IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-00281-WJM-KMT

ABBY LANDOW,
JEFFREY ALAN,
SUSAN WYMER,
LAWRENCE BEAL,

individually and on behalf of others similarly situated,

GREENPEACE, INC.,
NANCY YORK,

Plaintiffs,

v.

CITY OF FORT COLLINS,

Defendant.

PLAINTFFS' RESPONSE TO NOTICE OF REPEAL OF CONTESTED PORTIONS OF ORDINANCE NO. 70, 1995

In the brief it filed on February 18, Defendant City of Fort Collins vigorously defended the constitutionality of its panhandling ordinance. A week later, the Fort Collins City Council repealed the challenged provisions following an emergency session, while explicitly reserving the option to re-enact those provisions verbatim at a future date. [Doc. 28.] According to Defendant's Notice, the repeal moots Plaintiffs' request for a preliminary injunction. [*Id.* ¶ 14.][1] Plaintiffs disagree. Notwithstanding the

[1] Defendant does not assert that repeal has mooted the litigation itself. Any such assertion would be plainly meritless given Defendant's announcement that the repeal may be temporary and that Plaintiffs Abby Landow, Jeffrey Alan and Susan Wymer maintain a claim for nominal damages that cannot be mooted by any change to the

repeal, there still exists a live controversy as to Plaintiffs' request for preliminary injunctive relief. Whereas Plaintiffs initially sought to prohibit the City from enforcing the contested provisions of the ordinance, Plaintiffs now seek to prohibit the City from re-enacting the repealed provisions of the ordinance. Furthermore, the repeal has no effect on Plaintiffs' original request that the Court enjoin Defendant from continuing to target passive solicitors whose conduct never violated the ordinance or any of its challenged provisions to begin with.

I. THE REPEAL DOES NOT MOOT PLAINTIFFS' REQUEST FOR PRELIMINARY RELIEF AS TO THE CHALLENGED PROVISIONS BECAUSE THE CITY MAY RE-ENACT THEM

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). "If it did, the courts would be compelled to leave the defendant . . . free to return to his old ways." *Id.* (internal quotation marks omitted). A party asserting mootness has the "heavy burden of persuading the court" that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected

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challenged ordinance. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (explaining that "the case is not moot, since the moratorium by its terms is not permanent"); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (refusing to dismiss as moot plaintiff's challenge to a city licensing ordinance even after the city had removed the challenged language, because the City could reenact "precisely the same provision if the District Court's judgment were vacated"); *Camfield v. City of Okla. City*, 248 F.3d 1214, 1223-24 (10th Cir. 2001) (collecting cases discussing *Aladdin's Castle* mootness exception as applying where there is "evidence in the record to indicate that the legislature intends to reenact the prior version of the disputed statute").

to recur." *Id.* Courts apply this standard not only when defendants seek dismissal, but also when they seek to avoid a preliminary injunction. *See, e.g., LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1154 (9th Cir. 2006); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163, 166 (5th Cir. 1993); *Rouser v. White*, 707 F. Supp. 2d 1055 (E.D. Cal. 2010); *S.D. v. St. Johns Cty. Sch. Dist.*, 632 F. Supp. 2d 1085 (M.D. Fla. 2009); *Lopes v. Int'l Rubber Distributors, Inc.*, 309 F. Supp. 2d 972, 983 (N.D. Ohio 2004).

A defendant's vigorous defense of the allegedly wrongful conduct that it ceased only in response to litigation militates against a finding that defendant has met its burden to show there is no reasonable possibility of recurrence. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (denying mootness when "the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students"); *Sheely v. MRI Radiology Network*, 505 F.3d 1173, 1187 (11th Cir. 2007) ("[A] defendant's failure to acknowledge wrongdoing . . . suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains."); *Weigand v. Vill. of Tinley Park*, 129 F. Supp. 2d 1170, 1172-73 (N.D. Ill. 2001) (finding no mootness in challenge of repealed ordinance when defendant village did not "recognize[] their culpability," "admit that the ordinance was unconstitutional," or provide "assurance[s] against future violations").

In this case, Fort Collins has not carried its "heavy burden." Only days ago, in a 30-page brief, Fort Collins vigorously defended the validity of the provisions it has now

repealed. [Doc. 16.] Moreover, the City has not even attempted to assure the Court that the repealed provisions will remain repealed. On the contrary, the City candidly acknowledged in a memo accompanying the repeal ordinance (though not accompanying the City's Notice of Repeal to the Court) that the repeal is a litigation tactic aimed at "mooting much of the lawsuit" and that the City may reinstate the challenged provisions at some later date:

> In order to provide the City with more time to review and possibly consider amendments to these Challenged Provisions, and to avoid the substantial time and resource demands placed on the City that will result from the Lawsuit, this emergency ordinance will repeal the Challenged Provisions and direct City staff to continue its review of the Challenged Provisions, to conduct any needed public outreach concerning them, and to prepare and present to Council future ordinances to reinstate the Challenged Provisions as now existing or as they may be proposed for amendment. This repeal of the Challenged Provisions will have the effect of mooting much of the Lawsuit.

[Ex. 1 (Agenda Item Summary, Feb. 27, 2015) (emphasis added).] The preamble to the ordinance also states that "the City Council has elected to repeal the Challenged Provisions and to direct City staff . . . to prepare and present to Council future ordinances to reinstate the Challenged Provisions as now existing or as they may be proposed for amendment." [Doc. 28, Ex. B at 1.]

Considering Defendant's vigorous defense of the constitutionality of the repealed provisions and its candid acknowledgement that repeal was a tactic solely to avoid the expenses of this litigation, Defendant has failed to meet its "heavy burden" of showing that there is no reasonable possibility of reenactment. Therefore, the repeal does not moot Plaintiffs' request for preliminary injunctive relief. *See, e.g., LGS Architects, Inc.*, 434 F.3d at 1154 (appeal from denial of preliminary injunction was not moot where

"Concordia's representation that it has no intention to use LGS's architectural plans in the future does not make it 'absolutely clear' that Concordia will permanently refrain from future infringement. If the opposite were true, any defendant could moot a preliminary injunction appeal by simply representing to the court that it will cease its wrongdoing."); *Doe*, 994 F.2d at 163, 166 (although "[b]y the time of the preliminary injunction hearing, all class-time prayers had stopped," court affirmed issuance of preliminary injunction, holding that district's "voluntary cessation of its allegedly violative religious practices does not preclude a finding of irreparable injury," given that district court found "there is a substantial likelihood that the alleged conduct would be reinstituted if the court refused to grant the relief requested"); *Rouser*, 707 F. Supp. 2d at 1071 ("While [the reasoning of voluntary cessation] concerns mootness, and not whether a plaintiff is entitled to a preliminary injunction, it is immediately relevant to defendant's argument. Specifically, plaintiff would be entitled to injunctive relief at trial even if defendants could demonstrate that at the time of trial they were not infringing the practice of his religion. . . . Similarly, because a preliminary injunction is only awarded where plaintiff has shown that he is likely to receive such a permanent injunction after trial, the same reasoning applies. Accordingly, even if Rouser's religion were not currently being infringed by defendants, plaintiff's claim for injunctive relief has not become moot because defendants could resume their conduct at any time.").

Plaintiffs are entitled to preliminary relief, slightly modified from their original request. Whereas Plaintiffs initially sought preliminary relief enjoining the City from enforcing the contested provisions of the ordinance, Plaintiffs now seek to preliminarily

enjoin the City from reenacting any of the challenged provisions until the Court can decide the serious constitutional questions Plaintiffs have presented.

II. THE REPEAL DOES NOT MOOT PLAINTIFFS' REQUEST FOR INTERIM RELIEF AS IT PERTAINS TO PASSIVE SOLICITORS

Putting aside the possibility of reenactment, the mere repeal of the challenged provisions, without more, is simply insufficient to assure Plaintiffs that Fort Collins police will no longer target their passive solicitations. Plaintiffs made a strong evidentiary showing in their motion for interim relief that Fort Collins police have paid little heed to what specific behaviors the ordinance prohibits. Most notably, while the text of the ordinance exempts from its reach passive solicitors who merely hold a sign asking for a donation, Plaintiffs submitted to this Court almost four dozen citations in which Fort Collins police accused passive sign holders of violating the ordinance. [Doc. 2, Exs. 13-14.] Similarly, Plaintiffs identified several citations in which the description of the allegedly illegal "panhandling" did not reflect any violation of the ordinance's specific prohibitions regarding time of day, location, or manner of carrying out the solicitation. [Doc. 2, Ex. 20.] Thus, Plaintiffs documented a widespread policy and practice of targeting solicitors who were not violating the ordinance. For impoverished, sign-holding solicitors like Plaintiffs Abby Landow, Susan Wymer, and Jeffrey Alan, the mere repeal of the challenged provisions makes no difference: their solicitation did not violate the ordinance before repeal, and their solicitations do not violate the ordinance after repeal.

The City has not even acknowledged its troubling practice of targeting solicitors who are not violating the ordinance, much less committed to changing it. In its response to Plaintiffs' motion for interim relief, Defendant, while acknowledging the text of the

ordinance did not regulate passive solicitation, wholly ignored the overwhelming evidence that the City's police force was primarily enforcing the ordinance against passive solicitors. For all of the City's public explanation of intent in repealing the ordinance, it never once stated or suggested that, in addition to repealing the challenged portions of the ordinance, it had directed its police force to end its pattern of *ultra vires* enforcement against passive solicitors. Defendant's Notice of Repeal is also silent on passive solicitation; it is not accompanied by, for instance, an affidavit from the Fort Collins Chief of Police or City Attorney affirming that this practice will end. In addition, although Plaintiffs have asked Defendant to stipulate to a preliminary injunction prohibiting the City from enforcing the ordinance against passive solicitors, Defendant has not yet agreed to do so. Thus, Plaintiffs have reason to believe that the campaign by Fort Collins police against passive solicitors will continue unabated despite repeal of some portions of the ordinance.

CONCLUSION

The City's repeal of the contested portions of the ordinance is a transparent attempt to avoid the burdens of litigating this case and preserve the possibility of re-enacting the provisions another day. Plaintiffs ask this Court to preliminarily enjoin the City from (1) re-enacting any of the challenged (and now repealed) provisions of the ordinance; and from (2) relying on the ordinance as grounds for arresting, issuing citations, or issuing orders to "move on" to persons who solicit passively by displaying a sign or other means, without approaching, stopping, or accosting the person solicited.

Plaintiffs are prepared to present evidence and argument in support of their position at a preliminary injunction hearing at the Court's earliest convenience.

Dated: March 3, 2015

Respectfully submitted,

/s/ Hugh Q. Gottschalk

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on March 3, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of the same via email to the following:

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