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