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' RESPONSE TO THE SUGGESTION OF MOOTNESS FILED BY DEFENDANT CITY OF BOCA RATON, FLORIDA

Defendant City of Boca Raton, Florida ("City"), argues that, because it "voluntarily" passed an "emergency" repeal ordinance—that, by its own terms and the City's Charter **automatically expires in sixty days**—somehow Plaintiffs' claims for injunctive relief are now moot. The City is wrong, and the Court should swiftly enter the preliminary injunctive relief that has been ordered by the Eleventh Circuit, against both the City and the County of Palm Beach ("County"). (*See* Plaintiffs' Motion to Lift Stay, Enter Preliminary Injunction and Set Scheduling Conference, dkt. 150).

The City's "emergency" ordinance **temporarily** repealing the challenged ordinance would be comical, were it not for the tragic and profound way in which the City violated Plaintiffs' First Amendment rights over the last five years. Having unconstitutionally outlawed Plaintiffs' protected speech and counseling practices for five years, the City now wants the Court to believe that "preventing the chilling of [Plaintiffs'] protected speech is an emergency" that all of a sudden justifies the immediate repeal of the challenged ordinance, without compliance with the standard legislative means and processes. (Emergency Ordinance 5625, dkt. 151-1 at 2). However, the City notes its disagreement with the Eleventh Circuit's ruling (*id*. at 1, third "WHEREAS"), presumably because it still believes that what it did to Plaintiffs was right. Therefore, transparently, the only "emergency" that the City of Boca Raton fears is **not** imposing further harms upon Plaintiffs (as it

was quite willing to do for the last five years), but having to pay the substantial attorney's fees and costs that it has forced Plaintiffs to incur, if this litigation does not become immediately moot.

In its haste to declare a public "emergency" and enact an ordinance outside of the normal legislative process, however, the City overlooks two critical things:

First, by its own terms, the "emergency" repeal ordinance is set to **automatically expire in 60 days**. The ordinance claims that it is adopted "pursuant to Section 3.14 of the City Charter." (*Id*. at 1). That Section, expressly provides that:

> (d) Repeal. Every emergency ordinance except emergency appropriations **shall automatically stand repealed as of the sixty-first day following the date on which it was adopted**, but this shall not prevent re-enactment of the ordinance under regular procedures … .

(Boca Raton City Charter, Section 3.14(d), available at https://library.municode.com/fl/boca_raton/codes/code_of_ordinances?nodeId=VOLIPAICHRESPAC_SPACHBORA_ARTIIICICO_S3.14EMOR, last visited August 5, 2022 (emphasis added)).

Thus, the City's effort to persuade the Court that it will never ever, under any circumstances, return to its unlawful ways of punishing protected speech it does not like is hardly convincing, when the vehicle employed by the City has an automatic crash date, after which the City's laws will automatically return to the status quo. To find that Plaintiffs' injunctive relief claims are moot, the Court will have to speculate that the City will, in the next 60 days, introduce a regular, non-emergency, permanent ordinance to repeal the unconstitutional one. The Court will have to further speculate that in the legislative process and public comment period, the yet-to-be-proposed regular ordinance will survive unscathed. And the Court will have to further speculate that, at some point, such yet-to-be-proposed ordinance will actually be adopted. This is hardly the type of unequivocal voluntary cessation that renders injunctive relief moot, and none of the cases cited by the City even suggest, let alone establish, that mootness of injunctive relief can be found based on **future** legislative actions that the City may or may not take. In fact, the law is quite to the contrary. *See, e.g.*, *Already, LLC v. Nike*, 568 U.S. 85, 91 (2013) ("**a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur**" (emphasis added)); *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"); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.").

Simply put, therefore, Plaintiffs' injunctive relief claims are not moot. The Court should enter forthwith the preliminary injunctive relief required by the Eleventh Circuit to be entered, not only against the City but also against the County, who, at least as of now, has not yet concocted a similar "emergency," and has not temporarily (or permanently) repealed its unconstitutional ordinance. The Court should enter the preliminary injunctive relief in the form proposed by Plaintiffs. (*See* Plaintiffs' Motion to Lift Stay, Enter Preliminary Injunction and Set Scheduling Conference, dkt. 150 at 3).

Second, the City's "emergency" maneuver is much legal ado about nothing, in any event. Even if the City's temporary repeal of the challenged ordinance could somehow moot the injunctive relief required by the Eleventh Circuit (which it cannot do), there is no question that the City's "voluntary" cessation could not moot Plaintiffs' claims for damages. *See, e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (holding that "for the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right"); *Id.* ("[W]e conclude that a request for nominal damages satisfied the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right."); *Id.* (Kavanaugh, J., concurring) ("[A] plaintiff's request for nominal damages can satisfy the redressability requirement for Article III standing and can keep an otherwise moot case alive."); *Keister v. Bell*, 29 F.4th 1239, 1251 (11th Cir. 2022) ("[A] request for nominal damages saves a matter from becoming moot as unredressable when the plaintiff bases his claim on a completed violation of a legal right.").

If it is unquestionably true that even a claim for **nominal** damages would be sufficient to continue this case to final judgment, then it is doubly true that here, Plaintiffs' claims for both **actual** and nominal damages (Complaint, dkt. 1 at pp. 57-58, ¶¶ D-E) will survive whatever "emergency" mootness the City is attempting to manufacture. The only thing that the City's "emergency" accomplishes is to admit that the City violated Plaintiffs' constitutional rights, and that the City is liable for at least nominal damages (and for actual damages to be proven

subsequently). This litigation will therefore continue unabated to final judgment, until Plaintiffs are made whole, notwithstanding the City's ridiculous "emergency" attempt to "moot" its liability.

Therefore, in addition to entering the preliminary injunctive relief required by the Eleventh Circuit, the Court should set a scheduling conference so that a litigation schedule for Plaintiffs' claims for permanent injunctive relief, damages, and attorney's fees and costs can be established. (*See* Plaintiffs' Motion to Lift Stay, Enter Preliminary Injunction and Set Scheduling Conference, dkt. 150).

DATED this August 5, 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 5, 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