact its unconstitutional ordinance just as soon as its lawyers find the slightest legal opening.

(*Id*. at 2, Section 3 ("The City Council … has no intention or reenacting [the unconstitutional ordinance] **unless** there is a change in law that would make adoption of such regulation lawful." (emphasis added)). In the meantime, the City is content to work on enacting a "resolution" further condemning and demeaning Counselors and their protected speech, with the obvious intent and purpose to chill that protected speech, and with at least 4 of 5 Council members supporting such a resolution (*see* paragraph 23(a)–(f), *infra*), even as the City now proclaims that the "chilling of protected speech" is a "public emergency" of the highest order. Quite clearly, the City has had no "voluntary" change of heart, and the only "emergency" it faces is mooting the injunctive relief that this Court has mandated.

22. Notably, the City's use of an "emergency" legislative sham to bypass regular legislative hurdles and enact a repeal ordinance with immediate effect for the purpose of defeating jurisdiction over an imminent injunction is not even original. Other localities have tried it, and failed. In *S. Pac. Transp. Co.*, St. Charles Parish attempted to defeat a federal court's jurisdiction over an imminent injunction by enacting an "emergency" ordinance immediately repealing the challenged ordinance. 569 F. Supp. at 1178. There, as here, the city charter limited "emergency" legislation to true emergencies, "affecting life, health, property or public safety." *Id*. The district court saw right through the jurisdictional sham, and held that repeal of an ordinance that had been in existence for several years—

> can hardly be interpreted as a public emergency. No sudden or unexpected event took place which created a temporarily dangerous condition which necessitated immediate action. The Parish Council cannot defeat the provisions of its charter requiring notice and a public hearing by declaring an emergency where none exists.

Id. Therefore, the court held that the attempted "emergency" repeal was ineffective to defeat its jurisdiction over injunctive relief. *Id*. The same outcome should have obtained here from the district court, and should obtain from this Court. The City's jurisdictional sham provides no just reason for delaying the issuance of injunctive relief, and the continued imposition of daily constitutional harm upon Counselors.

23. Beyond the plain language of the "emergency" repeal ordinance, the following six short clips from the thirty-minute videotaped "emergency" City Council meeting also plainly reveal that the City is merely trying to defeat jurisdiction with its "emergency" maneuvers and mootness arguments:[2]

a) **09:23-10:45**, City Attorney Diana Grub Frieser indicates that each City Council member received a communication from Rand Hoch, the leader of the Palm Beach County Human Rights Council, who was the "primary local advocate" for the passage of the City's ordinance in 2017, in which Mr. Hoch advised and

[2] The official video of the "emergency" City council meeting on the adoption of the "emergency" repeal ordinance is available on the City Council's website at https://bocaraton.granicus.com/player/clip/2331 (last visited August 14, 2022).

recommended to the Council to repeal the ordinance and not pursue an appeal, not because the ordinance is unconstitutional, but strategically so as not to jeopardize counseling bans in other jurisdictions with an adverse ruling from the Supreme Court, and expressly to preserve the City's ability to "**reassess**" its counseling ban with "changes and other developments" "over time."

b) **18:53-19:50**, City Council Member Monica Mayotte, one of the five voters on the City Council, states that she "understand[s] the reasoning why we have to pass this emergency ordinance, it doesn't make me happy, but I understand that **we don't want to threaten lawful conversion therapy laws across the state or across the country** by appealing this to the Supreme Court," and she proposes that the unconstitutional ordinance be replaced with a City Council resolution "to **admonish** conversion therapy in our City . . . that **we support the banning**, we don't agree with conversion therapy here in this City, so I would really like to see us move forward with a resolution when the time is appropriate."

c) **19:50-20:13**, City Attorney Diana Grub Frieser assures Council Member Mayotte that, if the Council votes to approve the

"emergency" repeal ordinance, then, when the permanent repeal ordinance will be considered at a future date, "I will bring back the resolution that declares from a policy standpoint" that the City condemns Counselors' protected speech.

d) **20:14-21:15**, City Council Member Andrea O'Rourke, the second of five voters on the City Council, indicates she fully supports a resolution condemning Counselors' protected speech, because "it's the least we can do," and that she is opposed to Counselors' protected speech but she will vote in favor of the repeal ordinance because she "want[s] to comply" with Mr. Hoch's request to repeal the ordinance "because they feel that they won't have success at the higher level." Council Member O'Rourke ends by reiterating that the repeal is "a sad thing to have to approve," but she "would support a resolution saying that **we don't abide, we would not want to abide by this** in the City of Boca Raton."

e) **21:15-21:40**, City Council Member Yvette Drucker, the third of five voters on the City Council, indicates that she also is "100% super not happy about this, but I understand why we are doing it,

and I would agree on a resolution" to condemn Counselors' protected speech.

f) **21:40-22:55**, City Mayor Scott Singer, the fourth of five votes on the City Council, indicated that "our policy position is clear," boasted that 2 out of 4 federal judges that heard this matter (presumably the district judge and the dissenting judge on the Eleventh Circuit's panel) agreed with the City's ban on Counselors' protected speech, and indicated that he supports the repeal "in light of the information shared and **the impact on other jurisdictions**."

D. The District Court's Continued Delay in Entering a Preliminary Injunction, and its Indication That It Will Not Issue Injunctive Relief on the Prompt and Expedited Basis Necessary to Protect Counselors' Fundamental Rights From Being Further Infringed Each Day the Ordinances Are Not Enjoined.

24. By the time briefing on Counselors' Motion to Lift Stay and Enter Preliminary Injunction was complete, on August 11, 2022, this Court's clear mandate had been on the district court's docket for **thirteen days**. Frustrated and stymied in their efforts to immediately obtain the preliminary injunction mandated by this Court, and to forestall further, daily irreparable harm, in their last memorandum to the district court Counselors respectfully renewed their request for immediate injunctive relief and advised the district court that, if they were unable to

secure that relief **seventeen days** after it was mandated by the Eleventh Circuit, they would need to seek assistance from this Court:

> Plaintiffs respectfully renew their request for immediate injunctive relief, consistent with the Eleventh Circuit's mandate, and in the form proposed by Plaintiffs. (Dkt. 150 at 3). If this Court declines or delays this relief beyond 5 p.m. on August 15, 2022, Plaintiffs will have no choice but the treat the Court's delay as a tantamount denial, and to seek emergency relief from the Eleventh Circuit.

(Ex. E, dkt. 157 at 2).

25. This time, Counselors drew the district court's ire, but not the injunctive relief mandated by this Court. The district court chastised Counselors for being inpatient, and indicated that it would not issue the injunctive relief, if at all, on an expedited basis, but would instead address this Court's mandate "as soon as it is able to do so," but possibly only after a "hearing," which the district court had not yet decided whether and when it will hold. The entirety of the district court's paperless order reads as follows:

> PAPERLESS ORDER on the Plaintiffs' Second Reply at docket entry 157, in connection with the Plaintiffs' Motion to Lift Stay at docket entry 150, filed on August 4, 2022. In the Second Reply, the Plaintiffs represent to this Court that, if it "declines or delays [the entry of a preliminary injunction] beyond 5 p.m. on August 15, 2022, Plaintiffs will have no choice but to treat the Court's delay as tantamount to denial, and to seek emergency relief from the Eleventh Circuit." The Court's "delay" is not tantamount to denial, as the Court has neither delayed in its resolution of the pending motion nor denied the pending motion. As for denial, the Court has yet to enter a decision. As to delay, the motion has, as of the time of entry of this order, been ripe for but a few hours. The Court will rule on the motion as soon as its resources permit it to do so. The Eleventh Circuit's mandate to this Court is for it

> to enter a preliminary injunction "consistent with this opinion." The Eleventh Circuit's mandate is not for the Court to enter a preliminary injunction as unilaterally drafted by the Plaintiffs. The Court will carefully consider the briefing in connection with the pending motion and, as soon as it is able to do so, enter a ruling on the motion. The Court has not yet decided whether it will set a hearing on the motion and, if so, when the hearing will be held. Signed by Judge Robin L. Rosenberg (bkd) (Entered: 08/11/2022)

(Dkt. 158).

26. Respectfully, Counselors submit that the district court's response is insufficient, and that this Court's corrective intervention is once again warranted, for three reasons:

27. **First**, this Court's mandate was "ripe" and clear when it was entered on the district court's docket on July 29, 2022, seventeen days ago. Given this Court's unambiguous instruction that a preliminary injunction should issue, and its equally clear holding that delaying injunctive relief "for even minimal periods of time, constitutes a per se irreparable injury," *Otto*, 981 F.3d at 870, Counselors should have never needed to file another motion to request the district court to do what this Court had already mandated. In further delaying injunctive relief, the district court's reliance on the recent "ripeness" of Counselors' motion for the preliminary injunction mandated by this Court is improper, because this Court's mandate is "ripe," and has been "ripe," all along.

28. And, respectfully, Counselors are not being inpatient. They have waited patiently for **over three years** since Counselors first requested a preliminary

injunction from the district court (P.I. Mot., dkt. 3, June 14, 2018), and for **twenty-one months** after this Court held that the ordinances are facially unconstitutional, and now for another **seventeen days** since this Court's clear mandate was issued. Counselors believe that this Court meant what it said regarding the daily irreparable harm inflicted by facially unconstitutional ordinances that egregiously discriminate on the basis of both content and viewpoint. Counselors have done all that they could to convey the urgency of this matter to the district court, and have nowhere else to turn but back to this Court.

29. Counselors respectfully submit that the district court's stance—that the court will get to the mandate whenever the court can get to it—is not acceptable, in light of how much time has already elapsed, the daily irreparable harm to Counselors, and especially in light of how little time it would take to simply enter the injunction already mandated by this Court. Indeed, Counselors respectfully submit that the district court could have complied with this Court's clear mandate in less time than it took to enter the order indicating that such compliance would not be promptly forthcoming. This Court should not allow Counselors' fundamental rights to be violated for another day.

30. **Second**, the district court's acerbic dismissal of "the preliminary injunction as unilaterally drafted by the Plaintiffs" because of its acknowledged need "to enter a preliminary injunction consistent with [this Court's] opinion" (dkt. 158),

is puzzling. Counselors should have never needed to "unilaterally" draft an injunction, because this Court's mandate was clear on its own. But, when no action was forthcoming from the district court, Counselors proposed a very basic and non-controversial preliminary injunction that merely incorporates this Court's decision and the language of Fed. R. Civ. P. 65. (*See* paragraph 11, *supra*). Counselors respectfully submit that their "unilaterally drafted" proposed injunction, and the injunction "consistent with [this Court's] opinion" that the district court apparently acknowledges must be entered (dkt. 158), are one and the same thing, and there is no just cause for further delay.

31. **Third**, and finally, there is no need for any further "hearing," nor for allowing additional days and additional irreparable harm to accumulate until the district court determines whether and when to schedule such a hearing. As mentioned above, "[a] trial court, upon receiving the mandate of an appellate court, **may not** alter, amend, or **examine the mandate**, or give any further relief **or review**, but **must enter an order in strict compliance with the mandate**." *Piambino*, 757 F.2d at 1119 (emphasis added).

32. Even if there were a need for a further hearing, the district court could and should have entered an immediate preliminary injunction as mandated by this Court, to forestall the imposition of further, daily irreparable harm, and **then** it could have scheduled a hearing to determine whether the continuance of such preliminary

injunctive relief was warranted. In this way, the district court could have shown fidelity to this Court's clear mandate and concern for the daily irreparable harm being inflicted upon Counselors by the unconstitutional ordinances, while still satisfying any need for further deliberation.

E. Waiting on Further Action From the District Court is Futile.

33. Although Counselors indicated to the district court that they would wait until 5 p.m. on Monday, August 15, 2022, to seek relief from this Court (*see* paragraph 24, *supra*), the district court has since made it clear that it will not comply with this Court's mandate by that time, nor do so on an expedited basis commensurate with the daily irreparable harm being imposed upon Counselors. (*See* paragraph 25, *supra*). Indeed, the district court has not even decided yet whether it will hold a hearing, and when that hearing might take place. (*Id*.) Accordingly, it would have been futile for Counselors to wait any longer to seek this Court's assistance in the enforcement of its mandate, and it is futile for this Court to wait to provide that relief.

F. The Merits Panel Has Authority to Issue Further Orders to Enforce Its Mandate, or, Alternatively, to Issue Mandamus Relief.

34. "The power of an original panel to grant relief enforcing the terms of its earlier mandate is clearly established . . . with respect to cases that have been remanded to a District Court for further proceedings." *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984). This Court

entertains, and, where appropriate, grants motions to enforce its mandates. *See e.g.*, *Ballard v. Comm'r*, No. 01-17249, 2006 WL 4386510, at *1 (11th Cir. July 10, 2006) (granting, in part, "motion to enforce this court's mandate," and providing instructions to district court on actions needed to "expedite this matter in every way possible"); *Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238, 1240 (11th Cir. 1997) (noting that Eleventh Circuit in earlier appeal had considered, and denied, "motions to enforce the mandate from the previous appeal"); *United Airlines, Inc. v. U.S. Bank N.A.*, 409 F.3d 812, 813 (7th Cir. 2005) ("Disagreement with [the] substance [of an appellate mandate] . . . does not license defiance by a litigant or an inferior court," and "[i]naction [in implementing a mandate], for which the district judge has not offered any explanation, is unjustifiable") (treating "Motion to Enforce Opinion" as "a request for mandamus to enforce our mandate" and granting request).

35. Alternatively, if this Court concludes that the proper remedy for Counselors is a writ of mandamus, Counselors respectfully request that the Court construe and treat this motion as a petition for a writ of mandamus, and provide via mandamus the same relief. This Court has inherent authority to consider mandamus relief regardless of the form in which it is sought. *See e.g.*, *Piambino*, 757 F.2d at 1115 n.2 ("We treat Sylva's appeal as a petition for a writ of mandamus pursuant to 28 U.S.C. § 1651 (1982)."). As shown herein, Counselors have no other adequate

remedy available to promptly secure the relief already mandated by this Court, to avoid the daily imposition of ongoing irreparable harm. (*See* 11th Cir. R. 21-1(a)).

CONCLUSION AND TIME-SENSITIVE REQUEST FOR RELIEF

36. For the foregoing reasons, Counselors respectfully request that this Court grant this motion, and either immediately enjoin the unconstitutional ordinances at issue in this appeal, or direct the district court to enjoin them within twenty-four hours after this Court's order.

37. Counselors further respectfully request that the Court treat this motion as "time sensitive" pursuant to 11th Cir. R. 27-1(b)(1), and provide the relief requested by **Thursday, August 18, 2022**. By that time, this Court's mandate will have been sitting on the district court's docket for twenty days. Each one of those days has imposed new and additional irreparable harms upon Counselors, who have now waited over three years to obtain injunctive relief. This Court should not countenance another day of injury.

Dated this August 15, 2022.

/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–Appellants

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 5,139 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–Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this August 15, 2022, a copy of the foregoing motion was electronically filed through the Court's ECF system, which will effect service on the following counsel and parties of record:

Attorneys for Defendant–Appellee
City of Boca Raton, Florida

Jamie A. Cole
jcole@wsh-law.com
Daniel L. Abbott
dabbott@wsh-law.com
Anne R. Flanigan
aflanigan@wsh-law.com
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
200 East Broward Boulevard
Suite 1900
Fort Lauderdale, FL 33301

Attorney for Defendant–Appellee
Palm Beach County, Florida

Helene C. Hvizd
hhvizd@pbcgov.org
Senior Assistant County Attorney
Palm Beach County Attorney's Office
301 North Olive Avenue, Suite 601
West Palm Beach, FL 33401

Additionally, a Notice of Filing of this Motion, attaching this motion as an exhibit, is being concurrently filed on the district court's docket via the district court's ECF system.

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

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

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-CV-80771-ROSENBERG/REINHART

ROBERT W. OTTO and JULIE H. HAMILTON,

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANT, CITY OF BOCA RATON'S SUGGESTION OF MOOTNESS

Defendant, City of Boca Raton ("City"), files this Suggestion of Mootness as to the injunctive and declaratory relief sought against the City and states:

OVERVIEW

Plaintiffs, Robert W. Otto and Julie H. Hamilton ("Plaintiffs"), initiated this action primarily seeking[1] to enjoin the City's enforcement of Ordinance No. 5407, which prohibited conversion therapy on minors within the City limits ("Challenged Ordinance").[2]

Following an evidentiary hearing on Plaintiffs' motion for preliminary injunction [ECF No. 8], the Court denied said motion. ECF No. 141. Plaintiffs appealed, and the Eleventh Circuit reversed the order denying the preliminary injunction.[3] The City (as well as the County) moved for rehearing en banc, resulting in the withholding of the Eleventh Circuit's mandate. The Eleventh Circuit ultimately denied the request for rehearing en banc on July 20, 2022. On July

[1] The Complaint also seeks declaratory relief, as well as damages, all under the U.S. Constitution, the Florida Constitutional and various statutes. ECF No. 1.

[2] Plaintiffs also sued defendant, County of Palm Beach ("County"), to enjoin the enforcement of a similar (but not identical) ordinance, and for other relief.

29, 2022, the Eleventh Circuit issued its mandate to this Court with instructions to this Court to enter a preliminary injunction enjoining enforcement of the Challenged Ordinance consistent with its opinion. ECF No. 149.

However, on August 5, 2022, the City Council passed an Emergency Ordinance ("Emergency Ordinance"), which repealed the Challenged Ordinance[4]. A copy of the Emergency Ordinance is attached hereto as Exhibit "A." The City submits that Plaintiffs' request for injunctive relief is now moot, and no injunction is necessary or should be entered enjoining the enforcement of the now-repealed Challenged Ordinance.[5]

ARGUMENT

PLAINTIFF'S DEMAND FOR PRELIMINARY AND PREMANENT INJUNCTIVE RELIEF AGAINST THE CITY IS MOOT BECAUSE THE CITY HAS REPEALED THE CHALLENGED ORDINANCE.

"[T]he Supreme Court has held that the repeal of or amendment to challenged legislation rendered moot a plaintiff's request for injunctive relief." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474 (1990) (holding that a Commerce Clause-based challenge to Florida banking statutes was rendered moot by amendments to the law); *Massachusetts v. Oakes*, 491 U.S. 576, 582–83 (1989) (holding that an overbreadth challenge to a child pornography law was rendered moot by amendment to the statute); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (*per curiam*) (holding that the challenge to a university regulation was moot because the regulation had been

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[3] The Court stayed the case during the pendency of the interlocutory appeal. ECF No. 145.

[4] The Challenged Ordinance, Ordinance No. 5407, was codified into Chapter 9, Article VI of the City Code, which was repealed by the Emergency Ordinance.

[5] On August 4, 2022, Plaintiffs filed "Plaintiffs' Motion to Life Stay, Enter Preliminary Injunction And Set Scheduling Conference For Merits Litigation And Request For Expedited Consideration." The City will be filing a separate response thereto.

substantially amended); *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) (holding moot a constitutional challenge to a state statute governing the involuntary commitment of mentally ill minors, because the law had been replaced with a different statute); *Diffenderfer v. Cent. Baptist Church, Inc.*, 404 U.S. 412, 415 (1972) (holding moot a challenge to a Florida tax exemption for church property when the law had been repealed)). Government actors, moreover "carry a lesser burden than others when they have unambiguously terminated the challenged policy." *Rich v. Sec., Fla. Dep't. of Corr.*, 716 F.3d 525, 531 (11th Cir. 2013). Indeed, "governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities. *Coral Springs St. Sys., Inc.*, 371 F.3d at 1328-29.

The well-settled law recognizes only a limited exception to the mootness of a challenge to a repealed law: if there is a substantial likelihood that the challenged statutory language will be reenacted." *Id.* at 1329. No such substantial likelihood exists here. There is no evidence that the Challenged Ordinance, or any challenged aspect thereof, will be reenacted in the future. The repealing Emergency Ordinance specifically seeks "to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy)," thus, requiring immediate repeal of the Challenged Ordinance. Exh. A. In addition, the City Council explicitly found that "based upon the decision of the Eleventh Circuit, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful." *Id*. at Section 3.

Indeed, since enactment on October 10, 2017, the Challenged Ordinance was never enforced against Plaintiffs (or any other practitioner of conversion therapy in the City).

Plaintiffs, moreover, cannot meet the requisite elements for an injunction (i.e., a showing of irreparable harm), as the conduct at issue is no longer prohibited. There is simply no law in place the enforcement of which would be enjoined. Similarly, there is no need for a declaration of rights under a law that is no longer in effect. Accordingly, Plaintiffs' demand for injunctive and declaratory relief is now moot.

WHEREFORE, Defendant, City of Boca Raton, notifies this Court of the mootness of Plaintiffs' request for injunctive and declaratory relief and respectfully requests that the Court enter an order reflecting same and that the Court not enter unnecessary injunctive relief, as well as any further relief the Court deems just and proper.

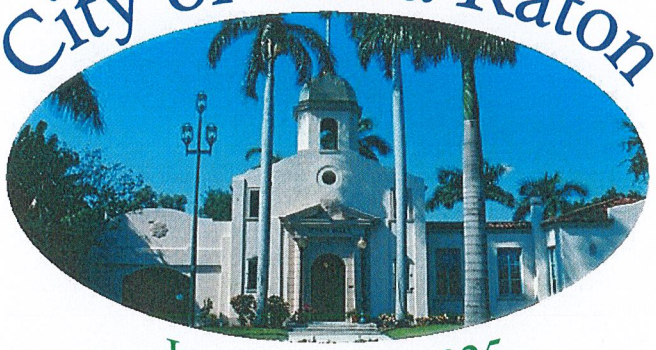
Dated: August 5, 2022

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/ Anne R. Flanigan*
JAMIE A. COLE
Florida Bar No. 767573
Primary email: jcole@wsh-law.com
Secondary email: msarraff@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

City of Boca Raton



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ORDINANCE

5625

AN EMERGENCY ORDINANCE OF THE CITY OF BOCA RATON REPEALING CHAPTER 9, ARTICLE VI, "PROHIBITION OF CONVERSION THERAPY ON MINORS," CODE OF ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEALER; PROVIDING AN EFFECTIVE DATE

WHEREAS, this emergency ordinance is adopted pursuant to Section 3.14 of the City Charter; and

WHEREAS, the Eleventh Circuit Court of Appeals, in the case of *Otto, et al. vs. City of Boca Raton and County of Palm Beach, Florida,* has found Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," of the City's Code of Ordinances (the "Conversion Therapy Prohibition") to be an unconstitutional restriction on speech in violation of the First Amendment to the United States Constitution; and

WHEREAS, the City has analyzed the decision of the Eleventh Circuit, and although the City disagrees with the decision, the City respects the judicial authority of the Eleventh Circuit and accepts the decision; and

WHEREAS, the Conversion Therapy Prohibition is applicable not only to the named plaintiffs in *Otto, et al. vs. City of Boca Raton, et al.*, but is also applicable to any other practitioners of conversion therapy in the City; and

WHEREAS, in order to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy), it is imperative for the City to immediately repeal Chapter 9, Article VI, Code of Ordinances, in its entirety; and

WHEREAS, City Council finds that preventing the chilling of protected speech is an emergency "affecting life, health, property or the public peace," as described in Section 3.14 of the City Charter; now therefore

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," Code of Ordinances, is deleted in its entirety.

Section 2. An emergency exists, as described in the above recitals, and this emergency ordinance is adopted in order to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy).

Section 3. The City Council finds that, based upon the decision of the Eleventh Circuit Court of Appeals, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful.

Section 4. If any section, subsection, clause or provision of this ordinance is held invalid, the remainder shall not be affected by such invalidity.

Section 5. All ordinances and resolutions or parts of ordinances and resolutions and all sections and parts of sections in conflict herewith shall be and hereby are repealed.

Section 6. This ordinance shall take effect immediately upon adoption.

PASSED AND ADOPTED by the City Council of the City of Boca Raton this 5th day of August, 2022.

CITY OF BOCA RATON, FLORIDA

ATTEST:

Scott Singer, Mayor

Mary Siddons, City Clerk

Approved as to form:

Diana Grub Frieser
City Attorney

COUNCIL MEMBER	YES	NO	ABSTAINED
MAYOR SCOTT SINGER	✓		
DEPUTY MAYOR ANDREA LEVINE O'ROURKE	✓		
COUNCIL MEMBER YVETTE DRUCKER	✓		
COUNCIL MEMBER MONICA MAYOTTE	✓		
COUNCIL MEMBER ANDY THOMSON	✓		

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-CV-80771-ROSENBERG/REINHART

ROBERT W. OTTO and JULIE H. HAMILTON,

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANT, CITY OF BOCA RATON'S REPLY REGARDING THE SUGGESTION OF MOOTNESS

Defendant, City of Boca Raton ("City"), files this Reply Regarding the Suggestion of Mootness as to the injunctive and declaratory relief sought against the City and states:

1. Plaintiffs argue that the City's suggestion of mootness is, essentially, disingenuous, because the City Council repealed the Challenged Ordinance – Ordinance No. 5407 – through an emergency ordinance (Ordinance No. 5625, the "Emergency Ordinance"), which pursuant to Section 3.14 of the City Charter lasts sixty days unless it is re-enacted under regular procedures. ECF No. 152 at 1-2. The City Council enacted the Emergency Ordinance because it desired to take immediate action in response to the Eleventh Circuit's decision. Although Plaintiffs' reading of the City's Charter regarding the 60-day period is correct, it is important to note that the City, at the August 5, 2022 meeting, also began the process of enacting an ordinance permanently repealing the Challenged Ordinance through the regular enactment procedures.

2. Specifically, at the August 5, 2022 special meeting (convened to repeal the Challenged Ordinance), the City Council not only unanimously approved the Emergency Ordinance repealing the Challenged Ordinance, but also held the first reading introducing Ordinance No. 5626, a non-emergency ordinance permanently repealing Ordinance No. 5407. *See* Declaration of Mary Siddons, attached as Exhibit "A." As required by the City Code, the final reading and approval of Ordinance No. 5626 will take place at the City Council meeting on August 23, 2022. *Id.* Both the Emergency Ordinance and non-emergency Ordinance No. 5626 contain explicit statements by the City Council that "based upon the decision of the Eleventh Circuit, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful." *See* Emergency Ordinance, Section 3; Ordinance No. 5626, Section 2.

3. Between the unanimous enactment of the Emergency Ordinance, the introduction of Ordinance No. 5626 and scheduling of final reading for August 23, 2022, and the factual finding regarding intent contained in both ordinances, the City has done everything possible to repeal the Challenged Ordinance as quickly as possible. As of the filing of this Reply, there is no City ordinance or regulation that would prevent Plaintiffs from engaging in conversion therapy for minors within the City, and thus there is nothing for the Court to enjoin.

4. Moreover, in light of the foregoing, Plaintiffs cannot genuinely contest that the City's intent to repeal the Challenged Ordinance <u>permanently</u> is either speculative or reflects a substantial likelihood of reenactment. The City's actions reflect an earnest effort to immediately and permanently comply with the Eleventh Circuit's ruling.

5. Notably, Plaintiffs' Response [ECF No. 152] wholly ignores the well-settled body of case law giving deference to municipalities that have repealed challenged legislation and

mooted injunctive relief. *See, e.g.*, *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474 (1990) (holding that a Commerce Clause-based challenge to Florida banking statutes was rendered moot by amendments to the law); *Massachusetts v. Oakes*, 491 U.S. 576, 582–83 (1989) (holding that an overbreadth challenge to a child pornography law was rendered moot by amendment to the statute); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (*per curiam*) (holding that the challenge to a university regulation was moot because the regulation had been substantially amended); *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) (holding moot a constitutional challenge to a state statute governing the involuntary commitment of mentally ill minors, because the law had been replaced with a different statute); *Diffenderfer v. Cent. Baptist Church, Inc.*, 404 U.S. 412, 415 (1972) (holding moot a challenge to a Florida tax exemption for church property when the law had been repealed)).

6. The cases upon which Plaintiffs rely deal exclusively with *private* actors and ignores the fact that governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities. *Coral Springs St. Sys., Inc.*, 371 F.3d at 1328-29.

7. Finally, Plaintiffs' argument regarding damages is a red herring. The City did not argue or even imply in the Suggestion of Mootness [ECF No. 151] that Plaintiffs' damages claim was now moot. While the City challenges the veracity of any claimed damages (particularly given the fact that the City has never once enforced the now-repealed Challenged Ordinance against Plaintiffs), it is not contending that the repeal of the Challenge Ordinance from the City's Code also moots Plaintiffs' purported damages claim.

8. Accordingly, and contrary to Plaintiffs' Response, the claim for declaratory and injunctive relief is now moot because of the emergency repeal of the Challenged Ordinance, a repeal that will continue through the passage of Ordinance No. 5626 on August 23, 2022. The entry of a preliminary injunction enjoining the City from enforcing a repealed ordinance is neither necessary nor appropriate. *See State v. Becerra*, 544 F. Supp. 3d 1241, 1251 (M.D. Fla. 2021) ("To present a justiciable case or controversy for a preliminary injunction, a plaintiff must establish by a 'clear showing' each element of 'standing.'") (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). Plaintiffs cannot demonstrate the concrete and particularized injury necessary for Article III arising from a repealed ordinance. *Tokyo Gwinnett, LLC v. Gwinnett Cnty., Ga.*, 940 F. 3d 1254, 1263 (11th Cir. 2019) ("Because the old ordinances were repealed and replaced, these alleged injuries stemming from those ordinances will never materialize and cannot support Article III standing.").

WHEREFORE, Defendant, City of Boca Raton, notifies this Court of the mootness of Plaintiffs' request for injunctive and declaratory relief and respectfully requests that the Court enter an order reflecting same, and that the Court not enter unnecessary injunctive relief, as well as any further relief the Court deems just and proper.

Dated: August 5, 2022

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/ Anne R. Flanigan*
JAMIE A. COLE
Florida Bar No. 767573

Primary email: jcole@wsh-law.com
Secondary email: msarraff@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

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.

_____/

DECLARATION OF MARY SIDDONS,
CITY CLERK OF DEFENDANT, CITY OF BOCA RATON

I, Mary Siddons, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am over eighteen (18) years of age and have personal knowledge of all of the facts stated herein.

2. At 10:00 a.m. on August 5, 2022, the City Council convened a special meeting, at which I was present and served as the City Clerk ("Special Meeting").

3. At the Special Meeting, the City Council unanimously approved Emergency Ordinance No. 5625, repealing Ordinance No. 5407, Exhibit "A" hereto.

4. Ordinance No. 5626, a non-emergency ordinance permanently repealing Ordinance No. 5407, was also introduced at the Special Meeting, a copy of which is attached hereto as Exhibit "B."

5. The City Council was then advised that Ordinance No. 5626 would be placed on the agenda for the final reading and approval by the City Council at the August 23, 2022 regular City Council meeting.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of August, 2022, at Boca Raton, Florida.

Mary Siddons
City Clerk, City of Boca Raton

City of Boca Raton

Incorporated 1925

ORDINANCE

5625

AN EMERGENCY ORDINANCE OF THE CITY OF BOCA RATON REPEALING CHAPTER 9, ARTICLE VI, "PROHIBITION OF CONVERSION THERAPY ON MINORS," CODE OF ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEALER; PROVIDING AN EFFECTIVE DATE

WHEREAS, this emergency ordinance is adopted pursuant to Section 3.14 of the City Charter; and

WHEREAS, the Eleventh Circuit Court of Appeals, in the case of *Otto, et al. vs. City of Boca Raton and County of Palm Beach, Florida,* has found Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," of the City's Code of Ordinances (the "Conversion Therapy Prohibition") to be an unconstitutional restriction on speech in violation of the First Amendment to the United States Constitution; and

WHEREAS, the City has analyzed the decision of the Eleventh Circuit, and although the City disagrees with the decision, the City respects the judicial authority of the Eleventh Circuit and accepts the decision; and

Exhibit "A"

WHEREAS, the Conversion Therapy Prohibition is applicable not only to the named plaintiffs in *Otto, et al. vs. City of Boca Raton, et al.*, but is also applicable to any other practitioners of conversion therapy in the City; and

WHEREAS, in order to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy), it is imperative for the City to immediately repeal Chapter 9, Article VI, Code of Ordinances, in its entirety; and

WHEREAS, City Council finds that preventing the chilling of protected speech is an emergency "affecting life, health, property or the public peace," as described in Section 3.14 of the City Charter; now therefore

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," Code of Ordinances, is deleted in its entirety.

Section 2. An emergency exists, as described in the above recitals, and this emergency ordinance is adopted in order to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy).

Section 3. The City Council finds that, based upon the decision of the Eleventh Circuit Court of Appeals, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful.

Section 4. If any section, subsection, clause or provision of this ordinance is held invalid, the remainder shall not be affected by such invalidity.

Section 5. All ordinances and resolutions or parts of ordinances and resolutions and all sections and parts of sections in conflict herewith shall be and hereby are repealed.

Section 6. This ordinance shall take effect immediately upon adoption.

PASSED AND ADOPTED by the City Council of the City of Boca Raton this 5th day of August, 2022.

CITY OF BOCA RATON, FLORIDA

ATTEST:

Scott Singer, Mayor

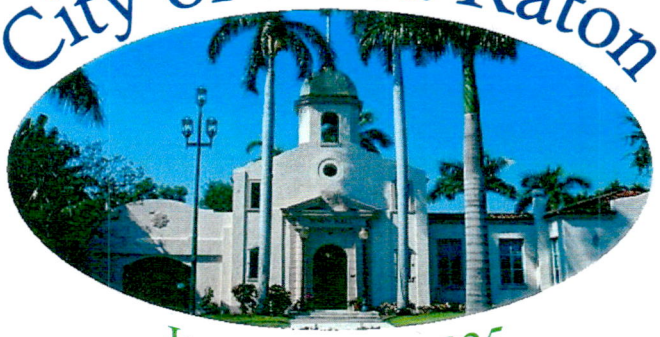
Mary Siddons, City Clerk

Approved as to form:

Diana Grub Frieser
City Attorney

COUNCIL MEMBER	YES	NO	ABSTAINED
MAYOR SCOTT SINGER	✓		
DEPUTY MAYOR ANDREA LEVINE O'ROURKE	✓		
COUNCIL MEMBER YVETTE DRUCKER	✓		
COUNCIL MEMBER MONICA MAYOTTE	✓		
COUNCIL MEMBER ANDY THOMSON	✓		

City of Boca Raton



Incorporated 1925

ORDINANCE

5626

AN ORDINANCE OF THE CITY OF BOCA RATON REPEALING CHAPTER 9, ARTICLE VI, "PROHIBITION OF CONVERSION THERAPY ON MINORS," CODE OF ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEALER; PROVIDING FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE

WHEREAS, the Eleventh Circuit Court of Appeals, in the case of *Otto, et al. vs. City of Boca Raton and County of Palm Beach, Florida,* has found Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," of the City's Code of Ordinances (the "Conversion Therapy Prohibition") to be an unconstitutional restriction on speech in violation of the First Amendment to the United States Constitution; and

WHEREAS, the City has analyzed the decision of the Eleventh Circuit, and although the City disagrees with the decision, the City respects the judicial authority of the Eleventh Circuit and accepts the decision; and

WHEREAS, the Conversion Therapy Prohibition is applicable not only to the named plaintiffs in *Otto, et al. vs. City of Boca Raton, et al.*, but is also applicable to any other practitioners of conversion therapy in the City; and

WHEREAS, in order to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy), the City wishes to repeal Chapter 9, Article VI, Code of Ordinances, in its entirety; and

WHEREAS, on August 5, 2022, the City Council adopted emergency Ordinance No. 5625 repealing the Conversion Therapy Prohibition, and now wishes to adopt the repeal as a non-emergency ordinance; now therefore

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," Code of Ordinances, is deleted in its entirety.

Section 2. The City Council finds that, based upon the decision of the Eleventh Circuit Court of Appeals, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful.

Section 3. If any section, subsection, clause or provision of this ordinance is held invalid, the remainder shall not be affected by such invalidity.

Section 4. All ordinances and resolutions or parts of ordinances and resolutions and all sections and parts of sections in conflict herewith shall be and hereby are repealed.

Section 5. Codification of the repeal of Chapter 9, Article VI in the City Code of Ordinances is hereby authorized and directed.

Section 6. This ordinance shall take effect immediately upon adoption.

PASSED AND ADOPTED by the City Council of the City of Boca Raton this _____ day of _____, 2022.

CITY OF BOCA RATON, FLORIDA

ATTEST:

_____
Scott Singer, Mayor

_____
Mary Siddons, City Clerk

Approved as to form:

_____
Diana Grub Frieser
City Attorney

COUNCIL MEMBER	YES	NO	ABSTAINED
MAYOR SCOTT SINGER			
DEPUTY MAYOR ANDREA LEVINE O'ROURKE			
COUNCIL MEMBER YVETTE DRUCKER			
COUNCIL MEMBER MONICA MAYOTTE			
COUNCIL MEMBER ANDY THOMSON			

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-CV-80771-ROSENBERG/REINHART

ROBERT W. OTTO and JULIE H. HAMILTON,

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANT, CITY OF BOCA RATON'S RESPONSE TO MOTION TO LIFT STAY, ENTER PRELIMINARY INJUNCTION AND SET SCHEDULING CONFERENCE FOR MERITS LITIGATION AND REQUEST FOR EXPEDITED CONSIDERATION

Defendant, City of Boca Raton ("City"), files this Response to the Motion to Lift Stay, Enter Preliminary Injunction, and Set Scheduling Conference for Merits Litigation and Request for Expedited Consideration ("Motion") [ECF No. 150], filed by plaintiffs, Robert W. Otto and Julie H. Hamilton ("Plaintiffs"), and states:

A. City Does Not Oppose The Request to Lift Stay and Set Scheduling Conference

1. The City does not oppose Plaintiffs' request to lift the stay of this action and to set a scheduling conference to discuss, *inter alia*, case management deadlines.

B. City Opposes the Request For Entry Of Preliminary Injunction

2. Following the Eleventh Circuit's denial of the motion for a rehearing en banc on July 20, 2022 and the entry of a Mandate on July 29, 2022, the City acted as quickly as possible to repeal Ordinance No. 5407 (the "Challenged Ordinance") and comply with the Eleventh Circuit's decision.

3. The City convened a special meeting on August 5, 2022 to repeal the Challenged Ordinance. At that meeting, the City Council unanimously approved Emergency Ordinance No. 5625 (the "Emergency Repeal Ordinance"), repealing the Challenged Ordinance. The purpose of an emergency ordinance is to enable the City to take action immediately, which action remains in place until the City Council is able to take action through the regular process. Thus, pursuant to Section 3.14 of the City Charter, an emergency ordinance lasts sixty days unless it is re-enacted under regular procedures. *See* City Charter, Section 3.14. Accordingly, at the August 5, 2022 special meeting, the City Council also held the first reading introducing Ordinance No. 5626, a non-emergency ordinance to permanently repeal Ordinance No. 5407 (the "Non-Emergency Repeal Ordinance"). *See* Declaration of Mary Siddons, attached as Exhibit "A," to which copies of the Emergency Repeal Ordinance and the Non-Emergency Repeal Ordinance are attached.

4. As required by the City Code, the final reading and public hearing for the Non-Emergency Repeal Ordinance will take place at the City Council meeting on August 23, 2022. *Id.*

5. Both the Emergency Repeal Ordinance and Non-Emergency Repeal Ordinance (if adopted) contain explicit statements by the City Council that "based upon the decision of the Eleventh Circuit, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful." *See* Emergency Repeal Ordinance, Section 3; Non-Emergency Repeal Ordinance, Section 2.

6. "[T]he Supreme Court has held that the repeal of or amendment to challenged legislation rendered moot a plaintiff's request for injunctive relief." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474 (1990) (holding that a Commerce Clause-based challenge to Florida banking

statutes was rendered moot by amendments to the law); *Massachusetts v. Oakes*, 491 U.S. 576, 582–83 (1989) (holding that an overbreadth challenge to a child pornography law was rendered moot by amendment to the statute); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (*per curiam*) (holding that the challenge to a university regulation was moot because the regulation had been substantially amended); *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) (holding moot a constitutional challenge to a state statute governing the involuntary commitment of mentally ill minors, because the law had been replaced with a different statute); *Diffenderfer v. Cent. Baptist Church, Inc.*, 404 U.S. 412, 415 (1972) (holding moot a challenge to a Florida tax exemption for church property when the law had been repealed)). Government actors, moreover "carry a lesser burden than others when they have unambiguously terminated the challenged policy." *Rich v. Sec., Fla. Dep't. of Corr.*, 716 F.3d 525, 531 (11th Cir. 2013). Indeed, "governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Coral Springs St. Sys.*, 371 F.3d at 1328-29.

7. The well-settled law recognizes only a limited exception to the mootness of a challenge to a repealed law: if there is a substantial likelihood that the challenged statutory language will be reenacted. *Id.* at 1329. Unlike private parties, the law recognizes that substantial deference is given to municipalities that have repealed challenged legislation and mooted injunctive relief. *See, e.g.*, *Coral Springs St. Sys.*, 371 F.3d at 1329.

8. With the unanimous enactment of the Emergency Repeal Ordinance, the introduction at the August 5, 2022 special meeting and scheduling of final reading and public hearing at the August 23, 2022 regular meeting of the Non-Emergency Repeal Ordinance, and the factual finding regarding intent contained in both ordinances, the City has done everything

possible to repeal the Challenged Ordinance as quickly as possible and formalize its intent to have that repeal continue indefinitely. The City's actions reflect an earnest effort to immediately and permanently comply with the Eleventh Circuit's ruling.

9. As of the time of the filing of this Response, there is no City ordinance or regulation that would prevent Plaintiffs from engaging in conversion therapy for minors within the City, and ***thus there is nothing for the Court to enjoin***.

10. Plaintiffs, moreover, cannot meet the requisite elements for an injunction (*i.e.*, a showing of irreparable harm), as the conduct at issue is no longer prohibited. There is simply no law in place the enforcement of which should (or could) be enjoined. Accordingly, Plaintiffs' demand for injunctive relief is now moot.

C. If the Court Were To Enter A Preliminary Injunction, it Should Be Narrower Than Proposed By Plaintiffs

11. If the Court were inclined to enter a preliminary injunction against the City notwithstanding the repeal of the Challenged Ordinance, the language and scope of the preliminary injunction proposed in Plaintiffs' Motion is overbroad. Specifically, Plaintiffs request an injunction enjoining the City from enforcing the now-repealed Challenged Ordinance against <u>any</u> actor(s) within the City. ECF No. 150, ¶ 6. Plaintiffs' request is broader than the relief sought in Plaintiffs' Complaint, namely, an injunction enjoining the City from prohibiting <u>Plaintiffs</u>' speech alone, not the public at large. *See* ECF No. 1, at 56. Consequently, to the extent the Court *were* to enter an injunction notwithstanding the repeal of the Challenged Ordinance, it should be limited to the relief expressly sought by Plaintiffs.

WHEREFORE, defendant, City of Boca Raton, respectfully requests that this Court lift the stay; set a status conference to discuss the status of the litigation and case management

deadlines; deny the entry of an injunction against the City for the reasons set forth herein; and grant any further relief that the Court deems just and proper.

Dated: August 9, 2022

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/ Anne R. Flanigan*
JAMIE A. COLE
Florida Bar No. 767573
Primary email: jcole@wsh-law.com
Secondary email: msarraff@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

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.

_____/

DECLARATION OF MARY SIDDONS,
CITY CLERK OF DEFENDANT, CITY OF BOCA RATON

I, Mary Siddons, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am over eighteen (18) years of age and have personal knowledge of all of the facts stated herein.

2. At 10:00 a.m. on August 5, 2022, the City Council convened a special meeting, at which I was present and served as the City Clerk ("Special Meeting").

3. At the Special Meeting, the City Council unanimously approved Emergency Ordinance No. 5625, repealing Ordinance No. 5407, Exhibit "A" hereto.

4. Ordinance No. 5626, a non-emergency ordinance permanently repealing Ordinance No. 5407, was also introduced at the Special Meeting, a copy of which is attached hereto as Exhibit "B."

5. The City Council was then advised that Ordinance No. 5626 would be placed on the agenda for the final reading and approval by the City Council at the August 23, 2022 regular City Council meeting.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of August, 2022, at Boca Raton, Florida.

Mary Siddons
City Clerk, City of Boca Raton

City of Boca Raton

Incorporated 1925

ORDINANCE

5625

AN EMERGENCY ORDINANCE OF THE CITY OF BOCA RATON REPEALING CHAPTER 9, ARTICLE VI, "PROHIBITION OF CONVERSION THERAPY ON MINORS," CODE OF ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEALER; PROVIDING AN EFFECTIVE DATE

WHEREAS, this emergency ordinance is adopted pursuant to Section 3.14 of the City Charter; and

WHEREAS, the Eleventh Circuit Court of Appeals, in the case of *Otto, et al. vs. City of Boca Raton and County of Palm Beach, Florida,* has found Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," of the City's Code of Ordinances (the "Conversion Therapy Prohibition") to be an unconstitutional restriction on speech in violation of the First Amendment to the United States Constitution; and

WHEREAS, the City has analyzed the decision of the Eleventh Circuit, and although the City disagrees with the decision, the City respects the judicial authority of the Eleventh Circuit and accepts the decision; and

Exhibit "A"

WHEREAS, the Conversion Therapy Prohibition is applicable not only to the named plaintiffs in *Otto, et al. vs. City of Boca Raton, et al.*, but is also applicable to any other practitioners of conversion therapy in the City; and

WHEREAS, in order to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy), it is imperative for the City to immediately repeal Chapter 9, Article VI, Code of Ordinances, in its entirety; and

WHEREAS, City Council finds that preventing the chilling of protected speech is an emergency "affecting life, health, property or the public peace," as described in Section 3.14 of the City Charter; now therefore

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," Code of Ordinances, is deleted in its entirety.

Section 2. An emergency exists, as described in the above recitals, and this emergency ordinance is adopted in order to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy).

Section 3. The City Council finds that, based upon the decision of the Eleventh Circuit Court of Appeals, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful.

Section 4. If any section, subsection, clause or provision of this ordinance is held invalid, the remainder shall not be affected by such invalidity.

Section 5. All ordinances and resolutions or parts of ordinances and resolutions and all sections and parts of sections in conflict herewith shall be and hereby are repealed.

Section 6. This ordinance shall take effect immediately upon adoption.

PASSED AND ADOPTED by the City Council of the City of Boca Raton this 5th day of August, 2022.

CITY OF BOCA RATON, FLORIDA

ATTEST:

Scott Singer, Mayor

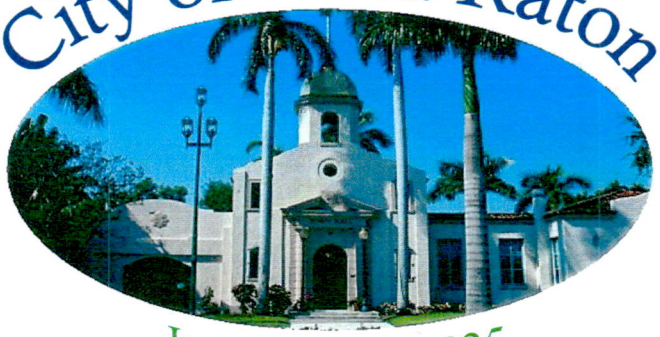
Mary Siddons, City Clerk

Approved as to form:

Diana Grub Frieser
City Attorney

COUNCIL MEMBER	YES	NO	ABSTAINED
MAYOR SCOTT SINGER	✓		
DEPUTY MAYOR ANDREA LEVINE O'ROURKE	✓		
COUNCIL MEMBER YVETTE DRUCKER	✓		
COUNCIL MEMBER MONICA MAYOTTE	✓		
COUNCIL MEMBER ANDY THOMSON	✓		

City of Boca Raton



Incorporated 1925

ORDINANCE

5626

AN ORDINANCE OF THE CITY OF BOCA RATON REPEALING CHAPTER 9, ARTICLE VI, "PROHIBITION OF CONVERSION THERAPY ON MINORS," CODE OF ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEALER; PROVIDING FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE

WHEREAS, the Eleventh Circuit Court of Appeals, in the case of *Otto, et al. vs. City of Boca Raton and County of Palm Beach, Florida,* has found Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," of the City's Code of Ordinances (the "Conversion Therapy Prohibition") to be an unconstitutional restriction on speech in violation of the First Amendment to the United States Constitution; and

WHEREAS, the City has analyzed the decision of the Eleventh Circuit, and although the City disagrees with the decision, the City respects the judicial authority of the Eleventh Circuit and accepts the decision; and

WHEREAS, the Conversion Therapy Prohibition is applicable not only to the named plaintiffs in *Otto, et al. vs. City of Boca Raton, et al.*, but is also applicable to any other practitioners of conversion therapy in the City; and

WHEREAS, in order to ensure that the Conversion Therapy Prohibition does not chill protected speech in violation of the First Amendment (and therefore harm practitioners of conversion therapy), the City wishes to repeal Chapter 9, Article VI, Code of Ordinances, in its entirety; and

WHEREAS, on August 5, 2022, the City Council adopted emergency Ordinance No. 5625 repealing the Conversion Therapy Prohibition, and now wishes to adopt the repeal as a non-emergency ordinance; now therefore

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. Chapter 9, Article VI, "Prohibition of Conversion Therapy on Minors," Code of Ordinances, is deleted in its entirety.

Section 2. The City Council finds that, based upon the decision of the Eleventh Circuit Court of Appeals, it has no intention of reenacting Chapter 9, Article VI, or anything substantially similar, unless there is a change in law that would make adoption of such regulation lawful.

Section 3. If any section, subsection, clause or provision of this ordinance is held invalid, the remainder shall not be affected by such invalidity.

Section 4. All ordinances and resolutions or parts of ordinances and resolutions and all sections and parts of sections in conflict herewith shall be and hereby are repealed.

Section 5. Codification of the repeal of Chapter 9, Article VI in the City Code of Ordinances is hereby authorized and directed.

Section 6. This ordinance shall take effect immediately upon adoption.

PASSED AND ADOPTED by the City Council of the City of Boca Raton this _____ day of _____, 2022.

CITY OF BOCA RATON, FLORIDA

ATTEST:

_____
Scott Singer, Mayor

_____
Mary Siddons, City Clerk

Approved as to form:

_____
Diana Grub Frieser
City Attorney

COUNCIL MEMBER	YES	NO	ABSTAINED
MAYOR SCOTT SINGER			
DEPUTY MAYOR ANDREA LEVINE O'ROURKE			
COUNCIL MEMBER YVETTE DRUCKER			
COUNCIL MEMBER MONICA MAYOTTE			
COUNCIL MEMBER ANDY THOMSON			

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

PLAINTIFFS' RESPONSE TO THE SUGGESTION OF MOOTNESS FILED BY DEFENDANT CITY OF BOCA RATON, FLORIDA

Defendant City of Boca Raton, Florida ("City"), argues that, because it "voluntarily" passed an "emergency" repeal ordinance—that, by its own terms and the City's Charter **automatically expires in sixty days**—somehow Plaintiffs' claims for injunctive relief are now moot. The City is wrong, and the Court should swiftly enter the preliminary injunctive relief that has been ordered by the Eleventh Circuit, against both the City and the County of Palm Beach ("County"). (*See* Plaintiffs' Motion to Lift Stay, Enter Preliminary Injunction and Set Scheduling Conference, dkt. 150).

The City's "emergency" ordinance **temporarily** repealing the challenged ordinance would be comical, were it not for the tragic and profound way in which the City violated Plaintiffs' First Amendment rights over the last five years. Having unconstitutionally outlawed Plaintiffs' protected speech and counseling practices for five years, the City now wants the Court to believe that "preventing the chilling of [Plaintiffs'] protected speech is an emergency" that all of a sudden justifies the immediate repeal of the challenged ordinance, without compliance with the standard legislative means and processes. (Emergency Ordinance 5625, dkt. 151-1 at 2). However, the City notes its disagreement with the Eleventh Circuit's ruling (*id*. at 1, third "WHEREAS"), presumably because it still believes that what it did to Plaintiffs was right. Therefore, transparently, the only "emergency" that the City of Boca Raton fears is **not** imposing further harms upon Plaintiffs (as it

was quite willing to do for the last five years), but having to pay the substantial attorney's fees and costs that it has forced Plaintiffs to incur, if this litigation does not become immediately moot.

In its haste to declare a public "emergency" and enact an ordinance outside of the normal legislative process, however, the City overlooks two critical things:

First, by its own terms, the "emergency" repeal ordinance is set to **automatically expire in 60 days**. The ordinance claims that it is adopted "pursuant to Section 3.14 of the City Charter." (*Id*. at 1). That Section, expressly provides that:

> (d) Repeal. Every emergency ordinance except emergency appropriations **shall automatically stand repealed as of the sixty-first day following the date on which it was adopted**, but this shall not prevent re-enactment of the ordinance under regular procedures … .

(Boca Raton City Charter, Section 3.14(d), available at https://library.municode.com/fl/boca_raton/codes/code_of_ordinances?nodeId=VOLIPAICHRESPAC_SPACHBORA_ARTIIICICO_S3.14EMOR, last visited August 5, 2022 (emphasis added)).

Thus, the City's effort to persuade the Court that it will never ever, under any circumstances, return to its unlawful ways of punishing protected speech it does not like is hardly convincing, when the vehicle employed by the City has an automatic crash date, after which the City's laws will automatically return to the status quo. To find that Plaintiffs' injunctive relief claims are moot, the Court will have to speculate that the City will, in the next 60 days, introduce a regular, non-emergency, permanent ordinance to repeal the unconstitutional one. The Court will have to further speculate that in the legislative process and public comment period, the yet-to-be-proposed regular ordinance will survive unscathed. And the Court will have to further speculate that, at some point, such yet-to-be-proposed ordinance will actually be adopted. This is hardly the type of unequivocal voluntary cessation that renders injunctive relief moot, and none of the cases cited by the City even suggest, let alone establish, that mootness of injunctive relief can be found based on **future** legislative actions that the City may or may not take. In fact, the law is quite to the contrary. *See, e.g.*, *Already, LLC v. Nike*, 568 U.S. 85, 91 (2013) ("**a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur**" (emphasis added)); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) ("voluntary cessation of a challenged practice does not moot a case unless subsequent

events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.").

Simply put, therefore, Plaintiffs' injunctive relief claims are not moot. The Court should enter forthwith the preliminary injunctive relief required by the Eleventh Circuit to be entered, not only against the City but also against the County, who, at least as of now, has not yet concocted a similar "emergency," and has not temporarily (or permanently) repealed its unconstitutional ordinance. The Court should enter the preliminary injunctive relief in the form proposed by Plaintiffs. (*See* Plaintiffs' Motion to Lift Stay, Enter Preliminary Injunction and Set Scheduling Conference, dkt. 150 at 3).

Second, the City's "emergency" maneuver is much legal ado about nothing, in any event. Even if the City's temporary repeal of the challenged ordinance could somehow moot the injunctive relief required by the Eleventh Circuit (which it cannot do), there is no question that the City's "voluntary" cessation could not moot Plaintiffs' claims for damages. *See, e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (holding that "for the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right"); *Id.* ("[W]e conclude that a request for nominal damages satisfied the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right."); *Id.* (Kavanaugh, J., concurring) ("[A] plaintiff's request for nominal damages can satisfy the redressability requirement for Article III standing and can keep an otherwise moot case alive."); *Keister v. Bell*, 29 F.4th 1239, 1251 (11th Cir. 2022) ("[A] request for nominal damages saves a matter from becoming moot as unredressable when the plaintiff bases his claim on a completed violation of a legal right.").

If it is unquestionably true that even a claim for **nominal** damages would be sufficient to continue this case to final judgment, then it is doubly true that here, Plaintiffs' claims for both **actual** and nominal damages (Complaint, dkt. 1 at pp. 57-58, ¶¶ D-E) will survive whatever "emergency" mootness the City is attempting to manufacture. The only thing that the City's "emergency" accomplishes is to admit that the City violated Plaintiffs' constitutional rights, and that the City is liable for at least nominal damages (and for actual damages to be proven

subsequently). This litigation will therefore continue unabated to final judgment, until Plaintiffs are made whole, notwithstanding the City's ridiculous "emergency" attempt to "moot" its liability.

Therefore, in addition to entering the preliminary injunctive relief required by the Eleventh Circuit, the Court should set a scheduling conference so that a litigation schedule for Plaintiffs' claims for permanent injunctive relief, damages, and attorney's fees and costs can be established. (*See* Plaintiffs' Motion to Lift Stay, Enter Preliminary Injunction and Set Scheduling Conference, dkt. 150).

DATED this August 5, 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 5, 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

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.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR
MOTION TO LIFT STAY AND ENTER PRELIMINARY INJUNCTION

The Response (dkt. 154) filed by Defendant City of Boca Raton, Florida ("City") to Plaintiffs' Motion to Lift Stay and Enter Preliminary Injunction (dkt. 150) demonstrates that an immediate preliminary injunction barring universal enforcement of both of the challenged ordinances is necessary, and should be swiftly entered, as ordered by the Eleventh Circuit.

First, the City cites no law for its contention that an **admittedly temporary** "emergency" repeal of a challenged law, which admittedly and by its terms is set to **automatically expire** in sixty days, can nevertheless render injunctive relief moot, based upon legislative action that the City may (or may not) take in its sole discretion at some point in the future. None of the cases relied upon by the City involve promises of future legislative action by a government actor. No caselaw cited by the City establishes that non-binding promises of future legislative action that may (or may not) take place can provide the type of unequivocal, "absolutely clear" indication that the challenged law will not resurface, as is necessary for meeting the "formidable burden" of demonstrating mootness. (*See* Plaintiffs' Response to City's Suggestion of Mootness, dkt. 152 at 2-3, and authorities cited therein).

Second, the last paragraph of the City's Response actually demonstrates why this Court must expeditiously enter preliminary injunctive relief that prohibits **all** enforcement of the defunct ordinances (both the City's and the County's). The City contends that, if the Court enters

preliminary injunctive relief as the Eleventh Circuit has mandated to be done, the Court should only enter injunctive relief protecting the two Plaintiffs in this action, and not "the public at large." (City Response, dkt. 154 at 4). This is a breathtaking argument from a City that wants this Court to believe that the City now deems the chilling of protected speech within its borders to be such a "public emergency" that it justifies the bypassing of normal legislative channels and timelines to rush the adoption of an "emergency" (and temporary) repeal ordinance before this Court can enter the injunctive relief ordered by the Eleventh Circuit. (*See* City's Suggestion of Mootness, dkt. 151, and Exhibit A thereto). If the City is suddenly so committed to never again enforcing its unconstitutional ordinance, then why would the City plead with this Court to only enjoin enforcement **as to the two Plaintiffs**? The City's argument for a "narrow" injunction that does not protect "the public at large" casts a large shadow of doubt over its proclaimed newfound commitment to avoid the chilling of protected speech, and also over the City's promises of legislative actions that it may take at its discretion in the future, supposedly to permanently repeal the unconstitutional ordinance. Clearly, the City has not fully mended its unlawful ways.

When the Eleventh Circuit held that the City's (and the County's) ordinances "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, 859 (11th Cir. 2020), and that the ordinances are "an egregious form of content discrimination," because "the ordinances discriminate on the basis of content … [and] [t]hey also discriminate on the basis of viewpoint," *id*. at 864, the Court invalidated the ordinances **on their face**, not only in their application to the two Plaintiffs. This means that there are no conceivable applications of the ordinances, against any conceivable parties, that would be constitutional. The Eleventh Circuit's mandate to this Court to issue injunctive relief consistent with its opinion therefore leaves no room for the City to enforce its ordinance ever again, **against anyone**.

"To begin with, a federal district court may issue a … universal injunction in appropriate circumstances." *Florida v. Department of Health & Human Services*, 19 F.4th 1271, 1281-82 (11th Cir. 2021) (cleaned up). Those circumstances include cases where injunctions are necessary "to protect similarly situated nonparties" and where "certain types of unconstitutionality are found." *Id.* at 1282. And, **facial unconstitutionality**, such as the 11th Circuit found here, is precisely the type of unconstitutionality that warrants universal injunctive relief in the applicable jurisdiction. *See Int'l Refugee Assistance Project v. Trump,* 857 F.3d 554, 605 (4th Cir. 2017), *vacated and*

remanded on other grounds, 138 S. Ct. 353 (2017) (noting that enjoining an ordinance that is facially unconstitutional under the first Amendment "only as to Plaintiff **would not cure the constitutional deficiency**" and "[i]ts continued enforcement against similarly situated individuals would only serve to reinforce the message that Plaintiffs 'are outsiders, not full members of the political community.'" (Emphasis added) (quoting *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000)).

For these reasons, and those articulated in Plaintiffs' Motion to Lift Stay and Enter Preliminary Injunction (dkt. 150), and in Plaintiffs' Response to City's Suggestion of Mootness (dkt. 152), the Court should immediately lift the stay in this action and enter preliminary injunctive relief barring the City (and the County) from enforcing their respective ordinances against anyone.

DATED this August 9, 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 9, 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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:18-CV-80771-ROSENBERG/REINHART

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,

v.
CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA,
Defendants.
_____/

DEFENDANT, PALM BEACH COUNTY'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO LIFT STAY, ENTER PRELIMINARY INJUNCTION AND SET SCHEDULING CONFERENCE FOR MERITS LITIGATION AND REQUEST FOR EXPEDITED CONSIDERATION.

Defendant, Palm Beach County (County) by and through undersigned counsel, files this Response in Opposition to Plaintiffs' Motion to Lift Stay, Enter Preliminary Injunction and Set Scheduling Conference for Merits Litigation and Request for Expedited Consideration, dated August 3, 2022, (Motion to Lift Stay) and states the following:

1. Plaintiffs initiated this action to enjoin the County's enforcement of Palm Beach County Code, Ordinance No. 2017-046, referred to as the "Prohibition of Conversion Therapy on Minors Ordinance." ("Challenged Ordinance"). At the onset of these proceedings, the Plaintiffs moved for the issuance of a preliminary injunction, a request that was denied by this Court following an evidentiary hearing. [ECF No. 141]. Plaintiffs then filed an interlocutory appeal of this Court's Order to the United States District Court of Appeal for the Eleventh Circuit (Eleventh Circuit). On July 20, 2020, the Eleventh Circuit reversed the denial of the request for preliminary injunction, determining that the Challenged Ordinance violated the First Amendment. The County

and the City of Boca Raton moved for rehearing *en banc*, which was denied by the Eleventh Circuit on July 20, 2022. On July 29, 2022, the Eleventh Circuit issued a mandate finalizing its decision. [ECF No. 149.]

2. This Court stayed the case during the pendency of the interlocutory appeal. [ECF No. 145]. On August 4, 2022, the Plaintiffs filed their Motion to Lift Stay of these proceeding asking this Court to enter a preliminary injunction, and to set a scheduling conference to proceed with the merits litigation of this proceeding. [ECF No. 150]. Specifically, Plaintiffs ask that this Court enjoin "Defendant County of Palm Beach, Florida . . . from enforcing Ordinance 2017-046 [against the Plaintiffs] pending the resolution of the merits of this action." [ECF No. 150, p. 3].

3. It is the County's position that the Plaintiffs' request for injunctive relief is both inappropriate and unnecessary because the County has already commenced the repeal of the Challenged Ordinance, rendering the Plaintiffs' request that this Court enjoin the County from enforcing the Challenged Ordinance against the Plaintiffs or Plaintiffs' clients, as moot.

4. Specifically, following the Eleventh Circuit's July 20, 2022, decision, and the issuance of mandate on July 29, 2022, the County initiated an expedited process to repeal the Challenged Ordinance in its entirety. Pursuant to section 125.66(2), Florida Statutes, the County has submitted for publication notice of an ordinance repealing the Challenged Ordinance, for the Palm Beach County Board of County Commissioners' approval at the next meeting of the Palm Beach County Board of County Commissioners on August 23, 2022. Exhibit A, Agenda Item Summary; Exhibit B, Ad Preview of Publication Notice. The Challenged Ordinance will be repealed in its entirety through Ordinance Repealing Art. V. Sec. 18-121 (Repeal Ordinance), attached hereto as Exhibit C. Once passed, the Repeal Ordinance will become a part of the Palm Beach County Code. Exhibit A. The County anticipates that the repeal of the Challenged

Ordinance will be filed with the Florida Department of State no later than August 29, 2022, at which point the Repeal Ordinance will be effective.

5. The County's upcoming repeal of the Challenged Ordinance will render the merits litigation of this case as it relates to injunctive relief moot. As already outlined in detail in Boca Raton's Suggestion of Mootness [ECF No. 151] and Boca Raton's Reply Regarding Suggestion of Mootness [ECF No. 153], it is in fact settled law that the repeal of or an amendment to challenged legislation renders moot a plaintiff's request for injunctive relief. [1]

6. The County's upcoming repeal of the Challenged Ordinance disposes of the Plaintiffs' requests for temporary and permanent injunctive relief. Simply put, the Plaintiffs ask this Court that it enjoin the County from enforcing the Challenged Ordinance against the Plaintiffs and their clients. However, without an existing Ordinance, there is nothing left for this Court to enjoin.

7. The County recognizes that the Plaintiffs' Complaint includes a request for an evidentiary proceeding relative to the issues of the Plaintiffs' actual and nominal damages. [ECF No. 1]. However, it is the County's position that a lift of the stay is unnecessary, as it is the County's good faith intent to resolve the outstanding issues of damages fees amicably,

[1] Boca Raton relies on the foregoing cases in support of its suggestion of mootness: Coral Springs St. Sys. Inc. v. City of Sunrise, 371 F.3d 1320, 1329 (11th Cir. 2004) (citing Lewis v. Cont't Bank Corp., 49 U.S. 472, 474 (1990) (holding that a challenge to Florida banking statute was rendered moot by amendments to the law); Massachusetts v. Oakes, 491 U.S. 576, 582-83 (1989) (holding that an overbreadth challenge to a child pornography law was rendered moot by amendment of statute); Princeton Univ. v. Schmid, 455 U.S. 100, 103 (1982) (per curium) (holding that the challenge to a university regulation was moot because the regulation had been substantially amended); Kremens v. Bartley, 431 U.S. 119, 128-129 (1977) (holding moot a constitutional challenge to a statute governing the involuntary commitment of mentally ill minors, because the law had been replaced with a different statute); Diffenderfer v. Cent. Baptist Church, Inc., 404 U.S. 412, 415 (1972) (holding moot a challenge to a Florida tax exemption for church property when the law had been repealed)).

expeditiously, and without unnecessarily driving up the cost of litigation for all parties involved. To that end, on August 5, 2022, County's counsel has reached out to Plaintiffs' counsel with a request for a settlement demand to settle all claims against the County raised by the Plaintiffs' Complaint, including the claims for damages and attorney's fees. Plaintiffs' Counsel acknowledged the receipt of the County's request for demand and indicated that one would be provided to the County by the end of this week.

8. As for the Plaintiffs' request for expedited consideration, given the upcoming repeal of the Challenged Ordinance, it is not necessary.

9. The denial of the requested injunctive relief and a further stay of these proceedings are both in the interests of judicial economy. For example (and as the Plaintiffs acknowledge in their Motion for Stay), the issuance of a preliminary injunction will likely require a hearing on the amount of bond to be posted, an unnecessary exercise in light of the County's repeal of the Challenged Ordinance. Plaintiffs will not be prejudiced by further stay because their stated objective: permanently enjoining the County from enforcing the Challenged Ordinance against them, will be effectuated by the County's repeal of the Ordinance. Likewise, their demands for damages and attorney's fees are being addressed through settlement discussions.

WHEREFORE, the Defendant, Palm Beach County respectfully requests that 1) this Court deny the Plaintiffs' request for issuance of preliminary injunction; 2) deny the Plaintiffs' request for lift of stay, and continue the stay of these proceedings while the parties negotiate a settlement; 3) should this Court be inclined to lift the stay, that this be done for the limited purpose of a status conference; 4) provide such other relief as is just and proper.

Respectfully submitted this 10th day of August, 2022.

/s/ David R.F. Ottey
David R.F. Ottey, Esquire
Chief Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 10, 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the authorized CM/ECF filers.

/s/ David R.F. Ottey
David R.F. Ottey, Esq.
Chief Assistant County Attorney
Florida Bar No. 15590
300 North Dixie Highway, Third Floor
West Palm Beach, Florida 33401
Tel: (561)355-6557 /Fax: (561) 355-4234
Emails: dottey@pbcgov.org;
jborum@pbcgov.org; mjcullen@pbcgov.org

Agenda Item #:

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS

AGENDA ITEM SUMMARY

Meeting Date: August 23, 2022 **[ ] Consent [ ] Regular**
[ ] Ordinance [X] Public Hearing

Submitted By: County Attorney

Submitted For: Administration

I. EXECUTIVE BRIEF

Motion and Title: **Staff recommends motion to adopt:** an Ordinance of the Board of County Commissioners of Palm Beach County, Florida, repealing Chapter 18, Article V, Section 18-121, et seq., Palm Beach County Code, Ordinance No. 2017-046, "Prohibition of Conversion Therapy on Minors Ordinance"; providing for repeal of laws in conflict; providing for inclusion in the code of laws and ordinances; and providing for effective date.

Summary: On December 21, 2017, the Palm Beach County Board of County Commissioners (BCC) enacted Chapter 18, Article V, Section 18-121, et seq., Palm Beach County Code, Ordinance No. 2017-046, referred to as the "Prohibition of Conversion Therapy on Minors Ordinance" (Ordinance). On June 13, 2018, two therapists filed a single suit against the City of Boca Raton, (the City), and Palm Beach County, (the County), in the United States District Court for the Southern District of Florida in *Otto v. City of Boca Raton, Florida*, Case No. 9:18-CV-80771-RLR, challenging the City's and County's substantially similar conversion therapy ban ordinances The District Court conducted a hearing on the therapists' claim for a temporary injunction that sought to prohibit the City and the County from enforcing their ordinances, and the District Court denied injunctive relief. The therapists appealed that interlocutory order to the United States Circuit Court of Appeals for the Eleventh Circuit (Eleventh Circuit). The Eleventh Circuit determined that the ordinances violated the First Amendment in *Otto v. City of Boca Raton, Florida*, 931 F.3d 854 (11th Cir. 2020), *reh'g en banc den.*, 2022 WL 2824907 (Jul. 20, 2022). The Eleventh Circuit issued mandate on July 29, 2022, finalizing its decision. In light of the Eleventh Circuit's ruling, the County Attorney recommends repeal of the County's Ordinance utilizing the regular enactment procedure provided for in section 125.66(2)(a), Florida Statutes (2021), which requires publication and consideration of the ordinance at a single public hearing. Countywide (HH)

Background and Policy Issues: In *Otto v. City of Boca Raton, Florida*, 931 F.3d 854 (11th Cir. 2020), *reh'g en banc den.*, 2022 WL 2824907 (Jul. 20, 2022), the Eleventh Circuit determined that the County's Ordinance prohibiting the practice of conversion therapy on minors violated the First Amendment. The *Otto* opinion became final on July 29, 2022, when mandate issued. The County Attorney has analyzed the Court's decision in *Otto*, including the concurring and dissenting opinions on denial of rehearing *en banc*, and recommends that no further appeal be taken from the Eleventh Circuit's decisions. Given the circumstances of this case, the County Attorney recommends repeal of the County's Ordinance utilizing the regular enactment procedure provided for in section 125.66(2)(a), Florida Statutes (2021), which requires publication and consideration of the ordinance at a single public hearing.

Attachment: Ordinance Repealing Chapter 18, Article V, Section 18-121, et seq., Palm Beach County Code, Ordinance No. 2017-046

Recommended by: _____
County Attorney **Date**

Approved By: _____
Assistant County Administrator **Date**

EXHIBIT
A

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2022	2023	2024	2025	2026
Capital Expenditures					
Operating Costs					
External Revenues					
Program Income(County)					
In-Kind Match(County					
NET FISCAL IMPACT	-0-	-0-	-0-	-0-	-0-
#ADDITIONAL FTE					
POSITIONS (CUMULATIVE					

Is Item Included in Current Budget? Yes No
Does this item include the use of federal funds? Yes No

Budget Account No:
Fund Agency Organization Object

B. Recommended Sources of Funds/Summary of Fiscal Impact:

No Fiscal Impact

C. Departmental Fiscal Review:

_____

III. REVIEW COMMENTS:

A. OFMB Fiscal and/or Contract Dev. and Control Comments:

OFMB **Contract Dev. & Control**

B. Legal Sufficiency

Assistant County Attorney

C. Other Department Review

Department Director

(THIS SUMMARY IS NOT TO BE USED AS A BASIS FOR PAYMENT.)

LOCALiQ
FLORIDA

Order Confirmation

Not an Invoice

Account Number:	730480
Customer Name:	Pbc Bocc Engineering
Customer Address:	Pbc Bocc Engineering PO BOX 4036 WEST PALM BEACH FL 334024036
Contact Name:	Jillian Zalewska
Contact Phone:	
Contact Email:	jzalewska@mypalmbeachclerk.com
PO Number:	

Date:	08/09/2022
Order Number:	7639276
Prepayment Amount:	$ 0.00

Column Count:	1.0000
Line Count:	53.0000
Height in Inches:	0.0000

Print

Product	#Insertions	Start - End	Category
WPB Palm Beach Post	1	08/11/2022 - 08/11/2022	Public Notices
WPB palmbeachpost.com	1	08/11/2022 - 08/11/2022	Public Notices

Total Order Confirmation	**$163.77**

EXHIBIT
B

Ad Preview

NOTICE OF PUBLIC HEARINGS

PLEASE TAKE NOTICE THAT AT 9:30 A.M. ON AUGUST 23, 2022, in the Palm Beach County Governmental Center, Jane Thompson Memorial Chambers, 6th Floor, 301 North Olive Avenue, West Palm Beach FL., the Board of County Commissioners of Palm Beach County, FL., intends to hold a public hearing for the purpose of considering the following proposed Palm Beach County Ordinance (s):

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, REPEALING CHAPTER 18, ARTICLE V, SECTION 18-121, ET SEQ., PALM BEACH COUNTY CODE, ORDINANCE NO. 2017-046, "PROHIBITION OF CONVERSION THERAPY ON MINORS ORDINANCE"; PROVIDING FOR REPEAL OF LAWS IN CONFLICT; PROVIDING FOR INCLUSION IN THE CODE OF LAWS AND ORDINANCES; AND PROVIDING FOR EFFECTIVE DATE.

A copy of the above-referenced proposed ordinance is available for inspection in the Minutes Department, 2nd floor, Room 203.2, Governmental Center. All interested parties may appear at the meeting and be heard with respect to the proposed ordinance(s).

If a person decides to appeal any decision made by this commission with respect to any matter considered at this meeting or hearing they will need to have a record of the proceeding, and for that, for such purpose, they may need to ensure that a verbatim record of the proceeding is made, which record includes the testimony and evidence upon which the appeal is based.

JOSEPH ABRUZZO,
Clerk of the Circuit Court &
Comptroller
Board of County Commissioners
AUGUST 11, 2022 7639276

ORDINANCE NO. 2022-_____

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, REPEALING CHAPTER 18, ARTICLE V, SECTION 18-121, ET SEQ., PALM BEACH COUNTY CODE, ORDINANCE NO. 2017-046, "PROHIBITION OF CONVERSION THERAPY ON MINORS ORDINANCE"; PROVIDING FOR REPEAL OF LAWS IN CONFLICT; PROVIDING FOR INCLUSION IN THE CODE OF LAWS AND ORDINANCES; AND PROVIDING FOR EFFECTIVE DATE.

WHEREAS, on December 21, 2017, the Palm Beach County Board of County Commissioners (BCC) enacted Chapter 18, Article V, Section 18-121, et seq., Palm Beach County Code, Ordinance No. 2017-046, referred to as the "Prohibition of Conversion Therapy on Minors Ordinance" (Ordinance); and

WHEREAS, the Eleventh Circuit Court of Appeals considered the Ordinance in *Otto v. City of Boca Raton, Florida*, 931 F.3d 854 (11th Cir. 2020), *reh'g en banc den.*, 2022 WL 2824907 (Jul. 20, 2022), and determined that the Ordinance was violative of the First Amendment; and

WHEREAS, in light of the decision in *Otto*, the BCC wishes to repeal the Ordinance.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, that:

Section 1.

Chapter 18, Article V, Section 18-121, et seq., Palm Beach County Code, Ordinance No. 2017-046, is hereby repealed in its entirety.

Section 2. REPEAL OF LAWS IN CONFLICT:

All local laws and ordinances in conflict with any provisions of this Ordinance are hereby repealed to the extent of such conflict.

Section 3. INCLUSION IN THE CODE OF LAWS AND ORDINANCES:

The provisions of this Ordinance shall become and be made a part of the Palm Beach County Code. The sections of this Ordinance may be renumbered or relettered to accomplish such, and the word "ordinance" may be changed to "section", "article", or other appropriate word.

Section 4. EFFECTIVE DATE:

The provisions of this Ordinance shall become effective upon filing with the Department of State.

EXHIBIT
C

APPROVED and ADOPTED by the Board of County Commissioners of Palm Beach County, Florida, on this the ____ day of _____, 2022.

JOSEPH ABRUZZO, CLERK
OF THE CIRCUIT COURT &
COMPTROLLER

By: _____
Deputy Clerk

PALM BEACH COUNTY, FLORIDA,
BY ITS BOARD OF COUNTY
COMMISSIONERS

By: _____
Robert S. Weinroth, Mayor

APPROVED AS TO FORM AND
LEGAL SUFFICIENCY

By: _____
County Attorney

EFFECTIVE DATE: Filed with the Department of State on the ____ day of _____, 2022.

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

PLAINTIFFS' SECOND REPLY IN SUPPORT OF THEIR
MOTION TO LIFT STAY AND ENTER PRELIMINARY INJUNCTION

AND RENEWED EMERGENCY REQUEST
FOR INJUNCTIVE RELIEF PRIOR TO 5 P.M. ON MONDAY, AUGUST 15, 2022

The Response (dkt. 156) filed by Defendant County of Palm Beach, Florida ("County") to Plaintiffs' Motion to Lift Stay and Enter Preliminary Injunction (dkt. 150), suffers from the same fatal defect as the Response of the City of Boca Raton ("City") (dkt. 154), but to a much higher degree.[1] Rather than temporarily repealing its unconstitutional ordinance on a so-called "emergency" basis, the County merely tells the Court that it **may** repeal it, **more than two weeks from now**, as of **August 29, 2022**. (Dkt. 156, at 2-3, ¶ 4). The County's lawyers, in an unverified filing, purport to look through the crystal ball and know the supposedly pre-determined outcome of the public hearing on the repeal ordinance scheduled by the County for August 23, 2022. (*Id*.) The County wants the Court to speculate how the County's elected representative will vote on a future vote, and to declare injunctive relief in this action moot based on a speculative vote that has not yet taken place. The law of voluntary cessation and mootness just does not work this way.

[1] Because the County filed its response after Plaintiffs had already filed their first reply (to the City's response), Plaintiffs submit this second reply to respond specifically to the County's arguments.

There is a reason why the County does not cite any authority for the proposition that professed **future** plans to repeal an unconstitutional ordinance **presently** moot injunctive relief. The County knew that this was the central issue in the current controversy, having seen the volley of pleadings between Plaintiffs and the City on this point, and yet still has not cited a single case to support its novel theory of mootness.

The Eleventh Circuit's mandate has now been on this Court's docket since July 29, 2022 (dkt. 149), **thirteen days** ago. That mandate expressly requires the entry of a preliminary injunction consistent with the Eleventh Circuit's opinion, leaving nothing but a ministerial act for this Court to perform. The Eleventh Circuit held that **every single day** that the ordinances are not enjoyed works a new, irreparable constitutional injury upon Plaintiffs. *See Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 870 (11th Cir. 2020) ("[b]ecause the ordinances are an unconstitutional 'direct penalization' of protected speech, **[their] continued enforcement, 'for even minimal periods of time,' constitutes a per se irreparable injury**." (emphasis added)). Thirteen days of additional injury inflicted upon Plaintiffs thus far is unjust. An additional **eighteen days** of injury until August 29, 2002 (if the County's legislative prognostications prove correct), is simply intolerable.

Plaintiffs respectfully renew their request for immediate injunctive relief, consistent with the Eleventh Circuit's mandate, and in the form proposed by Plaintiffs. (Dkt. 150 at 3). If this Court declines or delays this relief beyond 5 p.m. on August 15, 2022, Plaintiffs will have no choice but the treat the Court's delay as a tantamount denial, and to seek emergency relief from the Eleventh Circuit.

Finally, the County's assessment that "a lift of the stay is unnecessary" because the County supposedly intends to settle the remainder of Plaintiffs' claims is likewise no cause for any delay in lifting the stay, entering the preliminary injunction mandated by the Eleventh Circuit, and scheduling the case for prompt disposition.[2] While it is true that the County and the City have

[2] The County's counsel reached out to Plaintiffs' counsel to request their position on maintaining the stay while the parties discuss settlement. Plaintiffs advised the County that they are amenable to discussing settlement, **but that they would oppose any stay in the meantime**. Even though the County solicited Plaintiffs' position on maintaining the stay during settlement discussions, and even though the County purported to tell the Court that Plaintiffs have agreed to provide a settlement demand, the County inexplicably failed to advise the Court that Plaintiffs oppose any delay in lifting of the stay.

requested a settlement demand from Plaintiffs, and that Plaintiffs have already provided it, Plaintiffs have no reason to believe that Defendants have mended their unconstitutional ways and are truly prepared to turn the page. The City professes its disagreement with the Eleventh Circuit's clear holding, and admits that it intends to re-enact its unconstitutional ordinance as soon as its lawyers believe the legal landscape would support a new attack on Plaintiffs' constitutional rights. (Dkt. 151-1, at 1, last "WHEREAS"; *id*. at 2, Section 3). Both the City and the County are considering the adoption of resolutions that further perpetuate their flawed ideology and denigration of Plaintiffs' protected speech. Both the City and the County seem doggedly determined to deprive Plaintiffs of a judicial determination by this Court that their ordinances are unconstitutional, and that they caused damage to Plaintiffs. And the City not only "challenges the veracity of any claimed damages" by the Plaintiffs (dkt. 153 at 3, ¶ 7), it even goes so far as to argue, frivolously, that its unlawful ordinance could not have possibly damaged Plaintiffs because it was never actually enforced against them (*id*.), as if Plaintiffs are somehow required to violate the law and subject themselves to enforcement to claim damages.

Plaintiffs are willing to engage in settlement discussions with the County and the City. But if the County and the City are unwilling to acknowledge that their unlawful actions caused real damages to real people, then Plaintiffs will need to obtain that determination from this Court. In any event, it should take the parties no more than one week to determine if Defendants' settlement overture is genuine, and if Defendants have had a sudden change of heart. This Court should promptly lift the stay, enter a preliminary injunction consistent with the Eleventh Circuit's mandate, and schedule the case for merits litigation and disposition, without delay. If a settlement is subsequently reached, the parties will advise the Court promptly.

DATED this August 11, 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 11, 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