UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

SISTERS FOR LIFE, INC., *et al.*	Plaintiffs
v.	Lead Civil Action No. 3:21-cv-0367-RGJ
LOUISVILLE-JEFFERSON COUNTY METRO GOVERNMENT*, et al.*	Defendants
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EDWARD HARPRING, *et al.*	Plaintiffs
v.	Member Civil Action No. 3:21-cv-691-RGJ
LOUISVILLE-JEFFERSON COUNTY METRO GOVERNMENT	Defendant

PLAINTIFF EDWARD HARPRING AND MARY KENNEY'S LEGAL MEMORANDUM ADDRESSING MOOTNESS AND THE OCTOBER 11, 2023, EVIDENTIARY HEARING

I. INTRODUCTION

Defendant filed a motion to dismiss this case based on mootness eight months ago. [DE 76.] Plaintiffs responded to that motion. [DE 82.] This Court ordered an evidentiary hearing on October 11, 2023, "to determine the issue of mootness." [DE 106 at 2682.]

As argued herein, facts adduced at that hearing do not support Defendant's motion. Plaintiffs and others continue to engage in protected free speech activities outside EMW and engage in those same activities outside Planned Parenthood. But for this Court's preliminary injunction, Plaintiffs would be violating the law in doing so. The County's anticipated argument that, should this Court lift the injunction, it will not enforce the buffer zone outside EMW does not change things. The County cannot bear the heavy burden of demonstrating that events subsequent to this case being filed have completely and irrevocably eradicated the effects of the unconstitutional Ordinance that remains on the books. They cannot bear the formidable burden that there is no reasonable expectation that the

Ordinance will not be used again to regulate Plaintiffs' speech. Again, but for the preliminary injunction, it would do so today.

This case is not moot. Based on Plaintiffs' arguments in support of summary judgment [DE 75-1 and 85] and the rulings and rationale of the Sixth Circuit's decision in *Sisters For Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400 (6th Cir. 2022), this Court should dispose of this case in Plaintiffs' favor and enter a permanent injunction barring Defendant and its agents from enforcing Louisville-Jefferson Ord. Code § 132.09(B)(2).

II. LAW OF THE CASE

As an initial matter, the Sixth Circuit's legal rulings held in *Sisters For Life* constitute the law of the case and are binding on this Court. *See, e.g.*, *Daunt v. Benson*, 999 F.3d 299, 308 (6th Cir. 2021) ("The law of the case doctrine provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'") (citation omitted). Even though the Sixth Circuit's decision in *Sisters For Life* involved an interlocutory appeal, that is of no consequence here because the Sixth Circuit had the benefit of a fully developed record, as Plaintiffs' notices of appeal were filed six days after the close factual discovery. [DE 56, 57, and 40 (Scheduling Order).] *See also Daunt*, 999 F.3d at 308 (when an "appellate panel considering the preliminary injunction has issued a fully considered appellate ruling on an issue of law . . . . then that opinion becomes the law of the case.") (cleaned up).

The evidentiary hearing on October 11, 2023, regarding the County's motion to dismiss does not change what the Sixth Circuit held based on the record it had at its disposal, which included everything except declarations by Joe Lynch [DE 72-1] and Edward Harpring [DE 75-2], and the facts adduced at the hearing—all of which relate to a potential issue of mootness only.

Relevant rulings of the Sixth Circuit that bind this Court are as follows:

(1) Every healthcare facility in the County has a buffer zone, whether a facility requested it or not (discussed, *infra*, at II.A.)

(2) Buffer zones imposed by the Ordinance "create[] a limitation on speech." *Sisters For Life*, 56 F.4th at 402.

(3) "[B]ecause the County has not made any showing that *all* medical facilities need this kind of [speech] regulation, the ordinance lacks any tailoring, to say nothing of narrow tailoring." *Id.* at 405 (emphasis in original).

(4) "The County has not shown that it 'seriously undertook to address' its concerns 'with less intrusive tools.'" *Id.* at 405 (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)).

(5) The fact that "the buffer zone in *McCullen* was larger does not change things." *Id.* at 407.

None of the facts adduced at the evidentiary hearing change or undermine any of these legal conclusions.

III. THE CHALLENGED ORDINANCE

Before discussing the facts adduced at the October 11, 2023, evidentiary order, and how those facts apply to the County's motion to dismiss on grounds of mootness [DE 76], a brief word on the Ordinance Plaintiffs challenge on its face and as-applied is in order.

The Sixth Circuit held that the Ordinance "impose[s] a buffer zone on all medical facilities in Louisville," i.e., not only when a zone is requested and painted. *Sisters For Life,* 56 F.4th at 405. *See also id.* at 408 ("The County maintains that the ordinance creates buffer zones only when a facility requests painted lines outside its entrance. But that is not what the ordinance says. It applies always and everywhere there is a healthcare facility"). The County has acknowledged that as the holding of the Sixth Circuit, though it thinks the Court erred in so ruling. [DE 78 at 2513.]

A "healthcare facility" is broadly defined in the Ordinance to include "any institution, place, building, agency, or portion thereof" that provides medical, rehabilitative, and mental health services.

Louisville-Jefferson, Ken., Ord. Code § 132.09(A). It "covers every single hospital, clinic, and dentist's office in the area." *Sisters For Life*, 56 F.4th at 405.

The Ordinance prohibits any non-exempt individual from "knowingly enter[ing]" or "remaining . . . within" a buffer zone. § 132.09(B)(2). A buffer zone extends "from the entrance of a healthcare facility to the closest adjacent sidewalk curb and 10 feet from side to side," and is only effective "during the facility's posted business hours." *Id.* The Ordinance does not state that a buffer zone is only effective when the facility is receiving patients.

IV. FACTS ADDUCED AT THE EVIDENTIARY HEARING

A. EMW and its Buffer Zone

Like all other healthcare facilities in the County, a buffer zone exists outside EMW.[1] The only thing that sets EMW apart is that EMW is the only facility to request a buffer zone be painted on the public sidewalk outside its facility. [DE 120 at 2817.] The painted lines, as well as signs indicating the presence of the buffer zone, remain to this day. [*Id.* at 2780-81, 2811, 2823.]

EMW has a website posting its business hours. [*Id.* at 2776-77.] Those posted business hours are also to be found on the EMW building itself, behind its glass doors. [*Id.* at 2806.]

Ona Marshall is the co-owner of EMW and has knowledge of EMW's operations. [*Id.* at 2760, 2762.] Though EMW is no longer seeing patients, EMW remains open for "administrative work."

[1] There can be no dispute that EMW is a healthcare facility within the definition of the Ordinance. It is a "building . . . designed" to provide medical services, including abortion. The fact that EMW is not currently providing abortion services does not change this fact. If EMW temporarily ceased providing abortion services in order to make improvements to the building or its equipment it would not cease to be a healthcare facility. In addition, pursuant to 902 KAR 20:360, EMW renewed its annual abortion facility license just this year. *See* Kentucky Cabinet for Health and Family Services, Miscellaneous Health Care Facility Directory, https://www.chfs.ky.gov/agencies/os/oig/dhc/PublishingImages/Pages/hcf/MiscellaneousDirectory.pdf (indicating that EMW's license expires on May 31, 2024). EMW also filed its Annual Report with the Kentucky Secretary of State's Office on May 26, 2023. *See* https://web.sos.ky.gov/corpscans/39/0190139-09-99998-20230526-ARP-9714722-PU.pdf. Finally, it stands to reason that a referral for a medical service by a medical center, like EMW, is a medical service.

[*Id.*] Part of that work involves receiving phone calls from individuals seeking abortion counseling and referring patients to the National Abortion Federation hotline for assistance. [*Id.* at 2762.] As Ms. Marshall testified, "[w]e still have staff on site, and we're working out of that location." [*Id.* at 2780.] EMW continues to receive deliveries, and maintain its building, with people "entering and exiting the building." [*Id.* at 2686-87.] EMW continues to surveil the area outside its facility 24 hours a day with video that Ms. Marshall can review. [*Id.* at 2763.]

Pursuant to the Ordinance, EMW filed reports with the County regarding the efficacy of the buffer zone. [*Id.* at 2770.] It has stopped doing so, however, because the Ordinance is not currently enforceable. [*Id.*] Ms. Marshall testified that EMW is willing to file additional reports if the County wants them. [*Id.* at 2771.]

EMW renewed its license this year because "we don't know what the future holds." [*Id.* at 2779.] Ms. Marshall wants to keep the door open in case abortions resume in Kentucky. [*Id.*]

EMW has not withdrawn its request for a buffer zone and does not intend to. [*Id.* at 2771-72.]19-20.] EMW still has staff on-site and allegedly has "threats and people coming to . . . the building." [*Id.* at 2780.]

If the current injunction were to be lifted, and EMW witnessed a violation of the buffer zone, it would possibly inform the police, depending on the circumstances and whether the activity is considered threatening. [*Id.* at 2783.]

B. Ongoing Speech Activities

(1) Plaintiff Edward Harpring

Plaintiff Edward Harpring has been praying and sidewalk counseling at EMW for over 35 years. [*Id.* at 2875.] He has prayed the Rosary, the Chaplet of Divine Mercy, scripture verses, and "off-the-cuff prayers." [*Id.*] He prays both silently and out loud and has prayed with women entering and leaving EMW. [*Id.*]

Mr. Harpring continues to go to EMW to pray, two or three times a week. [*Id.* at 2877-78.] He mostly prays inside the buffer zone because "this is ground zero. Like people go to 911 to pray for human atrocities or go to Auschwitz to pray for human atrocities." [*Id.* at 2878.] As Mr. Harpring explains, "I'm there because I want to make a public and prayerful presence, and I want people to see me there. I want them to see me right in front of the door." [*Id.*]

Even after EMW stopped providing abortions, Mr. Harpring has counseled women outside EMW. [*Id.* at 2879.]

After this Court entered a preliminary injunction in January 2023, Mr. Harpring would stand mostly inside the buffer zone not only to pray but to speak with women outside the facility. [*Id.* at 2880.] Mr. Harpring explained it "was important to get as close as I could to the door before they went in so I could try to give them some last encouragement or something to think about or some prayer to give them as they entered." [*Id.*]

In addition to EMW, Mr. Harpring also prays and speaks with women on the sidewalk outside Planned Parenthood. [*Id.* at 2881.] He has stood within Planned Parenthood's driveway entrance to pray or speak with women. [*Id.*] In fact, a week before the evidentiary hearing, Mr. Harpring spoke with a woman right in that area, offering her a card for the Little Way Pregnancy Center. [*Id.* at 2882] As with EMW, when Mr. Harpring is outside Planned Parenthood, he prays both silently and audibly. [*Id.*][2]

[2] Mr. Harpring also filed a declaration with the Court on March 16, 2023. [DE 75-2.] That declaration explains (1) how he was still going to the public sidewalk in front of the EMW doors to pray and counsel, even after EMW stopped performing abortions; (2) how he has witnessed persons entering and exiting EMW on several occasions and has seen the car belonging to the EMW manager parked behind the building; (3) that even after EMW stopped performing abortions, he had met a number of women outside EMW who were not aware that EMW is not providing abortion services, and that he counseled them and directed some of them to BsideUforLife, a pro-life crisis pregnancy center.

(2) Joseph Lynch

For many years, Mr. Lynch has been involved with pro-life activities. [*Id.* at 2824-25.] During that time, and through Kentucky Right to Life, Mr. Lynch has been involved in sidewalk counseling and a prayer ministry. [*Id.* at 2826.] He has engaged in counseling and prayer outside EMW and continues to do so today, about once a week. [*Id.* at 2827, 2828.] Mr. Lynch currently prays the Rosary within the buffer zone and prays out loud in a normal speaking voice when he does so. [*Id.* at 2828.] He sees his public prayer as a witness and prays for the conversion of people. [*Id.* at 2829.] Mr. Lynch conducts his prayer activities and has spoken with others within EMW's buffer zone. [*Id.* at 2830.]

Like Mr. Harpring, Mr. Lynch also goes to Planned Parenthood, which he does as part of his prayer ministry. [*Id.* at 2831.] On at least one occasion, Mr. Lynch spoke with a woman directly in the parking lot entrance to Planned Parenthood about the availability of free ultrasounds. [*Id.*] He plans to continue his ministry outside Planned Parenthood and will resume sidewalk counseling at EMW if it once again performs abortions. [*Id.*]

(3) Angela Minter

Plaintiff Angela Minter founded Sisters for Life in 2004. [*Id.* at 2846.] Sisters for Life is a ministry dedicated to educating mothers and fathers about the issue of abortion and providing support to them. [*Id.* at 2847.] Prayer is a part of the Sisters for Life ministry, in addition to sidewalk counseling while abortions were being performed at EMW and Planned Parenthood. [*Id.*]

At least once a week, volunteers associated with Sisters for Life continue to pray inside the buffer zone outside EMW, as well as up and down the sidewalk. [*Id.* at 2850-51.] The same is true with respect to the area outside Planned Parenthood. [*Id.* at 2851.] The purpose of these prayer activities is for healing. [*Id.*]

Ms. Minter testified why it is important for Sisters for Life to pray within EMW's buffer zone: "Those are the doors that the women and men and families have gone through for some 30 years ….

And so since we've been going there, the purpose is to be in front of those doors, be in front of that building to make sure that we're claiming that building for the kingdom." [*Id.* at 2852.] Learning that EMW provides abortion referrals, Sisters for Life "continue[s] to pray that that ends, and continue to pray that women would have an opportunity to receive help from ministries that are offering life-affirming help." [*Id.* at 2854.]

Ms. Minter also testified why it is important to pray directly in front of Planned Parenthood, focusing on the need to be present and to assist the Black community. [*Id.* at 2853.]

C. Future Enforcement

The one agent of the County who testified at the evidentiary hearing is Lt. Caleb Stewart. Lt. Stewart has been an LMPD employee for 12 years. [*Id.* at 2796.] He was tasked by LMPD "to be the liaison between the department and EMW" and regularly responded to calls for service at EMW. [*Id.* at 2796-97.]

After the Ordinance went into effect, Louisville police continued to get "the same types of calls we did before and then, obviously, some in regards to the buffer zone -- buffer zone being violated." [*Id.* at 2798.]

Lt. Stewart stated that, if the injunction were lifted, he believes that EMW's buffer zone would not be enforced: "Where even if there was somebody that was in the zone, and the injunction was lifted, it's not something we would be enforcing, because the spirit of the ordinance, you know, wouldn't be in effect, because they're not seeing patients." [*Id.* at 2803.][3]

That assertion is based on advice that he received from "legal advisors" in conjunction with—he believes—the County attorney's office. [*Id.* at 2803, 2808.] Lt. Stewart received this information sometime in the fall of 2022 after EMW stopped performing abortions. [*Id.* at 2810.] While Lt. Stewart

[3] Lt. Stewart did not opine on whether the County would enforce the Ordinance at all other healthcare facilities, which, as explained, have buffer zones in place during a facility's posted business hours.

testified he was "pretty confident[]" that the buffer zone at EMW would not be enforced if this Court's injunction were lifted, he never received any specific advice about that. [*Id.* at 2810.]

Finally, though Lt. Stewart testified that because EMW is not "operational," i.e., scheduling appointments with patients using the front door, he admitted that application of the Ordinance to a healthcare facility does not turn on seeing patients, but during the facility's posted business hours—which EMW has. [*Id.* at 2810-11, 2805-06.]

V. THIS CASE IS NOT MOOT

A. Standard for Mootness

"Jurisdiction, including standing, is assessed under the facts existing when the complaint is filed." *ACLU of Ohio v. Taft*, 385 F.3d 641, 645 (6th Cir. 2004) (cleaned up). A potential issue of mootness arises **after** the suit has commenced, i.e., "during the course of litigation." *Id.* As the Sixth Circuit has explained:

> The doctrines of standing and mootness serve different purposes: "In essence, standing concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct 'was occurring at the time the complaint was filed' while mootness addresses whether that plaintiff continues to have an interest in the outcome of the litigation."'

Id. (quoting *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 525 (6th Cir. 2001)). "As long as the parties have a concrete interest, **however small**, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added).

In deciding whether a case has become moot, "[t]he **heavy burden** of demonstrating mootness rests on the party claiming mootness." *Cleveland Branch, NAACP*, 263 F.3d at 531 (emphasis added). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 457 n.1 (2017) (holding that because the government had "not carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its [prior] policy," the case was not moot). The reason for this "heavy burden" is simple: courts are to "protect a party from an opponent who seeks to defeat judicial review by

temporarily altering its behavior." *U.S. v. City of Detroit*, 401 F.3d 448, 451 n. 1 (6th Cir. 2005). Otherwise, "the courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted).

Importantly, Plaintiffs do not have to prove anything in objecting to the County's claim of mootness. For example, in *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699 (6th Cir. 2016), *rev'd on other grounds*, 138 S. Ct. 1833, "the district court held that Plaintiffs' claims were moot because '[t]here is no evidence to suggest that the Defendant does not plan to use this Revised Notice in 2016 or at any other point in the future.'" *Id.* at 713. The Sixth Circuit noted, however, that "this holding gets it backwards: Plaintiffs were not required to produce evidence suggesting that [the government defendant] planned on reengaging in the allegedly illegal behavior after resolution of the case. Rather, it was—and remains—[defendant's] 'formidable burden' of 'showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Laidlaw,* 528 U.S. at 190 (2000)).

As explained herein, the County cannot meet its daunting burden. It cannot show that it would be "impossible" for this Court "to grant any effectual relief whatever" to Plaintiffs. *Waid v. Snyder*, 63 F.4th 486, 498 (6th Cir. 2023) (citations omitted).

B. Buffer Zone Outside EMW

There can be no dispute that EMW is a healthcare facility with posted business hours. According to the text of the Ordinance, as interpreted by the Sixth Circuit in *Sisters For Life*, these facts alone demonstrate that a buffer zone is in place outside EMW.[4] It is irrelevant that EMW is not currently making appointments for patients; it is irrelevant that EMW is not providing abortions. EMW renewed its license to operate earlier this year, i.e., well after it stopped abortion services, and

[4] Lt. Stewart's testimony that he believes EMW's buffer zone will not be enforced should the preliminary injunction be lifted is discussed, *infra*, at V.E.

EMW employees provide a referral for abortion services when called. But for the preliminary injunction currently in place, it would be a criminal offense for any non-exempt person to enter and stand or remain within that buffer zone.

C. Ongoing Speech Activities Outside EMW

Just as there is no dispute that a buffer zone exists outside EMW, there is no dispute that free speech activities continue to take place within that buffer zone. Plaintiffs and others continue to enter and remain within the EMW zone on a regular basis to engage in constitutionally protected speech, i.e., one-on-one communication, leafletting, and prayer.

The fact that Plaintiffs and others may now speak and pray at EMW without facing the exact same burdens they faced when the buffer zone was enforceable is beside the point in assessing Plaintiffs' continuing Article III injury for purposes of mootness. As the Sixth Circuit succinctly put it, "[o]nce a buffer zone burdens speech, *McCullen* demands narrow tailoring." *Sisters For Life*, 56 F.4th at 407. It did not say that narrow tailoring only applies when a speech restriction "substantially" or "greatly" burdens speech. "Narrow tailoring turns on whether a law sweeps more broadly than necessary, not on whether its yoke is heavy or light." *Id.* (citing *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384-85 (2021) (rejecting the view that narrow tailoring is required only for laws that impose severe burdens)).

Judicial scrutiny of a speech restriction is triggered when a plaintiff is subject to a speech restriction, i.e., not just one that is substantially burdensome. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000). The **degree** of the restriction, i.e., the burden on the speaker, is irrelevant for purposes of Article III. The standard for an "intangible injury," "such as a violation of free-speech or free-exercise rights under the First Amendment," "is one of kind and not degree, as even an 'identifiable trifle' will suffice." *Norton v. Beasley*, No. 21-6053, 2022 U.S. App. LEXIS 33286,

at *20 (6th Cir. Dec. 1, 2022) (quoting *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)).[5]

As *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015), cited in *Sisters For Life*, 56 F.4th at 405, explains: "[W]here a plaintiff claims suppression of speech under the First Amendment, the plaintiff bears the initial burden of proving that speech was restricted by the governmental action in question." *Id.* at 226 (quoting *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 n.4 (9th Cir. 2000)). Once the plaintiff makes that showing, "the burden then falls on the government to prove the constitutionality of the speech restriction." *Id. See also Miller v. City of Cincinnati*, 622 F.3d 524, 533-534 (6th Cir. 2010) (after determining that plaintiffs' activities were "expressive activities protected under the First Amendment," the Court immediately moved to considering the nature of the forum and the requisite level of scrutiny to apply, without determining any degree of burden). Simply put, a restriction on speech, no matter the degree of the burden that restriction imposes, is enough to apply the requisite speech standard—in this case, narrow tailoring. "There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001).

Imposing criminal penalties for exercising one's constitutional liberties in a traditional public forum, as the Ordinance does here, creates an obvious burden on speech that the government must justify. Any argument that Plaintiffs' speech is not burdened because they can still pray or speak outside the buffer zone would be meritless. *See Schneider v. State*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

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[5] *See SCRAP*, 412 U.S. at 689 n.14 (""The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."') (quoting Kenneth C. Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1968)).

Plaintiffs Harpring and Minter, as well as Mr. Lynch, all testified about the importance to them of praying and speaking immediately outside the doors of EMW, i.e., within the buffer zone. Unless the Ordinance satisfies narrow tailoring—it does not—each of those persons has the First Amendment right to do so. The interests of the Plaintiffs in a successful outcome to this litigation are obvious, and a permanent injunction barring enforcement of the Ordinance would vindicate the free speech rights of Plaintiffs—not to mention that of every citizen of the County.

Finally, as the Sixth Circuit explained, because this case is not just an as-applied challenge to the Ordinance, but a facial one, it is irrelevant that Plaintiffs "mainly visit[] EMW rather than other medical facilities." *Sisters For Life*, 56 F.4th at 407. "In facial First Amendment challenges, we consider a statute's full range of applications even when some of them do not implicate a particular plaintiff." *Id.* Here, the Ordinance creates speech-suppressing buffer zones outside "every single hospital, clinic, and dentist's office" within the County. *Id.* at 405. "[B]ecause the County has not made any showing that **all** medical facilities need this kind of regulation, the ordinance lacks **any** tailoring, to say nothing of narrow tailoring." *Id.* (second emphasis added).[6]

For these reasons, the Sixth Circuit did not instruct this Court to preliminary enjoin the Ordinance only with respect to Plaintiffs and EMW. It instructed this Court "to preliminarily enjoin defendants from enforcing Louisville-Jefferson Ord. Code § 132.09(B)(2)"—full stop. That injunction bars enforcement of the buffer zone provision of the Ordinance no matter who is speaking, where they are speaking, or the degree of the burden the buffer zone imposes on their speech.

D. Ongoing Speech Activities Outside Planned Parenthood

Even if EMW were to shut down all operations and sell its building to an antique dealer or coffee shop, the case would still not be moot. Ample testimony was provided at the evidentiary hearing

[6] For this reason alone, should this Court deny the County's motion to dismiss, the Court has more than sufficient grounds to enter a permanent injunction, immediately resolving this case.

that Plaintiffs and others go to the public area outside Planned Parenthood to pray and speak with women. Because a buffer zone exists outside that healthcare facility even if no lines have been painted on the sidewalk, Plaintiffs would face criminal penalties for engaging in free speech activities in that traditional public forum—an obvious Article III injury. As explained, it does not matter for purposes of the County's mootness argument whether Plaintiffs could still engage in their constitutionally protected activities outside the zone or with greater ease than they faced at EMW while the Ordinance was being enforced. Plaintiffs wish to use the entirety of the public sidewalk outside Planned Parenthood to pray and speak. Because the Ordinance prohibits that, Plaintiffs' ongoing activities at Planned Parenthood provide further support to defeat the County's mootness argument.

E. Any Voluntary Cessation Argument by the County is Meritless

Based on Lt. Stewart's testimony, the County is likely to argue that the case is moot because it has voluntarily made the decision to cease enforcing the Ordinance at EMW. Any such argument is meritless. *See, e.g.*, *Johnson v. City of Cincinnati*, 310 F.3d 484, 490 (6th Cir. 2002) ("[T]he City's assurance that it no longer enforces the Ordinance . . . does not render the present appeal moot.").

"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." *Laidlaw*, 528 U.S. at 189 (cleaned up). *See also Already, LLC v. Nike*, 568 U.S. 85, 91 (2013) ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued."). "Voluntary cessation will only moot a case where there is 'no reasonable expectation that the alleged violation will recur,' **and** 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added). "When **both conditions** are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." *Davis*, 440 U.S. at 631 (emphasis added).

The Sixth Circuit has explained that adjudging mootness is a fact-based inquiry:

> While all governmental action receives some solicitude, not all action enjoys the same degree of solicitude. Determining whether the ceased action "could not reasonably be expected to recur," takes into account the totality of the circumstances surrounding the voluntary cessation, including the manner in which the cessation was executed.

Speech First, 939 F.3d at 768 (6th Cir. 2019) (internal citation omitted).

Based on the circumstances of this case, the County cannot meet its formidable burden.

(1) The Ordinance Remains on the Books

If the County no longer wishes to enforce the Ordinance, it can repeal it. *See e.g.*, *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) ("After we granted certiorari, the State of New York amended its firearm licensing statute, and the City amended the rule . . . . Petitioners' claim for declaratory and injunctive relief with respect to the City's old rule is therefore moot.") If the County wants to limit the Ordinance only to healthcare facilities that see patients it can amend it. As the Sixth Circuit has explained, "[w]here the government voluntarily ceases its actions by enacting new legislation or repealing the challenged legislation, that change will presumptively moot the case unless there are clear contraindications that the change is not genuine." *Speech First*, 939 F.3d at 768 (citing cases).

The County has not repealed or amended the Ordinance; nor has it proffered any evidence that it intends to do so. In addition, the County has never suggested that the Ordinance suffers from any First Amendment infirmities. *See e.g.*, *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir. 2004) ("[A] case is moot when a state agency acknowledges that it will not enforce a statute because it is plainly unconstitutional, in spite of the failure of the legislature to remove the statute from the books"); *but see Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 341 (6th Cir. 2007) ("Michigan argues that the plaintiffs' claims became moot after the issuance of the Attorney General's opinion … [and] that based on the opinion, the plaintiffs no longer have a fear of prosecution for performing constitutionally protected abortions. We reject the state's mootness argument. . .").

Even after the Sixth Circuit's decision in *Sisters For Life*, the County did not back down in its defense of the Ordinance. In fact, in opposing Plaintiffs' motion for summary judgment, the County took issue with the Sixth Circuit itself, arguing that the Court's narrow tailoring analysis was "mistaken and contrary to well-settled law." [DE 78 at 2513.] It criticized the Court for not looking "at the plain language of the Ordinance," and asserted that the decision "ignores all attempts from Metro Government to address the problem of the situation and appears to focus solely on Metro Government's failure to use injunctions." [*Id.* at 2513–2514.]

The County's ongoing defense of the (unconstitutional) Ordinance that remains on the books—with no plans to repeal it, even after the Sixth Circuit's decision last year—casts significant doubt over any assertion that it will not enforce the Ordinance in the future.

(2) The Ambiguous and Inconclusive Testimony of Lt. Stewart

A second problem with any voluntary cessation argument by the County is the ambiguous testimony of the County's one witness with any official connection to the County. Lt. Stewart, who acts according to the legal advice of others, testified that even if someone were to violate EMW's buffer one and the injunction lifted, "it's not something we would be enforcing, because the spirit of the ordinance, you know, wouldn't be in effect, because they're not seeing patients." [2803, 51, 15–19.]

"Only the written word is the law." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020). And the words of the challenged Ordinance are clear: a buffer zone exists outside every healthcare facility in the County during the time of that facility's posted business hours. It does not matter whether the facility is seeing patients; it does not matter whether it meets Lt. Stewart's standard of "operational" (a term nowhere located in the text of the Ordinance); it does not matter whether a buffer zone has

been requested and painted.[7] Laws are enforced and prosecuted according to what those laws say, not what their "spirit" may be.

In addition, Lt. Stewart did not opine on what the County would do if the injunction were lifted and EMW once again started seeing patients. Ms. Marshall testified that EMW renewed its license this year because "we don't know what the future holds," and that she wants to keep the door open in case abortions resume in Kentucky. [DE 120 at 2779.] The lack of certainty as to whether EMW will resume seeing patients and whether the County resume enforcing the Ordinance cuts off the County's mootness argument at the knees. It is the County—not Plaintiffs—that bears the "heavy burden" of demonstrating that (1) events have made it "absolutely clear" that the County will not resume enforcing the Ordinance, **and** (2) that "events have **completely** and **irrevocably eradicated**" future enforcement of the Ordinance. *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 530-31 (6th Cir. 2001) (emphasis added). "The possibility that [a party] may change its mind in the future is sufficient to preclude a finding of mootness." *United States v. Generix Drug Corp.*, 460 U.S. 453, 456–57 n.6 (1983).

The fact that the County, which allegedly made a decision sometime in the fall of last year not to enforce the buffer zone at EMW, has yet to remove the buffer zone lines it painted outside EMW,

[7] To make seeing patients the criterion of enforcing the Ordinance does not square with the language of the Ordinance for another reason. The Ordinance requires facilities that have requested buffer zone lines to report on "the efficacy of the 'buffer' zone in allowing patients **and staff** to enter and exit the facility safely." § 132.09(D). It also requires those same facilities to monitor the buffer zone "for obstructions created by individuals or groups to allow patients **and/or staff** to enter and exit the facility safely." § 132.09(E). In other words, staff safety is an interest of the Ordinance. In light of Ms. Marshall's testimony that EMW wants the buffer zone enforced for the sake of her staff [DE 120 at 2783], the County's abandonment of that interest not only makes little sense; it raises the alarm that the County's newly found cessation-mootness argument is based on nothing more than a stratagem to have this case dismissed—allowing the County to resume enforcement should this Court do so. "[A] party," however, "should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001).

or has yet to make any public-facing statement that the buffer zone will not be enforced at EMW, strongly suggests that the County is doing exactly what EMW is doing: waiting to see what the future holds. [DE 120 at 2821-22.] A case cannot possibly become moot where the party asserting it is "free to return to his old ways." *Laidlaw*, 528 U.S. at 189 (2000).

Finally, Lt. Stewart's testimony did not shed any light on how the latest legal advice he received (sometime last year) regarding EMW's buffer zone, could not be changed tomorrow—by the same legal advisors or new ones.[8] "If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than . . . bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Speech First*, 939 at 768. *See also Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Vilsack*, 6 F.4th 983, 991 (9th Cir. 2021) (it must be "absolutely clear to the court, considering the procedural safeguards insulating the new state of affairs from arbitrary reversal and the government's rationale for its changed practices, that the activity complained of will not reoccur.") (citation omitted); *Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) ("But the Attorney General . . . may change his mind about the meaning of the statute; and he may be replaced in office.").

"The First Amendment 'does not leave us at the mercy of *noblesse oblige*.'" *Sisters For Life*, 56 F.4th at 408 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). In other words, it does not leave us at the mercy of how a current government official wishes to apply "the spirit" of the law. "[W]e would not bless an ill-tailored statute if the government enforced it only in particularly worthy cases." *Id.* The Ordinance that the County has not amended or repealed means what it says: that buffer

[8] Oddly, it does not appear that Lt. Stewart has been advised of what the Sixth Circuit held about the scope of the Ordinance, i.e., that it "impose[s] a buffer zone on all medical facilities in Louisville." *Sisters For Life*, at 405. As he testified, "I don't believe there are any other buffer zones in the county." [DE 120 at 2816.] He also testified that he is not familiar with the terms of this Court's preliminary injunction order. [*Id.*]

zones are in place outside every healthcare facility in the County and are enforceable during that facility's posted business hours. EMW is one such facility. This Court should not rely on the testimony of Lt. Stewart that unnamed legal advisors made the decision not to enforce the buffer zone at the one facility that requested painted lines (a request that has not been rescinded). *See Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) ("[T]he State's representation cannot remove VRLC's reasonable fear that it will be subjected to penalties for its planned expressive activities. If we held otherwise, we would be placing VRLC's asserted First Amendment rights 'at the sufferance of' Vermont's Attorney General.").

(3) The Timing of the County's Mootness Argument

The burden a party—including a government party—must overcome to show mootness is "increased by the fact that the voluntary cessation only appears to have occurred in response to . . . litigation, which shows a greater likelihood that it could be resumed." *Northland*, 487 F.3d at 342-43 (6th Cir. 2007); *see also Speech First*, 939 F.3d at 769 (holding that timing of change after suit was filed increased government's burden). The timing of the cessation is relevant "because it weighs on whether a party's disengagement from alleged illegal conduct is genuine." *Amalgamated Transit Union v. Chattanooga Area Reg'l Transp. Auth.*, 431 F. Supp. 3d, 961, 976 (E.D. Tenn. 2020) (citing *Speech First*, 939 F.3d at 769-70; *Northland*, 487 F.3d at 342-43)).

In this case, any claim by the County that it will not enforce the Ordinance in the future is rendered highly suspect by the timing of the assertion. Lt. Stewart testified that he received advice of this late last year, sometime after EMW stopped performing abortions. If that were the case, the County could have filed a motion with the Sixth Circuit seeking dismissal of the appeal on those grounds. It did not do so (nor did it say a word about it at the Sixth Circuit oral argument on December 8, 2022). The County could also have made this argument in a dispositive motion with this Court eight months ago. It did not do so. Instead of arguing mootness based on voluntary cessation in its motion

to dismiss, the County argued the case was moot based on wholly different (and inapposite) grounds. [DE 76.] While no party can waive jurisdiction, the timing of the County's anticipated cessation argument (approximately a year after Lt. Stewart was told the County would not enforce the Ordinance) makes its mootness argument weak as water. *See, e.g.*, *Doe v. Wooten*, 747 F.3d 1317, 1325 (11th Cir. 2014) (holding that timing of voluntary cessation days before trial was to begin "suggests a change was made simply to deprive the District Court of jurisdiction").

The Supreme Court has cautioned that "maneuvers designed to insulate" conduct from judicial review "must be viewed with a critical eye." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). The County's timing in advancing its newly minted mootness argument based on voluntary cessation demonstrates such maneuvering. This Court should reject it outright.

VI. THE ORDINANCE CONTINUES TO LACK ANY NARROW TAILORING

In conclusion, facts adduced at the evidentiary hearing not only show that this case is not moot; they demonstrate that the Ordinance lacks even less tailoring than it did when the Sixth Circuit issued its ruling in *Sisters For Life*—though it is admittedly difficult to see how it could be less tailored when it already "lacks **any** tailoring," 56 F.4th at 405 (emphasis added).

"[T]he County may not 'burden substantially more speech than is necessary' to further the County's order and access interests." *Id.* (quoting *McCullen*, 573 U.S. at 486). The lack of patients entering or leaving EMW, as well as the absence of clinic escorts, shows that the Ordinance—which undoubtedly regulates speech (on its face and as applied to Plaintiffs), *id.* at 402—is now a solution in search of a problem. Lt. Stewart testified that the County did not have to increase police presence at EMW or any other healthcare facility to guarantee access since the preliminary injunction has been in place. [DE 120 at 2816.] In other words, not being able to enforce the Ordinance has made no difference to the County's interests—but it continues to impact directly the free speech rights of Plaintiffs and others not before this Court. EMW's current hold on performing abortions does not

render this case moot, it further undermines "the requisite degree of fit," between the interests served by the Ordinance (or, now, the lack thereof) and the broad scope by which it suppresses speech outside "every single hospital, clinic, and dentist's office in the area." *Sisters For Life*, 56 F.4th at 405. In short, while the County's interests have all but disappeared, at least for the time being, Plaintiffs' interest in the outcome of this litigation remains exactly the same as when they filed suit: to be able to engage in core protected speech in a traditional public forum. A favorable ruling by this Court will vindicate Plaintiffs' right to do so.

CONCLUSION

This case is not moot. Plaintiffs respectfully ask the Court to deny Defendant's motion to dismiss.

Respectfully submitted on this 20th day of November 2023,

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[redacted]

Counsel for Plaintiffs Harpring and Kenney

CERTIFICATE OF SERVICE

I certify that I have served the foregoing via the Court's CM/ECF system, which will provide notice to all counsel or parties of record, on this 20th day of November 2023.

/s/Geoffrey R. Surtees
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Counsel for Plaintiffs Harpring and Kenney