

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

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,

v.

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

Defendants.

**DEFENDANT, PALM BEACH COUNTY'S REPLY TO PLAINTIFFS' CONSOLIDATED
RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

Defendant, Palm Beach County ("County"), by and through undersigned counsel, replies to Plaintiffs' Consolidated Response in Opposition to Defendants' Motions to Dismiss [DE 188], ("Response") and in support thereof states the following:

The County's Motion to Dismiss Plaintiffs' Amended Complaint [DE 184], already addresses the arguments in the Plaintiffs' Response. The following authority provides further grounds in support of why the Plaintiffs' Amended Complaint should be dismissed.

I. The County has met its burden under Rule 12(b)(1). (Re: Argument I(A)).

The Plaintiffs' assertion that this Court cannot rely on Fed. R. Civ. P. 12(b)(1) to dismiss the Complaint because the facts necessary to sustain jurisdiction implicate the merits of the Plaintiffs' causes of action is entirely unsubstantiated. Plaintiffs do not point to any specific facts, or otherwise provide any bases for this assertion. As the County's Motion to Dismiss [DE 184] makes clear, the facts

necessary to sustain jurisdiction do not implicate the merits of the Plaintiffs' causes of action. Accordingly, this Court is free to rely on Rule 12(b)(1) to dismiss the Amended Complaint.

Further, Plaintiffs misrepresent the holding in *Lawrence v. Dunbar*, 919 F.2d 1525 (11th Cir. 1990) by claiming that a 12(b)(1) motion must be accompanied by extrinsic evidence in the form of affidavits or testimony to be considered. In *Lawrence*, the Eleventh Circuit distinguished facial from factual attacks to jurisdiction, explaining that in the case of the latter “matters outside the pleadings, **such as** testimony and affidavits, are considered.” 919 F.2d at 1529. (Emphasis added). “Testimony” and “affidavits” were identified as examples of matters outside the pleadings that a court could look at, and not as mandatory submissions, as the Plaintiffs claim. *See Id.* at 1529.

II. A live damages claim does not save the merits litigation from mootness. (Re: Argument II(A)).

The Plaintiffs' assertion that the County seeks to moot out the entire case is disingenuous, and is contradicted by the docket. Since the case was remanded, the County has maintained that while the injunctive relief and the declaratory judgment claims are moot, the sole remaining issue in this litigation is the matter of Plaintiffs' damages. [DE 156, p. 3; DE 171, p. 8.] Consistent with this position, the County's Motion focuses only on Plaintiffs' claims for injunctive and declaratory relief.

However, the fact that the Plaintiffs may have a viable claim for damages does not save their claims for declaratory and injunctive relief from being moot. Plaintiffs rely on *Uzuegbunam v. Preczewski* to argue that because they continue to pursue monetary relief that the entire case remains alive. [DE 188, p. 6.] However, *Uzuegbunam* is both distinguishable from this case, and even to the extent that it applies, does not support the Plaintiffs' argument. *See Uzuegbunam*, 141 S.Ct. 792 (2021).

In *Uzuegbunam*, former students sued the university for First Amendment violations. Plaintiffs sought injunctive relief and nominal damages. The university chose to discontinue the challenged policies, and sought dismissal on the ground that the policy change left the students without standing

to sue. *Uzuegbunam* is distinguishable from this case not only because it involved standing as opposed to mootness, but also because there the parties agreed that the policy change rendered the student's request for injunctive relief moot. The sole dispute was whether the students had standing to maintain suit based on the remaining claim for nominal damages. *See Id.* The Supreme Court issued a limited holding that a request for nominal damages satisfies the redressability element of standing under Article III, where a plaintiff's claim is based on a completed violation of a legal right. *Id.* at 802.

Further, *Uzuegbunam* does not actually support Plaintiffs' argument that their request for nominal damages entitles them to the adjudication of the entire case on the merits. To the contrary, the Supreme Court reiterated that "[a] plaintiff must maintain a personal interest in dispute at every stage of litigation, including when judgment is entered . . . and **must do so separately for each form of relief sought.**" *Id.* (Emphasis added).¹

III. Plaintiffs fail to meet their burden of showing that the case is not moot. (Re: Argument II(B)).

Plaintiffs' next argument is premised on the "voluntary cessation" exception to mootness.² They rely largely on the Eleventh Circuit's decision in *Flanigan's Enterprises, Inc. of State of Georgia, et. al.*, 863 F.3d 1248 (11th Cir. 2017) to argue that this exception saves their case. That reliance is misplaced, as the application of the standards outlined in *Flanigan's* to the undisputed jurisdictional facts of this case only makes clear that the Plaintiffs' declaratory and injunctive claims are moot. *See Id.*

First and foremost, Plaintiffs misrepresent the holding in *Flanigan's* by stating that "**the burden is on the party asserting mootness** to persuade the court that the challenged conduct cannot

¹ Citing to *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167 (2000)) "[A] Plaintiff must demonstrate standing separately for each form of relief sought . . . notwithstanding the fact that plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief. Standing is not dispensed in gross." (Internal citations omitted).

² The voluntary cessation exception to mootness, and its lack of applicability in this case, was fully briefed in the County's Motion to Dismiss. *See* [DE 184, p. 8-11].

reasonably be expected to start up again.” [DE 188, p. 6]. What the Plaintiffs neglect to mention is that per the express language of the Eleventh Circuit, this standard applies **only to private defendants**:

While it may be true that the burden of mootness generally falls heavily on the party asserting it, ‘governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities. . . . As a result, **‘once the repeal of an ordinance has caused our jurisdiction to be questioned, the plaintiff bears the burden** of presenting affirmative evidence that its challenge is no longer moot.’ *See Id.* at 1256 (citing to *National Advertising Co. v. City of Miami*, 403 F.3d 1329, 1334 (11th Cir. 2005); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d at 1328-29 (11th Cir. 2004)). (Emphasis added).

Accordingly, the Plaintiffs’ assertion that pursuant to *Flanigan’s*, the burden falls on the County is false. Moreover, the *Flanigan’s* court continued to state that

[b]ecause of the deference with which we view voluntary changes in government action, a plaintiff disputing a finding of mootness must present more than ‘mere speculation that the City may return to its previous ways.’³ . . . Indeed, even where the intervening governmental action does not rise to the level of full legislative repeal, we have held that ‘a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated that the suit is terminated.’⁴

Here, the government action is a full legislative repeal of the Challenged Ordinance by the County. Accordingly, the burden on the Plaintiffs is heavy, and as more particularly described below, one that they cannot overcome.

First Flanigan factor favors finding of mootness. (Re: Argument II(B)(1)).

The Eleventh Circuit outlined three broad factors intended to guide a court in determining whether the “voluntary cessation” exception applies. *Id.* at 1257. (“*Flanigan’s* factors”). The first factor is

³ Citing to *City of Miami*, 402 F.3d 1339, 1334 (“Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions.”)

⁴ Citing to *Troiano v. Supervisor of elections*, 382 F.3d 1276, 1285 (11th Cir.) (“When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the case. The Court rejected the assertion of mootness in this kind of challenge **only** when there’s a substantial likelihood that the offending policy will be reinstated when terminated.”) (Emphasis in original).

whether the change in conduct resulted from substantial deliberation, or was merely an attempt to manipulate jurisdiction. *Id.*

Having first misrepresented the law, Plaintiffs proceed to misrepresent the facts by asserting that the “[d]efendants’ repeal of the Ordinances is . . . an attempt to manipulate this Court’s jurisdiction.” Rather than presenting any reasonable basis in support of this assertion, the Plaintiffs point to hearsay and speculate as to the County’s intent. Contrary to the Plaintiffs’ unsubstantiated assertions, and as addressed in depth in the County’s Motion to Dismiss, the repeal was not an attempt to manipulate this jurisdiction. Rather, it was the County’s good faith effort to comply with the Eleventh Circuit’s mandate. *See* [DE 184; DE 174.1].

Next, Plaintiffs’ argument that “the timing of the repeal is reason enough to doubt the [Defendant’s] sincerity” is contradicted by the very case that they rely upon. The *Flanigan’s* court rejected a similar argument, holding that “in the context of a full repeal of allegedly unconstitutional legislation . . . the timing of the repealing legislation is not dispositive if the court concludes from other evidence that there is no reasonable expectation that the government actor will reenact the challenged provisions.” *Id.* at 1259. Instead of timing, the Eleventh Circuit focused on the process that the City followed in repealing the ordinance: a process that is nearly identical to the one utilized by the County here.⁵ *See* [DE 174.1]. Likewise, the Eleventh Circuit put little stock on the purpose behind the repeal, holding that “the purpose of amending the statute is not the central focus of our inquiry nor is it

⁵ The Court described the process as follows: “[H]ere the City Council voted on both the Ordinance's repeal and the resolution regarding that repeal in open session during regularly scheduled meetings. Both measures were placed on the Council's published agenda and are reflected in their meeting minutes. The repeal itself was passed unanimously with all members present and, although a single member was missing for the second vote, the resolution regarding the repeal was likewise passed without objection. In short, the procedures used by the City to repeal the Ordinance reflect the same level of deliberation we would expect for any other change in policy. *Id.* at 1260.

dispositive of our decision. . . rather the most important inquiry is whether we believe the City would re-enact the prior ordinance.” *Id.* at 1259 (citing to *City of Miami*, 402 F.3d 1339).

Based on the foregoing, the application of the first *Flanigan*’s factor to the facts of this case makes clear that the doctrine of voluntary cessation does not save this case from mootness.

Arguments related to the second and third Flanigan’s factors do not apply to the County, as the facts outlined therein pertain only to the City of Boca Raton. (Re: Argument II(B)(3 and II(B)(4)).

Prior to addressing the remainder of the Plaintiffs’ arguments based on the *Flanigan*’s factors, it is critical to point out that in discussing the application of the second and third *Flanigan*’s factors, the Plaintiffs categorically refer to the plural “Defendants.” They do so notwithstanding the fact that their arguments are based exclusively on facts related only to the City of Boca Raton. Plaintiffs fail to point to any alleged specific action by Palm Beach County. In light of the “substantial burden” that the Plaintiffs must overcome to demonstrate that the case is not moot, Plaintiffs’ approach does not qualify as the “affirmative evidence” contemplated by the Eleventh Circuit. *See Id.* at 1256. The Court should not consider these arguments when determining whether to grant the County’s Motion to Dismiss.

Second Flanigan’s factor favors finding of mootness. (Re: Argument II(B)(2)).

The second *Flanigan*’ factor is “whether a government’s decision to terminate the challenged conduct was unambiguous. This requires [the court] to consider whether the actions that have been taken to allegedly moot the case reflect a rejection of the challenged conduct that is both permanent and complete.” *Id.* at 1257. The Eleventh Circuit determined that the City’s repeal was a plain and unambiguous termination of the challenged conduct, looking to the fact that “the City has not merely declined to enforce the Ordinance against these Appellants; it has removed the challenged portion in its entirety.” *Id.* at 1261. That, of course is what the County did in this case. [DE 174.1].

As part of its determination that the repeal was unambiguous, the Eleventh Circuit also looked to the fact that City’s counsel represented that the City had no intention to reenact the repealed ordinance.

Id. at 1261-1262. To that end, the undersigned has been authorized to represent same: namely, that **Palm Beach County has no intention to reenact the Challenged Ordinance.** For the foregoing reasons, the application of the second *Flanigan's* factor supports a finding of mootness.

Finally, the County notes that Plaintiffs fixate on whether or not representatives of Boca Raton agree with the Eleventh Circuit's decision in *Otto*, presenting this as a dispositive factor in whether the repeal was ambiguous. However, the Eleventh Circuit rejected a similar argument, stating that:

[O]ur jurisdiction turns on the presence of a live controversy throughout the litigation and, in this context, that turns on whether there is a reasonable expectation that the City will reenact the challenged legislation. Whether the City defended the Ordinance and/or continues to believe it was constitutional provides only weak evidence, if any, that its repeal was ambiguous and, therefore, that the City will reenact the legislation. *Id.*

Third Flanigan's factor supports a finding of mootness (Re: Argument II(B)(3)).

As for the third *Flanigan's* factor: whether the government entity maintained its commitment to the new legislative scheme, the Eleventh Circuit noted that while it was too early to tell, it was reassured not only by the City's commitment not to reenact the legislation, but also by its demonstrated lack of commitment to enforcing the old scheme. Likewise, here, the County Ordinance was never enforced, and in fact, County employees were expressly instructed to not enforce it while the repeal was effectuated. *See* [DE 184; DE 164.1]. This too supports a finding of mootness.

IV. Jurisdictional discovery would be futile and should be denied. (Re: Argument II(C)).

County's 12(b)(1) motion is based on undisputed facts tied to the procedural history of this case. As discussed, the County Ordinance was unambiguously, and permanently repealed. The Repeal Ordinance incorporates the Eleventh Circuit's holding in *Otto*. [DE 174.1]. The County has represented to this Court that it does not intend to reenact it in the future, and no reasonable basis exist for suggesting otherwise. In short, there is no general dispute as to any material jurisdictional fact to warrant jurisdictional discovery. In light of the foregoing, jurisdictional discovery would be futile and

should be denied. “[T]here is no absolute right to conduct jurisdictional discovery” and as such, this procedural tool is discretionary. *Barboza v. Drummond Co.*, No. 06-61527-CIV, 2007 WL 8025825, at *7 (S.D. Fla. July 17, 2007) (citing to *Utsey v. New Eng. Mut. Life Ins. Co.*, No. 07-0199-WS-M, 2007 WL 1076703, *2 (S.D.Ala. Apr.9, 2007)).

V. This Court already ruled that Plaintiffs’ clients do not have standing. (Re: Argument III(C)).

Plaintiffs are correct in stating that this Court has already established that the Plaintiffs Otto and Hamilton have standing to challenge both the County and the City Ordinances. The County withdraws its standing argument as for the named Plaintiffs only. However, in the same Order that the Plaintiffs rely upon, this Court, immediately after holding that Otto and Hamilton had standing, held that their minor clients did not. *See* [DE 141 at 12-13.] Wherefore, the County reasserts its argument that should this Court determined that the case is not moot, that the claims involving the Plaintiffs’ minor patients, be dismissed.

VI. Plaintiffs do not sufficiently allege that Defendant County conspired against them in violation of Section 1985(3). (Re: Argument V(E)).

Plaintiffs, in their Response, here again attempt to misdirect the argument and to conflate the issues. As outlined in *Griffin v. Breckenridge*, 403 U.S. 88, (1971), the Plaintiffs must identify themselves as: 1) members of a protected class; *and* 2) that the alleged conspiracy to deprive them of equal protection of the laws was motivated by animus toward that protected class. *See Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 267-68 (1993) (wherein the conspiracy was motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus”). Again, this standard requires that the course of conduct by the defendant was engaged in *because of, not merely in spite of*, its adverse effects upon an identifiable group. *Id.* at 271-272. (emphasis added) Plaintiffs attempt to sidestep the truth that they have failed to allege facts sufficient to overcome this

requirement. In order to maintain a cause of action for conspiracy, Plaintiffs must allege both: (a) a conspiracy motivated by discriminatory animus against an identifiable class, and (b) that the class discrimination was “invidious.” Plaintiffs’ Amended Complaint fails to do either and their Response doubles down in this regard. As such, Plaintiffs’ conspiracy claim must be dismissed.

In their Response, Plaintiffs again play fast and loose with their argument as to protected class. Even if the Court were to accept that “religion” is the Plaintiffs’ protected class for the purposes of an alleged conspiracy argument, Plaintiffs’ still fail to sufficiently allege facts to support their claim they were deprived “equal protection of the law”. *See* [DE at 33]. As outlined in Defendant’s Motion to Dismiss, and as incorporated in Plaintiffs’ Amended Complaint, the County’s Repealed Ordinance itself [DE 182-2] was replete with specific references to the American Psychological Association (“APA”) Report on SOCE Counseling [DE 182-3]. That report included an extensive analysis of positives, negatives, and outcomes regarding SOCE counseling, identifying varied societal beliefs regarding SOCE counseling or “conversion therapy,” including religious beliefs of other non-Christian religious communities, such as Orthodox Jews and Muslims. SOCE counseling is not inherently “religious” in nature, let alone Christian. No facts alleged by Plaintiffs support their entirely conclusory claim that Defendant’s Repealed Ordinance was targeted at Christians or that it denied Plaintiffs equal protection of the law on the basis of their religion.

Additionally, Plaintiffs’ allegation that Defendants alleged conspiracy was motivated by “discriminatory animus toward Plaintiffs’ religion, specifically their Christian viewpoints and beliefs on human sexuality and their desire to exercise their Christian beliefs through their SOCE counseling” [DE 188 at 34] is entirely conclusory. As outlined in the County’s Motion to Dismiss [DE 184], the only truly “factual allegations” regarding the County’s alleged motivation in adopting the Repealed Ordinance (other than the legislative findings contained in the Repealed Ordinance,

which belie any invidious discrimination claims) appear in paragraphs 41 through 52 of the Amended Complaint. Those allegations themselves do not reflect any invidious animus against religion in general or against Christianity in particular.

Further, Plaintiffs' Amended Complaint affirmatively alleges that the Repealed Ordinance was advocated for by "a local LGBTQ activist organization" that claims to have been "responsible for the enactment of more than 160 laws and policies providing equal rights, protections and benefits for the LGBTQ community since 1990." [DE 182 at ¶ 42]. Thus, the Amended Complaint itself belies the contention that the County's Repealed Ordinance was motivated by animus against Christianity by contending that it was instead motivated by a desire to afford "equal rights, protections and benefits" for the LGBTQ community.

Wherefore, the County reasserts that Plaintiffs' conspiracy claim should be dismissed.

VII. Amendment would be futile, and dismissal should be with prejudice. (Re: Argument VI).

The County's 12(b)(1) motion, which pertains to all counts of the Plaintiffs' complaint is based on the case being moot as the result of the repeal of the County Ordinance. There is no amendment that the Plaintiffs can make that will revive this case. Accordingly, dismissal should be with prejudice.

Respectfully submitted this 7th day of January, 2023.

/s/ Eric Reichenberger

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 7, 2023, 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/ Eric Reichenberger _____

Eric Reichenberger