UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Charles Collins, et al., individually and on behalf of a class of all others similarly situated, Plaintiffs, v. City of Milwaukee, et al., Defendants.	Case No. 17-CV-00234-JPS PLAINTIFFS' OPPOSITION TO DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS FOR MOOTNESS AND LACK OF SUBJECT MATTER JURISDICTION

Plaintiffs, by and through counsel, hereby submit this Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss for Mootness and Lack of Subject Matter Jurisdiction.

INTRODUCTION

Defendants ask this Court to reach an unprecedented conclusion: that, where an unconstitutional municipal policy, practice, and custom exists, the departure of a senior official moots any legal action to vindicate the rights of those impacted by the city's unlawful conduct. For the last decade, the Defendant City of Milwaukee (the "City")—acting through the Milwaukee Police Department ("MPD")—has effected a "high-volume, suspicionless stop-and-frisk program." Am. Compl., Dkt. No. 19, ¶ 2. The City authorizes MPD officers to stop and frisk individuals in Milwaukee without the particularized suspicion required by law and subjects individuals to unlawful stops based upon race and ethnicity. MPD's conduct is the result of guidance, implementation, acquiescence, and failures in training, supervision, monitoring, and discipline by the City, the Milwaukee Fire and Police Commission ("FPC")—also a Defendant in this case—and the MPD itself. This case squarely challenges Defendants' broadly adopted

municipal policies, practices, and customs—which result in pervasive, routine, and unlawful stops and frisks city-wide and demonstrate deliberate indifference to Plaintiffs' constitutional rights—not the actions of any single individual, including Defendant Police Chief Edward Flynn.

To avoid responsibility for their racially motivated and unlawful policies, customs, and practices, Defendants now attribute all such conduct to Chief Flynn, who recently announced his impending retirement from MPD. Defendants misrepresent the Amended Complaint as a narrow attack on Chief Flynn—who is sued in his official, not personal, capacity—while ignoring the allegations against all Defendants. Contrary to controlling precedent, Defendants claim that this suit is moot based on Chief Flynn's impending retirement. Defendants alternatively argue that this case is mooted by MPD's preliminary outreach to residents of Milwaukee for input regarding potential reforms responsive to recommendations in a draft report by the United States Department of Justice's ("DOJ") Office of Community Oriented Policing Services ("COPS"). The nature, extent, and timing of implementation of any such recommendations—which are not coextensive with the Plaintiffs' requested relief and are no longer supported by the COPS office—are unknown.

Defendants do not meet their burden to prove that the City's unconstitutional stop-and-frisk program cannot reasonably be expected to continue after Chief Flynn's retirement. Accordingly, the Court should deny Defendants' motion and permit this case to proceed to trial.

BACKGROUND

Plaintiffs' Amended Complaint challenges the City's "unlawful policy, practice, and custom" of stopping and frisking individuals without reasonable suspicion and/or due to their race or ethnicity, as violations of the Fourth and Fourteenth Amendments, as well as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. Am. Compl. ¶ 2. The Amended

Complaint names as Defendants the City of Milwaukee, the FPC, and Chief Flynn, who is sued in his official capacity. It cites a wide array of evidence to support Plaintiffs' allegations, including preliminary data analyses, *e.g.*, *id.* ¶¶ 6, 229–252, statements by various current and former members of the MPD, *e.g.*, *id.* ¶¶ 211, 219–222, official policies, *e.g.*, *id.* ¶¶ 268–275, input from the Milwaukee community, *e.g.*, *id.* ¶¶ 204, and public statements by senior leaders in Milwaukee, including Chief Flynn, articulating, justifying, and defending the MPD's approach to policing, *e.g.*, *id.* ¶¶ 189–90, 198, 202, 216, 222.

Defendants answered, *see* Answer, Dkt. No. 20, and this case proceeded to discovery. In January 2018, in the midst of discovery, Chief Flynn announced his retirement, to take effect on February 16, 2018.[1] On January 10, counsel for Defendants sent Plaintiffs' counsel a letter contending that the case was now moot. *See* Defendants' Memorandum in Support of Defendants' Rule 12(b)(1) Motion to Dismiss for Mootness and Lack of Subject Matter Jurisdiction ("Defs.' Mem."), Russell Decl., Dkt. No. 71, Ex. C. After Plaintiffs' counsel rejected the contentions in Defendants' letter, *id.*, Defendants filed the instant motion.

[1] Defendant FPC's selection of the interim chief will occur during the evening of February 15, 2018 – the date this response is due. Should Defendants try to introduce any matters relating to that decision in their reply brief, Plaintiffs will object and/or request the opportunity to submit a sur-reply. In the event that Defendants seek to rely on the retirement of Assistant Chief James Harpole from the MPD, announced after Defendants filed their motion and also effective on February 16, 2018, or his statement in his publicly-released resignation letter that he had withdrawn his candidacy for interim chief because "the [FPC] desires to move in a different direction from the administration of Chief Flynn . . . .", s*ee* January 6, 2018 Letter from James Harpole, Declaration of Shanya J. Dingle ("Dingle Decl.") Ex. 1, at 2, the Court should decline to consider this unsubstantiated, hearsay assertion. Any credit the Court might consider awarding Harpole's self-serving statement is further unjustified in light of the response of Defendant FPC, which publically refuted Harpole's statement that there was "diminished interest in [Harpole's] candidacy as a sitting assistant chief appointed by [Flynn]" by stating that "[w]e want you to know that this, frankly, is not true." *See* February 7, 2018 Letter from FPC Chairman Steven DeVougas, Dingle Decl. Ex. 2.

I. The City of Milwaukee's Unlawful Stop-and-Frisk Program

Plaintiffs allege *city-wide* unlawful stop-and-frisk policies, customs and practices that pervade the FPC and MPD, which has over 1,800 officers.[2] The City's pervasive, routine, and unlawful stops and frisks, combined with a lack of oversight by the FPC, is not solely attributable to Chief Flynn, nor have Plaintiffs ever alleged as much. Rather, the City's institutionalized policies, practices, and customs, and its deliberate indifference to the constitutional rights of Milwaukee residents have resulted in tens of thousands of unconstitutional stops, including those of the named class representatives, throughout the City of Milwaukee. Am. Compl. ¶¶ 4, 37–187. MPD's unconstitutional stop-and-frisk program has been documented in MPD's written communications and training materials, and has been confirmed by numerous MPD witnesses under oath. Some examples of the evidence Plaintiffs have identified include:

[redacted]

[2] Federal Bureau of Investigation Uniform Crime Reporting, "2016 Crime in the United States, Wisconsin, Full-Time Law Enforcement Employees by City, 2016," Dingle Decl., Ex. 4, at 6/11.

[3] Plaintiffs intend to offer considerably more evidence at trial and submit this sample merely to demonstrate that a controversy remains alive and well.

[redacted]

[4] "F.I.'s" likely refers to "field interviews," an MPD term frequently used to refer to pedestrian stops. *See, e.g.*, Excerpts from October 30, 2017 Deposition of Heather Wurth, Dingle Decl. Ex. 6, at 148:24-49:2 ("A field interview is essentially the same thing as a Terry stop that's conducted based on reasonable suspicion."); [redacted].

[redacted]

5. In 2016, President of the Milwaukee Police Association, Michael V. Crivello, stated that there was an "absolute quota like mandate" from MPD command staff directing police officers to "produce two stops every day." May 5, 2016 Letter from Michael V. Crivello to FPC, Dingle Decl., Ex. 11.

[redacted]

8. In 2017, MaryNell Regan, Executive Director of the FPC, testified that she had not seen materials used to train officers on constitutional stops and frisks, and that it is not her standard practice to review training materials. Excerpts from November 14, 2017 Deposition of MaryNell Regan, Dingle Decl., Ex. 14 ("Regan Deposition"), at 72:13–73:4.

9. In 2017, Officer Matthew Brooks acknowledged that officers "would be criticized for not being towards the [traffic stop] average" and that Black males are "more suspicious" in areas "where the stats show that most of the crimes are being committed by black males." Excerpts from October 9, 2017 Deposition of

Matthew Brooks, Dingle Decl., Ex. 15, at 173:20–25; 161:19–23; *see also* 174:1–7.

10. In 2017, Detective Andrew Farina testified that he had been told as an officer "[Y]our field interviews are -- are down, so try to conduct more field interviews." He also acknowledged that discussion of traffic stop numbers during evaluations and meetings with supervisors was a common part of his experience as a police officer. Excerpts from October 12, 2017 Deposition of Andrew Farina, Dingle Decl., Ex. 16, at 49:16–19, 50:17–51:9.
11. In 2017, Officer Torrey Lea testified that a field interview could be justified when an officer sees a person whom the officer does not recognize in a neighborhood he otherwise knows well. October 11, 2017 Deposition of Torrey Lea, Dingle Decl., Ex. 17, at 79:3–17.

In sum, from District Captains to line officers, MPD's unlawful stop-and-frisk program has become integral to the way the MPD does business. Moreover, its program is conducted with the approval of the FPC, MPD's oversight authority. As Inspector Terrence Gordon testified: "[P]olice officers are people . . . it doesn't matter what your policies are, it doesn't matter what the laws are, and it doesn't matter what fancy posters you post on the wall. People learn what to do by watching other people and by the consequences that they see occur to other people[.]" Excerpts from October 20, 2017 Deposition of Terrence Gordon, Dingle Decl., Ex. 18, at 127:24–128:8.

None of the Defendants have made any statement disavowing the policies, practices, and customs challenged by Plaintiffs for leading to pervasive and unlawful stops and frisks throughout Milwaukee, whether in their motion to dismiss or public statements following

commencement of this action. Nor has any Defendant rescinded or even amended any MPD Standard Operating Procedures, guidelines, or policies relating to the conduct, documentation, supervision, training, monitoring, or oversight of stops and frisks, or promulgated any new policies on these topics. No interim or permanent successor to Chief Flynn has been named and no changes to MPD polices have been announced or approved by the FPC, as is required for any new MPD policy, *see* Regan Deposition, Dingle Decl. Ex. 14, at 46:20–48:23.

Moreover, Defendants have not developed a process for selecting a permanent chief, and have not even decided how long the interim chief, who will replace Chief Flynn, will serve. *See* Garza, J., "Commission announces events leading to interim police chief appointment," *Milwaukee Journal-Sentinel*, Jan. 26, 2018, Dingle Decl. Ex. 19 (noting that the FPC "is still determining what the process will be to find a permanent replacement for Police Chief Edward Flynn"). Any interim chief will inherit a police department of more than 1,800 officers whose training and instruction have conditioned them to implement daily an unlawful policy, practice, and custom of conducting large numbers of suspicionless stops and frisks, with supervisors and overseers who fail to monitor and correct such unlawful conduct. Of the two MPD members who are being considered for the position of acting or interim chief, neither has stated an intention to cease those policies, practices and customs giving rise to MPD's longstanding conduct of city-wide stops and frisks without reasonable suspicion and/or based on racial and ethnic profiling. *See, e.g.*, Russell Decl., Ex. S (FPC job announcement for the acting or interim chief); Luthern, A., "Interim chief candidates outline their vision for the Milwaukee Police Department," *Milwaukee Journal-Sentinel*, Feb. 9, 2018, Dingle Decl., Ex. 20.

AUTHORITY AND ARGUMENT

I. Legal Standard

A "case becomes moot . . . *only when it is impossible* for a court to grant any effectual relief whatever to the prevailing party."[5] *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (emphasis added) (internal quotation marks and citations omitted). So long as the parties have "a concrete interest" in the outcome of the litigation, the case is not moot. *Id.* Where, as here, Defendants claim that their "voluntary conduct" has mooted a case, Defendants must prove that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *U.S. v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (declining to find mootness where defendant's hazardous waste facility began to voluntarily comply with pollutant regulations)). Indeed, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Service Employees Intern. Union, Local 1000*, 567 U.S. 298, 307 (2012) (declining to find mootness of action challenging improper union dues despite refund of dues after commencement of litigation). The "heavy burden of persua[ding]" the court that MPD's unlawful stop-and-frisk program "cannot reasonably be expected to start up again" lies with Defendants. *See Friends of the Earth*, 528 U.S. at 189 (quoting *Concentrated Phosphate*, 393 U.S. at 203).

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[5] As an initial matter, courts have addressed mootness questions like the one raised here in the posture of a Rule 12(b)(1) motion. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Salazar*, No. 08-CV-659-BBC, 2009 WL 1110409, at *4 (W.D. Wis. Apr. 24, 2009) (rejecting mootness argument made under Rule 12(b)(1)).

II. Defendants Offer No Evidence That Proves Their Unconstitutional Policies, Customs, and Practices Are No Longer In Effect.

Based upon even the limited recitation of facts in the Amended Complaint and the instant memorandum, *infra*, Defendants cannot meet their burden. While they cite a few cases suggesting that the departure of a public official renders moot a lawsuit challenging that official's policies, these cases are easily distinguishable from the facts and circumstances surrounding this case. The cases cited by Defendants concern circumstances where the challenged policies are "personal" to the former official; the departed official is the sole named defendant; or there has been a formal disavowal of the former official's challenged policies. *See* Defs.' Mem. at 17–19. There is no basis in the case law for mooting a case where, as here, claims are brought against a municipal entity for unlawful policies that pervade an entire municipal department and unlawful practices that are so widespread, ingrained, and sanctioned by municipal officials as to have become custom with the force of law, based on the departure of a single senior employee.

A. This case challenges institutionalized municipal policies, practices, and customs—not the "personal" conduct of a departing official.

Plaintiffs' claims are against multiple Defendants, not only Chief Flynn, and Flynn is named as a Defendant only in his official capacity. *See, e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (holding that official-capacity suits are simply a way to sue the "entity of which [the official] is an agent"); *Kincaid v. Rusk*, 670 F.2d 737, 741 (7th Cir. 1982), *abrogation on other grounds recognized in Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent[.]") (quoting *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 n.55 (1978)). Plaintiffs challenge policies deeply ingrained throughout the FPC and MPD as well as longstanding municipal custom—the widespread and pervasive conduct of unlawful

stops and frisks throughout the City—that City leadership have sanctioned despite their awareness that such practices caused the routine violation of constitutional rights. *See, e.g.*, Am. Compl. ¶¶ 9–10, 12, 258–61, 264–75. Chief Flynn's statements and command over the MPD are only facts illustrative of municipal policy and the City's deliberate indifference to the widespread and pervasive violation of the rights of Black and Latino people to be free from stops and frisks made without reasonable suspicion and/or based on race or ethnicity.

Defendants essentially ask this Court to declare that the departure of a public official named in his official capacity moots *any* case involving a policy, practice, or custom that was in effect during that official's term in office—whether or not the claims are aimed solely at that official's personal behavior. If Defendants' rule were applied, municipalities could evade liability and avoid their longstanding legal burden of proving mootness by doing nothing more than pointing to the retirement of an official. *See Friends of the Earth*, 528 U.S. at 189–90. Such a ruling would eliminate injunctive or declaratory relief in official-capacity suits seeking to hold municipalities accountable and should be rejected.

Defendants' argument that this case is moot rests heavily on an overbroad reading of two Supreme Court cases: *Spomer v. Littleton*, 414 U.S. 514 (1974), and *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974), both of which involve conduct "personal" to the departing official, which is not the case here. In *Spomer*, plaintiffs alleged, *inter alia*, discriminatory conduct by the State's Attorney, Peyton Berbling, who was sued *individually* as well as in his official capacity. 414 U.S. at 515. During the pendency of the litigation, W.C. Spomer replaced Berbling. *See id.* at 520. Rather than reach the merits, the Court observed that:

> [T]he injunctive relief requested against [Berbling] is based upon . . . enumerated instances in which Berbling favored white persons

> and disfavored Negroes. The wrongful conduct charged in the complaint is *personal to Berbling*, despite the fact that he was also sued in his then capacity as State's Attorney. No charge is made . . . that the policy of the office of State's Attorney is to follow the intentional practices alleged, apart from the allegation that Berbling, as the incumbent at the time, was then continuing the practices he had previously followed.

Id. at 521 (emphasis added) (footnote omitted). Because the allegations in the Complaint centered on Berbling's personal animus and behavior, the Court remanded the case for a determination of mootness. *See id.* at 522.[6]

Similarly, in *Mayor of City of Philadelphia*, the plaintiffs claimed that the mayor had personally engaged in racial discrimination when he made appointments to a "Nominating Panel" that submitted nominees for the Philadelphia School Board. 415 U.S. at 605. After the mayor left office while the litigation was pending, the Court concluded it was improper to order "prospective injunctive relief against the new mayor in a case devoted *exclusively* to the personal appointment policies of his predecessor." *Id.* at 613 (emphasis added).

Defendants also rely heavily upon the inapposite case of *Kincaid v. Rusk*, where the U.S. Court of Appeals for the Seventh Circuit found a plaintiff's claims for injunctive and declaratory relief against a Sheriff, the sole defendant, to be mooted by that official's death and replacement while the plaintiff's appeal was pending. 670 F.2d 737 (7th Cir. 1982), *abrogated on other grounds recognized in Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991). In *Kincaid*, the court's decision was largely driven by the evidentiary record that the alleged violations would

[6] Notably, Spomer did not replace Berbling until after the Court of Appeals had rendered its decision and a petition for certiorari was pending. *See Spomer*, 414 U.S. at 520. Thus, unlike here, the factual record was closed, and the Supreme Court remanded the case for a determination as to whether respondents would want to, and should be permitted to, amend their complaint to include claims for relief against Spomer. *Id.* at 522–23.

not continue. *Id.* at 742. In support of their argument for mootness, Defendants lean heavily on *Kincaid*'s statement that

> when a public official is sued in his official capacity and the official is replaced or succeeded in office during the pendency of the litigation, the burden is on the complainant to establish the need for declaratory or injunctive relief by demonstrating that the successor in office will continue the relevant policies of his predecessor.

Id. at 741. *Kincaid*, however, reflects the Seventh Circuit's straightforward application of *Spomer* to "personal" conduct of a governmental defendant. *See id*. at 742 n.5 (recognizing that "[i]n *Spomer* the alleged wrongful conduct was personal to the defendant originally named"). It does not eviscerate the general rule, articulated in a decision issued more than a decade after *Kincaid*, that to establish mootness the *defendant* bears the burden of proving that the alleged conduct "could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189.

The court in *Kincaid* concluded that the prior sheriff's policies would not continue; in fact, his successor had already explicitly "rescinded" some of the earlier sheriff's practices and "Kincaid [had] not challenged these assertions." *Kincaid*, 670 F.2d at 742; *see also Wernsing v. Thompson*, 423 F.3d 732, 745 (7th Cir. 2005) (holding "[p]laintiffs' claim for injunctive relief is moot" where the "directive at issue was personal to" the former official and "[t]he undisputed evidence reveals that [the former official's] directive is no longer in force" because "there remains no misconduct for this court to enjoin"); *Tara Enterprises, Inc. v. Humble*, 622 F.2d 400, 402 (8th Cir. 1980) (holding that, because there was an "affirmative disavowal of any intention to follow the alleged wrongful policies and practices of the former City Attorney and Police Chief and the plaintiffs have made no showing to the contrary" the claim for equitable relief against the present City Attorney and Police Chief was moot); § 3533.7 Discontinued Official Action, 13C Fed. Prac. & Proc. Juris. § 3533.7 (3d ed.) ("[T]here is much to be said for

the suggestion that the plaintiff should be saddled with this burden only after the new official has expressly disclaimed the challenged policy.").

Other district court cases Defendants cite also show that *Kincaid* is only implicated when the challenged conduct is "personal" or "idiosyncratic," rather than institutional. *See Plotkin v. Ryan*, No. 99-C-53, 1999 WL 965718, at *1, *6 (N.D. Ill. Sept. 29, 1999) (allegations that former Secretary of State gave subordinates tickets to campaign events to sell did not justify injunctive relief against current Secretary of State who had a "stated policy of not soliciting contributions."); *Moore v. Watson*, 838 F. Supp. 2d 735, 762 (N.D. Ill. 2012) (citing *Kincaid* and relying on record evidence that practices at issue were "idiosyncratic practices" of particular officials).[7]

Spomer, Mayor, and *Kincaid* do not govern the mootness analysis in this case for the simple reason that the policies challenged by the Plaintiffs are not "personal" to the retiring official nor rescinded by a new official, who has the power to take such action. The burden, thus, remains squarely on the Defendants to prove voluntary cessation. In any event, the record shows that the City's stop-and-frisk policy will continue for the foreseeable future, regardless of Chief Flynn's retirement, for two overarching reasons.

First, at the most basic level and as discussed *supra*, Defendants have not disavowed—either in their motion or in their public statements—the policies, practices, and customs challenged in this litigation. *See, e.g., Ciudadanos Unidos De San Juan v. Hidalgo Cty. Grand Jury Comm'rs*, 622 F.2d 807, 822 (5th Cir. 1980) (concluding that "under the principles of

[7] The only other district court case cited by Defendants is irrelevant, as the court found the claims for injunctive relief against the *former* State's Attorney were moot, and dismissed the claim for injunctive relief against the present State's Attorney on prosecutorial immunity grounds and on the merits, not on mootness grounds. *See Newsome v. Daley*, No. 84 C 4996, 1987 WL 9311, at *3 (N.D. Ill. Apr. 7, 1987).

Spomer, the controversy between appellants and the judge . . . remains a live one" in part because the current defendant "*has made no record allegation that he will not continue [former] Judge Smith's practices*") (emphasis added); *Hoffman v. Jacobi*, No. 4:14-cv-00012, 2014 WL 5323952, at *3–4 (S.D. Ind. Oct. 17, 2014) (finding defendant's mootness argument premature where the Clark County Drug Court, which was accused of improper conduct, had chosen to suspend operations "temporarily," the new presiding judge was unknown, and there was no evidence that the alleged violations had "permanently abated"). As the *Hoffman* court acknowledged—despite quoting *Kincaid*—"where a plaintiff can show that an official's actions reflect an institutional policy that could be assumed to persist under that official's successor, the suit may continue." *Id.* at *3.

Second, the MPD's stop-and-frisk policies, practices, and customs remain in force—and thus are not personal or idiosyncratic to Chief Flynn.[8] Therefore, even if it were Plaintiffs' burden to demonstrate that Chief Flynn's successor will continue the challenged policies, that burden is met. Less than a year ago, a federal court reached a similar conclusion in a lawsuit by civil rights plaintiffs claiming racial discrimination was *not* mooted by the replacement of Sheriff Joe Arpaio, the architect of a challenged system of constitutional violations against Latinos. *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 WL 1133012, at *4–*5 (D. Ariz. Mar. 27, 2017). Distinguishing *Spomer*, the district court explained that, "if the challenged

[8] In any case, no matter how the Court rules on mootness as to Chief Flynn as a defendant, the ultimate question for trial remains: whether the City is liable under *Monell*, 436 U.S. 658, for causing city-wide constitutional and statutory violations. Dismissal of the claims against Chief Flynn would not moot Plaintiffs' claims against the City and the FPC. Even assuming arguendo that this court finds Plaintiffs' claims against Chief Flynn to be moot, Defendants cannot not carry their heavy burden of showing the absence of a controversy as to the remaining Defendants. *See Campbell-Ewald*, 136 S. Ct. at 669 (holding that, where there is an actual controversy, a case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party").

conduct in this case arises from an established policy or a recurrent practice of MCSO officials, the case is not mooted by a change in sheriff," *id.* at *4, and stated that "[a]lthough many of the factual allegations in this case focused on former Sheriff Arpaio and his statements, Plaintiffs also provided evidence of an established institutional policy." *Id.* at *5.

Likewise, in *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985), the Ninth Circuit held that the district court had not abused its discretion in permitting claims to proceed against successor penitentiary officials. The court distinguished *Spomer* and *Mayor*, stating that "[i]n this case, most of the evidence does not relate to the personal conduct of the principal named defendants." *Hoptowit*, 753 F.2d at 782. Rather, the court's holding found the challenged practices to be institutional and "not merely 'idiosyncratic abuses of the particular members of the outgoing administration.'" *Id.* (quoting *A.C.L.U. v. Finch*, 638 F.2d 1336, 1346 (5th Cir. 1981)). As a result, the court found it reasonable to infer continuation of the dispute. *Id.*; *see also Santiago v. Miles*, 774 F. Supp. 775, 796 (W.D.N.Y. 1991) (declining to find mootness where "[t]he systemic procedures were not personal to any one official but have pervaded the institution for many years" and there was "no indication from [the] record that the alleged constitutional violations were isolated incidents caused by a few individuals").

For the foregoing reasons, the burden is on Defendants to prove this case is moot. Even if the impending retirement of a single Defendant named in his official capacity in a case alleging municipal liability against multiple defendants shifted this burden to Plaintiffs—and it does not—the record shows that dismissal for mootness is unwarranted because Defendants' institutionalized policies and longstanding, widespread custom of unlawful stops and frisks will continue. Thus, this Court should deny Defendants' motion to dismiss.

B. Defendants fail to prove that eliciting public input on DOJ COPS recommendations ensures that pervasive unlawful stops and frisks have ceased.

Defendants' alternative theory of mootness consists of vague promises to implement the Department of Justice's recommendations for policing reform and a claim that this case is moot because any resulting reforms demonstrate a "commit[ment] to substantively change the traffic-stop and pedestrian-stop strategies[.]" Defs.' Mem. at 19. On its face, Defendants' argument is meritless.[9] Defendants assert they are "working with stakeholders to find solutions to implement the [COPS Report's] recommendations[,]" and are *beginning* discussions about what implementing certain recommendations would cost if they were in fact implemented. *Id.* at 9–10. These assertions are entirely insufficient to meet Defendants' "formidable" burden to prove that the challenged unlawful conduct cannot be reasonably be expected to recur. *Friends of the Earth*, 528 U.S. at 190.

First, this lawsuit seeks broader, more complete, and alternative relief than would be achieved even if the MPD were to adopt and implement in full every one of the COPS recommendations. Second, Defendants have not identified which COPS recommendations they intend to implement, and any purported "implementation" of the COPS recommendations is so preliminary as to be meaningless. In the meantime, Black and Latino people in the City of Milwaukee will continue to be stopped and frisked without reasonable suspicion and as a result

[9] It is worth noting that, following the change of administration in 2017, the Department of Justice chose to change the focus of the technical support provided by the COPS office. Rather than collaborating with law enforcement agencies to implement reforms related to community policing, COPS has instead shifted its attention to providing police departments with additional tools and resources to fight crime. Dingle Decl. Ex. 21 (September 15, 2017 U.S. Department of Justice Press Release "announc[ing] significant changes to the Office of Community Oriented Policing Services . . . [t]hese changes will return control to the public safety personnel sworn to protect their communities and focus on providing real-time technical assistance to best address the identified needs of requesting agencies to reduce violent crime"). As such, it is not clear whether the Department of Justice will provide the MPD with any further support.

of racial and ethnic bias. Although Defendants concede that the unlawful practices Plaintiffs challenge must cease in order to demonstrate mootness, *see* Defs.' Mem. at 21, Defendants curiously do not claim, let alone prove, that they have in fact ceased any of the policies, customs, and practices alleged in the Amended Complaint. Defendants' claim of mootness on this basis is meritless and unsupported by law.

i. Plaintiffs seek relief far beyond the scope of the COPS recommendations.

Unlike the instant lawsuit, the COPS evaluation of MPD policies and practices neither alleged nor sought to impose liability for constitutional and statutory violations. *See, e.g.*, Am. Compl. ¶¶ 1, 297–328. Contrary to Defendants' assertion, the COPS recommendations do not "mirror[]" Plaintiffs' allegations and desired relief. *See* Defs.' Mem. at 7. Below is a comparison of the relief sought by Plaintiffs and the recommendations of the draft COPS report.

Relief Requested by Plaintiffs	COPS Recommendations
A declaration that Defendants' suspicionless stops and frisks violate the Fourth Amendment. Am. Compl. at 86, ¶ C.	None
A declaration that Defendants' race- and/or ethnicity-based stops and frisks against Black and Latino residents violate the Fourteenth Amendment and Title VI of the Civil Rights Act. Am. Compl. at 87, ¶ D.	None
An injunction against suspicionless stops. Am. Compl. at 87 ¶ E.a.	None
An injunction against suspicionless frisks. Am. Compl. at 87 ¶ E.b.	None
An injunction against race- and/or ethnicity-based stops and frisks. Am. Compl. at 87 ¶ E.c.	None

Relief Requested by Plaintiffs	COPS Recommendations
An injunction requiring documentation of *all* stops and frisks in a single, up-to-date computerized database. Am. Compl. at 89 ¶ E.i.	None
An injunction against use of formal or informal quotas for [*traffic and pedestrian*] stops and frisks. Am. Compl. at 87 ¶ E.d.	MPD to "communicate" throughout the ranks a *traffic stop* quota is prohibited. Russell Decl., Ex. I, at 10 (Recommendation No. 33.7).
An injunction requiring improved training, supervision, monitoring, and discipline that will eliminate suspicionless [*traffic and pedestrian*] stops and frisks. Am. Compl. at 87-88 ¶ E.e.	Creation of a "training bulletin" to reinforce the reasonable suspicion requirement for *pedestrian stops*. Russell Decl., Ex. I, at 10 (Recommendation No. 34.2).
An injunction requiring improved training, supervision, monitoring, and discipline to eliminate race- and/or ethnicity-based [*traffic and pedestrian*] stops and frisks. Am. Compl. at 88 ¶ E.f.	Training for all officers on fair and impartial policing and procedural justice. Russell Decl., Ex. I, at 10 (Recommendation No. 33.6). Training for supervisors on identifying trends and patterns that give rise to potentially biased practices regarding *traffic and pedestrian stops and vehicle searches*. Russell Decl., Ex. I, at 11 (Recommendation No. 34.5).
An injunction requiring appropriate and adequate supervision and discipline of MPD officers conducting [*traffic and pedestrian*] stops and frisks. Am. Compl. at 88 ¶ E.g.	Supervisors to conduct "roll call training" regarding reasonable suspicion for *pedestrian stops*. Russell Decl., Ex. I, at 10 (Recommendation No. 34.2). Supervisors to be held accountable for submission of field interview cards documenting *pedestrian stops*. Russell Decl., Ex. I, at 11 (Recommendation No. 34.5).

Relief Requested by Plaintiffs	COPS Recommendations
An injunction requiring documentation of [*traffic and pedestrian*] stops and frisks in sufficient detail for supervisory review, regardless of whether an encounter is followed by the use of force, consent search, citation, or arrest. Am. Compl. at 88 ¶ E.h.	Officers to include the basis for reasonable suspicion with regard to *pedestrian stops* within the field interview card, Russell Decl., Ex. I, at 11 (Recommendation No. 34.3), which currently is not required if the stop is followed by citation or arrest. *See* Standard Operating Procedure 085 – Citizen Contacts, Field Interviews, Search and Seizure, Dingle Decl., Ex. 22, at 6.
An injunction requiring disclosure of data on [*traffic and pedestrian*] stops and frisks to the public on a semiannual basis. Am. Compl. at 89 ¶ E.j.	MPD to provide a public, quarterly report to FPC on outcomes of its *traffic* enforcement strategy, including demographic and crime trends. Russell Decl., Ex. I, at 10 (Recommendation No. 33.5).
An injunction requiring monitoring and audit of Defendants' [*traffic and pedestrian*] stop-and-frisk policies, practices and customs to ensure compliance with constitutional and statutory requirements. Am. Compl. at 89 ¶ E.k.	Supervisors to analyze traffic stop data to identify trends and potential bias-based behaviors at an early stage. Russell Decl., Ex. I, at 10 (Recommendation No. 33.4). MPD to conduct an audit of its field interview cards (*pedestrian stops*). Russell Decl., Ex. I, at 11 (Recommendation No. 34.6).
Though not specifically mentioned in the Amended Complaint, Plaintiffs' claims assume oversight of the proposed reforms to MPD's policing strategy as to traffic and pedestrian stops by the Court and/or an independent monitor.	An independent evaluator to measure community impact of Defendants' *traffic* enforcement strategy as compared to potential benefits. Russell Decl., Ex. I, at 10 (Recommendation No. 33.1).

As set forth above, while there is some overlap between the COPS recommendations and the Amended Complaint, the two are far from coextensive. There are significant gaps: (1) Plaintiffs seek enforceable injunctions barring unlawful stop-and-frisk practices in their entirety; (2) Plaintiffs seek enforceable injunctions requiring the documentation of demographic information and the reasons for every stop and frisk, with sufficient detail to permit supervisory review, in a single, up-to-date, computerized database; (3) the reforms sought by Plaintiffs apply

to both traffic and pedestrian stops, while the COPS recommendations are frequently limited to one or the other, or to unrelated issues; and (4) Plaintiffs seek more holistic change—for instance, improvements to officer training, supervision, monitoring, and discipline—while the COPS recommendations merely call for discrete training programs.

ii. Defendants have not implemented any of the COPS recommendations.

Defendants' identification of steps that they intend to work on is not the same as actually completing them and demonstrating that the challenged pervasive, unlawful stops and frisks could not reasonably be expected to recur. Defendants' COPS argument rests entirely on what they have "committed" to do, not what they have *actually done*. *See* Defs.' Mem. at 19–20. The documents Defendants cite in support of their mootness argument fail to show that any change is *actually occurring*.

For example, the Executive Director of Defendant FPC testified that she "pretty much did not agree with any of the contextual writing that the DOJ put forward, but [she did] think that there were some good recommendations regarding having written procedures, giving the EIP program an update, working on accountability between dispatch and patrol. Things of that nature." Regan Deposition, Dingle Decl. Ex. 14, at 212:8-14. Defendants' brief does not identify what specific changes to MPD's stop-and-frisk program will occur, nor how the City's undefined, hypothetical changes would constitute "intervening circumstances" that "deprive[] the [Plaintiffs] of a personal stake in the outcome of the lawsuit," and thus make it *impossible* for this Court to grant "any effectual relief whatever" to Plaintiffs. *Campbell-Ewald*, 136 S. Ct. at 669 (internal quotation marks omitted).

Defendants tellingly and repeatedly equivocate on the nature and timing of their purported remedial actions. *See, e.g.*, Defs.' Mem. at 12 (describing Defendants' "commit[ment]

to working with community stakeholders to *find solutions to implement the recommendations*[.]" (emphasis added)); *id.* at 11 ("[W]e're going to engage in a community process . . . to solicit community feedback and input on the recommendations.") (quoting Russell Decl., Ex. M., at 309:15–19)); *id.* at 13 ("We are moving forward *with allowing the community to have a process to discuss the recommendations*.") (quoting Russell Decl., Ex. P, at 213:11–14 (emphasis added)); *id.* (noting that the community-driven process will "hopefully" . . . "be wrapped up by next September [2018]") (quoting Russell Decl., Ex. P, at 218:2). The public record reflects that Defendants' process may even take up until 2019—long after trial in this case. *See* Luthern, A., "Here's how residents can get involved in changing the Milwaukee Police Department," *Milwaukee Journal-Sentinel*, Jan. 26, 2018, Dingle Decl. Ex. 23 (explaining that the "Milwaukee Collaborative Community Committee . . . is planning a series of 'community hubs' in the next *months* for residents to give input on the reform process"; that the "results from the hub discussion will be compiled in a report and presented in *May* [of 2018] to the Common Council, Mayor Tom Barrett and the city's Fire and Police Commission"; and that "[t]he goal is for the report to be reflected in the city's *2019* budget and in police policies this fall") (emphasis added). Finally, Defendants maintain that the COPS "findings and recommendations . . . contain inaccuracies," which they plan to address through their community engagement process—a clear example of Defendants' lack of commitment to any particular reforms, with specific decisions to occur after extended discussion, if ever. Russell Decl., Ex. I, at 1.

It is well-established that voluntary-cessation doctrine requires more than gesturing towards actions that would be a good first step if taken, which is *at most* what Defendants have done. *See* § 3533.7 Discontinued Official Action, Wright & Miller, 13C Fed. Prac. & Proc. Juris. § 3533.7 (3d ed.) ("It hardly need be added that mootness does not occur where there has

been no change in the challenged activity, or when any change does not fully address the claimed illegality. Nor does mootness follow announcement of an intention to change or adoption of a plan to work toward lawful behavior.") (footnotes omitted). Accordingly, Defendants' ostensible commitment to change will not suffice to meet their burden to prove mootness. A recent decision of the United States Court of Appeals for the District of Columbia Circuit is analogous. *See CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408 (D.C. Cir. 2011). The agency claimed the case was moot because the agency intended to conduct rulemaking that would "most likely change the legal landscape" and would grant the plaintiff "a temporary exemption from [a] statutory certification requirement." *Id.* at 414 (internal quotation marks and citation omitted). The *CSI* Court disagreed, finding a live controversy given that the agency's "promised rulemaking has yet to occur" and the agency's "assurances provide nothing more than the mere possibility that the agency might allow [petitioner] to continue operating." *Id.*; *see also Doe v. Kidd*, 501 F.3d 348, 354, 458 (4th Cir. 2007) (rejecting a mootness argument based on voluntary cessation where defendants "ha[d] not yet voluntarily ceased their conduct"). So too here—Defendants offer "nothing more than the mere possibility" of meaningful change to their unconstitutional conduct. *Id.*

Finally, to the extent that Defendants rely on cases regarding the "good faith" of government agencies, the cited cases relate to good faith that the government will not *restart* an illegal practice that it has *actually terminated*; they do not extend "good faith" to the government's vague promises to cease an illegal practice at some point in the future. *See, e.g.*, *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991) (noting that courts "place greater stock in [public officials'] *acts* of self-correction" in a case in which the defendant city had ceased threatening to terminate plaintiffs' water service after plaintiffs complied with a

program, the non-compliance with which was the basis for the city's threat (emphasis added)). This Court should similarly reject Defendants' argument that promises to implement recommendations in the COPS report are sufficient to moot this litigation.

For the foregoing reasons, Defendants fail to meet their heavy and formidable burden to prove that Defendants' unlawful conduct could not reasonably be expected to recur. The Court should deny the Defendants' motion.

III. In the Alternative, Plaintiffs Request Discovery and Leave to Amend.

The record in this case provides sufficient reason for this Court to deny Defendants' motion. Should the Court conclude otherwise, Plaintiffs respectfully request the opportunity for additional discovery sufficient to assess whether it is "absolutely clear" that Defendants' constitutional violations "could not reasonably be expected to recur" and to thereafter amend or supplement their complaint. *Friends of the Earth*, 528 U.S. at 189–90. It is axiomatic that "where issues arise as to jurisdiction . . . discovery [pursuant to Fed. R. Civ. P. 26(b)(1)] is available to ascertain the facts bearing on such issues." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13 (1978); *see also Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147 (D.C. Cir. 1994) ("The Federal Rules of Civil Procedure generally provide for liberal discovery to establish jurisdictional facts."); *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990) ("[G]enerally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue . . . ."); *Boustead v. Barancik*, 151 F.R.D. 102, 104 (E.D. Wis. 1993) (holding that discovery is available to ascertain facts bearing on jurisdiction). Here, where Defendants contend that the entire case against three distinct Defendants is moot due to the retirement of one Defendant named in his official capacity, discovery would be warranted to test the assertion that

Defendants' unconstitutional policies, customs, and practices could not reasonably be expected to recur.

CONCLUSION

Chief Flynn's retirement does not repeal the City's unlawful stop-and-frisk program. Nor will Defendants' vague promises to implement recommendations from an outside entity that no longer stands behind those recommendations, at an indeterminate time in the future, vindicate the Plaintiffs' rights. This case challenges policies, practices, and customs implemented and enforced at all levels of Milwaukee's law enforcement apparatus—from approval by the City and the FPC, to administration by the Chief of Police, the Assistant Chief, Inspectors, and District Captains, all the way down to street-level implementation by even the most junior officers. Defendants have failed to meet their burden to prove that this live controversy is moot. The motion to dismiss should be denied.

Dated this 15th day of February, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2018, I caused a copy of Plaintiffs' Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss for Mootness and Lack of Subject Matter Jurisdiction to be filed via the Court's CM/ECF filing system, which will cause a copy of this document to be served on counsel for all parties that have entered appearance in this action.

By: s/ Jon-Michael Dougherty
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