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' REPLY IN SUPPORT OF MOTION TO THE MERITS PANEL TO ENFORCE MANDATE

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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

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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' REPLY IN SUPPORT OF MOTION TO THE MERITS PANEL TO ENFORCE MANDATE

The responses filed by Defendants–Appellees, City of Boca Raton ("City"), and County of Palm Beach ("County") (collectively, the "Localities"), to the motion to enforce mandate ("Motion") filed by Plaintiffs–Appellants, ROBERT W. OTTO, Ph.D. LMFT and JULIE H. HAMILTON, Ph.D. LMFT (collectively, "Counselors"), demonstrate that the injunctive relief ordered by this Court's July 29, 2022 mandate is not moot, and that this Court's further order is necessary and warranted to secure immediate relief for Counselors.

First, the County confirms that it has not repealed its unconstitutional ordinance. (County Resp. at 1). The most that the County can offer this Court is the same thing the County offered the district court—a promise that "an ordinance repealing the subject Ordinance **will be considered** by the Palm Beach County Board of County Commissioners, (the Board), on August 23,2022." (*Id*. (emphasis added)). Although the County quibbles with the irrelevant minutiae of the legislative process, the County ultimately still must ask this Court, as it asked the district court, to speculate how a political process and ultimate vote will play out **in the future**, and to conclude today that such yet-to-happen vote **presently** moots the claim for injunctive relief. This Court can search the County's response from top to bottom, and will not find a single case supporting the County's novel theory of mootness by future decree.

Actually, the County does appear to offer this Court something new, but it is of no moment. The County contends that its Code Enforcement Division "has never received a complaint concerning conduct prohibited by the subject Ordinance," and its enforcement officer has been "advised … of this Court's ruling that the subject Ordinance was unconstitutional." (County Resp. at 3). But, whether the County has ever enforced its unconstitutional ordinance is immaterial, because "the mere existence of the [statute], coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). The County cites no authority for its apparent contention that Counselors must violate its ordinance and subject themselves to punishment in order for its ordinance to present a live controversy and be subject to enjoinment by the Court.

And, notably, the County stops short of representing unequivocally to this Court that its enforcement officer will not, under any circumstances, enforce its still-in-effect unconstitutional ordinance. (County Resp. at 3). The most that the County can say is that it "advised" its enforcement officer of this Court's decision. That advisory letter is included in the County's Response Appendix (page 12 of 13). The County's hortatory advisory to its enforcement official could hardly have been milder: "please **consider** the **potential** repeal of this ordinance in regard to any reported violations of the ordinance received before August 23, 2022." (*Id.*

(emphasis added)). The County stops well short of assuring this Court that its repeal ordinance will certainly (rather than "potentially") pass, and that the unconstitutional ordinance will not be enforced under any circumstances in the interim. There is, therefore, no question that a preliminary injunction should have been issued against the County's unconstitutional ordinance as of this Court's July 29, 2022 mandate, eighteen days ago.

Second, the City's response fares no better. Its most prominent feature is the continued, repeated, and gratuitous denigration of Counselors as "providing conversion therapy to minors," (City Resp. at 2), and purportedly now being "free to provide conversion therapy to minor patients" (*id*.). (*See also id*. at 6, 9 and 14 (repeatedly misrepresenting that Counselors wish to "engag[e] in conversion therapy")). As this Court has already noted, "the terminology itself is contested" and Counselors "reject the often-used label 'conversion therapy.'" *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 859 n.1 (11th Cir. 2020). Having been unsuccessful in its attempt to permanently shut down Counselors' voluntary, speech-only counseling with their willing patients, the City remains committed now to malign Counselors as "conversion therapists," both in its legal pleadings and through a forthcoming resolution, as demonstrated in Counselors' Motion. (Motion, ¶¶ 23(a)-(f)).

Beyond its liberal use of offensive and disputed labels, the City's response does nothing to support its contention that an admittedly temporary, highly dubious

"emergency" repeal of an unconstitutional ordinance—that expires automatically by its terms in sixty days, and that was openly acknowledged in legislative deliberations to be a strategic move to forestall litigation that would jeopardize the survival of this and other similar ordinances in the future—is sufficient to moot the injunctive relief mandated by this Court.

The City badly misreads or misrepresents the Eleventh Circuit's holding in *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598 (11th Cir. 1985), falsely contending that this Court found mootness there based upon a repeal ordinance "that would have expired by its own terms in 90 days." (City Resp. at 9-10). In fact, in *Church of Scientology*, the plaintiff resisting mootness had **argued** that the emergency ordinance would expire on its own terms in 90 days and that the unconstitutional ordinance would be automatically revived, **but this Court was not persuaded of this fact**, noting that "[n]o citation is given to support this assertion, nor did the district court discuss the issue of state law." *Id*. at 605 n.18. This Court, in fact, rejected plaintiff's contention about the temporal nature of the emergency repeal, pointing out that the emergency repeal ordinance "provided for the repeal of inconsistent ordinances and **made no provision for bringing the prior ordinance back to life**." *Id*. (emphasis added).

This Court further found in *Church of Scientology* that "there was no indication that the City was acting in a manipulative fashion in order to prevent an

adjudication or that any reasonable likelihood existed that the [challenged ordinance] would regain vitality." *Id*. at 605. Here, in stark contrast, the members of the City Council all but admitted that they are begrudgingly attempting to repeal the unconstitutional ordinance for the express purpose of manipulating jurisdiction, at the request of the chief proponent of the ordinance who has a vested interest in bringing it back here, and saving similar ordinances elsewhere. (Motion, ¶¶ 23(a)-(f)).

Ultimately, this Court concluded that the repealed ordinance in *Church of Scientology* was moot, not because the repeal was temporary and subject to an automatic revival, as is indisputably the case here, but because it was **permanent and not subject to automatic revival**:

> An actual controversy must exist at all stages of review. It is clear that the controversy over Ordinance No. 3091–83 retains no vitality at this stage of review. Ordinance No. 3479–84 has been **permanently** enacted and is the subject of vigorous litigation between the same parties.

777 F.2d at 605 n.19 (emphasis added). Because the City's "emergency" repeal ordinance admittedly and indisputably expires by its own terms in 60 days (in the absence of additional legislative action **in the future**), injunctive relief is not moot at **present**, and should have been granted by the district court eighteen days ago, when this Court's mandate was issued.

Similarly unhelpful to the City is *Covenant Media of Cal., L.L.C. v. City of Huntington Park, Cal.*, 377 F. Supp. 2d 828 (C.D. Cal. 2005) (City Resp. at 11). There, the court found that there was "no immediate likelihood" that a challenged ordinance would be revived after being temporarily repealed, because, at the same time it enacted the temporary repeal, the city adopted a resolution that completely and unequivocally disclaimed any intent to ever return to the challenged conduct, and this was "**the only evidence in the record**" on the city's intent. *Id*. at 836 (emphasis added). In stark contrast, here the City has not only expressly announced its disagreement with this Court's decision and its intent to reenact its ban as soon as it thinks it can get away with it legally, but also, instead of passing a resolution condemning its past conduct and vowing not to return to it, the City is discussing a resolution, supported by at least 4 out of its 5 council members, that condemns **Counselors' protected speech**, not the City's conduct in unconstitutionally banning it. (Motion, ¶¶ 20-23).

At the end of the day, the Localities do nothing to establish that the injunctive relief mandated by this Court is moot, and that the district court is justified in delaying the entry of that mandated injunction for what is now the eighteenth day. This Court should grant the relief requested by Counselors.

Dated this August 16, 2022.

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

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 1,419 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 16, 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:

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