UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHARLES COLLINS, *et al.*,

Plaintiffs,

v.

Case No. 17-CV-00234-JPS

CITY OF MILWAUKEE, *et al.*,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS FOR MOOTNESS AND LACK OF SUBJECT MATTER JURISDICTION

The City of Milwaukee, the Milwaukee Fire and Police Commission and former Chief of Police Edward Flynn (collectively, "Defendants") respectfully submit this Reply Memorandum in Support of Defendants' Motion to Dismiss for Mootness and Lack of Subject Matter Jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1).

INTRODUCTION

Defendant Edward Flynn—the sole architect of the "high volume, suspicionless stop-and-frisk program" alleged by Plaintiffs (Am. Compl. Dkt. No. 19 ¶ 2)—retired as Milwaukee's Chief of Police on February 16, 2018, as did James Harpole, the last remaining Assistant Police Chief who served under Chief Flynn.[1] Russell Decl., Exs. A, B. Chief Flynn's departure—along with his alleged "suspicionless" law enforcement strategies that form the core of Plaintiffs' Amended Complaint—renders Plaintiffs' claims moot (including Plaintiffs' putative class

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[1] It bears repeating, as Plaintiffs pointed out in their response, that Assistant Chief Harpole withdrew his candidacy for interim chief because he believed "the [FPC] desire[d] to move in a different direction from the administration of Chief Flynn." Pls.' Resp. at 3, n.1.

claims),[2] now that Alfonso Morales has been named Interim Chief of Police for the Milwaukee Police Department.[3]

The Milwaukee Fire and Police Commission ("FPC") has committed to substantively change the traffic-stop and pedestrian-stop strategies that were implemented under Chief Flynn and which were already being addressed by the U.S. Department of Justice "COPS" Office, the MPD and the FPC before Plaintiffs filed their lawsuit. The Executive Director of the FPC, MaryNell Regan, has testified that many of the recommendations made by the COPS Office have already been implemented. Russell Decl., Ex. D, 213:19-23 ("[F]or example, many of their recommendations have already been implemented, and that's part -- going to be part of the community-led discussion to educate and inform the residents about that."). Reflecting this commitment to reform, the FPC has recently launched the Milwaukee Collaborative Reform Initiative Community Feedback Portal ("MKECR") to effect the recommendations provided by the COPS Office, with the full support of the Milwaukee Common Council, the Collaborative Community Committee and Milwaukee's Mayor:

> Speaking to the importance of this tool, Common Council President Ashanti Hamilton states, "The online portal was created in keeping with our shared commitment to transparency during this process and ensuring that the public can share input in variety of ways. Input from the community remains among our highest priorities as we move toward the implementation of recommendations that are intended to improve police-community relations and trust."
>
> The MKECR web portal will support the work of the Collaborative Community Committee (CCC) that has been developed by

[2] Defendants note that Plaintiffs have not moved for class certification, even though a year has now passed since the lawsuit was filed. It is unclear whether Plaintiffs still intend to do so.

[3] Chief Morales' biography notes that his previous rank was Captain, before succeeding Chief Flynn in his current position. Russell Decl., Ex. C. Chief Morales was not identified as among MPD leadership to be deposed by Plaintiffs, underscoring the new direction under which the MPD is heading under his command.

> members of the Milwaukee Common Council. The CCC is chaired by Markasa Tucker, Director of the African-American Roundtable, and is a diverse cross section of engaged community members. This group will be holding public meetings to discuss the draft report findings and recommendations, summarize community input gathered, prioritize recommendations, and report their findings to city government. Upcoming community meetings organized by the CCC will be posted on the MKECR portal, and summaries of each meeting will be posted there as well.
>
> Markasa Tucker adds, "The Collaborative Community Committee urges community members to utilize the MKECR portal to not only provide their responses to the findings, but to also take time to educate themselves by reading the US DOJ's draft report. We want residents to know that the Collaborative Community Committee is working very closely with the Fire and Police Commission to ensure this process is transparent and accessible to all residents in the City of Milwaukee."
>
> As the civilian oversight body for the Milwaukee police and fire departments, the FPC is committed to ensuring that policies and practices of the MPD and Milwaukee Fire Department, as well as our own, reflect best practices of the professions while accounting for community concerns and unique local circumstance. Milwaukee Mayor Tom Barrett indicated his support of the Collaborative Reform process by stating, "My hope is that this effort receives broad community support and that as a city we move forward together."

Russell Decl. Ex. E. Numerous community meetings have already been held or scheduled "to discuss the draft findings, recommendations, the online comments, and work towards developing priorities and solutions to the issues addressed," including one that will address "Citizen Stop and Search Practices" at the Dr. Martin L. King Jr. Community Center on March 10, 2018. Russell Decl., Ex. F at 3.

In light of these recent events, it is absolutely clear that the alleged wrongful behavior implemented by Chief Flynn—the "high volume, suspicionless stop-and-frisk program" on which Plaintiffs' Amended Complaint is founded—cannot reasonably be expected to continue or recur under Chief Morales.

ARGUMENT

I. It is Plaintiffs' Burden to Demonstrate that Chief Morales will Continue the "High Volume, Suspicionless Stop-and-Frisk Program" Implemented by Chief Flynn.

Article III of the Constitution limits the jurisdiction of federal courts to "cases" and "controversies." *Campbell–Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016). This requires an actual controversy at "all stages of review, not merely at the time the complaint is filed." *Id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)); *see also Milwaukee Police Ass'n v. Board of Fire & Police Comm'rs*, 708 F.3d 921, 929 (7th Cir. 2013). At this stage of review, and in light of Chief Flynn's resignation, Plaintiffs can no longer establish that an actual controversy still exists.

Here, the burden of establishing that an actual controversy exists falls squarely on Plaintiffs. As set forth in Defendants' opening brief, *Spomer v. Littleton*, 414 U.S. 514 (1974), *Mayor v. City of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) and *Kincaid v. Rusk*, 670 F.2d 737 (7th Cir. 1982) govern the mootness analysis under the circumstances present here: where a public official, who is sued in his official capacity, is succeeded in office during the pendency of the litigation. *See, e.g.*, Defs.' Memo. at 17-18. As such, it is Plaintiffs' burden to prove that Chief Morales will continue the law-enforcement strategy of high-volume suspicionless traffic and pedestrian stops implemented by Chief Flynn. Simply put, "when a public official is sued in his official capacity and the official is replaced or succeeded in office during the pendency of the litigation, *the burden is on the complainant* to establish the need for declaratory or injunctive relief by demonstrating that the successor in office will continue the relevant policies of his predecessor." *Kincaid,* 670 F.2d at 741 (7th Cir. 1982) (emphasis added) (citing *Spomer v. Littleton*, 414 U.S. 514, 520–523(1974), *abrogation on other grounds recognized by Salazar v. City of Chi.*, 940 F.2d 233 (7th Cir. 1991)).

The cases cited by Plaintiffs address different circumstances than those present here: they do not involve the resignation of a public official, sued in his official capacity, who was the chief architect of the "suspicionless" law enforcement strategies of which Plaintiffs complain. *See, e.g.*, *Campbell–Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). (holding an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000) (addressing a hazardous waste facility's voluntary compliance with pollution regulations); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012 (action challenging improper union dues despite refund of dues after commencement of litigation).

Yet, even if Defendants did shoulder the burden to demonstrate an actual controversy still exists, Defendants have met that burden in light of Chief Flynn's resignation and the collaborative reforms the MPD and the FPC are implementing with the support of the Milwaukee Common Council, the Collaborative Community Committee and the Mayor's office. In short, Defendants "may show a case is moot by demonstrating there is "no *reasonable* expectation that the wrong will be repeated." *Ciarpaglini v. Norwood*, 817 F.3d 541, 546 (7th Cir. 2016) (emphasis added) ("We recognize that government policies and practices change. That will always be true. But a defendant may show a case is moot by demonstrating there is 'no reasonable expectation that the wrong will be repeated.'") (quoting *Milwaukee Police Association v. Jones*, 192 F.3d 742 (7th Cir. 1999); *see also Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir. 2005) (per curiam) ("[V]oluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction."). Here, there is no reasonable expectation that Chief Flynn's "high-volume suspicionless stop-and-frisk program" will continue or be repeated. Moreover, the

FPC's commitments to reform refute Plaintiffs' allegations that Defendants are "deliberately indifferent" to the alleged unconstitutional practice of high-volume, suspicionless traffic and pedestrian stops. *See, e.g., Strauss v. City of Chicago*, 760 F.2d 765, 768 n.4 (7th Cir. 1985) (recognizing that police departments may take actions to address constitutional concerns).

Plaintiffs rely heavily on *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). *See e.g*., Pls.' Resp. at 10. However, even if *Laidlaw* was apposite—which it is not—courts have found "[i]n practice . . . *Laidlaw's* heavy burden frequently has not prevented governmental officials from discontinuing challenged practices and mooting a case." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 (10th Cir. 2010). Rather, courts place a "comparatively lighter burden of proof on governmental officials" than on private parties and that is reconcilable with *Laidlaw* because governmental officials act "in their sovereign capacity in the exercise of their official duties [and] are accorded a presumption of good faith because they are public servants, not self-interested private parties." *Id.* at 1117, n. 15. Courts have even contemplated a "rebuttable presumption" that the objectionable behavior will not recur when the Defendant is a governmental actor. *Id.* In short, the "withdrawal or alteration of administrative policies can moot an attack on those policies." *Id.* at 1117 (internal brackets omitted). "And the mere possibility that an agency might rescind amendments to its actions or regulations does not enliven a moot controversy." *Id.* (internal quotations omitted).

Here, the burden of persuasion is not "insurmountable, especially in the context of government enforcement." *Brown v. Buhman*, 822 F.3d 1151, 1167 (10th Cir. 2016), *cert. denied,* 137 S. Ct. 828, 197 L. Ed. 2d 68 (2017). "In practice, this heavy burden frequently has not prevented governmental officials from discontinuing challenged practices and mooting a case." *Id.* (internal brackets omitted). "Most cases that deny mootness following government

officials' voluntary cessation rely on clear showings of reluctant submission by governmental actors and a desire to return to the old ways." *Id.* (internal quotations, brackets, and emphasis omitted). There is no requirement for "some physical or logical impossibility that the challenged policy will be reenacted absent evidence that the voluntary cessation is a sham for continuing possibly unlawful conduct." *Id.* Government "self-correction provides a secure foundation for mootness so long as it seems genuine." *Id.* (ellipsis omitted); *see also Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991) (omitting citation) ("[w]hen the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine") (omitting citation). Here, there is no doubt that the MPD and FPC's self-correction is genuine.

Brown is instructive in conducting the mootness analysis in the present circumstances. In *Brown*, the plaintiffs, who had formed a "plural family," filed a 42 U.S.C § 1983 action challenging Utah's bigamy statute naming the Utah County Attorney, among others, as a defendant. *Id.* at 1155. The plaintiffs were the subject of a reality television show and when word got out, the local police department opened an investigation into whether the plaintiffs had violated the bigamy statute. *Id.* While the suit was pending, the Utah County Attorney's Office closed its file on the plaintiffs and adopted a policy under which it would bring bigamy prosecutions only against those who (1) induce a partner to marry through misrepresentation, or (2) are suspected of committing a collateral crime such as fraud or abuse. *Id.* The plaintiffs fell into neither category, but the district court nonetheless denied the Utah County Attorney's motion to dismiss. *Id.* at 1155. However, the court of appeals ruled that the district court lost jurisdiction after the Utah County Attorney submitted the declaration announcing the new policy. *Id.* at 1168. In short, the court of appeals found that the "voluntary cessation" exception to

mootness did not apply because, *inter alia*, (1) there was no reasonable expectation that the Utah County Attorney would violate the new policy, (2) the possibility that a future county attorney may change the policy did not defeat mootness, and (3) the Utah County Attorney's motives for the new policy did not defeat mootness. *Id.* at 1168, 1175-76.

Similarly, here, there is no reasonable expectation that the MPD would revert back to the challenged law-enforcement strategies directed by Chief Flynn. *Fed. of Advertising Ind. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2007) ("[a] question of mootness arises when as here, a challenged [policy or practice] is repealed during the pendency of litigation, and a plaintiff seeks only prospective relief"). As such, Plaintiffs' claims for declaratory and injunctive relief can no longer be sustained. The City, MPD and FPC have or are implementing changes to the policies, practices and customs of which Plaintiffs complain. Defendants have committed to substantively change the traffic-stop and pedestrian-stop strategies that were implemented under Chief Flynn and which were already being addressed by the COPS Office, the MPD and the FPC prior to this suit.

II. The Law-Enforcement Strategy of High-Volume Traffic and Pedestrian Stops was Personal to Chief Flynn.

Contrary to Plaintiffs' arguments (Pls.' Resp. at 11-12), the high-volume traffic and pedestrian stop strategy was personal to Chief Flynn, as reflected in the traffic enforcement policy memorandum he issued on March 3, 2009. Russell Decl., Ex. G. This memo states, in pertinent part, as follows:

> It is abundantly clear that crime disproportionately afflicts some of our neighborhoods. It is an unfortunate paradox that the vulnerable neighborhoods that most need the police are often inhabited by racial and ethnic minorities who sometimes feel unfairly targeted by the police. Yet experience tells us that the intelligent, assertive use of police authority to stop people and

> vehicles can be an invaluable tool that reduces crime and enhances safety.
>
> *   *   *
>
> Traffic enforcement will continue to be a key part of our policing strategy going forward. It is well known that traffic enforcement can save lives and reduce injuries by preventing motor vehicle crashes. In addition, academic studies have proven that over time traffic enforcement can cause decreases in non-traffic related crime, including motor vehicle thefts, robberies and firearm related crime. We have already experienced this impact in 2008 with a 16% reduction in motor vehicle thefts and a 10% reduction in robberies compared to 2007.

Id.

Chief Flynn was questioned at length regarding his memo and the implementation of his law-enforcement traffic stop strategy at his deposition:

> Well, this was really to attempt to explain to the department what it was we were trying to accomplish and one of the methods we were going to use to try to accomplish that fact.
>
> And these were issues that I wanted officers to bear in mind as they went through their work. And the goal was to make it abundantly clear that our -- we were trying to -- that we were recognizing the fundamental challenge of urban police work, which is the neighborhoods that are most in need of, most demanding of police services and most disproportionately afflicted by violence, for social and historical reasons were also suspicious of the police, and all too often experienced police tactics, that were designed to be effective at crime reduction, would experience them as alienating or frustrating.
>
> So my goal here was to make it clear that we weren't going to engage in racially biased behavior, that traffic enforcement would be a key part of our strategy, because traffic violations are objective. But I experienced -- I mean, I expected them to understand that implicitly – and the data backs this up -- that the areas where there are the most car crashes are often very consistently colocated with areas of high rates of crime.

Russell Decl. Ex. H, Flynn Dep. 43:22–44:23, Nov. 6, 2017.

Chief Flynn further testified that the MPD's Office of Management Analysis and Planning ("OMAP") did not have a role in developing this traffic-enforcement policy; rather, Chief Flynn testified that "[t]his is pretty much my language." *Id.* at 48:17-20. In fact, he explained, he "had developed a similar document while [he] was in Arlington," serving as police chief. *Id.* at 48:17-20. Nor did the FPC have a role in developing the traffic enforcement policy under Chief Flynn:

> Q: And the Fire and Police Commission, they had no role in this – issuance of this?
>
> A: No. This wasn't – this wasn't a standard operating procedure, so, no.
>
> Q: So this is your policy, pretty much?
>
> A: Yeah.
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> * * *
>
> Q: So you were the final decision-maker for this traffic enforcement policy?
>
> A: Yes.

Russell Decl. Ex. A, Flynn Dep. 51:20 – 52:16.

Significantly, Chief Flynn recognized that his successor has the authority to rescind the allegedly "suspicionless" traffic-enforcement policy. *Id.* at 53:9-14. In short, the complained-of law enforcement strategies were personal to Chief Flynn and began upon his arrival in Milwaukee in January 2008, as reflected in Plaintiffs' own allegations:

> Upon assuming control of the MPD in 2008, Defendant Flynn ushered in a "broken windows policing" strategy involving "proactive policing" and so-called "saturation patrols." As part of this strategy, Defendant Flynn directs MPD officers to increase the number of traffic and pedestrian stops, also known as "field interviews" and "field contacts," throughout the City, and particularly in neighborhoods that are economically depressed

> and/or perceived as suffering from social disorder. Defendant Flynn has publicly suggested that saturating these neighborhoods with police and ramping up the number of stops made by MPD officers will disrupt and deter crime, whether or not the stops lead to arrest or prosecution.

Am. Compl. ¶ 189.

Chief Flynn's deposition testimony fully corroborates that his law enforcement strategies were personal to him. *See, e.g.*, Russell Decl., Ex. H at 55:5-9 ("So my first couple years I got here we used to count the activities we were capable of counting, which were, you know -- you know, arrests, reports, you know, vehicle stops, pedestrian, field interviews, whatnot."); *id.* at 136:21-25 ("I referenced the increase in vehicle and pedestrian stops and concluded I think it's reasonable to assert this has something to do with saved lives and reduced crime."). His deposition testimony also confirms that his pedestrian-stop strategy, which was also personal to him, was already being de-emphasized before his retirement because it did not have a "negative correlation" to crime rates. *Id.* at 57:9-15 ("Interesting, when we had been doing it for a while, we gradually realized that the field interviews did not have that negative correlation. And so we ultimately stopped measuring them, because they clearly were not having the impact that we thought that aggregate activity would have."); *id.* at 138:2-6 ("we would subsequently find out there was not a correlation with the field interviews, so we stopped measuring it and communicated to our officers that it was not a -- there was not that correlative effect"); *id.* at 138:23-139:1 (noting that the de-emphasis on proactive pedestrian stops occurred "in the last year or two"). Such testimony contradicts Plaintiffs' repeated assertions that Chief Flynn's law enforcement policies remain integral to the MPD, under the command of a new Chief, rather than remaining personal to Chief Flynn.

Accordingly, under *Spomer*, *City of Philadelphia* and *Kincaid*, Plaintiffs have the burden of proving that Chief Morales will continue the strategy of having MPD officers conduct a high-volume of traffic and pedestrian stops. Such has been the conclusions in similar cases within the Seventh Circuit. *See, e.g.*, *Hoffman v. Jacobi*, No. 4:14-cv-12, 2014 WL 5323952, *3 (S. D. Ind. Oct. 17, 2014) ("Where the plaintiff has failed to meet that burden, the suit against that official is moot and must be dismissed for lack of subject matter jurisdiction.") (omitting citation); *Moore v. Watson*, 838 F. Supp. 2d 735, 762 (N. D. Ill. 2012) ("Because Plaintiffs have not met their burden [that the complained-of policies or practices will continue], declaratory and injunctive relief against Defendants for these practices is improper."); *Plotkin v. Ryan*, No. 99-C-53, 1999 WL 965718 (N. D. Ill. Sept. 29, 1999) ("The burden is on the complainant to establish the need for injunctive relief by demonstrating that the successor in office will continue the relevant policies of his predecessor.") (omitting internal citation). No actual controversy now exists.

CONCLUSION

Defendants respectfully request the Court to dismiss Plaintiffs' claims as moot because (1) Chief Flynn—whose law-enforcement strategies provide the foundation for all of Plaintiffs' claims—has retired and (2) the evidence shows Defendants are already implementing the COPS Office recommendations and suggested reforms regarding the manner in which traffic stops and pedestrian stops are conducted by Milwaukee police officers.

Dated this 1st day of March, 2018.

Respectfully submitted,

/s/ Joseph M. Russell
JOSEPH M. RUSSELL
State Bar No. 1092211
DAVID A. FRANK II

State Bar No. 1090058
von Briesen & Roper, S.C.
411 E. Wisconsin Ave., Suite 1000
Milwaukee, WI 53202
Telephone: (414) 287-1414
Fax: (414) 276-6532
jrussell@vonbriesen.com
dfrank@vonbriesen.com
Attorneys for Defendants

GRANT F. LANGLEY
JAN A. SMOKOWICZ
NAOMI E. GEHLING
Milwaukee City Attorney's Office
800 City Hall
200 East Wells Street
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550
jsmoko@milwaukee.gov
ngehli@milwaukee.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2018, a true and correct copy of the foregoing was served on Plaintiffs via the court e-notice system, through their following counsel below:

SHANYA DINGLE
ANTHONY HERMAN
JON-MICHAEL DOUGHERTY
JUSTIN GOLART
KERREL MURRAY
JESSICA JENSEN
HWA YOUNG JIN
Covington & Burling LLP
One City Center 850 Tenth Street, NW
Washington, DC 20001
sdingle@cov.com
aherman@cov.com
jdougherty@cov.com
jgolart@cov.com
kmurray@cov.com
jjensen@cov.com
hjin@cov.com

NUSRAT J. CHOUDHURY
JASON D. WILLIAMSON
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
nchoudhury@aclu.org
jwilliamson@aclu.org

KARYN L. ROTKER
LAURENCE J. DUPUIS
ASMA I. KADRI
American Civil Liberties Union of Wisconsin Foundation
207 E. Buffalo Street, Suite 325
Milwaukee, WI 53202
krotker@aclue-wi.org
ldupuis@aclu-wi.org

s/ Joseph M. Russell
JOSEPH M. RUSSELL