

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

ROBERT W. OTTO, PH.D. LMFT,	)	
individually and on behalf of his patients,	)	
and JULIE H. HAMILTON, PH.D., LMFT,	)	
individually and on behalf of her patients,	)	Civil Action No. 9:18-cv-80771-RLR
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CITY OF BOCA RATON, FLORIDA, and	)	
COUNTY OF PALM BEACH, FLORIDA,	)	
	)	
Defendants.	)	

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**PLAINTIFFS’ 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

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#### **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*