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 RESPONSE TO DEFENDANT'S POST-HEARING BRIEF ON MOOTNESS

Plaintiffs Edward Harpring and Mary Kenney respectfully submit the following response to the County's Post-Hearing Brief on Mootness. [DE 122.]

INTRODUCTION

Considering the Sixth Circuit's decision in this case, holding that the challenged Ordinance "lacks any tailoring, to say nothing of narrow tailoring," the County's attempt to avoid a decision on the merits of Plaintiffs' First Amendment claim is understandable. *Sisters For Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400, 405 (6th Cir. 2022). Nonetheless, the County's attempt fails. As explained herein, the County's mootness argument is predicated on a self-serving, cherrypicked account of the record facts and an incomplete, if not erroneous, understanding of the relevant law. It fails to carry its "heavy burden" of showing that this case is moot—a well-established standard the County does not even acknowledge.

This Court should deny the County's motion to dismiss, premised on mootness, and enter a permanent injunction enjoining the County from enforcing Louisville-Jefferson Ord. Code §

132.09(B)(2).

ARGUMENT

I. The County is Incorrect on the Standard of Review

The County says nary a word about its "heavy burden" to establish mootness. *See, e.g.*, *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 531 (6th Cir. 2001) ("The heavy burden of demonstrating mootness rests on the party claiming mootness."). That omission speaks volumes. While the County is correct that "[t]he party claiming jurisdiction bears the burden of demonstrating that the court has jurisdiction over the subject matter" [DE 122 at 2910 (citation omitted)], "[j]urisdiction, 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). Plaintiffs established standing and this Court's jurisdiction at the outset of this case—as the County concedes [*Id.* at 2910].

Contrary to how the County frames the standard, the doctrines of standing and mootness are related but "are not the same." *Sumpter v. Wayne Cty.*, 868 F.3d 473, 490 (6th Cir. 2017). Standing ensures that a plaintiff has a "personal stake in the outcome of the controversy" at the outset of litigation. *Id.* (citation omitted). Mootness, on the other hand, "is akin to saying that, although an actual case or controversy once existed, changed circumstances have intervened to destroy standing." *Id.* (citation omitted). In short, "standing applies at the sound of the starting gun, and mootness picks up the baton from there." *Id.*

As the Third Circuit has explained, "once the plaintiff shows standing at the outset, she need not keep doing so throughout the lawsuit." *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305-06 (3d Cir. 2020). Instead, "the burden shifts." *Id.* "If the defendant (or any party) claims that some development has mooted the case, it bears the heavy burden of persuading the court that there is no longer a live controversy." *Id.* at 305-6 (cleaned up). *See also Kentucky v. Yellen*, 54 F.4th 325, 340 n.10

(6th Cir. 2022) ("The burden to establish jurisdiction rests on the party invoking jurisdiction . . . while the burden to defeat jurisdiction with a mootness objection rests on the party asserting mootness.").

Because the heavy burden of showing mootness lies squarely on the shoulders of the County, Plaintiffs do not have to prove anything. *See, e.g.*, *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016) (requiring plaintiffs to prove that the defendant would not reengage in illegal behavior "gets it backwards"); *NRDC v. Cty. of L.A.*, 840 F.3d 1098, 1104 (9th Cir. 2016) (noting that the district court "impermissibly shifted the evidentiary burden to the Plaintiffs" to defeat a claim of mootness).

The County cannot hide the ball on the well-established standard governing its motion to dismiss. As this Court noted in its Order scheduling the evidentiary hearing on the County's motion: "The party seeking dismissal bears the burden of proving a case has become moot." [DE 106 at 2684 (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).]

II. The County is Incorrect on the Facts

Just as the County has cherrypicked case law to support its incomplete standard of review, it has cherrypicked the record facts to support its incorrect argument that this case is moot.

A. Plaintiffs Verified Complaint Addresses Both Prayer and Speaking with Others

The County says that "[t]he sole purpose of the Plaintiffs' ministry was to dissuade women from seeking abortions." [DE 122 at 2911.] **Not true**. The County quotes liberally from Plaintiffs' verified complaint but ignores the fact that, according to the complaint, Plaintiffs would visit the sidewalk outside EMW for two reasons: (1) to pray, and (2) to speak with individuals entering or leaving EMW:

> For the past 37 years and 15 years respectively, Harpring and Kenney have regularly used the public sidewalk in front of EMW **to pray**, and to speak with individuals heading to or from the abortion clinic.

[3:21-cv-00691, DE 1 at 3, ¶ 21 (emphasis supplied).]

As stated in his March 7, 2023, Declaration—executed well after EMW stopped performing abortions—Plaintiff Harpring goes to EMW two to three times a week when he is in town to both pray and to speak with women who might be standing outside the front doors of EMW. [Harpring Declaration, DE 75-2, at 2432, ¶ 3.] In addition, as Harpring further stated:

> Even after EMW allegedly stopped performing abortions, I have met a number of women outside EMW who were not aware that EMW is not providing abortion services. I have counseled them and directed some of them to BsideUforLife, a prolife crisis pregnancy center, located at 701 W. Muhammad Ali Blvd., Louisville, KY 40203.

[*Id.*, at ¶ 5.]

Harpring's undisputed testimony at the evidentiary hearing bolsters what he stated in his declaration. Two or three times a week, Mr. Harpring continues to go to EMW to pray. [*Id.* at 2877-78.] His audible and silent prayers are recited mostly in the buffer zone itself 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 explained, "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.*] Also consistent with his declaration, Mr. Harpring testified that he has counseled women outside EMW, even after it stopped performing abortions. [*Id.* at 2879.]

The change in Kentucky abortion law does not change things. Before adoption of the challenged Ordinance, Mr. Harpring was praying and speaking with women outside EMW in the area that eventually became off-limits to him. After adoption of the Ordinance, Mr. Harpring continued to pray and speak with women outside EMW, though not within the buffer zone so as not to violate the law. After this Court's preliminary injunction, Mr. Harpring has resumed praying and speaking with women inside the buffer zone. In short, Mr. Harpring continues to engage in the same protected speech activities he's been engaging in for forty years. None of this is seriously disputed and it takes

no small measure of chutzpah for the County to argue that Mr. Harpring no longer has a vested interest in whether he can continue these activities in the years to come.[1]

B. Future Enforcement

The County states that "Lt. Stewart testified that if the injunction were lifted, the buffer zone would not be enforced because EMW is not seeing patients." [DE 122 at 2907.] Any attempt to conclude from Lt. Stewart's testimony that it is unequivocally clear that the County will never again enforce EMW's buffer zone is hard to square with Lt. Stewart's own testimony and the words of the Ordinance itself. First, Lt. Stewart does not believe he ever received any specific advice about what the County would do if the injunction were lifted—only that he could "pretty confidently say" that the County would not enforce EMW's buffer zone. [DE 120 at 2810.] Lt. Stewart's less-than-complete confidence falls well short of the abundance of clarity needed to moot a case or controversy. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("Our cases have explained that 'a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that **it is absolutely clear** the allegedly wrongful behavior could not reasonably be expected to recur.'") (quoting *Laidlaw*, 528 U.S. at 190) (emphasis added).

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[1] Like other forms of protected speech (one-on-one communication and leafletting) prayer, i.e., religious speech, is protected fully by the First Amendment:

> Private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (plurality opinion) (citations omitted). *See also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) ("Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."); Shqeir*at v. United States Airways Grp., Inc.*, 645 F. Supp. 2d 765, 786 (D. Minn. 2009) ("Praying in public . . . is protected speech under the First Amendment.").

Second, Lt. Stewart stated that it was his "understanding," i.e., not based on a written policy, directive, or regulation, that EMW is only "operational" if it has "scheduled appointments, and they're seeing patients that are utilizing the front door." [*Id.* at 2811.] That might be how Lt. Stewart understands the "spirit of the law," but the Ordinance's definition of "healthcare facility" does not turn on scheduling appointments of patients using a facility's front door. Plaintiffs and others should not be beholden to the whims of how County officials interpret the Ordinance based on their understanding of the Ordinance's purpose. "The First Amendment 'does not leave us at the mercy of *noblesse oblige*.'" *Sisters For Life*, 56 F.4th at 408 (citation omitted).

Third, Lt. Stewart did not explain, if the County is not going to enforce EMW's buffer zone, why painted lines and signs indicating the presence of the buffer zone have yet to be removed. Any person walking down the sidewalk outside EMW today would reasonably conclude that a buffer zone is in place and enforceable outside that facility. A typical pedestrian is not going to be familiar with the details of this Court's preliminary injunction order prohibiting enforcement of the Ordinance. Even Lt. Stewart testified that he did not know for sure about the scope of the injunction. [DE 120 at 2816.] The County's assertion that it will not enforce EMW's buffer zone is undermined by the still-present lines and signs the County could have removed months ago.

Fourth, Lt. Stewart did not opine on what would happen if EMW resumed seeing patients in person. That uncertainty is enough to conclude that nothing has transpired inside or outside this case to "completely and irrevocably eradicate[] the effects" of the unconstitutional Ordinance that is devoid of any tailoring. *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)).

In short, the testimony of Lt. Stewart, the only agent of the County to testify at the evidentiary hearing, is riddled with ambiguities and inconsistencies. It is altogether insufficient to carry the heavy

burden the County must bear to demonstrate mootness.[2]

C. Planned Parenthood

The County cannot seriously dispute that (1) Plaintiffs and others engage in free speech activities outside Planned Parenthood (i.e., to pray and speak with women); (2) that Planned Parenthood is a healthcare facility, as defined by the Ordinance; and (3) that, because it is a healthcare facility, a buffer zone is in place outside Planned Parenthood. Moreover, and setting aside any meritless claim of voluntary cessation, the County cannot dispute that, but for the preliminary injunction currently in place, Plaintiffs would be subject to criminal penalties for praying and speaking within the buffer zone outside Planned Parenthood.

The fact that Plaintiffs' verified complaint does not specifically address Planned Parenthood is of no moment. In addition to their as-applied challenge, Plaintiffs bring a facial challenge against the Ordinance, as the Sixth Circuit recognized. *Sisters For Life*, 56 F.4th at 407. Plaintiffs' activities outside Planned Parenthood involve the **same** conduct as their activities outside EMW and are entitled to the **same** First Amendment protection, i.e., prayer and speaking with others. The Ordinance that imposes a buffer zone outside EMW is the **same** Ordinance that imposes one outside Planned Parenthood. As explained, *supra*, II.A, the County is simply wrong to suggest that "Plaintiffs' Complaints are based **solely** on their sidewalk ministry efforts to counsel women obtaining abortions." [DE 122 at 2910 n.1 (emphasis added).] Plaintiffs' activity of prayer is not a "new allegation," as the County suggests [*id.* at 2910] but is specifically identified in their verified complaint.

[2] The County points to Lt. Stewart's testimony that he has not seen any "demonstrators outside of EMW in quite some time." [DE 122 at 2906.] Lt. Stewart also admitted, however, that he only drives by EMW a few times a day, with his observations lasting no longer than 30 seconds at a time. [DE 120 at 2807.] That admission, coupled with the undisputed testimony of Plaintiff Harpring, Mr. Lynch, and Ms. Minter that they and others still regularly go to EMW to this day is enough to undermine any idea that persons have ceased going to EMW altogether.

III. The County is Incorrect in its Application of the Law

A. Kentucky's Pro-Life Legislation Does not Moot the Case

No one doubts that "[l]egislative repeal or amendment of a challenged statute . . . usually eliminates this requisite case-or-controversy," as the County says. [DE 122 at 2912 (quoting *Hill v. Snyder*, 878 F.3d 193, 203 (6th Cir. 2017).] The fact that in the wake of *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), KRS 311.772 is now enforceable is irrelevant as far as mootness is concerned. The challenged law **in this case**—the Ordinance—has not been repealed or amended. The testimony of Plaintiffs at the evidentiary hearing demonstrated beyond peradventure that Plaintiffs and others have not ceased their First Amendment activities because of *Dobbs* or a change in Kentucky law. While the motivation inspiring their speech may now be slightly different, "[u]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (quoting M. Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy*, 91 (2001)).

B. The County's Assertion of Voluntary Cessation Does not Withstand Scrutiny

Plaintiffs have argued in considerable detail why Lt. Stewart's testimony about the County's alleged position not to enforce the buffer zone outside EMW fails to carry its formidable burden in showing that this case is moot. [DE 123 at 2933-39.] The County, on the other hand, has not explained in any detail at all how its **alleged** voluntary cessation of enforcing EMW's buffer zone moots the case. It points to no case law supporting the proposition that a case can be mooted when a law enforcement officer states on the record he is "pretty confident" that the government will not enforce the law in the future. It cannot demonstrate how Lt. Stewart's testimony satisfies the criteria that "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,'" because it does not describe, let alone mention, these criteria in the first place. *Speech First*, 939 F.3d at 767.

C. Criminalizing Protected Speech in a Traditional Public Forum Imposes a Burden—a Burden the Government Must Justify

The County argues that "there is no burden on Plaintiffs' prayer regardless of buffer zone enforcement." [DE 122 at 2913.] That is a remarkable statement. The right to engage in free speech activities, such as prayer and speaking with others, in a traditional public forum is a cornerstone of First Amendment law. "[G]overnment entities are strictly limited in their ability to regulate private speech in . . . traditional public fora," such as public sidewalks, streets, and parks. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).[3] Imposing criminal penalties on speakers who wish to use a public sidewalk to exercise their First Amendment liberties—as does the Ordinance—creates an obvious burden on speech. And it is a burden that the County must (but cannot) justify. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions"). *See also Phila. Newspapers v. Hepps*, 475 U.S. 767, 777 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified").

As Plaintiffs have already argued, the fact that Plaintiffs may not be burdened in the same exact way as when they first filed suit is irrelevant. [DE 123 at 2930-32.] But for this Court's preliminary injunction—entered by order of the Sixth Circuit, and which prohibits the County from enforcing the Ordinance no matter the degree of the burden on any speaker—Plaintiffs would face criminal penalties

[3] Streets, public parks, and sidewalks, have long been understood as "'quintessential' public forums for free speech." *Saieg v. City of Dearborn*, 641 F.3d 727, 734 (6th Cir. 2011) (citation omitted). Those forums "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (cleaned up).

for engaging in the activities they are currently engaging in to this very day.[4] The County does not explain how penalizing speech on a public sidewalk can be anything other than a burden on speech.

In short, narrow tailoring is not triggered **only** by a **substantial** burden on speech. "Once a buffer zone burdens speech [*simpliciter*], *McCullen* demands narrow tailoring." *Sisters For Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400, 407 (6th Cir. 2022). *See also Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015) (recognizing that the "threshold determination triggering application of First Amendment scrutiny is whether [the] challenged regulation burdens speech"—not whether the challenged regulation **substantially** burdens speech) (citation omitted); *Verlo v. Martinez*, 820 F.3d 1113, 1136 (10th Cir. 2016) (noting that *McCullen* "began its analysis by recognizing that the buffer-zone statute operated to restrict speech in traditional public fora: streets and sidewalks"). Indeed, "[e]ven a showing that the First Amendment burden is incidental . . . does not relieve a city of its burden of establishing that the restrictions are necessary to meet delineated city goals." *Keego Harbor Co. v. Keego Harbor*, 657 F.2d 94, 98 (6th Cir. 1981).

IV. The County Cannot Carry its Heavy Burden of Establishing Mootness

If the County had repealed the challenged Ordinance, this case would be moot. If Plaintiffs altogether stopped engaging in protected speech activities within the forbidden zones created by the Ordinance, this case would be moot. Neither of these have happened. To the contrary: the Ordinance remains on the books and Plaintiffs and others continue to pray and speak with others within buffer zones in the County, specifically EMW and Planned Parenthood.

[4] One must assume that the injunction ordered by the Sixth Circuit was "narrowly tailored to give only the relief to which plaintiffs are entitled." *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) (quoting *Brown v. Trustees of Boston University*, 891 F.2d 337 361 (1st Cir. 1989)). If the Sixth Circuit thought it would have been more appropriate to limit the injunction only as to sidewalk counseling or only to those whose speech has been substantially burdened, it would have said so. The Sixth Circuit's instructions to this Court "to preliminarily enjoin defendants from enforcing Louisville-Jefferson Ord. Code § 132.09(B)(2)" recognizes the constitutional infirmities of the Ordinance **on its face**—not just in its application to Plaintiffs.

Moreover, considering Lt. Stewart's ambiguous and inconclusive testimony on the issue of enforcement, in addition to the suspicious timing of the County's assertion of voluntary cessation [*see* DE 123 at 2938-29], the County has "not carried the 'heavy burden' of making 'absolutely clear'" that it will not resume enforcement of the Ordinance or EMW's buffer zone. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 457 n.1 (2017) (citation omitted).

CONCLUSION

This case is not moot. Plaintiffs respectfully ask the Court to deny Defendant's motion to dismiss and to enter a permanent injunction enjoining the County from enforcing Louisville-Jefferson Ord. Code § 132.09(B)(2).

Respectfully submitted on this 4th day of December 2023,

/s/ Geoffrey R. Surtees
Geoffrey R. Surtees
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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 4th day of December 2023.

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