IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INGRID BUQUER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:11-cv-0708 SEB-MJD
	)	
CITY OF INDIANAPOLIS, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO CITY'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The plaintiffs in this case challenge two (2) recently enacted provisions of Indiana law that, by their very nature, are enforced by municipal officers—including officers employed by the City of Indianapolis ("City"). Although the City expresses no opinion on the merits of the plaintiffs' legal claims (ECF No. 138, at 1), it has sought summary judgment (and opposed the plaintiffs' request for summary judgment) on the grounds that a duly enacted state law does not create a municipal "practice, policy, or custom" for which the City may be held liable. Of course, were this so, then no plaintiff would be permitted to challenge the constitutionality or legality of a state law that is enforced by municipal actors. Not surprisingly, therefore, this is not the law. The City's argument is without merit, and its Cross-Motion for Summary Judgment (ECF No. 137) must be denied. The plaintiffs are entitled to summary judgment against the City.

ISSUES CONCERNING THE FACTS

The City does not dispute any of the material facts asserted by the plaintiffs (ECF No. 123, at 3–11). Consequently, these facts are deemed admitted. *See* S.D. IND. L.R. 56.1(e). The

plaintiffs likewise do not dispute any of the City's factual assertions, which consist exclusively of the procedural history of this case and the challenged statutes (ECF No. 138, at 2).

ARGUMENT

The City argues that it may not be held liable in this case because any "practice, policy, or custom" is attributable only to the State of Indiana. This argument is erroneous.[1]

I. A MUNICIPAL "PRACTICE, POLICY, OR CUSTOM" IS ESTABLISHED IF THE CITY IS NOT ACTING UNDER THE *COMPULSION* OF STATE LAW.

As the City notes, one question that must be answered in any case alleging municipal liability under 42 U.S.C. § 1983 is whether the unconstitutional act "may fairly be said to represent official policy" of that municipality and whether the policy was the "moving force" behind the violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Stated another way, there must exist a "direct causal link," *City of Canton v. Harris*, 489 U.S. 378, 386, (1989), between the violation and a "deliberate choice [by the municipality] to follow a course of action . . . made from among various alternatives." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). As another district court in the Seventh Circuit has observed, "[a]lthough this standard is well established, the Supreme Court has yet to discuss its application in the context a municipality's enforcement of a state law. In this vacuum, lower courts have come to their own unique conclusions." *N.N. ex rel. S.S. v. Madison Metro. Sch. Dist.*, 670 F.Supp.2d 927, 934 (W.D. Wis. 2009). It is unnecessary, however, for this court to wade through a variety of

[1] Only the City has responded to the plaintiffs' summary judgment motion or filed a summary judgment motion of its own. As noted immediately above, the City's argument is premised entirely on its (erroneous) notion that a municipality may not be held liable for its enforcement of a state statute. It is worth noting at the outset that this argument is not available to the prosecutor defendants represented by the Office of the Attorney General in this case, for under Indiana law prosecutors are state officials. *See, e.g.*, *Hendricks v. New Albany Police Dep't*, No. 4:08-cv-0180, 2010 WL 4025633, at *3 (S.D. Ind. Oct. 13, 2010) (collecting numerous cases).

formulations on the proper rule under these circumstances, for the Seventh Circuit has spoken clearly on the issue.

In *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991), which forms the basis for the City's argument, the court addressed whether a municipality could be held liable for an allegedly unconstitutional deprivation of property as a result of an alleged "'policy' of allowing or instructing its police officers to enforce" a state statute that permitted the deprivation without providing a hearing. *Id.* at 791. Said the court:

> It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

Id. at 791–92. The City's focus on the court's holding in *Surplus Store*, however, is unpersuasive, for seven (7) years later the Seventh Circuit either back-tracked from or further explicated the broad pronouncement of *Surplus Store* in *Bethesda Lutheran Homes & Services, Inc. v. Leean*, 154 F.3d 716 (7th Cir. 1998)—a case that is cited by the City but not addressed in any detail.

In *Bethesda Lutheran*, the court addressed whether a county could be held liable for money damages resulting from its unconstitutional enforcement of a state law concerning the eligibility for admission to long-term care facilities for individuals with mental disabilities. Concluded the court:

> The plaintiff who wants a judgment against [a] municipality under [§ 1983] must be able to trace the action of the employees who actually injured him to a policy or other action of the municipality itself. When the municipality is acting under *compulsion* of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury.

Id. at 718 (emphasis added). The court thus expressly adopted the rationale expressed by the Sixth Circuit in *Garner v. Memphis Police Department*, 8 F.3d 358 (6th Cir. 1993), whereby a municipality cannot be held liable under § 1983 "for acts that it did under the *command* of state or federal law." 154 F.3d at 718 (emphasis added). In other words, a municipality may not be forced to endure the Hobson's choice between acting in an allegedly unconstitutional manner and acting in a manner in direct violation of state or federal law.[2]

Thus, "the question under *Bethesda Lutheran* is whether the municipality enforcing a state law has enough discretion in implementation to make the municipality 'responsible' for any constitutional violation that occur[s]." *N.N.*, 670 F.Supp.2d at 936. Other circuits have likewise held that the focal point governing municipal liability for the enforcement of state law is on whether the municipality was compelled to act (or prohibited for acting) by that law. *See Vives v. City of New York*, 524 F.3d 346, 353–55 (2d Cir.2008) (In determining whether a municipality could be held liable for enforcing state law, the question is whether "the Police Department's policy makers can instruct its officers not to enforce a given section—or portion thereof—of the penal law."); *Cooper v. Dillon*, 403 F.3d 1208, 1222–23 (11th Cir. 2005) (A municipality may be held liable for its decision to enforce an unconstitutional state statute when the municipality had discretion not to enforce it.); *Garner*, 8 F.3d at 364–65 (A municipality may be held liable for a policy enacted under discretion afforded by state statute.). And at least one district court in another circuit has reached a similar conclusion. *See Lederman v. United States*, No. 99-3359, 2007 WL 1114137, *3 (D.D.C. Apr. 13, 2007) (The District of Columbia can be held liable

[2] The Second Circuit has characterized the holding of *Bethesda Lutheran* as *dicta* insofar as the Seventh Circuit "found the policy in issue to be mandatory and thus further held that the city was not liable." *Vives v. City of New York*, 524 F.3d 346, 352 n.2 (2d Cir. 2008). The mandatory/discretionary distinction, which is in keeping with the holdings of multiple circuits, is not *dicta* simply because the state law in that case was mandatory. Regardless, there is no reason to depart from this rule.

under § 1983 for enforcing a regulation that it promulgated under authority of Congress because Congress did not compel the District to adopt the particular regulation and did not require the District to enforce it).[3]

II. THE CITY HERE IS NOT COMPELLED TO ACT OR PROHIBITED FROM ACTING BY INDIANA LAW, BUT RATHER IS AFFORDED A CHOICE FOR WHICH IT MAY BE HELD LIABLE.

It should require little citation to demonstrate that the City is not compelled to act (or prohibited from acting) by either statute that is challenged in this case. After all, although Indiana Code § 35-33-1-1(a) permits police officers employed by the City to arrest persons for enumerated reasons, it does not require them to make such an arrest. *See* IND. CODE § 35-33-1-1(a) ("A law enforcement officer *may* arrest a person . . . .") (emphasis added). Likewise, Indiana Code § 34-28-8.2-1, *et seq.*, prohibits a person from offering or accepting a consular identification card, but it does not *compel* the issuance of citations by a municipal officer. In each instance, "the City could elect not to arrest anyone at all." *McKusick v. City of Melbourne*, 96 F.3d 478, 484 (11th Cir. 1996); *see also, e.g.*, *Lederman*, 2007 WL 1114137, at *4 ("[T]he statute mandates the choice of prosecutors, but not the prosecutor's choices."). This Court previously made this clear in referencing "the discretionary authority of government officials" that is "present in virtually all [civil and criminal] statutes." *Buquer v. City of Indianapolis*, 797 F.Supp.2d 905, 917 (S.D. Ind. 2011). If the City chose not to enforce the challenged statutes, it would be contravening neither constitutional norms nor Indiana law.

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[3] There also exists authority for the proposition that municipalities may be held liable even for enforcing state statutes that compelled them to act. *See, e.g.*, *Conroy v. City of Philadelphia*, 421 F.Supp.2d 879, 886 (E.D. Pa. 2006); *Davis v. Camden*, 657 F.Supp. 396, 402–04 (D.N.J. 1987). These cases generally base their holdings on the notion that municipal actors "are required to independently assess the constitutionality of [state] laws" and have the choice to refuse to enforce unconstitutional statutes. *Davis*, 657 F.Supp. at 404. While there is some appeal to this logic, it is foreclosed in this circuit by *Bethesda Lutheran*.

There can thus be no doubt that the City is left with a choice in determining whether or not to enforce the challenged provisions of Indiana law. Under *Bethesda Lutheran*, this *choice* suffices to establish a municipal "custom, practice, or policy" within the meaning of *Monell*. The fact that the City has not yet enforced these statutes—for the preliminary injunction was issued before they took effect—is an issue of ripeness, not one of municipal policy or practice. However, this Court previously rejected the defendants' contention that the claims in this case are unripe:

> [I]t is well-established that a plaintiff need not be required to undergo arrest and prosecution before being able to challenge the constitutionality of a statute. *See, e.g.*, *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) ("[O]ne does not have to await the consummation of a threatened injury to obtain preventive relief.") (citation and quotation omitted); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998) ("It is not necessary . . . that a plaintiff expose itself to actual arrest or prosecution.").
>
> As long as there is a credible threat of enforcement, the second prong of the ripeness doctrine is satisfied. Such a threat is credible "when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute." *Commodity Trend Serv.*, 149 F.3d at 687 (citing *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (emphasis in original)). Here . . . neither party has pointed to evidence to establish, nor is there anything in the statute or legislative history to suggest, that Section [20] will not be enforced as written.

797 F.Supp.2d at 917 (citations to additional reporters omitted); *see also Ezell v. City of Chicago*, 651 F.3d 684, 695–96 (7th Cir. 2011) (announcing similar principles and collecting Seventh Circuit precedent). Thus, in *Steffel* itself the Supreme Court permitted a challenge to a state statute to proceed even though the only parties named as defendants were municipal officials (as well as various private parties), and it did so without the necessity of inquiring into whether a municipal policy had been established. 415 U.S. at 454–55. The original complaint in

American Booksellers was likewise filed only against a county police official, who appears to have remained a defendant in the Supreme Court, and the State in that case only became a party because of its decision to intervene. 484 U.S. at 390. In this case, too, no separate inquiry was required to establish a municipal policy.

To be clear, the City in the present case is not impotent. To the contrary, it may avoid liability by expressly disavowing any intention to enforce the challenged provisions of Indiana law, and by taking all reasonable steps necessary to ensure that its officers and employees abide by this dictate. Were these steps taken, the plaintiffs would have no continuing controversy with the City and it could be dismissed from this action. The City, however, has elected not to take these steps. Accordingly, the discretionary nature of the statutes challenged in this case renders the City liable unless and until it "indicate[s] affirmatively that it will *not* enforce the statute[s]." *Buquer*, 797 F.Supp.2d at 917 (quoting *Commodity Trend Serv.*, 149 F.3d at 687) (emphasis in original).[4]

III. THE CITY'S ARGUMENT, IF ACCEPTED, WOULD MEAN THAT NUMEROUS DECISIONS WERE ERRONEOUSLY DECIDED AND WOULD FREQUENTLY LEAD TO THE COMPLETE INABILITY OF PLAINTIFFS TO BRING A LAWSUIT CHALLENGING THE CONSTITUTIONALITY OR LEGALITY OF A STATE STATUTE THAT CAUSES THEM INJURY.

Were the City's argument meritorious, it would lead to the inevitable conclusion that a wide array of pre-enforcement challenges to state statutes wherein local officials have been named as defendants were wrongly decided (or at least subject to dismissal under *Monell*). For a small sampling of such cases from the Supreme Court, the Seventh Circuit, and this Court, see *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 185–87 (2008) (plurality opinion) (local

[4] Indeed, the City itself notes that it has only never enforced the statutes at issue in this case "as the challenged provisions never went into effect" (ECF No. 137, ¶ 4; *see also* ECF No. 138, at 4 ["As the Court enjoined the law prior to its effective date, the City took no action in furtherance of the state law."]).

election board named in challenge to constitutionality of state statute concerning voter identification); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (local election officials, among others, named in challenge to state electioneering statute); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 631 (7th Cir. 1990) (local officials named as defendants in challenge to state obscenity statute); *Doe v. Prosecutor*, 566 F.Supp.2d 862, 869 (S.D. Ind. 2008) (Hamilton, J.) (Mayor of Indianapolis, among others, named as defendant in action challenging the constitutionality of state law); and *Brownsburg Area Patrons Affecting Change v. Baldwin*, 943 F.Supp. 975, 978 (S.D. Ind. 1996) (Hamilton, J.), *aff'd*, No. 96-3981, 1999 WL 33611333 (7th Cir. Sept. 17, 1999) (county election officials, among others, named as defendants in action challenging the constitutionality of state statute regulating political action committees).

Indeed, the City's argument would lead to the irrational result whereby a plaintiff wishing to challenge a state statute that is enforced by local officials simply could not do so. After all, in such circumstances—when a state statute is enforced by local officials, as most criminal statutes are—state officials are not always properly named as a defendant (for the plaintiff's injury is both caused by the municipal enforcement of the statute and redressable only through an order prohibiting that municipal enforcement). The plaintiff's only alternative would be to name as defendants every single law enforcement officer in the municipality (in their official capacities), a tack that would be incredibly burdensome, administratively impractical, and bureaucratically nonsensical—and a tack that the City surely does not desire the plaintiffs to avail themselves of.[5]

[5] The fact that this would be a plaintiff's only alternative under the City's argument makes another point clear. Like a formal practice or policy, "an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997) (citations omitted). As indicated both previously and above, the City's police officers are presumed to enforce the law as written absent the express disavowal of an intent to do so. Given

For these practical reasons, too, the City's argument is without merit.

CONCLUSION

For the foregoing reasons, as well as those stated previously, the plaintiffs are entitled to summary judgment against the City of Indianapolis (and all other defendants). The plaintiffs' Motion for Summary Judgment (ECF No. 122) should be granted, and the City's Cross-Motion for Summary Judgment (ECF No. 137) should be denied.

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this presumption, the discretionary enforcement of Indiana law as written is clearly a "custom" capable of subjecting the City to municipal liability even if it is not a formally adopted policy. Indeed, it is difficult—if not impossible—to envision circumstances under which a plaintiff could properly bring an action against every police officer employed by a municipality but the municipality itself could not be held liable. In this case, the injury is clearly sufficiently "widespread" to amount to municipal custom.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2012, a copy of the foregoing was filed electronically with the Clerk of this Court. The following parties will be served by operation of the Court's electronic system:

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