Case 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 - CIV. NO. 18-80771

CITY OF BOCA RATON'S RESPONSE TO PLAINTIFFS-APPELLANTS'S TIME SENSITIVE MOTION TO THE MERITS PANEL TO ENFORCE THE MANDATE

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Otto v. City of Boca Raton
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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee, City of Boca Raton, submits this list, which includes the trial judge, and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this review:

1. Abbott, Daniel L.
2. Alliance for Therapeutic Choice
3. Carlton Fields Jorden Burt, P.A.
4. City of Boca Raton, Florida
5. Cole, Jamie A.
6. Dreier, Douglas C.
7. Dunlap, Aaron C.
8. Equality Florida Institute, Inc.,
9. Fahey, Rachel Marie
10. Flanigan, Anne R.
11. Gannam, Roger K.
12. Gibson, Dunn & Crutcher LLP
13. Guedes, Edward G.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
(Continued)

14. Hamilton, Julie H., Ph.D., LMFT
15. Hoch, Rand
16. Hvizd, Helene C.
17. Kay, Eric S.
18. Liberty Counsel, Inc.
19. Mihet, Horatio G.
20. Otto, Robert W., Ph.D. LMFT
21. Palm Beach County, Florida
22. Palm Beach County Human Rights Council
23. Phan, Kim
24. Price, Max Richard
25. Reinhart, Bruce E., Magistrate Judge
26. Rosenberg, Robin L., Judge
27. SDG Counseling, LLC
28. Staver, Mathew D.
29. Sutton, Stacey K.
30. The Trevor Project
31. Walbolt, Sylvia H.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
(Continued)

32. Weiss Serota Helfman Cole & Bierman, P.L.

33. Yasko, Jennifer A.

/s/ *Anne R. Flanigan*
Anne R. Flanigan

CITY OF BOCA RATON'S RESPONSE TO TIME SENSITIVE MOTION TO MERITS PANEL TO ENFORCE THE MANDATE

Pursuant to the Court's order dated August 15, 2022, the City of Boca Raton ("City") hereby responds to "Plaintiffs-Appellants' Time Sensitive Motion to the Merits Panel to Enforce Mandate" (the "Motion").[1]

OVERVIEW

The Motion asks this Court to enjoin the City from enforcing an ordinance that has already been repealed. On August 5, 2022, just five business days following the entry of this Court's mandate, the City Council unanimously enacted an emergency ordinance, *repealing* the challenged City ordinance that had prohibited conversion therapy on minors. At that same meeting, the City Council approved on first reading a permanent ordinance to affirm the emergency repeal. That permanent ordinance is set for final approval on August 23, 2022, just one week from today. The City acted as quickly as possible to unambiguously repeal the challenged ordinance (and affirm no intent to reenact), because it desired to take immediate action in response to this Court's decision.[2]

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[1] At the eleventh hour before Appellees' Response to Appellants' Motion was due (literally, at 11:00 a.m.), Appellants, based upon information known to them and brought to the District Court's attention nearly four years ago, filed a "Supplement" before this Court. As acknowledged by Appellants, their filing does not constitute a request for the District Judge's recusal nor did they ever seek same. There are applicable procedures for recusal. There Supplement fails to follow those procedures and is utterly improper.

[2] Oddly, Appellants criticize the City for acting too quickly by adopting an emergency ordinance (followed by a permanent ordinance), while criticizing (continued . . .)

Nevertheless, Appellants demanded that the District Court enter an injunction against the City (and the County) by 5:00 p.m. on August 15, 2022 (a date and time imposed and created by Appellants), or they would seek relief in this Court. The District Court properly responded that it would "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." Unhappy with that response, Appellants have come to this Court, filing a "time-sensitive" Motion seeking relief from this Court by Thursday, August 18, 2022 (another self-created deadline).

Appellants, in dire fashion, claim irreparable daily injury, even though *there is no City ordinance or regulation currently in place* that would prevent them from providing conversion therapy to minors within the City. The challenged ordinance *stands repealed*, and during the following seven days before second reading of the permanent repeal ordinance on August 23, 2022, there is *no possibility of enforcement* by the City of any conversation therapy ban. Therefore, notwithstanding their repeated protestations of impending harm, Appellants will suffer *none*. They legally are free to provide conversion therapy to minor patients. In short, there is nothing for the District Court (or this Court) to enjoin, and certainly no emergency necessitating immediate action that would justify depriving the District Court of its traditional role in deciding, in the first instance, whether

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(. . . continued)

the County for not acting quickly enough (by directly moving forward with a permanent ordinance). Both the City and the County have moved expeditiously to repeal the challenged ordinances.

injunctive relief has been rendered moot (and, if not moot, the scope of the injunction and any appropriate bond).

This Court should deny the Motion and allow the District Court to comply with this Court's Mandate, after considering the issues raised by the parties.

RELEVANT FACTS

1. Appellants, Robert W. Otto and Julie H. Hamilton, initiated this action primarily seeking[3] to enjoin the City's enforcement of Ordinance No. 5407, which prohibited conversion therapy on minors within the City limits by licensed therapists ("Challenged Ordinance").[4]

2. Following an evidentiary hearing on Appellants' motion for preliminary injunction (ECF No. 8), the District Court denied the motion. ECF No. 141. Appellants appealed, and this Court reversed the order denying the preliminary injunction.[5] On December 11, 2020, the City and County jointly moved for panel rehearing and rehearing en banc, which resulted in this Court withholding the mandate. The Court ultimately denied the joint motion on July 20, 2022. On July 29, 2022, the Court issued its mandate to the District Court with

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3 The complaint also seeks declaratory relief, as well as damages. ECF No. 1.

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

5 The District Court stayed the case during the pendency of the interlocutory appeal. ECF No. 145.

instructions to enter a preliminary injunction consistent with its opinion. ECF No. 149.

3. However, at a special meeting on August 5, 2022, just five business days after the entry of the Mandate, the City Council passed Emergency Ordinance No. 5625 ("Emergency Ordinance"),[6] which repealed the Challenged Ordinance.[7] The City Council enacted the Emergency Ordinance because it desired to take immediate action in response to this Court's now-final decision.

4. Pursuant to Section 3.14 of the City Charter, emergency ordinances are in effect for sixty days unless they are re-enacted under regular procedures. ECF No. 152 at 1-2. Accordingly, at the same special meeting on August 5, 2022 (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 to permanently repeal the Challenged Ordinance (Ord. No. 5407). *See* Declaration of Mary Siddons, Motion, at 46-53 (previously below filed at ECF Nos. 153-1 & 154-1). As required by state statute and the City Code, the

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[6] Municipal ordinances are usually adopted only after two "readings," held on separate days. § 166.041(3)(a), Florida Statutes. However, by supermajority vote, a municipality may enact an "emergency ordinance" without complying with those usual formalities. § 166.041(3)(b), Florida Statutes.

[7] The Challenged Ordinance was codified into Chapter 9, Article VI of the City Code, which was repealed by the Emergency Ordinance.

final reading and public hearing for adoption of Ordinance No. 5626 will take place at the City Council meeting on August 23, 2022. *Id.*

5. The Emergency Ordinance contains an explicit statement 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.[8]

6. Between the unanimous enactment of the Emergency Ordinance, the introduction of Ordinance No. 5626 and scheduling of final reading/public hearing for August 23, 2022, and the factual statement regarding intent contained in the Emergency Ordinance, the City has done everything possible to repeal the Challenged Ordinance as quickly as possible. The City's intent to repeal the Challenged Ordinance *permanently* is neither speculative nor reflects a substantial

[8] Appellants take issue with (i) the City Council's acknowledgment that, ***if*** the law changes so as to make a conversion therapy ban constitutionally lawful in this circuit, either by further decision of this Court or of the United States Supreme Court, the City may reenact a ban; and (ii) the individual Council Members' expression of their personal beliefs regarding conversion therapy. Motion at 10, 12-15. What Appellants fail to explain, though, is how the City Council's mere expression of its philosophical disagreement with conversion therapy or the possibility of future *lawful* legislation negates the present legal effect of the emergency repeal of the Challenged Ordinance. What's more, such evidentiary concerns—for that is what they are—and their significance, are more properly consigned to the District Court in the first instance.

likelihood of reenactment. The City's actions reflect an earnest effort to immediately and permanently comply with this Court's ruling.

7. As noted in the introduction, it is undisputed that there is no City ordinance or regulation in effect that would prevent Appellants from engaging in conversion therapy for minors within the City, and thus, there is nothing for the District Court (or this Court) to enjoin.

ARGUMENT

I. THE DISTRICT COURT SHOULD BE PERMITTED TO FULFILL ITS TRADITIONAL ROLE OF IMPLEMENTING THE MANDATE AND ADDRESSING, IN THE FIRST INSTANCE, ANY PENDING ISSUES THAT WERE NOT ADDRESSED BY THE APPEAL.

The City does not dispute that the District Court must comply with this Court's Mandate. That is precisely what the District Court was doing when this expedited relief was sought. In response to Appellants' "Motion to Lift Stay, Enter Preliminary Injunction, and Set Scheduling Conference for Merits Litigation and Request for Expedited Consideration" (ECF No. 150), the City (and the County) each filed responses and raised substantive issues for the District Court to consider, which had not been raised or addressed in the appeal to this Court, including but not limited to the mootness of further injunctive relief. ECF Nos. 154 & 156.

Although a District Court must comply with a mandate from an appellate court, it "is free to address, as a matter of first impression, those issues not

disposed of on appeal." *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985).[9] It is appropriate, therefore, for this Court to give the District Court sufficient time to address a change in circumstances that occurred after the Mandate, namely, the City's repeal of the Challenged Ordinance, as well as the scope of any potential injunction and any necessary bond.[10]

II. THIS COURT SHOULD ALLOW THE DISTRICT COURT, IN THE FIRST INSTANCE, TO DETERMINE WHETHER THE CLAIM FOR INJUNCTIVE RELIEF AGAINST THE CITY IS MOOT.

The City has filed a Suggestion of Mootness with the District Court, because the Challenged Ordinance has been repealed. "[T]he Supreme Court has held that the repeal of or amendment to challenged legislation rendered moot a plaintiff's

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[9] *Piambino* is the *sole* appellate decision (other than the decision in this case) that Appellants' rely on to support their demand for expedited relief, and yet, Appellants managed not to bring to the Court's attention this critical language from the decision. Be that as it may, Appellants cite *Piambino* for the proposition that the District 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." Motion at 4. *Piambino*, though, did not (as this case does) involve a post-Mandate change in circumstances such as the repeal of the challenged legislation.

[10] For example, the post-Mandate preliminary injunction proposed by Appellants would enjoin the City from enforcing the now-repealed Challenged Ordinance against any actor(s) within the City (and sought a similarly broad injunction against the County related to its ordinance). ECF No. 150, ¶ 6. The proposal, however, is broader than the relief sought in Appellants' Complaint, namely, an injunction enjoining the City and County from enforcing their respective ordinances against Appellants only. *See* ECF No. 1, at 56.

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)).

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." *Coral Springs St.*, 371 F.3d 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. In the Emergency Ordinance repealing the Challenged Ordinance, 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. That the City expressed its *possible* legislative intent in some hypothetical future, where conversion therapy bans are lawful in this circuit, does not diminish the legal effect of the current repeal nor undermine the City's commitment to the repeal absent a change in substantive law.

Moreover, the fact that the initial repeal was by an emergency ordinance that remains in effect for sixty days (expiring on October 4, 2022) while a permanent repeal can be noticed and heard through the regular process (which began on August 5, 2022 and will conclude on August 23, 2022), does not negate the assertion of mootness. ***Currently, there is no City Ordinance preventing Appellants from engaging in conversion therapy in the City, and therefore, they cannot possibly be harmed (much less irreparably harmed), and there is no need for injunctive relief.*** The determination of whether the emergency repeal, coupled with the about-to-be-enacted permanent repeal, are sufficient to render the claim for injunctive relief moot is for the District Court to determine upon consideration of any evidence that may be presented, subject to *subsequent* review by this Court.

Appellants' unequivocal assertion that an Emergency Ordinance cannot render moot a claim for injunctive relief ("all authority is to the contrary," Motion at 9), misrepresents the law, both in this circuit and elsewhere. *See Church of Scientology Flag Services Org., Inc. v. City of Clearwater*, 2 F.3d 1509, 1511 (11th Cir. 1993) (vacating on mootness grounds order enjoining enforcement of 1983

Ordinance that had been repealed in part by an emergency ordinance that would have expired by its own terms in 90 days).[11]

Other federal courts have reached a similar conclusion, despite Appellants' assurance that "all authority is to the contrary." *See, e.g., World Wide Rush LLC v. City of Los Angeles*, 605 F. Supp. 2d 1088, (C.D. Cal., W. Div. 2009) (finding

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[11] In the underlying related appeal, *Church of Scientology Flag Servs. Org., Inc. v. City of Clearwater*, 777 F.2d 598 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986), this Court explained why the repeal of the prior ordinance rendered the matter moot, deprived the district court of jurisdiction to issue an injunction, and warranted vacatur of the orders:

> The Constitution limits the exercise of the judicial power to cases and controversies. U.S. Const. art. III, § 2. An action that has become moot or academic does not present a justiciable controversy within the case or controversy clause. The case must consist of a present, live controversy in order to "avoid advisory opinions on abstract propositions of law."
>
> In addition to the constitutional limits on jurisdiction, the Supreme Court has established a long-standing policy of refusing to decide constitutional issues unless strictly necessary. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." … Ordinance No. 3091–83 was no longer in force when the district court declared it unconstitutional. "Where by ... a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly."

Id. at 604-05 (citations and footnotes omitted). While the district court did not explore the consequences of the automatic expiration of the emergency ordinance, this Court noted "that [replacement] Ordinance No. 3479–84 provided for the repeal of inconsistent ordinances and made no provision for bringing the prior ordinance back to life." *Id.* at 605 n.18.

claim for injunctive relief moot based upon a 90-day interim control ordinance because "the Court here does not find it likely that the City will re-enact or enforce" the repealed law); *Covenant Media of California v. City of Huntington Park*, 377 F. Supp. 828, 833, 837 (C.D. Cal. 2005) (finding claim for injunctive relief moot based upon an ordinance adopted as an "urgency measure" that would expire in 45 days).

The district court decisions cited by Appellants are, in fact, inapposite. Appellants cite the "absolutely clear" standard, which is applicable to *private* parties only. *See* Motion at 8-9 (citing *Already, LLC v. Nike*, 568 U.S. 85, 91 (2013), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017)). Government actors, however, "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.*, 371 F.3d at 1328-29.

Moreover, Appellants' reliance on district court decisions from outside this circuit is misplaced and their reasoning is not persuasive. These decisions are merely examples of district courts determining a factual question: whether, based upon the specific evidence (and the standard applicable in their circuits), the local government is likely to re-enact (through new legislation or allowing an emergency ordinance to lapse) the challenged regulation.

In *Desert Outdoor Advert. v. City of Oakland*, No. C 03-1078 MJJ, 2005 WL 147582, at *2 (N.D. Cal. Jan. 20, 2005), a California District Court found "Oakland has provided no evidence that it will not re-enact the prior legislation when the temporary term of the emergency ordinance expires." This was a factual finding *by the district court*.[12] In contrast here, the City has proffered evidence in the form of a permanent ordinance, passed on first reading, to permanently repeal the Challenged Ordinance. Moreover, unlike the Emergency Ordinance here, there was no indication in the Oakland ordinance that it was enacted to comply with an existing court ruling or an expression of intent not to reenact the prior ordinance. *Id.* at *2.

In *Landon v. City of Flint*, No. 16-11061, 2017 WL 345854, at *1–2 (E.D. Mich. Jan.24, 2017), a Michigan District Court declined to find mootness based upon an undated and unsigned emergency ordinance, where "it is not evident that the required steps to effectuate either ordinance were taken" and the "language of the relevant amended section … undermine[s] the City's assertion of mootness." In short, the district court's criticism of the city's purported legislative corrective action was not merely that it would expire in sixty days, but rather that it was defective (because it was not signed or dated) and did not correct the substantive

[12] *In Desert Outdoor Advertising*, the California district court applied the "absolutely certain" standard applicable to private entities, rather than apply this circuit's standard requiring deference to the City and presuming that it is unlikely to resume illegal activities. *Rich*, 715 F.3d at 531; *Coral Springs*, 371 F.3d at 1328-29.

defect in the challenged ordinance. *Id.* Again, these were factual determination made by the district court based upon specific facts.[13]

The decision in *Bayou Fleet, Inc. v. Alexander*, No. Civ.A. 97–2205, 1997 WL 625492 (E.D. La. Oct. 7, 1997), is even less relevant in that the emergency ordinance enacted in that case "merely suspended and [did] not revoke[]" the challenged ordinance in that case. *Id.* at *1. That alone is sufficient to differentiate the City's Emergency Ordinance, which unambiguously repealed the Challenged Ordinance.

Finally, *S. Pac. Transp. Co. v. St. Charles Par. Police Jury*, 569 F. Supp. 1174 (E.D. La. 1983), is also inapposite. The local government in that case, St. Charles Parish, repealed the ordinance in the middle of trial, before any court had ruled on the issues, and attempted to avoid a ruling. *Id.* at 1178. In fact, the district court noted, "Voluntary action by the Parish Council during the course of trial on the merits is suspect." *Id.* Here, the City has already conclusively lost on appeal. Unlike St. Charles Parish, which was trying to *avoid* a ruling, the City here was trying to comply expeditiously with this Court's decision. Furthermore, as was true in the other decisions relied upon by Appellants, the district court did not apply this circuit's deferential standard applicable to governmental entities. *Id.* (questioning

[13] The District Court in *Landon* did not apply this Circuit's standard requiring deference and a presumption in favor of local governments that repeal legislation. Instead, it applied a more stringent standard.

the government's motivations because, "No evidence was introduced to show that the offending ordinance would not be re-enacted.").

CONCLUSION

Appellants' rhetoric and exhortations notwithstanding, they have failed to demonstrate why the District Court should not be permitted to perform its traditional role in deciding, among other things, the pending question of mootness before possibly entering an injunction. Appellants *are not being harmed in any way* at the present time, because there is no City ordinance in place prohibiting their practice of conversion therapy. To the extent this Court is nonetheless inclined to pretermit the mootness analysis by deciding the issue in the first instance, the City respectfully requests that, consistent with existing precedents affording local governments deference in the repeal of past legislation, the Court should conclude that the emergency repeal and forthcoming permanent repeal of the Challenged Ordinance renders moot any request for injunctive relief directed to the Challenged Ordinance.

Respectfully submitted,

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By: /s/ *Anne R. Flanigan*
Anne R. Flanigan

Counsel for Defendant-Appellee, City of Boca Raton, Florida

CERTIFICATE OF SERVICE

I, Anne R. Flanigan, counsel for Defendant-Appellee, City of Boca Raton, Florida, and a member of the Bar of this Court, certify that, on August 16, 2022, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ *Anne R. Flanigan*
Anne R. Flanigan

CERTIFICATE OF COMPLIANCE

On behalf Defendant-Appellee, City of Boca Raton, Florida, I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the foregoing Response to Appellants' Motion is proportionally spaced, has a typeface of 14 points or more, is set in Times New Roman, and contains 3,600 words.

/s/ *Anne R. Flanigan*
Anne R. Flanigan