Case No. 10-2102

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN DOE,

Plaintiff-Appellee,

v.

CITY OF ALBUQUERQUE,

Defendant-Appellant,

On Appeal from the United States District Court
for the District of New Mexico
The Honorable M. Christina Armijo
United States District Judge
Case No. 08-CV-1041 MCA/LFG

APPELLEE JOHN DOE'S SUPPLEMENTAL BRIEF

Before **BRISCOE**, Chief Judge, **EBEL** and **O'BRIEN**, Circuit Judges.

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APPELLEE JOHN DOE'S SUPPLEMENTAL BRIEF

Pursuant to this Court's October 20, 2011 Order for Supplemental Briefing on whether Amended Executive Instruction No. 25 has mooted this appeal, Plaintiff-Appellee John Doe respectfully submits that the instant case and appeal are not moot because Defendant-Appellant City of Albuquerque only revised Executive Instruction No. 25 to comply with the district court's order granting Plaintiff-Appellee summary judgment and will reinstate its complete ban against sex offenders if successful before this Court. *See* Amended Executive Instruction No. 25 (as revised 5-6-2010), attached hereto as Exhibit 1. Further, if the Court finds the case is moot, vacatur is not justified because the case would not have been mooted by happenstance or the actions of the prevailing party. Instead, the Defendant-Appellant City revised Executive Instruction No. 25 with the explicit purpose of complying with the district court's order pending the instant appeal to this Court.

RELEVANT FACTS

In a February 6, 2008 meeting, the former mayor of Defendant-Appellant City of Albuquerque (hereinafter "Defendant-Appellant City") directed city librarians to ban sex offenders from city libraries. *See* Appendix at 111. On March 4, 2008, the former mayor formalized that ban through Executive Instruction No. 25. *Id.* at 205-06. John Doe filed suit soon thereafter alleging that the executive instruction at issue violated his constitutional rights.

On March 31, 2010, the district court granted Plaintiff-Appellee's Motion for Summary Judgment and enjoined the Defendant-Appellant City from enforcing the

above-described instruction. *See* Appendix, at 246-47. Albuquerque's current mayor, Richard J. Berry, revised Executive Instruction No. 25 on May 6, 2010, a little more than a month after the full ban was enjoined. *See* Exhibit 1. The revision was, by the Defendant-Appellant City's own account, "[i]n response to the court order in *John Doe v. City of Albuquerque*, CV-1041 MCA/LGF." *See* Exhibit 1. On April 28, 2010, Defendant-Appellant City filed its notice of appeal in the district court. *See* Appendix at 248. On July 8, 2010, approximately two months after revising the executive instruction at issue, Defendant-Appellant City filed its Brief-in-Chief before this Court (as later amended and re-filed on August 11, 2010).

It appears that the City of Albuquerque has every intention of re-instating the full ban on sex-offenders originally enacted on March 4, 2008 should the City prevail on appeal. This intent to return to the previous ban is evidenced in a Memorandum written by the manager of the Main Library, Cindy Williams, where she documents her response to questions from library patrons regarding the revised administrative instruction permitting limited access to city libraries: "I told them that the ABC Library System is operating under a court order, that the current Order was being challenged by the City, and that the Library was not able to change the policy." May 14, 2010 Memorandum, attached hereto as Exhibit 2.[1]

[1] Exhibit 2 was obtained from Defendant-Appellant City in response to the undersigned's request to inspect public records under NMSA 1978, § 14-2-1, *et seq*. *See* May 26, 2010 Cover Letter, attached hereto as Exhibit 3.

I. VOLUNTARY CESSATION

Plaintiff-Appellee's claims have not been mooted by the Defendant-Appellant City's compliance with the district court's order. Generally, "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *See, e.g., R.M. Inv. Co. v. U.S. Forest Service*, 511 F.3d 1103, 1107 (10th Cir. 2007) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). *See also Prier v. Steed*, 456 F.3d 1209, 1213 (10th Cir. 2006) ("The crucial question [in determining mootness] is whether granting a present determination of the issues offered will have some effect in the real world" (ellipses and internal quotation marks omitted)).

"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," however. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (holding that because a city could reenact a challenged ordinance if the case was mooted by the city's repeal of objectionable language in that ordinance, the challenging party's claims were not moot); *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (same). This rule protects litigants from temporary cessations that have only been implemented to deprive the court of its jurisdiction. *See, e.g., Jordan v. Sosa*, 654 F.3d 1012, 1037 (10th Cir. 2011); *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008). To protect litigants from a party evading review through temporary cessation, "[t]he party asserting mootness bears the heavy burden of persuading the court that the challenged conduct cannot reasonably be

expected to start up again." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 (10th Cir. 2010) (internal quotations and cites omitted). *See also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) ("Voluntary cessation does not moot a case or controversy unless 'subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'" (quoting *Friends of the Earth*, 528 U.S. at 189)).

When the party asserting mootness is a governmental entity and the plaintiff is challenging a since repealed or amended statute or administrative rule, this Court requires clear indication of the entity's intent to reenact the challenged law in order to avoid a finding of mootness. *See e.g., Rio Grande Silvery Minnow*, 601 F.3d at 1116-1117 ("Indeed, in this governmental context, most cases that deny mootness rely on *clear showings* by government actors and a desire to return to the old ways") (internal quotations and citations omitted); *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1223-24 (10th Cir. 2001). But even when a governmental entity has ceased a challenged practice, the voluntary cessation of an alleged illegal practice that a "defendant is free to resume at any time" will not moot a plaintiff's claims. *Chihuahuan Grasslands Alliance*, 545 F.3d at 892. The interim relief must have "completely and irrevocably eradicated the effects of the alleged violation." *Rio Grande Silvery Minnow*, 601 F.3d at 1115 (internal quotation marks omitted) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). *See also Harrell v. The Florida Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010) ("[T]he 'timing and content' of a voluntary decision to cease a challenged activity are critical in determining the motive for the cessation and therefore 'whether there is [any]

reasonable expectation ... that the alleged violation will recur' (citing *Burns v. PA Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008)).

Defendant-Appellant City's revision of Executive Instruction No. 25 in the wake of the district court's ruling has not mooted this appeal because the City only acted to comply with the district court's order. Defendant-Appellant City will return to the original instruction if the instant appeal is resolved in its favor, and its steadfast pursuit of this appeal indicates the same. *See* Exhibit 2. Thus, all available evidence demonstrates that it is not a mere possibility Defendant-Appellant City will return to a complete ban, but a certainty should it prevail on appeal. Notwithstanding, Defendant-Appellant City's revised Executive Instruction No. 25 does not significantly alter the original version at issue in this case and cannot be characterized as a voluntary cessation.

II. DEFENDANT-APPELLANT CITY REVISED EXECUTIVE INSTRUCTION NO. 25 IN ORDER TO COMPLY WITH THE DISTRICT COURT'S ORDER

Defendant-Appellant City revised Executive Instruction No. 25 "[i]n response to the court order in *John Doe v. City of Albuquerque*, CV-1041 MCA/LGF." *See* Exhibit 1. This Court has acknowledged that temporary compliance with a court order does not moot an appeal. *Rio Grande Silvery Minnow*, 601 F.3d at 1119 (quoting Wright, Miller, Cooper, Discontinued Official Action, 13C Fed. Prac. & Proc. Juris., Supra note 22, § 3533.7 (3d ed)). In this case, Defendant-Appellant City's revision of the challenged instruction amounts to nothing more than temporary compliance with the district court's order while on appeal. *See* Exhibit 2. This revision ostensibly complies with the district

court's order, but does not represent the Defendant-Appellant City's final word on the subject: it will reinstate the complete ban if successful on appeal to this Court.

III. DEFENDANT-APPELLANT CITY WILL RETURN TO A COMPLETE BAN ON SEX OFFENDERS' USE OF CITY LIBRARIES IF THIS APPEAL IS RESOLVED IN ITS FAVOR

In the instant case, Plaintiff-Appellee expects Defendant-Appellant City to plainly state its intention to return to its complete ban against registered sex offenders if successful on appeal in its supplemental brief. This position would be consistent with its past representations— outlined in the above statement of the case—and its pursuit of this appeal following revision of the challenged executive instruction. Further, because an executive instruction is at issue and not legislation or an administrative order subject to the protections of administrative procedure, the City can easily actualize its stated intent to return to the complete ban. *See* Albuquerque City Charter, Art. V, § 3 ("The Mayor shall control and direct the executive branch… The Mayor shall be the chief executive officer with all executive and administrative powers of the city"); Art. V, § 4(k) (The Mayor shall "[p]erform other duties not inconsistent with or as provided in this Charter"); Art. IV, § 8 ("[T]he [Albuquerque City] Council shall not perform any executive functions except those functions assigned to the Council by this Charter"). *See also* City of Albuquerque Executive Instruction No. 1 (as revised on December 1, 2009 by Mayor Richard J. Berry) ("All policy directives and guidance of the previous administration will remain in effect and enforced, unless rescinded or amended by subsequent instructions") (attached hereto as Exhibit 4); City of Albuquerque Executive Instruction No. 2 (as revised on December 1, 2009) ("The signature authority of the City of Albuquerque is

vested in the Mayor as the Chief Executive of the City, unless otherwise delegated") (attached hereto as Exhibit 5).

In *Camfield*, 248 F.3d at 1223-24, this Court held that the mere possibility of reenactment will not overcome a mootness determination unless it is absolutely clear that a "legislature intends to reenact the prior version of the disputed statue." *Id*. When a body political, dependent on consensus and vote, discontinues a challenged practice, a more rigorous showing is sensible as it is near impossible to predict future legislative action. This Court has also applied the same reasoning to rules and regulations promulgated under the Administrative Procedures Act. *See, e.g., Rio Grande Silvery Minnow*, 601 F.3d at 1116-1117. The decision-maker in the instant case, however, is not reliant on consensus or bound by administrative procedure, and Plaintiff-Appellee is challenging an executive instruction, not a statute or administrative order. Under the Albuquerque City Charter, the mayor is the chief executive officer and can issue executive instructions so long as those instructions are consistent with the City's Charter. *See* Albuquerque City Charter, Art. V, § 3; Art. V, § 4(k); Art. IV, § 8. Defendant-Appellant City adopted the original instruction with ease, responded to the Court's Order within a month of issuance, and can and would reinstate a complete ban if given the opportunity.

IV. DEFENDANT-APPELLANT CITY'S VIGOROUS DEFENSE OF THE CHALLENGED BAN PROVIDES CLEAR INDICATION OF ITS INTENT TO RETURN TO THAT BAN IF SUCCESSFUL ON APPEAL

Defendant-Appellant City filed its Brief-in-Chief approximately two months after revising Executive Instruction No. 25. Had it intended to permanently settle for the new limited access adopted in direct response to the district court's order it would not have appealed this case and refused to dismiss this appeal. In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), the Seattle School District had ceased the challenged practice of utilizing race as a tiebreaker to determine placement in city charter schools while the issue was on appeal. But because the school district had vigorously defended the constitutionality of this program on appeal and failed to demonstrate that it would not resume the use of race in placement, the Supreme Court rejected a mootness argument. *Id.* at 719. The timing of this appeal in relation to the Defendant-Appellant City's revised executive instruction makes clear Defendant-Appellant City's intent to return to its complete ban on registered sex offenders in city libraries if successful on the merits before this Court.

V. REVISED EXECUTIVE INSTRUCTION NO. 25 DOES NOT SIGNIFICANTLY DIFFER FROM ITS ORIGINAL VERSION

If this Court finds that the evidence does not support Defendant-Appellant's clear intent to return to a complete ban if successful on appeal, the new iteration of Executive Instruction No. 25 does not completely and irrevocably eradicate the effects of the alleged violation and cannot, therefore, fairly be considered a voluntary cessation. *See Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*,

508 U.S. 656, 662 (1993) (the Court rejected the defendant City of Jacksonville's argument that its enactment of a substantially similar ordinance to the one originally at issue had mooted plaintiff's claims). Admittedly, the district court's opinion in this case emphasized that it only addressed the ban "as currently written." *See* Appendix, at 246. Still, Plaintiff-Appellee disputes that the amended Executive Instruction No. 25 differs significantly from the old. Like the replacement ordinance in *Ne. Florida Chapter of Associated Gen. Contractors of Am.*, Defendant-Appellant City's amended Executive Instruction No. 25 is not a significant departure from the prior version the district court found unconstitutional. Plaintiff-Appellee challenged the ban of registered sex offenders in all city libraries. The new executive instruction only allows two days of access per week to one of seventeen libraries in the city. *See* Exhibit 1. This very limited right of use does not constitute an actual change in practice.

VI. VACATUR

If the Court does find that Plaintiff-Appellees' claims are mooted by Defendant-Appellant City's amended Executive Instruction No. 25, it should not remand with instructions to the district court to vacate its opinion. "Vacatur is in order when mootness occurs through ... the unilateral action of the party who prevailed in the lower court" or happenstance. *See Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1121 (10th Cir. 2009) (internal citation omitted); *Wyoming v. U.S. Dept. of Agr.*, 414 F.3d 1207, 1213 (10th Cir. 2005). "Vacatur is generally not appropriate when mootness is a result of a voluntary act of a nonprevailing party." *Wyoming v. U.S. Dept. of Agr.*, 414 F.3d 1207, 1213 (10th Cir. 2005).

Applying these doctrines, in *Tandy v. City of Wichita*, 380 F.3d 1277, 1291-92 (10th Cir. 2004), this Court refused to vacate the lower court's opinion even though it found that the plaintiff's claims had been mooted by the city defendant's voluntary cessation of practices found unconstitutional by the lower court. In so doing, the *Tandy* Court noted that "vacatur [ ] is an equitable remedy, and a key consideration in determining its appropriateness is whether the party seeking vacatur caused the mootness through voluntary action." *Id.*

In the case at bar, Defendant-Appellant City is the non-prevailing party and is the sole cause of potential mootness. It has made clear its intent to return to the original ban if successful on appeal. And it would certainly return to the ban if this Court orders vacatur of the district court's Order. It would be manifestly unjust to reward the City as if Plaintiff-Appellee had not been successful below and leave Plaintiff-Appellee without any protection in the future.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk. I also certify that the digital submissions have been scanned on November 29, 2011 for viruses with the most recent version of a commercial virus scanning program Prevx 3.0 and, according to the program, are free of viruses.

/s/ Brendan K. Egan
Brendan K. Egan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 29, 2011, I filed the foregoing pleading electronically through the CM/ECF system and caused the following parties and/or counsel to be served electronically through the CM/ECF system. I also certify that on November 30, 2011, I mailed seven (7) bound copies of the foregoing pleading by U.S. Mail, postage prepaid, to the Tenth Circuit Court of Appeals, and one (1) bound copy has been mailed by U.S. Mail, postage prepaid, to the following parties:

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