

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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,

vs.

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

Defendants.

**DEFENDANT, CITY OF BOCA RATON'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION TO TAKE JURISDICTIONAL DISCOVERY**

Defendant, the City of Boca Raton ("City"), files this its Response in Opposition to Plaintiffs' Motion for Leave to Take Jurisdictional Discovery [ECF No. 197] (the "Motion"), and states:

I. The City's Interest in Connection with the Motion.

As noted in the Motion (at p. 1, f.n. 1), both Plaintiffs have accepted Rule 68 offers of Judgment made by the City, and it is expected that judgments will soon be entered in connection therewith. Those offers (and, presumably, those future judgments) do not contain any injunctive or declaratory relief. Nevertheless, the Motion seeks leave to undergo discovery efforts against the City, whether the City is a party at the time or not.

The reasons the Motion seeks such discovery against the City, however, are contradictory and confusing. For instance, the Motion claims that the City and the County acted in “conspiracy” with one another to “violate Plaintiffs’ rights.” The significance of the contention is not apparent. It is true that the Amended Complaint added a new claim (in Count IX) for “conspiracy,” but that Count is no less moot than the other eight. All nine Counts challenge the legality of the City and County ordinances, and all of the claims for relief seek damages, declarations and injunctions for the time the ordinances were in effect. In short, the “conspiracy” Count is no less or no more “moot” than the remainder of the counts.

The Motion additionally purports to need discovery from the City because Plaintiffs contend that the City and the County (and “others”) conspired to “strategically moot” Plaintiffs’ claims. Again, no explanation is made with regard to why this justifies discovery as to the City after judgment is entered and it is dismissed from this case. Whether the City tried to “strategically moot” the case (it didn’t, as explained below) is irrelevant. Plaintiffs’ requests for injunctive and declaratory relief against the County will be moot or not, and that decision may be based, in part, on the perceived likelihood that the County will re-enact its now repealed ordinance. That subject, however, would not appear to involve the City at all.¹

Finally, the Motion baselessly alleges (at p. 3) that the City “continue[s]” to “discriminate against Plaintiffs because of their religious beliefs and counseling practices.” The operative

¹ Moreover, any implicit suggestion that County contacts with the City (as a simple third-party witness) may uncover evidence relevant to the continued viability of Plaintiffs’ claims *against the County* is belied by the scope of proposed discovery against the City. *See e.g.*, Motion, Exhibits A and C [ECF No.s 197-1; 197-3] (Seeking discovery regarding *inter alia*, City communications with third-parties other than the County; the City’s deliberations in repealing (its own) Ordinance, and the City’s “commitment” to not ban “conversion therapy” in the future). None of these matters have even tangential relevance to Plaintiffs’ claims against the County, or the mootness thereof.

Amended Complaint, however, does not seek relief for any conduct other than the adoption of the (City and County) ordinances. *See* ECF No. 182 at pp. 65-67. Thus, the Motion represents Plaintiffs' efforts to obtain discovery from the City on a matter that has now been resolved, regarding contentions not even made in the operative Amended Complaint. Even if jurisdictional discovery is permitted regarding the continued viability of this case against the County, that discovery should not be authorized against the City.

II. THE MOTION CITES NO AUTHORITY FOR THE PROPOSITION THAT DISCOVERY IS REQUIRED TO RESOLVE THE MOOTNESS ISSUE.

While the Motion purports to cite authority for the proposition that discovery is available “where jurisdictional issues arise” (Motion at p. 4), the Motion offers no support for the proposition that mootness resulting from repeals of allegedly unconstitutional laws are the sorts of “jurisdictional issues” subject to that standard. Instead, the Motion relies on four cases that discuss discovery in connection with issues of long-arm personal jurisdiction over non-residents (*In re: CP Ships LTD Securities Litigation*, 578 F.3d 1306 (11th Cir. 2009), *abrogated*, *Morrison v. National Australia Bank LTD*, 561 U.S. 247 (2010); *Leon v. Cont'l AG*, 301 F.Supp. 1203, 1212 (S.D. Fla. 2017); *Bernardele v. Bonorino*, 608 F.Supp. 2d 1313, 1321 (S.D. Fla. 2009); and *Mother Doe I v. Al Maktoum*, 632 F.Supp.2d 1130, 1144 (S.D. Fla. 2007)) and one that discusses discovery regarding whether a defendant is subject to the statute sued upon (*Eaton v. Dorchester Dev., Inc.* 692 F.2d 727, 729 n. 7) (11th Cir. 1982) (Motion at pp. 4-5).

No decision referenced in the Motion has ever held that discovery is required to determine whether an action premised upon a repealed statute or ordinance is moot. Plaintiffs' failure to identify authority supporting their request is unsurprising because “when a government fully repeals a challenged law, a case challenging that law is almost surely moot.” *Keister v. Bell*, 29

Fed.4th 1239, 1250 (11th Cir. 2022). *See also Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1284 (11th Cir. 2021) (“Generally, a challenge to the constitutionality of a statute is mooted by repeal of the statute”); *Troiano v. Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004) (“When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit”) (citations omitted); *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) (“[O]n numerous occasions, the Supreme Court has held that the repeal of or amendment to challenged legislation rendered moot a plaintiff’s request for injunctive relief”).

Thus, actions seeking declaratory or injunctive relief from legislation are routinely dismissed as moot when the legislation is repealed, without so much as mentioning the possibility of “jurisdictional discovery.”² For instance, in *Princeton University v. Schmid*, 455 U.S. 100 (1982), a constitutional challenge to a state university’s regulations governing solicitations was dismissed when, during the appeal, the subject regulations were amended. *Id.* at 103. Since the regulations were not amended until the appeal was pending, the plaintiff was, of course, not permitted to engage in “jurisdictional discovery” in order to challenge, for instance, whether the university might re-impose the regulations after the “voluntary cessation.” Similarly, in *Kremins v. Bartley*, 431 U.S. 119 (1977), the Supreme Court held that the amendment of challenged statutes during the pendency of the appeal “clearly moots the claims of the named appellees,” and accordingly dismissed the appeal, without so much as mentioning that discovery might be

² To put the matter slightly differently, government repeal of a challenged regulation does not require analysis of anything outside the pleadings, and so such challenges are “facially moot,” rather than “factually moot,” thus obviating the need for discovery. *Leon v. Continental AG*, 301 F.Supp.3d 1203, 1212 (S.D. Fla. 2017).

appropriate to determine whether the challenged statute might, in the future, be re-adopted. *Id.* at 129. *See also Diffenderfer v. Central Baptist Church of Miami, Inc.*, 92 S.Ct. 574, 576 (1972) (dismissing declaratory judgment action contending that statute violated the First Amendment, without mentioning the possibility of “jurisdictional discovery,” because “[declaratory] relief is, of course, inappropriate now that the statute has been repealed”).

III. The Voluntary Cessation Exception Does Not Apply.

As discussed above, the general rule is that repeal of a challenged law moots challenges thereto. The Motion relies on the doctrine of voluntary cessation, which is an exception to that rule. *Troiano*, 382 F.3d at 1282; 1276, 1283; *Coral Springs Street Systems*, 371 F.3d at 1329.

But while the Motion is *based* on the voluntary cessation exception, it does not, even in passing, contain any argument regarding the *applicability* of that exception. For good reason: the City’s repeal of the challenged Ordinance was not a “voluntary cessation” at all. Instead, the Eleventh Circuit of Appeal had clearly announced

We hold that the challenged ordinances violate the First Amendment because they are content-based regulations of speech that cannot withstand strict scrutiny.

Otto v. City of Boca Raton, 981 F.3d 854, 859 (11th Cir. 2020). The Ordinance was repealed immediately, on an emergency basis, upon the Eleventh Circuit’s announcement that it would not rehear the matter *en banc*.

Binding precedent holds that conduct that is discontinued *as a result of a court order* is not “voluntary cessation” of that conduct. *United States v. Sabatino*, 823 Fed.Appx. 850, 853 (11th Cir. 2020) (dismissing appeal on mootness grounds over objection that voluntary cessation of offending activity overcame mootness because “the conduct at issue in this case does not fall under the voluntary cessation doctrine, since [the changed conduct] only came about pursuant to a court

order”). The Eleventh Circuit’s opinion is consistent with that of other courts that have considered the issue. For instance, the Ninth Circuit dismissed an appeal as moot, and noted:

While it is true that voluntary cessation of allegedly illegal conduct does not necessarily deprive a court of power to grant injunctive relief, ..., ‘legally compelled’ cessation of such conduct is not ‘voluntary’ for purposes of this exception to the mootness doctrine (citation omitted). Here, [the defendant] was ordered by the District of Columbia Circuit to comply with the NLRB’s ruling, and the ILWU has announced its intention to comply. Under these circumstances, [Plaintiff’s] requests for relief ... are moot”).

Sea-Land Service, Inc. v. Int’l Longshoremen’s and Warehousemen’s Union, 939 F.2d 866, 870 (9th Cir. 1991). *See also Tawfeeq v. Duke*, 309 F.Supp.3d 1350, 1355-56 (N.D. Ga. 2017) (dismissing action as moot, over “voluntary cessation” objection, noting that the challenged regulation “was revoked only after multiple courts enjoined its enforcement. This is not a case where the defendant escaped adjudication of the illegality of its actions by voluntarily ceasing its improper conduct before the court could act”)’ *Dubois v. U.S. Dep’t of Agriculture*, 20 F.Supp.2d 263, 269-70 (D. N.H. 1998) (dismissing complaint as moot over plaintiff’s “voluntary cessation” objection where “[t]he instant case falls well outside the voluntary cessation exception because [the defendant] did not voluntarily stop its .. violations.... This is not a case where the defendant escaped an adjudication of the illegality of its actions by voluntarily ceasing its improper conduct before the court could act”). Since the “voluntary cessation” *exception* does not apply, no discovery should be authorized thereon. The mootness *rule* prevails, without need of discovery.

IV. Even if the Voluntary Cessation Exception Applied, No Discovery is Required Before Dismissing the Case as Moot.

Even if the repeal of the Ordinance were deemed to be a “voluntary cessation,” “there is an important exception to this important exception, when there is no reasonable expectation that the voluntarily ceased activity will, in fact, actually recur after the termination of the suit.” *Troiano*,

382 F.3d at 1283. As noted in the Motion (at pp. 3-4), “three broad factors” guide the inquiry to determine if there is a “reasonable expectation” that “voluntarily ceased” challenged legislation may be re-enacted. *Fort Lauderdale Food Not Bombs*, 11 F.4th at 1284. Review of those factors demonstrate that the claims for injunctive and declaratory relief are, indeed, moot, and that no discovery is appropriate or necessary to so determine.

1. *The Repeal was Not a Strategic Move to Manipulate Jurisdiction.*

The Motion reiterates allegations in the Complaint suggesting that the City decided to repeal the Ordinance in order to limit the likelihood that the Ordinance might be deemed invalid by the U.S. Supreme Court, and describes that reasoning as a “strategic move[] to moot this case.” Motion at p. 5. The Motion does not argue, and it is not otherwise clear, why, if the City seeks to avoid Supreme Court review of SOCE prohibitions, it would be motivated to re-enact the Ordinance, which would result in legal challenges that could eventually reach the Supreme Court.

Be that as it may, the Motion misunderstands what it means to “voluntarily cease” challenged activity to “manipulate jurisdiction.” As discussed *supra*, the voluntary cessation exception to mootness doctrine is to prevent efforts to “escape adjudication of the illegality of its actions by voluntarily ceasing its improper conduct *before the court could act.*” Prior invalidation of the Ordinance prevents such an attempt by the City herein.

Moreover, no discovery is required to “test” the City’s “commitment” to not re-enact an Ordinance that has expressly been held to be unconstitutional. “[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to assume illegal activities.” *Coral Springs Street Systems*, 371 F.3d at 1328-29. Thus, when a governmental individual or entity withdraws a challenged regulation and advises a court that it has no intention of re-enacting the regulation, there is no need for discovery to

challenge that representation. *See, e.g., Id.* at 1332-33 (dismissing case as moot, and finding that the offending regulation was unlikely to be re-adopted, based upon statements of counsel in appellate brief and at oral argument); *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288, 1292 (11th Cir. 2004) (affirming dismissal of claim against Judicial Inquiry Commission and finding no likelihood of reimplementing of challenged restriction when Commission “acknowledged the superseding import” of a Supreme Court decision invalidating the restriction, stated “in a pleading” that it would no longer enforce the restriction).

2. *The Voluntary Cessation Doctrine Requires a Change in Activity and Practice, Not a Change of Heart.*

The Motion questions whether the City has “reject[ed] the challenged conduct” because, *inter alia*, the City has expressed “hope that the Eleventh Circuit or the Supreme Court will eventually recognize the validity of SOCE regulations.” Motion at p. 6.

Plaintiffs again misunderstand the mootness analysis. Mootness does not require the City’s elected officials to change their views and affirmatively support SOCE. In this context, “rejecting the challenged conduct” means agreeing to discontinue the activity and practice that has been deemed to violate rights, and agreeing to not re-impose the challenged conduct until and unless the law changes.³ There is simply no basis to believe that the City will contemptuously ignore the on-point decision that invalidated the Ordinance by readopting it, and no basis to subject the City’s elected officials to discovery to confirm as much.

³ Cases relied upon in the Motion recognize as much, even if the text of the Motion does not. For instance, the Motion cites *Pierce v. Ducey*, 2019 WL 4750138, *5 (D. Az. 2019) for the proposition that “when the government *ceases a challenged policy without renouncing it*, the voluntary cessation is less likely to moot the case.” True though this suggestion might be, the more relevant observation by the *Pierce* court was made two paragraphs earlier: “the *repeal or amendment of a statute* is usually enough to render a case moot even if the statute can later be reenacted.” *Id.* at *4 (all emphasis supplied).

3. *The City has Maintained its Commitment to Not Violate the Law.*

The City has “maintained its commitment to the new ... legislative scheme.” *Fort Lauderdale Food Not Bombs*, 11 F.4th at 1284. That the City has not re-enacted the Ordinance, or placed re-enactment on a Council meeting agenda, is a matter of public record. There is simply no need for discovery to establish this point.

WHEREFORE, the City respectfully requests that the Motion be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail on February 22, 2023 on all counsel of record on the attached Service List.

Respectfully submitted,

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