UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

Defendant City of Indianapolis's Reply in
Support of its Cross-Motion for Summary Judgment

Without citation to even a remotely analogous case, Plaintiffs argue that the City can face pecuniary liability for the mere possibility that it **could choose** to follow a non-mandatory state law—a law which never went into effect. While ostensibly relying on the Seventh Circuit's holding in *Bethesda Lutheran Homes and Services, Inc*., Plaintiffs ignore that decision's requirement that municipal liability under Section 1983 necessitates "a **deliberate choice** to follow a course of action." Plaintiffs' theory of liability—that the City had an opportunity to prospectively violate the Constitution pursuant to a state law and the City did not affirmatively disavow that opportunity—is not a valid legal theory because no "deliberate choice" was made by the City.

Furthermore, there is no reason to presume that Plaintiffs faced the possibility of arrest by City of Indianapolis officers but for the present proceedings. The City of Indianapolis has an explicit policy enumerating when its officers may arrest individuals and the challenged provisions of Indiana's Immigration Act are not among those enumerated reasons. With regard to the consular identification, there is not even a risk of arrest as Indiana Code section 34-28-8.2-

2 does not criminalize use of consular identification, but only imposes an infraction. The City's policies do not allow officers to arrest for infractions. Finally, Plaintiffs have ample opportunities to challenge a state statute without harming the pocketbook of an innocent municipality who did not promulgate the law, did not enforce the law, and did not take any actions authorized by the law.

Statement of Additional Material Facts Not in Dispute with Regard to Defendant City of Indianapolis's Cross-Motion for Summary Judgment

The City has a policy setting out the reasons for which its officers may arrest individuals and the challenged provisions of Indiana's Immigration Act are not among those reasons. (Ex. A, IMPD General Order 1.11.) With regard to the consular identification, City policy would not allow an arrest because Indiana Code section 34-28-8.2-2 does not criminalize use of consular identification, but only imposes an infraction. The City has a written policy stating its officers may not arrest for infractions. (Ex. B, IMPD General Order 7.5.)

Argument

A. Summary Judgment for the City of Indianapolis Is Appropriate Because Plaintiffs Have No Evidence of a Deliberate Municipal Policy.

Plaintiffs erroneously argue that municipal liability can accrue because the challenged state laws were not mandatory and left the City with the choice to violate the Constitution. However, it is clear from *Bethesda Lutheran Homes & Servs. v. Leean*, 154 F.3d 716 (7th Cir. 1998)—the chief case relied upon by Plaintiffs in challenging summary judgment—that the existence of a possible course of action which would be in violation is not sufficient to create municipal liability. Instead, "'[m]unicipal liability under § 1983 attaches where—and only where—a **deliberate choice** to follow a course of action is made from among various

alternatives.'" *Id*. at 718-19 (emphasis added) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion)). Without citation to authority, Plaintiffs ask this Court to nullify the requirement of a **deliberate choice** to establish a *Monell* claim.

The other cases cited by Plaintiffs notably do not make the same mistake. Instead, each case analyzing municipal liability for discretionary state laws looks at whether the municipality made the conscious or deliberate choice to enforce an unconstitutional statute. *See Vives v. City of New York*, 524 F.3d 346, 353 (2nd Cir. 2008); *Garner* v. *Memphis Police Dept.*, 8 F.3d 358, 364 (6th Cir. 1993); *Lederman v. U.S.*, 2007 WL 1114137, *3 (D.D.C. 2007) ("not obligated to adopt the statute as its own"). In *Vives*, the Second Circuit held "there must [be] conscious decision making by the City's policymakers before the City can be held to have made a conscious choice." *Vives*, 524 F.3d at 353. Similarly, in *Garner*, the Sixth Circuit found municipal liability could attach because the city made a "deliberate choice from among various alternatives[.]" *Garner*, 8 F.3d at 364.

Here, Plaintiffs have presented no evidence that the City of Indianapolis has made a conscious choice to make arrests under, or otherwise follow, the challenged portions of Senate Enrolled Act 590. Under Rule 56, summary judgment is the "put up or shut up" moment in litigation. *Goodman v. National Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010). As such, Plaintiffs are now required to present evidence which a reasonable jury could rely on to prove his claim. *Delapaz v. Richardson*, 634 F.3d 895, 900 (7th Cir. 2010). As the challenged statutes were enjoined prior to their effective date, Plaintiffs cannot meet this burden as the City has not even had the opportunity to make that choice. (Dkt. 79.) Since there is no evidence of a deliberate choice, summary judgment for the City of Indianapolis is appropriate. *See Vives*, 524 F.3d at 353.

Alternatively, Plaintiffs attempt in a footnote to invoke the "widespread practice" method of establishing a *Monell* claim by arguing that the City is presumed to enforce all state laws and that presumption creates a custom. (Response at 8-9.) However, there is simply no logic to their argument that a "widespread practice" can exist prospectively, particularly based on a state statute which Plaintiffs argue is not binding upon municipal police officers. Regardless, the same essential argument was rejected by the Second Circuit in *Vives*. *Vives*, 524 F.3d at 353. There, the court observed "[w]e do not believe a mere municipal directive to enforce all state and municipal laws constitutes a city policy to enforce a particular unconstitutional statute." *Id*.

Moreover, City of Indianapolis' policies unambiguously prohibit any arrest under the challenged portions of Senate Enrolled Act 590. The City has an explicit policy enumerating when its officers may arrest individuals, and the challenged provisions of Indiana's Immigration Act are not among those enumerated reasons. (IMPD General Order 1.11.) Each of those enumerated bases requires officers to have probable cause to believe a crime has occurred. (*Id*.) With regard to the consular identification, there is also no risk of arrest—Plaintiffs' present basis for standing—because Indiana Code section 34-28-8.2-2 does not criminalize use of consular identification, but only imposes an infraction. The City has an explicit policy stating its officers may not arrest for infractions. (IMPD General Order 7.5.) Under that policy, "[a]n outright arrest may never be made for state infractions or local ordinance violations." (*Id*.) Thus, there is not even a plausible presumption that Plaintiffs could be subject to arrest by a deliberate choice of the City.

Finally, Plaintiffs attempt to raise false alarms by asserting that the City's defense would make it impossible to challenge state statutes enforced by municipalities. However, there is no shortage of individuals who could potentially enforce the challenged laws, including the state's

own law enforcement division. Plaintiffs also wrongly assert that the City's argument would require Plaintiffs to sue "every single law enforcement officer in the municipality (in their official capacities[].)" (Response at 7.) However, official capacity claims would fail for the same reason that Plaintiffs' municipal claim is invalid. *See Pourghoraishi v. Flying J, Inc*., 449 F.3d 751, 765 (7th Cir. 2006). "When a plaintiff sues an individual officer in his official capacity, the suit is treated as if the plaintiff has sued the municipality itself." *Id*.

Conclusion

The City of Indianapolis respectfully asks that this Court enter summary judgment in its favor because Plaintiffs have no evidence of an unconstitutional municipal custom, policy, or practice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012, a copy of the foregoing served by electronic filing. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system Parties may access this filing through the Court's system.

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