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' MOTION TO THE MERITS PANEL TO ENFORCE MANDATE

*****TIME SENSITIVE*****

*****RELIEF REQUESTED BY THURSDAY, AUGUST 18, 2022*****

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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

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' TIME SENSITIVE
MOTION TO THE MERITS PANEL[1] TO ENFORCE MANDATE

Plaintiffs–Appellants, ROBERT W. OTTO, Ph.D. LMFT and JULIE H. HAMILTON, Ph.D. LMFT (collectively, "Counselors"), pursuant to Fed. R. App. P. 27, 11th Cir. R. 27-1, and the Court's inherent authority to enforce its mandates, respectfully request the merits panel in this appeal to issue a further order necessary to enforce its mandate, and either to immediately enjoin the unconstitutional ordinances at issue in this appeal, or to direct the district court to enjoin them within twenty-four hours of this Court's order. The Court's clear mandate directing the district court to preliminarily enjoin the unconstitutional ordinances has been on the district court's docket for over two weeks. Even though this Court has already concluded that every day the unconstitutional ordinances remain in effect works a new, irreparable harm on Counselors, and even though this Court's clear mandate left nothing for the district court to examine or do besides entering a preliminary injunction consistent with this Court's decision, the district court has declined to enter the immediate relief mandated by the Court, and has indicated that it does not

[1] Counselors respectfully request that this motion be forwarded to, and decided by, the merits panel, pursuant to "[t]he power **of an original panel** to grant relief enforcing the terms of its earlier mandate [which] is clearly established . . . with respect to cases that have been remanded to a District Court for further proceedings." *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984) (emphasis added). *See also*, paragraph 34, *infra*.

intend to provide that relief on the prompt and expedited basis necessary to protect Counselors' fundamental rights from being further infringed each day the ordinances are not enjoined. Therefore, Counselors have no choice but to appeal to this Court for further, immediate relief to enforce its mandate.

A. This Court's Unambiguous Mandate Imposed a Clear Duty Upon the District Court to Enter a Preliminary Injunction Swiftly, to Prevent the Further Imposition of Daily Irreparable Harm Upon Counselors.

1. This appeal arises from the district court's denial of Counselors' motion for preliminary injunction in a First Amendment challenge to ordinances passed by Defendants–Appellees, City of Boca Raton ("City"), and County of Palm Beach ("County") (collectively, the "Localities"), which ban Counselors' speech-only, voluntary counseling for minors who desire help with reducing or eliminating unwanted same-sex attractions or gender confusion.

2. On November 20, 2020, this Court issued an opinion reversing the district court's denial of a preliminary injunction. *See Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020). The Court held, among other things, that the two ordinances facially "violate the First Amendment because they are content-based regulations of speech that cannot survive strict scrutiny." *Id*. at 859. The Court found that "the ordinances discriminate on the basis of content . . . [and] [t]hey also discriminate on the basis of viewpoint," and, as such, they are "an egregious form of content discrimination." *Id*. at 864.

3. In the same opinion, this Court also held that the requirement of irreparable harm is clearly met, "[b]ecause the ordinances are an unconstitutional 'direct penalization' of protected speech, [and **their] continued enforcement, 'for even minimal periods of time,' constitutes a per se irreparable injury**." *Id*. at 870 (emphasis added).

4. This Court reversed the district court's denial of preliminary injunctive relief and "remand[ed] **for entry of a preliminary injunction consistent with this opinion**." *Id*. at 872 (emphasis added).

5. Although the Court's opinion was issued almost two years ago, it did not become effective until July 29, 2022, after the Court issued its mandate following its denial of the Localities' petition for en banc rehearing on July 20, 2022. *See Otto v. City of Boca Raton, Fla.*, No. 19-10604, 2022 WL 2824907 (11th Cir. July 20, 2022).

6. As a result, the unconstitutional ordinances that work daily irreparable harm upon Counselors have remained effective for **over three years** since Counselors first requested a preliminary injunction (P.I. Mot., dkt. 3, June 14, 2018), and for **twenty-one months** after this Court found that they were facially unconstitutional.

7. The district court was notified of this Court's mandate on July 29, 2022, the same day it was issued. (Dkt. 149). At that time, the district court had a clear

duty to enter a preliminary injunction "consistent with this [Court's] opinion," *Otto*, 981 F.3d at 872, without delay, and without further "review" or "examin[ation]." *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985) ("A trial court, upon receiving the mandate of an appellate court, **may not alter, amend, or examine the mandate**, or give any further relief or review, but **must enter an order in strict compliance with the mandate**." (emphasis added)).

8. Moreover, because this Court held that the "continued enforcement [of the unconstitutional ordinances] **for even minimal periods of time**, constitutes a **per se irreparable injury**," *Otto*, 981 F.3d at 870 (emphasis added), the district court also had an obligation to **swiftly** enter the preliminary injunction mandated by this Court, as expeditiously as possible to avoid further, daily irreparable harm. *See Piambino*, 757 F.2d at 1119 ("The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion, and the circumstances it embraces." (cleaned up)).

B. The District Court's Initial Delay in Entering the Preliminary Injunction, and Counselors' Follow-up Motion to Request Expedited Compliance With This Court's Mandate.

9. Notwithstanding its obligation to strictly and swiftly comply with this Court's mandate, as of the filing of this motion—**seventeen days** after the mandate was entered on the district court's docket—the district court has not complied.

10. On August 4, 2022, six days after this Court's mandate was issued, when the district court had not yet undertaken the simple, ministerial act of entering a preliminary injunction consistent with this Court's decision, Counselors filed a Motion to Lift Stay and Enter Preliminary Injunction (dkt. 150, attached hereto as **Exhibit A**). Counselors respectfully requested expedited consideration, noting this Court's clear mandate and its conclusions regarding daily, irreparable harm to Counselors. (*Id*. at ¶¶ 3–4 and p. 4.)

11. To ease the already minimal administrative burden on the district court in entering the straightforward injunction mandated by this Court, Counselors proposed a "plain vanilla" injunction to the district court, which merely and uncontroversially invokes this Court's decision and parrots the language of Fed. R. Civ. P. 65:

> Consistent with the Eleventh Circuit's opinion in *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020), reh'g denied, No. 19-10604, 2022 WL 2824907 (11th Cir. July 20, 2022), Defendant City of Boca Raton, and its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them, are hereby enjoined from enforcing Ordinance 5407 pending the resolution of the merits of this action, and Defendant County of Palm Beach, Florida, and its officers, agents, servants, employees, attorneys and other persons who are in active concert or participation with them, are hereby enjoined from enforcing Ordinance 2017-046 pending the resolution of the merits of this action.

(*Id*. at 2–3, ¶ 6).

C. The Localities' Attempt to Avoid the Consequences of This Court's Decision Through Sham "Emergencies" and Red-Herring, Patently Meritless "Mootness" Arguments.

12. Thereafter, the Localities embarked on a calculated course of political and legal maneuvering, in an "attempt[] to avoid the consequences of [this Court's] decision." *Piambino*, 757 F.2d at 1118.

13. The City argued that Counselors' claim for injunctive relief was suddenly "moot," because the City had declared a "public emergency" enabling it to pass an "emergency" repeal ordinance on less than 24-hours' notice. (*See* City's Suggestion of Mootness, dkt. 151; City's Reply Regarding Suggestion of Mootness, dkt. 153; City's Response to Counselors' Motion to Lift Stay and Enter Preliminary Injunction, dkt. 154; all attached hereto as composite **Exhibit B**).

14. Counselors pointed out that, under the City's own charter, the so-called "emergency" repeal ordinance was merely **temporary**, because it had **an automatic sunset of sixty days**, after which it would itself be **automatically repealed**, thereby reviving the City's unconstitutional ordinance. To permanently repeal its unconstitutional ordinance, the City would be required to introduce another ordinance in the regular legislative channels, provide multiple readings, allow for public comment, and ultimately take a vote of the City Council. And, to give any credence to the City's mootness argument, the City and the Court would be required to speculate how the City's independently elected representatives will ultimately

vote on such a future repeal ordinance. (*See* Counselors' Response to City's Suggestion of Mootness, dkt. 152; Counselors' First Reply in Support of Motion to Lift Stay and Enter Preliminary Injunction, dkt. 155; both attached hereto as composite **Exhibit C**).

15. Importantly, the City has **admitted** that its "emergency ordinance lasts sixty days," and that it becomes permanent only if future legislative action is adopted, **which is not guaranteed**. (City Response to Motion to Lift Stay and Enter Injunction, Exhibit B, dkt. 154, ¶¶ 3, 5) (discussing possible permanent future ordinance, "**if** adopted." (emphasis added)).

16. The County, on the other hand, did not bother with a declaration of a "public emergency" and an "emergency" repeal ordinance. Instead, the County entreated the district court to violate this Court's injunction mandate based merely upon its lawyers' unverified promise that the County would vote on a repeal ordinance on August 23, 2022. In so many words, the County asked the Court to speculate how the public comment to the proposed repeal ordinance would play out, and how the County's elected representatives will ultimately vote. The County anticipated a predetermined outcome at the August 23, 2022 vote, and that the repeal ordinance would become effective **on August 29, 2022—a full month after this Court's mandate was issued**. (*See* County's Response to Counselors' Motion to Lift Stay and Enter Preliminary Injunction, dkt. 156, attached hereto as **Exhibit D**).

17. Counselors once again pointed out that promises of **future** legislative action cannot **presently** moot injunctive relief, and that the district court could not wait several more weeks to see if the County's speculation about future political events would prove accurate, because the County's unconstitutional ordinance remained on the books and was imposing daily irreparable harm upon Counselors. (*See* Counselors' Second Reply in Support of Motion to Lift Stay and Enter Preliminary Injunction, dkt. 157, attached hereto as **Exhibit E**).

18. Indeed, the Localities' mootness arguments are red herrings, patently without merit, and should not have served to delay the district court's timely compliance with this Court's mandate. It has never been the law that promises of **future** legislative action are sufficient to **presently** moot injunctive relief. It is therefore no surprise that neither the City nor the County could provide **a single authority** to the district court to support their arguments that their unverified statements and speculation about how some future votes might play out can overcome the "**formidable burden** of showing that it is **absolutely clear** the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike*, 568 U.S. 85, 91 (2013) (emphasis added). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) ("voluntary cessation of a challenged practice does not moot a case unless subsequent events

make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur").

19. Instead, all authority is to the contrary. *See, e.g.*, *Desert Outdoor Advert. v. City of Oakland*, No. C 03-1078 MJJ, 2005 WL 147582, at *2 (N.D. Cal. Jan. 20, 2005) ("emergency" "temporary" ordinance repealing unconstitutional ordinance did not moot claim for injunctive relief against local government because "Oakland has provided no evidence that it will not re-enact the prior legislation **when the temporary term of the emergency ordinance expires**." (emphasis added)); *Landon v. City of Flint*, No. 16-11061, 2017 WL 345854, at *1–2 (E.D. Mich. Jan. 24, 2017) (emergency ordinance did not moot preliminary injunction because, *inter alia*, precisely like the City's "emergency" ordinance here, the emergency ordinance enacted by the City of Flint "according to its terms and the Flint City Charter, **expires sixty-one days after its enactment**, unless reenacted." (emphasis added)); *Bayou Fleet, Inc. v. Alexander*, No. Civ.A. 97–2205, 1997 WL 625492, at *1 (E.D. La. Oct. 7, 1997) ("The council adopted this Emergency Ordinance on October 6, 1997, to be effective immediately. Because the ordinance at issue is merely suspended and not revoked, the court finds that Bayou Fleet's challenge to the ordinance is not moot."); *S. Pac. Transp. Co. v. St. Charles Par. Police Jury*, 569 F. Supp. 1174, 1178 (E.D. La. 1983) ("Assuming arguendo that Emergency Ordinance 81–4–1 was validly enacted, I find that this fact does not render this case moot.")

20. Moreover, the City's declaration of a "public emergency," so that it could bypass the normal legislative channels and enact an "emergency" repeal ordinance before the district court could enter the preliminary injunction mandated by this Court, is ridiculous on its face, and a transparent sham to defeat jurisdiction. Having been content to run roughshod over Counselors' protected speech, and to outlaw their counseling practices **for the last five years**, the City now expects the district court, and this Court, to believe that—only when suddenly faced with an imminent injunction—the City now deems that "preventing the chilling of protected speech is an '**emergency affecting life, health, property, or the public peace**,' as described in Section 3.14 of the City Charter." (City's "Emergency" Repeal Ordinance, Exhibit B, dkt. 151-1 at 2, last "WHEREAS" (emphasis added)). As the old adage goes, "Give me a break!"

21. The very language of the "emergency" repeal ordinance betrays the City's true motive and intent. In it, the City declares its disagreement with this Court's decision invalidating the City's unconstitutional ordinance. (*Id*. at 1, last "WHEREAS" ("**the City disagrees with the [Eleventh Circuit's] decision**" (emphasis added)). And, in the same breath where it dutifully checks the obligatory "mootness" box with lip service to disclaiming any intention to re-enact its unconstitutional ordinance, the City actually makes clear its intent to reenact its unconstitutional ordinance just as soon as its lawyers find the slightest legal opening.

(*Id*. at 2, Section 3 ("The City Council … has no intention or reenacting [the unconstitutional ordinance] **unless** there is a change in law that would make adoption of such regulation lawful." (emphasis added)). In the meantime, the City is content to work on enacting a "resolution" further condemning and demeaning Counselors and their protected speech, with the obvious intent and purpose to chill that protected speech, and with at least 4 of 5 Council members supporting such a resolution (*see* paragraph 23(a)–(f), *infra*), even as the City now proclaims that the "chilling of protected speech" is a "public emergency" of the highest order. Quite clearly, the City has had no "voluntary" change of heart, and the only "emergency" it faces is mooting the injunctive relief that this Court has mandated.

22. Notably, the City's use of an "emergency" legislative sham to bypass regular legislative hurdles and enact a repeal ordinance with immediate effect for the purpose of defeating jurisdiction over an imminent injunction is not even original. Other localities have tried it, and failed. In *S. Pac. Transp. Co.*, St. Charles Parish attempted to defeat a federal court's jurisdiction over an imminent injunction by enacting an "emergency" ordinance immediately repealing the challenged ordinance. 569 F. Supp. at 1178. There, as here, the city charter limited "emergency" legislation to true emergencies, "affecting life, health, property or public safety." *Id*. The district court saw right through the jurisdictional sham, and held that repeal of an ordinance that had been in existence for several years—

> can hardly be interpreted as a public emergency. No sudden or unexpected event took place which created a temporarily dangerous condition which necessitated immediate action. The Parish Council cannot defeat the provisions of its charter requiring notice and a public hearing by declaring an emergency where none exists.

Id. Therefore, the court held that the attempted "emergency" repeal was ineffective to defeat its jurisdiction over injunctive relief. *Id*. The same outcome should have obtained here from the district court, and should obtain from this Court. The City's jurisdictional sham provides no just reason for delaying the issuance of injunctive relief, and the continued imposition of daily constitutional harm upon Counselors.

23. Beyond the plain language of the "emergency" repeal ordinance, the following six short clips from the thirty-minute videotaped "emergency" City Council meeting also plainly reveal that the City is merely trying to defeat jurisdiction with its "emergency" maneuvers and mootness arguments:[2]

a) **09:23-10:45**, City Attorney Diana Grub Frieser indicates that each City Council member received a communication from Rand Hoch, the leader of the Palm Beach County Human Rights Council, who was the "primary local advocate" for the passage of the City's ordinance in 2017, in which Mr. Hoch advised and

[2] The official video of the "emergency" City council meeting on the adoption of the "emergency" repeal ordinance is available on the City Council's website at https://bocaraton.granicus.com/player/clip/2331 (last visited August 14, 2022).

recommended to the Council to repeal the ordinance and not pursue an appeal, not because the ordinance is unconstitutional, but strategically so as not to jeopardize counseling bans in other jurisdictions with an adverse ruling from the Supreme Court, and expressly to preserve the City's ability to "**reassess**" its counseling ban with "changes and other developments" "over time."

b) **18:53-19:50**, City Council Member Monica Mayotte, one of the five voters on the City Council, states that she "understand[s] the reasoning why we have to pass this emergency ordinance, it doesn't make me happy, but I understand that **we don't want to threaten lawful conversion therapy laws across the state or across the country** by appealing this to the Supreme Court," and she proposes that the unconstitutional ordinance be replaced with a City Council resolution "to **admonish** conversion therapy in our City . . . that **we support the banning**, we don't agree with conversion therapy here in this City, so I would really like to see us move forward with a resolution when the time is appropriate."

c) **19:50-20:13**, City Attorney Diana Grub Frieser assures Council Member Mayotte that, if the Council votes to approve the

"emergency" repeal ordinance, then, when the permanent repeal ordinance will be considered at a future date, "I will bring back the resolution that declares from a policy standpoint" that the City condemns Counselors' protected speech.

d) **20:14-21:15**, City Council Member Andrea O'Rourke, the second of five voters on the City Council, indicates she fully supports a resolution condemning Counselors' protected speech, because "it's the least we can do," and that she is opposed to Counselors' protected speech but she will vote in favor of the repeal ordinance because she "want[s] to comply" with Mr. Hoch's request to repeal the ordinance "because they feel that they won't have success at the higher level." Council Member O'Rourke ends by reiterating that the repeal is "a sad thing to have to approve," but she "would support a resolution saying that **we don't abide, we would not want to abide by this** in the City of Boca Raton."

e) **21:15-21:40**, City Council Member Yvette Drucker, the third of five voters on the City Council, indicates that she also is "100% super not happy about this, but I understand why we are doing it,

and I would agree on a resolution" to condemn Counselors' protected speech.

f) **21:40-22:55**, City Mayor Scott Singer, the fourth of five votes on the City Council, indicated that "our policy position is clear," boasted that 2 out of 4 federal judges that heard this matter (presumably the district judge and the dissenting judge on the Eleventh Circuit's panel) agreed with the City's ban on Counselors' protected speech, and indicated that he supports the repeal "in light of the information shared and **the impact on other jurisdictions**."

D. The District Court's Continued Delay in Entering a Preliminary Injunction, and its Indication That It Will Not Issue Injunctive Relief on the Prompt and Expedited Basis Necessary to Protect Counselors' Fundamental Rights From Being Further Infringed Each Day the Ordinances Are Not Enjoined.

24. By the time briefing on Counselors' Motion to Lift Stay and Enter Preliminary Injunction was complete, on August 11, 2022, this Court's clear mandate had been on the district court's docket for **thirteen days**. Frustrated and stymied in their efforts to immediately obtain the preliminary injunction mandated by this Court, and to forestall further, daily irreparable harm, in their last memorandum to the district court Counselors respectfully renewed their request for immediate injunctive relief and advised the district court that, if they were unable to

secure that relief **seventeen days** after it was mandated by the Eleventh Circuit, they would need to seek assistance from this Court:

> 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.

(Ex. E, dkt. 157 at 2).

25. This time, Counselors drew the district court's ire, but not the injunctive relief mandated by this Court. The district court chastised Counselors for being inpatient, and indicated that it would not issue the injunctive relief, if at all, on an expedited basis, but would instead address this Court's mandate "as soon as it is able to do so," but possibly only after a "hearing," which the district court had not yet decided whether and when it will hold. The entirety of the district court's paperless order reads as follows:

> PAPERLESS ORDER on the Plaintiffs' Second Reply at docket entry 157, in connection with the Plaintiffs' Motion to Lift Stay at docket entry 150, filed on August 4, 2022. In the Second Reply, the Plaintiffs represent to this Court that, if it "declines or delays [the entry of a preliminary injunction] beyond 5 p.m. on August 15, 2022, Plaintiffs will have no choice but to treat the Court's delay as tantamount to denial, and to seek emergency relief from the Eleventh Circuit." The Court's "delay" is not tantamount to denial, as the Court has neither delayed in its resolution of the pending motion nor denied the pending motion. As for denial, the Court has yet to enter a decision. As to delay, the motion has, as of the time of entry of this order, been ripe for but a few hours. The Court will rule on the motion as soon as its resources permit it to do so. The Eleventh Circuit's mandate to this Court is for it

> to enter a preliminary injunction "consistent with this opinion." The Eleventh Circuit's mandate is not for the Court to enter a preliminary injunction as unilaterally drafted by the Plaintiffs. The Court will carefully consider the briefing in connection with the pending motion and, as soon as it is able to do so, enter a ruling on the motion. The Court has not yet decided whether it will set a hearing on the motion and, if so, when the hearing will be held. Signed by Judge Robin L. Rosenberg (bkd) (Entered: 08/11/2022)

(Dkt. 158).

26. Respectfully, Counselors submit that the district court's response is insufficient, and that this Court's corrective intervention is once again warranted, for three reasons:

27. **First**, this Court's mandate was "ripe" and clear when it was entered on the district court's docket on July 29, 2022, seventeen days ago. Given this Court's unambiguous instruction that a preliminary injunction should issue, and its equally clear holding that delaying injunctive relief "for even minimal periods of time, constitutes a per se irreparable injury," *Otto*, 981 F.3d at 870, Counselors should have never needed to file another motion to request the district court to do what this Court had already mandated. In further delaying injunctive relief, the district court's reliance on the recent "ripeness" of Counselors' motion for the preliminary injunction mandated by this Court is improper, because this Court's mandate is "ripe," and has been "ripe," all along.

28. And, respectfully, Counselors are not being inpatient. They have waited patiently for **over three years** since Counselors first requested a preliminary

injunction from the district court (P.I. Mot., dkt. 3, June 14, 2018), and for **twenty-one months** after this Court held that the ordinances are facially unconstitutional, and now for another **seventeen days** since this Court's clear mandate was issued. Counselors believe that this Court meant what it said regarding the daily irreparable harm inflicted by facially unconstitutional ordinances that egregiously discriminate on the basis of both content and viewpoint. Counselors have done all that they could to convey the urgency of this matter to the district court, and have nowhere else to turn but back to this Court.

29. Counselors respectfully submit that the district court's stance—that the court will get to the mandate whenever the court can get to it—is not acceptable, in light of how much time has already elapsed, the daily irreparable harm to Counselors, and especially in light of how little time it would take to simply enter the injunction already mandated by this Court. Indeed, Counselors respectfully submit that the district court could have complied with this Court's clear mandate in less time than it took to enter the order indicating that such compliance would not be promptly forthcoming. This Court should not allow Counselors' fundamental rights to be violated for another day.

30. **Second**, the district court's acerbic dismissal of "the preliminary injunction as unilaterally drafted by the Plaintiffs" because of its acknowledged need "to enter a preliminary injunction consistent with [this Court's] opinion" (dkt. 158),

is puzzling. Counselors should have never needed to "unilaterally" draft an injunction, because this Court's mandate was clear on its own. But, when no action was forthcoming from the district court, Counselors proposed a very basic and non-controversial preliminary injunction that merely incorporates this Court's decision and the language of Fed. R. Civ. P. 65. (*See* paragraph 11, *supra*). Counselors respectfully submit that their "unilaterally drafted" proposed injunction, and the injunction "consistent with [this Court's] opinion" that the district court apparently acknowledges must be entered (dkt. 158), are one and the same thing, and there is no just cause for further delay.

31. **Third**, and finally, there is no need for any further "hearing," nor for allowing additional days and additional irreparable harm to accumulate until the district court determines whether and when to schedule such a hearing. As mentioned above, "[a] trial court, upon receiving the mandate of an appellate court, **may not** alter, amend, or **examine the mandate**, or give any further relief **or review**, but **must enter an order in strict compliance with the mandate**." *Piambino*, 757 F.2d at 1119 (emphasis added).

32. Even if there were a need for a further hearing, the district court could and should have entered an immediate preliminary injunction as mandated by this Court, to forestall the imposition of further, daily irreparable harm, and **then** it could have scheduled a hearing to determine whether the continuance of such preliminary

injunctive relief was warranted. In this way, the district court could have shown fidelity to this Court's clear mandate and concern for the daily irreparable harm being inflicted upon Counselors by the unconstitutional ordinances, while still satisfying any need for further deliberation.

E. Waiting on Further Action From the District Court is Futile.

33. Although Counselors indicated to the district court that they would wait until 5 p.m. on Monday, August 15, 2022, to seek relief from this Court (*see* paragraph 24, *supra*), the district court has since made it clear that it will not comply with this Court's mandate by that time, nor do so on an expedited basis commensurate with the daily irreparable harm being imposed upon Counselors. (*See* paragraph 25, *supra*). Indeed, the district court has not even decided yet whether it will hold a hearing, and when that hearing might take place. (*Id*.) Accordingly, it would have been futile for Counselors to wait any longer to seek this Court's assistance in the enforcement of its mandate, and it is futile for this Court to wait to provide that relief.

F. The Merits Panel Has Authority to Issue Further Orders to Enforce Its Mandate, or, Alternatively, to Issue Mandamus Relief.

34. "The power of an original panel to grant relief enforcing the terms of its earlier mandate is clearly established . . . with respect to cases that have been remanded to a District Court for further proceedings." *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984). This Court

entertains, and, where appropriate, grants motions to enforce its mandates. *See e.g.*, *Ballard v. Comm'r*, No. 01-17249, 2006 WL 4386510, at *1 (11th Cir. July 10, 2006) (granting, in part, "motion to enforce this court's mandate," and providing instructions to district court on actions needed to "expedite this matter in every way possible"); *Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238, 1240 (11th Cir. 1997) (noting that Eleventh Circuit in earlier appeal had considered, and denied, "motions to enforce the mandate from the previous appeal"); *United Airlines, Inc. v. U.S. Bank N.A.*, 409 F.3d 812, 813 (7th Cir. 2005) ("Disagreement with [the] substance [of an appellate mandate] . . . does not license defiance by a litigant or an inferior court," and "[i]naction [in implementing a mandate], for which the district judge has not offered any explanation, is unjustifiable") (treating "Motion to Enforce Opinion" as "a request for mandamus to enforce our mandate" and granting request).

35. Alternatively, if this Court concludes that the proper remedy for Counselors is a writ of mandamus, Counselors respectfully request that the Court construe and treat this motion as a petition for a writ of mandamus, and provide via mandamus the same relief. This Court has inherent authority to consider mandamus relief regardless of the form in which it is sought. *See e.g.*, *Piambino*, 757 F.2d at 1115 n.2 ("We treat Sylva's appeal as a petition for a writ of mandamus pursuant to 28 U.S.C. § 1651 (1982)."). As shown herein, Counselors have no other adequate

remedy available to promptly secure the relief already mandated by this Court, to avoid the daily imposition of ongoing irreparable harm. (*See* 11th Cir. R. 21-1(a)).

CONCLUSION AND TIME-SENSITIVE REQUEST FOR RELIEF

36. For the foregoing reasons, Counselors respectfully request that this Court grant this motion, and either immediately enjoin the unconstitutional ordinances at issue in this appeal, or direct the district court to enjoin them within twenty-four hours after this Court's order.

37. Counselors further respectfully request that the Court treat this motion as "time sensitive" pursuant to 11th Cir. R. 27-1(b)(1), and provide the relief requested by **Thursday, August 18, 2022**. By that time, this Court's mandate will have been sitting on the district court's docket for twenty days. Each one of those days has imposed new and additional irreparable harms upon Counselors, who have now waited over three years to obtain injunctive relief. This Court should not countenance another day of injury.

Dated this August 15, 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 5,139 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 15, 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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Additionally, a Notice of Filing of this Motion, attaching this motion as an exhibit, is being concurrently filed on the district court's docket via the district court's ECF system.

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