UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SCOTT MCLEAN,

Plaintiff, CASE NO. 1:14-CV-1398

v.

CITY OF ALEXANDRIA,

Defendant.
_____/

PLAINTIFF MCLEAN'S OPPOSITION
TO CITY OF ALEXANDRIA'S MOTION TO DISMISS

STATEMENT OF THE CASE

This civil rights lawsuit challenges the constitutionality of a City of Alexandria (City) ordinance that prohibits anyone who parks a vehicle on a City street from placing a "For Sale" sign on the vehicle. Section 10-4-13 of the City Code (the Speech Ordinance) punishes violators of the Speech Ordinance with a $40 civil fine if they advertise their cars for sale. Yet it does not prohibit any other form of advertising. The Speech Ordinance therefore violates the First Amendment right to free speech because it singles out one message for censorship.

Plaintiff Scott McLean is a resident of Alexandria. *See* Dkt. 1, Plaintiff's Verified Complaint ¶ 6. On October 5, 2012, McLean placed two standard, store-bought "For Sale" signs in his 2008 Chevrolet Malibu and parked it on Old Dominion Boulevard, near West Glebe Road in Alexandria, about one block from where he lives. *Id.* ¶ 10. Later that day, McLean received a $40 fine for violating the Speech Ordinance. *Id.* ¶ 11. McLean paid the fine and took the signs down whenever he was parked on Alexandria streets. *Id.* ¶ 12. Starting on October 8, 2012, he instead advertised

his car by parking it each day with the signs just outside of Alexandria city limits. *Id.* He walked the half-mile between his car and his home whenever he needed to use his car. *Id.* Four months later, he finally sold his car on February 6, 2013. *Id.* More than a year after that, McLean decided he wanted to sell his truck, a 2007 Dodge Ram 1500. *Id.* ¶ 13. He wanted to place a "For Sale" sign in the truck while it was parked near his home, but could not because of the Speech Ordinance. *Id.* ¶¶ 15-16.

On October 23, 2014, McLean filed this constitutional challenge to the Speech Ordinance. *See id.* He seeks declaratory and injunctive relief, as well as nominal damages in vindication of his right to free speech. *See id.* at Prayer for Relief ¶¶ 1-4. McLean also filed a Motion for Preliminary Injunction on October 23, 2014. *See* Dkt. 4, Plaintiff's Motion for Preliminary Injunction. In response, just five days later, the City suspended enforcement of the Speech Ordinance, pending a determination as to whether it should keep, amend, or repeal the law. *See* Dkt. 14, Joint Notice of Cancellation of Hearing at Ex. 2. The City also announced that prior to lifting the suspension, it would give a 30-day notice to the public. *Id.* In response, McLean and the City filed a Joint Notice withdrawing the Motion for Preliminary Injunction. *Id.*

Now the City moves to dismiss McLean's complaint as moot, contending that a justiciable case or controversy no longer exists because of the *temporary* suspension of the Speech Ordinance. Without a justiciable case or controversy, this Court is without subject matter jurisdiction, according to the City's argument. The City is mistaken as a matter of law. A temporary, open-ended executive suspension of an unconstitutional law, like the Speech Ordinance, does not render a lawsuit challenging that unconstitutional law moot, and this Court still has subject matter jurisdiction.

STANDARD OF REVIEW

In deciding a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss, the Court must accept as true the factual allegations concerning the merits of the complaint. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). "If the defendant challenges the factual predicate of subject matter jurisdiction" by way of proffered evidence, "'[a] trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations,' without converting the motion to a summary judgment proceeding." *Id.* (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). The Court may weigh evidence from affidavits, depositions, and live testimony as well as matters of public record. *Adams*, 697 F.2d at 1219; *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

In considering the Rule 12(b)(1) motion and this response, the Court should take note that the City has failed to present evidence to the Court in support of its motion. *See* Dkt. 21, 22, City's Motion to Dismiss and Memorandum in Support. The City refers to a City press release that the parties submitted to the Court when canceling the previously-set motion for preliminary injunction. *See* Dkt. 14 at Ex. 2. McLean does not dispute the press release for purposes of this motion. But the Court should reject the other implied allegations of fact proffered by the City, as none of those "facts" have been introduced and are more properly considered—should the City ever present evidence to support those allegations—on a motion for summary judgment. *See* Dkt. 22, City's Memorandum of Law at 5 (insinuating, e.g., that McLean should have sold his car by now if he intended to sell his car at all).

Although the burden is on McLean to show that this Court retains subject matter jurisdiction of the case in light of the temporary suspension of the Speech Ordinance, that burden is relatively

light. *Simanonok v. Simanonok*, 787 F.2d 1517, 1519 (11th Cir. 1986) ("it is extremely difficult to dismiss a claim for lack of subject matter jurisdiction"). McLean meets his burden easily.

ARGUMENT

Federal courts do not have authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (quotation marks omitted). But a case does not become moot simply because a defendant agrees to *temporarily* abstain from illegal conduct. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993). Rather, a case becomes moot when a defendant persuades the Court that "the challenged conduct cannot reasonably be expected to start up again." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*., 528 U.S. 167, 189 (2000)). The City cannot do that here because it boldly admits that the suspension of the Speech Ordinance is temporary. It acknowledges that upon 30 days notice, it could re-institute this unconstitutional law. On the facts of the complaint, and even accepting as true that the law is temporarily suspended, it is reasonable to expect that the challenged conduct will start up again.

Moreover, even if this Court somehow accepted that the City would never enforce the unconstitutional Speech Ordinance again, the Court would then only lose subject matter jurisdiction as to the *prospective* relief that McLean seeks. McLean's claim for nominal damages for the past violations of his rights would not be mooted.

But that is not the case here. Here, the City has a "heavy burden" to show that the Speech Ordinance cannot reasonably be expected to start up again. *See Wall*, 741 F.3d at 497. The City has failed to carry that burden, and for this reason the Court should deny the City's Motion to Dismiss.

I
THE CITY HAS FAILED TO DEMONSTRATE THAT ANY OF MCLEAN'S CLAIMS ARE MOOT

A. Temporary Cessation of the Challenged Practice Is Not Enough To Moot a Case

The City has not demonstrated that any of McLean's claims are mooted by the City's temporary suspension of its sign ban. As the Supreme Court has repeated time and again, "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." *City of Jacksonville*, 508 U.S. at 661-62 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)). Otherwise, "the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Aladdin's Castle*, 455 U.S. at 289 n.10 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)).

When a party voluntarily ceases allegedly illegal activity, courts require the defendant to persuasively show that the case is moot. *Id.* "[T]he party asserting mootness" bears the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Wall*, 741 F.3d at 497 (quoting *Laidlaw*, 528 U.S. at 189). Formally changing or repealing a law can help meet that burden, but it is not dispositive. And in this case, the City has not even formally changed or repealed its law.

A good comparison for this case is *Town of Nags Head v. Toloczko*, 728 F.3d 391, 395 (4th Cir. 2013). In *Nags Head*, homeowners challenged the legality of efforts by the Town of Nags Head to declare their beachfront cottage a nuisance and regulate it accordingly. *Id.* at 394. After the

lawsuit was filed, Nags Head voluntarily stopped enforcing its nuisance regulations against the plaintiffs, much as the City has done here. *Id*. at 395. Although Nags Head stopped enforcing the regulations, its town manager maintained that Nags Head had the legal authority to enforce the nuisance laws against the plaintiffs in the future. *Id*. at 394 n.3. On those facts, the Fourth Circuit held that the case was not moot, because "[u]nder these conditions it is not clear—certainly not 'absolutely'—that the asserted injury will not recur." *Id*.

The *Nags Head* facts are similar to the facts here. The City has temporarily suspended enforcement of the Speech Ordinance. But the City retains the authority to terminate the suspension and begin enforcing the unconstitutional Speech Ordinance upon thirty days notice. On these facts, the case is not moot, because it is not absolutely clear that the asserted injury will not recur.

Wall is another helpful precedent. There an inmate filed a lawsuit challenging a prison's policy as violating his First Amendment rights. 741 F.3d at 497. In response, the prison fixed the policy. *Id*. But the prison maintained that it had the authority to enforce its previous policy. *Id*. The court explained that "when a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot." *Id*. (citing *Town of Nags Head*, 728 F.3d at 395 n.3; *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013); *Lyons P'ship, L.P. v. Morris Costumes, Inc*., 243 F.3d 789, 800 (4th Cir. 2001)).

Likewise, McLean's claims should not be dismissed as moot, because the City has said that it may choose at any time to announce that it will end the Speech Ordinance's suspension and again start penalizing citizens for advertising cars for sale. *See* Dkt. 22, City's Memorandum of Law In Support of Its Motion to Dismiss at 5. Specifically, the City contends that McLean can currently advertise his car, but it admits that the "City's legislative process" may "result[ ] in the ordinance

remaining in place." *Id.* On these facts, the case is not moot, because it is anything but absolutely clear that the wrongful behavior will not occur again. *See Town of Nags Head*, 728 F.3d at 395 n.3; *Wall*, 741 F.3d at 497.

B. The Cases upon Which the City Relies Show That This Case Is Not Moot

The cases relied upon by the City for its motion to dismiss demonstrate that McLean's claim is a live controversy, and do not support the City's position that the case is moot. First, in *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 115 (4th Cir. 2000), the plaintiff challenged the constitutionality of several provisions of West Virginia law. The plaintiffs won an injunction, but while motions for reconsideration were pending, the state legislature "substantially revised" the offending laws and other related provisions, rendering moot the plaintiff's claim for prospective relief. *Id.* at 116. In the absence of evidence suggesting otherwise, the Court explained that "statutory changes that discontinue a challenged practice are 'usually enough to render a case moot.'" *Id.* at 115-16. In contrast, here, the City has not revised the Speech Ordinance at all. It has only temporarily suspended enforcement of the Speech Ordinance.

Permanence was key again in *Rock for Life-UMBC v. Hrabowski*, 643 F. Supp. 2d 729, 741 (D. Md. 2009). On a motion for summary judgment (not a Rule 12(b)(1) motion), the court found the plaintiff's request for injunctive relief moot, because the university voluntarily changed the offending sign policy during the course of the litigation. But there, the university "***made the revised Policy*** . . . as public and ***as permanent as possible*** by formally changing the policy, alerting the Court to the revision, and updating their public website to include the revised policy." *Rock for Life*, 643 F. Supp. 2d at 741 (internal quotation and brackets omitted; emphasis added). Here, by contrast, the City of Alexandria explicitly has not made any permanent changes to its enforcement policy or

to the Speech Ordinance itself. It is also worth noting that the court in *Rock for Life* only dismissed as moot the plaintiff's claim for prospective relief. The Fourth Circuit, in a subsequent unpublished decision, held that the plaintiff's as-applied challenge for damages was justiciable. *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 553 (4th Cir. 2010).

Other cases cited by the City are so factually different that they offer little, if any, insight. The claim in *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002), became moot after a state court granted the exact same relief that the plaintiff sought in federal court. In *Williams v. Ozmint*, 716 F.3d 801 (4th Cir. 2013), an inmate sought relief from a prison warden who stopped his visitation privileges after the inmate attempted to obtain contraband from a visitor. *Id.* at 804, 810. The claim for injunctive relief was moot, because the inmate's visitation privileges had been reestablished three years before and would not "be suspended again in the absence of culpable conduct on his part." *Id.* at 810.

The only case cited by the City that actually involves a 12(b)(1) motion, rather than a later stage of litigation, is *Simmons v. United Mortgage & Loan Inv., LLC*, 634 F.3d 754, 762 (4th Cir. 2011). In *Simmons*, the district court had found that the case became moot when the defendants sent a purported "offer of judgment" providing for "full relief" for all parties, including costs and attorney's fees. *Id.* at 763. The Fourth Circuit reversed the decision, because the settlement did not actually provide for full relief: it did not include an actual offer of judgment in favor of the plaintiffs, *id.* at 764, was not unconditional, *id.* at 766, and would have required the plaintiffs to agree to keep the entire settlement confidential. *Id.* at 767. The plaintiff did not receive full relief from the purported settlement offer and thus the case was not moot. Likewise, McLean's case is not moot. *Simmons* actually supports McLean's right to pursue his cause of action until he secures the

full relief sought in his complaint: the enjoinment or repeal of the Speech Ordinance and nominal damages.

II
MCLEAN'S CLAIM FOR NOMINAL DAMAGES PRESERVES HIS CAUSE OF ACTION AGAINST THE CITY, EVEN IF THE CITY WERE TO REPEAL ITS SIGN LAW

Because McLean is seeking relief for past harm, his claim for nominal damages cannot be made moot even if future harm becomes unlikely. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428-29 (4th Cir. 2007); *Chapin Furniture Outlet Inc. v. Town of Chapin, S.C.*, 252 F. App'x 566, 570-71 (4th Cir. 2007). "[S]o long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608-09 (2001); *see also Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (a change of circumstances can moot prospective relief, but a claim for relief for past violation of constitutional rights does not depend upon future changes). A claim for nominal damages for past harm is enough to preserve a claim even after government repeals a constitutionally offensive law. *Covenant Media*, 493 F.3d at 428-29; *see also Carey v. Piphus*, 435 U.S. 247, 267 (1978) (cause of action for nominal damages). "'[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Knox v. Serv. Employees Int'l Union, Local 100*, 132 S. Ct. 2277, 2287 (2012) (brackets in original) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)).

In *Covenant Media*, the Fourth Circuit addressed mootness in a similar situation. 493 F.3d at 428-29. Covenant Media had filed a 1983 challenge, alleging that the City's enforcement of its sign regulation had violated the company's First Amendment rights. *Id*. at 424. Subsequently, the City revised the law to make prospective relief unnecessary and moved for dismissal. *Id*. The

Fourth Circuit held that the claim was not moot, because the plaintiff's nominal damages claim could not be mooted by the change in law. *Id*. The court explained that if Covenant was right that the law violated the First Amendment, then Covenant had "suffered an injury by the City's application of an unconstitutional ordinance that is redressable at least by nominal damages." *Id*. at 429.

McLean's standing to recover for past harm is in no way diminished simply because he seeks vindication in the form of nominal damages. Nominal damages are important. *See Farrar v. Hobby*, 506 U.S. 103, 121 (1992) ("Nominal relief does not necessarily a nominal victory make.") (O'Connor, J., concurring). "By making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266. When a party wins nominal damages, "the lawsuit will have determined that the conduct of which the plaintiff complains as in fact unconstitutional, and this determination (rather than an award of money) may be the main point of the litigation." Michael L. Wells & Thomas A. Eaton, *Constitutional Remedies: A Reference Guide to the United States Constitution* 172 (2002).

From October, 2012, until February, 2013, Scott McLean was unable to advertise his car for sale, because he did not want to be fined again for exercising his First Amendment rights. For many weeks prior to the lawsuit and for one week after the lawsuit, McLean was forced to postpone exercising his First Amendment right to advertise his truck in the simplest way possible—by posting a sign on it. Moreover, if the City lifts the suspension of the law, as the City confidently asserts it may do at its pleasure, McLean faces further prosecution for simply exercising his First Amendment right. The case is not moot, and the Court should deny the City's motion.

CONCLUSION

Because McLean's claims raised in his Verified Complaint present an active case or controversy, the Court should deny the City's motion to dismiss.

DATED: January 14, 2015.

Respectfully Submitted,

By: /s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of January, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. The CM/ECF system has served electronically the following individuals:

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