**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 15-cv-0281-WJM-KMT

ABBY LANDOW,
JEFFREY ALAN,
SUSAN WYMER,
LAWRENCE BEALL,
GREENPEACE INC., and
NANCY YORK,
Plaintiffs
v.

CITY OF FORT COLLINS,
Defendant

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***DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S NOTICE OF REPEAL OF CONTESTED PORTIONS OF ORDINANCE NO. 70, 1995***

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The Plaintiffs attempt to cast the City's actions, in thoroughly briefing the issues before the Court[1] and through its quick passage of Emergency Ordinance No. 040, 2015 ("Ordinance No. 040),[2] in a disingenuous light. The City has no nefarious motives. Rather, the City Council recognized there had been developments in the law since passage of Ordinance No. 70, 1995 some twenty years ago ("Ordinance No. 70"),[3] possibly causing a shift in the law on issues that were believed to impact the health, safety, and welfare of its citizens. Accordingly, the City repealed the contested portions of Ordinance No. 70 to enable the City more time "to review the challenged provisions,

[1]The City maintains its stated position that the Supreme Court's holding in *McCullen v. Coakley*, ___ U.S. ___, 134 S.Ct. 2518 (2014) and the 2014 decisions out of the First and Seventh Circuits in *Thayer v. Worcester,* 755 F.3d 60 (1st Cir. 2014) (Souter, J.) and *Norton v. City of Springfield, Ill.*, 768 F.3d 713 (7th Cir. 2014), respectively are supportive of the its arguments—particularly related to the content-neutral nature of Ordinance No. 70, 1995.

[2] Given the tight timeframes related to the lawsuit being filed on February 10th, the nature of the complaint and concomitant briefing schedule, the first scheduled City Council meeting after the City filed its brief was not until February 24th when the Council had the opportunity to discuss this lawsuit in executive session and to continue that meeting to a meeting on February 27th, at which the Council adopted Ordinance No. 040 to repeal the challenged provisions of Ordinance No. 70.

[3] Indeed, the fact that Plaintiffs relied upon two cases that were decided after the City filed its brief, just over two weeks ago, evidences the rapidly evolving nature of the legal authority in this area.

to consider any changes to them, to conduct any needed public outreach and for staff to present to Council for future consideration an ordinance to possibly reinstate these repealed provisions or to consider amendments to them." (*See* Plf. Resp. Not. Repl. Ex. 1).[4] And, as more fully set forth in Ordinance No. 040's whereas clause:[5]

> City Council [ ] determined, after consultation with the City's legal counsel, that it [was] in the City's best interest for the Council to have more time to review the Challenged Provisions and to consider possible future amendments without hav[ing] to address at the same time the Plaintiff's claims in the Lawsuit concerning the Challenged Provisions under the legal constraints and tight deadlines imposed [by] this kind of civil litigation; and

However, at this time, no decisions have been made as to whether there will be a new ordinance and, if there is, what form it will take.[6]

## *I. Due to the City's repeal of all challenged portions of its Ordinance, Plaintiffs' request for a preliminary injunction now lacks a justiciable issue*

As a threshold matter, courts look to the question of justiciability. Article III of the Constitution requires an actual case or controversy to support the exercise of judicial power. The three strands of the justiciability doctrine—standing,[7] ripeness, and mootness—play an important role in the determination of whether the Plaintiffs' case, in light of the repeal of all the contested portions of Ordinance No. 70, presents an Article

[4] Plaintiffs make much to do over the fact that the word "moot" appeared within close proximity to the word "litigation" in the Agenda. And, they extrapolate from this that the City's repeal is nothing more than a "litigation tactic." However, Plaintiffs discount or completely ignore the other explanations for the repeal, and instead simply focus on spinning an evil motive behind the City's actions.

[5] *See* Ordinance No. 040, (Def. Notice of Repeal, Ex. B, p. 1 "Whereas clauses").

[6] Furthermore, adding to the complexities and uncertainties of this case is the City's upcoming regular election on April 7, 2015, which will change the make-up of the City Council and thus may have an effect on the legislative priorities and position of City Council concerning any future panhandling ordinance. (*See* Affidavit, Carrie Daggett, "Ex. A," ¶ 9).

[7] Plaintiffs lack standing to seek prospective injunctive relief over the challenged subsections of the now repealed Ordinance. In order to demonstrate injury-in-fact to their constitutional rights, Plaintiffs must at - the very least show that they intend to engage in conduct proscribed by the Ordinance. *Susan B. Anthony List v. Driehaus*, 571 U.S. ___ (2014). Plaintiffs' facial challenge concerns solely those subsections that address aggressive panhandling; however, Plaintiffs have already conceded that they do not approach, accost, or stop individuals to solicit money. (*See* Plf. Mtn. for TRO and Prelim. Inj., pg. 31).

III case or controversy. *See Rio Grande Silver Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010); *see also Socialist Workers Party v. Leahy,* 145 F.3d 1240, 1244 (11th Cir.1998).

***A. Plaintiffs' request for preliminary injunction is moot***

The general rule is that legislative repeal of a statute renders a case moot and the "voluntary cessation exception" applies only when a recalcitrant legislature *clearly* intends to reenact the challenged regulation. *See, e.g.*, *City of Mesquite v. Aladdin's Castle,* 455 U.S. 283 (1982) (holding that the city's announcement of its intention to reenact an unconstitutional ordinance if the case was dismissed as moot forms an exception to the general rule); *see also Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (holding that repeal did not moot the case because the city had already replaced the repealed ordinance with one that was substantially similar, causing the Court to note that "[t]here is no mere risk" that the city will repeat its allegedly wrongful conduct because it had already done so); *Citizens for Responsible Gov't v. Davidson,* 236 F.3d 1174, 1182 (10th Cir. 2000) (in general, the repeal of a challenged statute is one of those events that makes it absolutely clear that the allegedly wrongful behavior—here the threat of prosecution under one of the repealed sections—could not reasonably be expected to recur); *Nat'l Black Police Assoc. v. Dist. of Columbia,* 108 F.3d 346, 349 (D.C. Cir. 1997) (finding that although voluntary cessation analysis applies where a challenge to government action is mooted by passage of legislation, the mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists—there must be evidence indicating that the challenged

law likely will be reenacted); *Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1510 (9th Cir. 1994) (concluding as a general rule, if a challenged law is repealed or expires, the case becomes "moot" except where it is "virtually certain" that the repealed law will be reenacted).

Here, City Council voiced its desire to review thoroughly the developing legal authority, to gather information, and to conduct public outreach, before possibly undertaking any reinstatement or further amendments to its new Ordinance No. 040. And, to the extent the City openly stated it might reenact portions of Ordinance No. 70 that does not mean that it will, or that it will do so "verbatim" as Plaintiffs speculate. Indeed, the City has neither explicitly voiced its intention to reenact the challenged portions of Ordinance No. 70, nor has it yet proposed any amendments. Thus, the exceptions which have been carved out from the general rule are not applicable here.

Furthermore, to the extent that the litigation played any role in the City's decision to repeal the contested portions of Ordinance No. 70, it evidences the City's good-faith desire to ensure that if it decides to amend its new Ordinance No. 040, it will do so to best ensure that it passes an ordinance that is constitutional. *See, e.g.*, *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924 (7th Cir. 2003) (finding good-faith in the city's attempts to maintain an effective ordinance that complies with the Constitution and the city's desire to avoid substantial litigation costs by removing a potential problems).

To this end, it is the City's intention to continue to canvas the developing legal authority, and to confer with various organizations that may have already analyzed the same or similar issues, such as the Colorado Municipal League, the National League of

Cities, and the International Municipal Lawyer's Association. (Ex. A, ¶ 7). The City also intends to invite community input and to engage in discussion with the various City departments that interface (directly or indirectly) with panhandlers and the general public, as well as to obtain useful geographic information systems ("GIS") data. (Ex. A, ¶ 8). Indeed, the opinions of Plaintiffs and the ACLU will be welcome at any public hearing on the topic of a revised ordinance and Plaintiffs' briefing in this case may well be taken into account. It is the City's desire to study further the complex legal nuances of the First Amendment and to decipher similar and dissimilar factual threads that run through the cases in an area of the law where there are currently few "bright lines." The foregoing components will better ensure that any such ordinance will be narrowly tailored and leave ample channels open for communication.

Any attempt to cast doubt on the City's stated intentions by focusing on a couple of words (namely "moot" and "lawsuit"), while ignoring the overall goal, suggests that Plaintiffs may have motives other than ensuring an ordinance is enacted that passes constitutional muster and complies with applicable judicial decisions. Courts have recognized that it may take multiple attempts before a governmental entity enacts a constitutional ordinance, and repeated attempts to do so does not suggest that there are improper motives afoot. *Fed'n of Adver. Indus. Representatives, Inc.*, 326 F.3d at 931 (citing *Thomas,* 884 F.2d at 995) (finding no expectation that the City will reenact the challenged ordinance even when the city moved to amend the ordinance on several occasions). In part, legislative changes are often driven by rapidly evolving law, much like that which exists here.

Although Plaintiffs rely on *Friends of the Earth*[8] for the broad proposition that the City will "return to its old ways" without an injunction, that case and the others relied on by Plaintiffs address situations where the defendant was a private party, not a public entity, or where the public entity was acting in the absence of a legislative mandate. *See, e.g., S.D. v. St. Johns County School Dist.*, 632 F. Supp. 2d 1085 (M.D. Fla. 2009) (dismissing mootness argument since school could simply return to previous habit of performing a particular song). Cases involving governmental bodies or public officials acting in a legislative capacity are analyzed from a different framework, especially where such legislation is no longer in existence. Traditionally, cases involving governmental action are treated with "more solicitude" and a self-correction provides a secure foundation for mootness as long as it appears genuine. *Brandywine, Inc. v. City of Richmond,* 359 F.3d 830, 836 (6th Cir. 2004) (holding city's repeal of an allegedly unconstitutional provision of an ordinance mooted plaintiffs' claims for declaratory and injunctive relief—concluding that the court could neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect); *Valero Terrestrial Corp. v. Paige,* 211 F.3d 112, 116 (4th Cir. 2000) (reviewing post-*Aladdin's Castle cas*e law and concluding that *Aladdin* is generally limited to the circumstance, and like circumstances, when a defendant openly announces its intention to reenact *precisely* the same provision held unconstitutional below).

Finally, Plaintiffs' theories appear to encourage this Court to presume that the City has acted in bad faith—harboring hidden ill-motives to simply reenact the ordinance provisions which were repealed. Despite Plaintiffs' repeated urging for the Court to attempt to unearth improper purposes on the part of the City—that is something that the

[8] *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. TOC Inc.,* 528 U.S. 167, 174 (2000).

courts do not presume. *See generally N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 677 (1993) (O'Connor, J., dissenting). Even with the possibility of a proposal of another panhandling ordinance, that does not give rise to the conclusion that there is a reasonable expectation that the City will return to "its old ways" as advanced by Plaintiffs.[9]

Where a challenged statute is replaced by one that would create a "substantially different controversy," then the new statute provides "no basis for concluding that the challenged conduct [will be] repeated." *Northeastern Florida,* 508 U.S. at 662 n.3. (holding that proposed ordinance, a content-neutral prohibition, would create a substantially different controversy than the repealed ordinance and unless and until an ordinance is enacted, the preliminary injunction is moot insofar as it addressed a fundamentally content-based prohibition). *See also Fed'n of Adver. Indus. Representatives, Inc.*, 326 F.3d at 932 (finding the fact that the subject ordinance was only "proposed" was *not insignificant*, because there is "no way of knowing the likelihood that this ordinance will actually be enacted"). "This presents a quite different case than either *Aladdin's Castle*—where the City explicitly informed the Court that it would reenact the repealed law, 455 U.S. at 289 & n.11, 102 S. Ct. 1070—or *Northeastern Florida*—where the City had already enacted a substantially similar ordinance." *Id.*

There is no reason here to deviate from the general rule—repeal, expiration, or significant amendment to challenged legislation ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief. *See, e.g., Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 474 (1990); *Mass. v. Oakes,* 491 U.S. 576, 582–83 (1989);

[9] *See* Plf. Resp. Notice Repeal, pg. 2

*Princeton Univ. v. Schmid,* 455 U.S. 100, 103 (1982); *Kremens v. Bartley,* 431 U.S. 119 (1977); *Diffenderfer v. Cent. Baptist Church, Inc.,* 404 U.S. 412, 415 (1972).

***B. Plaintiffs' claims are not ripe***

Like mootness, "[t]he ripeness doctrine 'prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.' " *Wilderness Soc'y v. Alcock,* 83 F.3d 386, 390 (11th Cir. 1996) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49 (1967)). To determine whether a claim is ripe, courts evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* The examination becomes whether there is sufficient injury to meet Article III's requirement of a case or controversy, and if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete to permit effective decision-making by the court. *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1158 (10th Cir. 2013). Plaintiffs' request is in effect a request that the Court enjoin the City from passing an as of yet undrafted and entirely speculative ordinance; effectively requiring the Court to itself either draft an acceptable ordinance or rule on the infinite number of possible positions the City might take. Without the benefit of an actual ordinance, the Court must simply guess as to what the City *might* enact in the future.

***C. Plaintiffs' requests constitute impermissible advisory opinions***

There must be a "present, live controversy in order to 'avoid advisory opinions on abstract propositions of law.' "*Hall v. Beals,* 396 U.S. 45, 48 (1969). It seems that no matter what the City does it is subject to attack. It appears that the Plaintiffs wish to force the City into a seemingly no-win situation—either the City must continue to defend

its twenty year old Ordinance No. 70 as written or risk being enjoined from enacting a future panhandling ordinance without having the opportunity to consider and fix any constitutional deficiencies in its panhandling provisions. The Court's deliberation in these circumstances has the potential to run afoul of Article III's prohibition on advisory opinions. Whether the Court passes judgment on the constitutionality of the repealed Ordinance No. 70 or enjoins the City from passing some hypothetical ordinance, the Court must necessarily consider issues that are not based upon facts currently disputed between the parties. *See Roth v. Delano*, 338 U.S. 226, 231 (1949) ("to now decide this suit for a declaratory judgment might be to render an advisory opinion on the constitutionality of a repealed State Act").

***II. Plaintiffs request for interim relief (re: passive panhandling) is also moot***

As further assurance of the genuine nature of the City's efforts, attached are affidavits from the City's Police Chief and Interim City Attorney disclaiming any intention to arrest or prosecute anyone for violating the sections of Ordinance No. 70 that have been repealed. (*See* Affidavit, John Hutto, "Ex. B," ¶¶s 1, 2, 3, 4, 5, 6, and 7). The City has undertaken efforts to ensure that persons will not be prosecuted for any past or future violations of the repealed portions of Ordinance No. 70. (*See* Ex. A, ¶ 6). The City Attorney's Office has also undertaken efforts to work with Fort Collins Police Services to ensure that all law enforcement personnel have been advised that certain portions of Ordinance No. 70 have been repealed and to help sworn officers understand the meaning of Ordinance No. 70, particularly as it relates to enforcement of the provisions that remain in effect after the adoption of Ordinance No. 040. (*See* Ex. A, ¶¶s 3 and 4). Further, the City Attorney's Office has made good faith efforts to ensure that the sworn

officers do not enforce the provisions of the Ordinance No. 70 that were repealed by Ordinance No. 040. (*See* Ex. A, ¶ 5).

To the extent that Plaintiffs seek additional prospective assurances that the City will not violate its own law, their remedies are at law for any such alleged violations, not through a preliminary injunction, particularly when the challenged portions of Ordinance No. 70 no longer exist. And, to the extent that there might have been any misunderstanding or confusion about the enforcement of "aggressive panhandling" versus "passive panhandling," the repeal of the challenged portions of Ordinance No. 70, *in their entirety,* eliminates the possible subjectivity associated with judgment calls as to where the conduct falls on the continuum. To the extent that Plaintiffs continue to press for a ruling, other than one finding the issues before the Court related to a preliminary injunction are moot, Plaintiffs may be driven by other agendas.[10]

Wherefore, because a preliminary injunction hearing at this time would deal with moot issues, require the Court to give a speculative, impermissible advisory opinion, and waste judicial resources, the City respectfully urges this Court to hold that all preliminary injunction issues are now mooted and/or not ripe.

[10] In *Lewis*, the Supreme Court held that where on the face of the record it appears that the only concrete interest in the controversy has terminated, reasonable caution is needed to be sure that mooted litigation is not pressed forward and unnecessary judicial pronouncements on even constitutional issues obtained, solely in order to obtain reimbursement of sunk costs. *Lewis v. Continental Bank Corp.,* 494 U.S. 472 (1990) (noting that mootness would prevent the plaintiff from becoming the prevailing party for the purpose of awarding attorney's fees under 42 U.S.C. § 1988). Nevertheless, the *Lewis* Court stated, "[t]his interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Id.* at 480.

Respectfully submitted this 6th day of March, 2015.

*s/ Heidi J. Hugdahl*
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***CERTIFICATE OF SERVICE***

I hereby certify that on this 6th day of March, 2015, I electronically filed the foregoing ***DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S NOTICE OF REPEAL OF CONTESTED PORTIONS OF ORDINANCE NO. 70, 1995*** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following at their e-mail addresses:.

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