UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHARLES COLLINS, *et al.*,

Plaintiffs,

Case No. 17-CV-00234-JPS

v.

CITY OF MILWAUKEE, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS FOR MOOTNESS AND LACK OF SUBJECT MATTER JURISDICTION

The City of Milwaukee, the Milwaukee Fire and Police Commission and Chief of Police Edward Flynn (collectively, "Defendants") respectfully submit this Memorandum in Support of Defendants' Motion to Dismiss for Mootness and Lack of Subject Matter Jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1).

INTRODUCTION

Nine plaintiffs have brought a putative class action complaint, now amended (Dkt. No. 19), against Defendants for a "high-volume, suspicionless stop-and-frisk program" that the current Milwaukee Police Chief, Edward Flynn, allegedly authorized and implemented once he was sworn into office on January 7, 2008. Am. Compl. ¶ 2.[1] Plaintiffs each allege that they were subject to either an unconstitutional traffic stop or an unconstitutional pedestrian stop that occurred as a result of Chief Flynn's law-enforcement strategies. *Id.* at ¶¶ 37-187. As the caption of the Amended Complaint makes clear, Plaintiffs have brought suit against Chief Flynn

[1] Plaintiffs' putative class period begins the same day Chief Flynn was first sworn into office (*i.e.*, January 7, 2008). Am. Compl. ¶ 281.

only in his "official capacity as Chief of the Milwaukee Police Department." *Id*. at 1. Plaintiffs seek declaratory and prospective injunctive relief only—relief that addresses the policy, practice and custom by which Chief Flynn has directed Milwaukee's police officers to conduct traffic and pedestrian stops during his ten-year tenure. *Id*. at 1, 86-89.

Chief Flynn announced his retirement on January 8, 2018, which is to be effective February 16, 2018. Russell Decl., Ex. A at 1.[2] Pursuant to state law, the Milwaukee Fire and Police Commission ("FPC") is now in the process of selecting the interim police chief as well as the next permanent police chief. Wis. Stat. § 62.50(6); Russell Decl., Ex. B. As the FPC announced the same day Chief Flynn announced his retirement, "We at the FPC wish to assure the Milwaukee community that we are committed to serving the community's best interests as we begin the important task of selecting [Chief Flynn's] successor." Russell Decl., Ex. B.

In addition, the Milwaukee Police Department ("MPD") and FPC are already implementing changes recommended by the U.S. Department of Justice—changes which mirror the equitable relief requested by Plaintiffs—pursuant to a collaborative reform process that began in 2015, well before the Plaintiffs' instant lawsuit (filed in 2017). Russell Decl., Ex. F.

In light of Chief Flynn's retirement, and in light of the changes the MPD and FPC have and are implementing pursuant to the long-standing reform process originating between the MPD, FPC and the U.S. Department of Justice, Plaintiffs' lawsuit is now moot. *See Spomer v. Littleton*, 414 U.S. 514, 521-22 (1974) (remanding for determination whether claims against

[2] In reviewing a factual challenge to subject matter jurisdiction, the Court may look beyond the pleadings and view any evidence submitted to determine if subject matter jurisdiction exists. *Silha v. ACT, Inc*., 807 F.3d 169, 173 (7th Cir. 2015) (omitting citation). In addition, the Court is permitted to take judicial notice of matters of facts not subject to reasonable dispute. F.R.E. 201(b); *see also Parungao v. Cmty. Health Sys., Inc*., 858 F.3d 452, 457 (7th Cir. 2017) ("Courts may take judicial notice of court filings and other matters of public record when the accuracy of those documents reasonably cannot be questioned.")

former State's Attorney are moot and whether Plaintiffs should be permitted to amend their complaint to include claims for injunctive relief against the successor State's Attorney, where there is no record that the successor State's Attorney intended to continue the asserted practices of the former State's Attorney of which Plaintiffs complained) (omitting citations); *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003) ("mootness arises when . . . a challenged [policy or practice] is repealed during the pendency of litigation, and a plaintiff seeks only prospective relief").

Two days after Chief Flynn's announced retirement, Defendants sent a letter to Plaintiffs in which Defendants set forth their position on the mootness of Plaintiffs' lawsuit. Russell Decl., Ex. C at 1. Rather than providing a substantive response, however, Plaintiffs simply emailed Defendants that "Plaintiffs strongly disagree that this action, which is brought against multiple defendants and is based upon policies and practices of the City of Milwaukee is moot." *Id.* Upon Defendants' subsequent query as to whether they could expect a more substantive response to their letter, Plaintiffs only repeated that they "strongly disagree with [Defendants'] contention that this case is moot" and that, moreover, "no further response is required or forthcoming [from Plaintiffs], unless and until Defendants move the Court for relief on the grounds in counsel's letter." Russell Decl., Ex. D at 1. Pursuant to these communications with Plaintiffs, Defendants now move the court for such relief.

FACTUAL BACKGROUND

On November 10, 2015, Chief Flynn requested participation in the U.S. Department of Justice's Office of Community Oriented Policing Services ("COPS Office") Collaborative Reform Initiative for Technical Assistance ("CRT-TA") process, with the "expectation that entering into this voluntary process with the COPS Office will provide an avenue to strengthen

and build the mutual trust between the Milwaukee Police Department and the communities we serve." Russell Decl., Ex. E.[3] On December 17, 2015, pursuant to Chief Flynn's request, the COPS Office began to "conduct a thorough, independent and objective assessment of the Milwaukee Police Department's policies, practices and accountability systems." Russell Decl., Ex. F. One of the events the COPS Office organized, for example, was a "town hall meeting" at which, Plaintiffs allege, "numerous Milwaukee residents, including Black and Latino people, expressed concern that MPD officers engage[d] in suspicionless stops and racial and ethnic profiling." Am. Compl. ¶ 205. The ACLU, which represents Plaintiffs in the instant suit, discussed similar concerns with the COPS Office, and memorialized them in a letter (joined by other community organizations) that was sent to the COPS Office on January 27, 2016. Russell Decl., Ex. G. In pertinent part, the letter stated as follows:

> We are writing to follow up on the conversations your [COPS Office] teams had with the ACLU, the NAACP, and other organizations during your visit to Milwaukee.
>
> In the context of discussing the scope of your work in Milwaukee, the ACLU made you aware of a number of concerns that we hope you will consider as you develop your objectives going forward. . . .

[3] The COPS Office describes itself as "a federal agency responsible for advancing community policing nationwide." Russell Decl., Ex. F. It describes the CRT-TA process as follows:

> The COPS Office's Collaborative Reform Initiative for Technical Assistance is an independent and objective way to transform a law enforcement agency through an analysis of policies, practices, training, tactics and accountability methods around key issues facing law enforcement today. The initiative is designed to provide technical assistance to agencies facing significant law enforcement-related issues. Using subject matter experts, interviews and direct observations, as well as conducting extensive research and analysis, the COPS Office assists law enforcement agencies in enhancing and improving their policies and procedures, operating systems and professional culture.

Id.

> Regarding racially biased policing, which also was discussed, we want to ensure that you are aware of our specific concerns regarding traffic stops, pedestrian stops, pretextual stops, consent searches, and stop and frisk generally.
>
> We also hope you stay true to the commitment you made at the NAACP offices to have conversations with community stakeholders prior to determining the scope, goals and objectives of this investigation. It is important to the credibility of your efforts that the scope of the investigation be determined with input from the community about its highest priority concerns with MPD.

Russell Decl., Ex. G at 1.

On February 22, 2017, in the midst of the robust collaborative reform process in which the ACLU was already providing input, Plaintiffs filed their complaint. This complaint, now amended (Dkt. No. 19), is primarily directed at Chief Flynn and the various law-enforcement strategies (*i.e.*, the alleged "unconstitutional, suspicionless stop-and-frisk program") he has implemented since January 7, 2008, when he was first sworn into office. *See, e.g.*, Am. Compl. ¶ 281. Reflecting Plaintiffs' specific targeting of Chief Flynn and his policies, Plaintiffs reference his name over fifty (50) times in the Complaint, detailing specific things he has personally said or done and which, Plaintiffs allege, reflect the unconstitutional law-enforcement strategies he has personally developed and implemented in Milwaukee since 2008. For example:

> Upon assuming control of the MPD in 2008, Defendant Flynn ushered in a "broken windows policing" strategy involving "proactive policing" and so-called "saturation patrols." As part of this strategy, Defendant Flynn directs MPD officers to increase the number of traffic and pedestrian stops, also known as "field interviews" and "field contacts," throughout the City, and particularly in neighborhoods that are economically depressed and/or perceived as suffering from social disorder. Defendant Flynn has publicly suggested that saturating these neighborhoods with police and ramping up the number of stops made by MPD officers will disrupt and deter crime, whether or not the stops lead to arrest or prosecution. Am. Compl. ¶ 189.
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> [W]hen questioned about racial disparities in MPD traffic stops, Defendant Flynn publicly acknowledged, "Yes, of course, we are going to stop lots of innocent people. The point is, do folks understand what their role is as a cooperative citizen in having a safe environment." *Id.* ¶ 190.

> In 2015, the U.S. District Court for the Eastern District . . . upheld the jury verdict and observed: ". . . MPD Chief Edward Flynn has made clear that one of his prerogatives is encouraging large amounts of pedestrian stops, regardless of the reasons. In criticizing *Floyd v. City of New York*, the Southern District of New York case finding the New York Police Department's stop-and-frisk tactics illegal, Chief Flynn stated, 'That's what worries us about what's happening in New York. It would be a shame if some people decided to put us back in our cars just answering calls and ceding the streets to thugs.'" Order, *Hardy v. City of Milwaukee*, 88 F. Supp.3d 852, 881 at n.19 (E.D. Wis., Feb. 27, 2015) (omitting citation). *Id*. ¶ 198.
>
> Defendant Flynn told the Milwaukee Journal Sentinel, "If we are going to heavily engage with those communities that are both victimized and from whence a significant majority of our offenders come, we are going to generate disparities because of where we're physically located." *Id*. ¶ 202.
>
> Defendant Flynn addressed the Defendants' policy, practice, and custom of directing and encouraging MPD patrol officers to aggressively use traffic and pedestrian stops and frisks in designated areas in a 2011 video on Milwaukee Police Traffic Stops . . . Defendant Flynn asserted: "We needed this department to be visible and we needed it to be active. We started to take more calls over the phone, and started to create more foot patrols, and more bicycle patrols and time for officers to do directed patrol missions, which means, that hot spot over there, I want you to stop cars and talk to people. I want you to disrupt the environment, because the cops are here now." *Id*. ¶ 210.
>
> Defendant Flynn has directed MPD officers to target so-called "known offenders" and "frequent fliers" for stops and frisks. He has made numerous statements encouraging officers to stop people with criminal histories, regardless of the specific circumstances in which police officers encounter them. His statements fail to acknowledge that stops must be supported by reasonable suspicion of criminal activity, and send the message that reasonable suspicion is not required. *Id*. ¶ 225
>
> [I]n the 2011 Traffic Stops Video, Chief Flynn stated: "If we know 10% of our offenders are responsible for 50% of the crime . . . we've got to target those guys. We've got to drive around looking for people. And if we see them, we have to encounter them and engage them. Most of the time, they are not carrying anything bad. But once we get inside their head, we're hoping we're gonna affect their behavior." *Id*. ¶ 226.

Other than Chief Flynn, no other leaders of the Defendant entities are identified by name in the Amended Complaint. Instead, the other Defendant entities have only the most vague and conclusory allegations set forth against them. *See, e.g., id*. ¶ 223 ("Defendant FPC is aware of,

and has effectively ratified and sanctioned, the MPD's high-volume, suspicionless stop-and-frisk program").

On August 30, 2017, three months after Plaintiffs filed their amended complaint, a draft CRT-TA assessment report (the "CRT-TA Report")—authored by the COPS Office and its consultants pursuant to the collaborative reform process—was made public. Russell Decl., Ex. H. This CRT-TA Report contains a large number of findings and recommendations relative to Chief Flynn's policies, practices and accountability systems. Russell Decl., Ex. I. In particular, the CRT-TA Report directly addresses Chief Flynn's "Citizen Stop and Search Practices," of which Plaintiffs complain, and provides findings and recommendations mirroring the allegations and relief sought by the Plaintiffs (*cf.* Am. Compl. at 86-89):

> **Finding 33**: MPD's traffic stop practices have a disparate impact on the African-American community.
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> > **Recommendation 33.1**: MPD should engage an independent evaluator to measure the community impact of its traffic enforcement strategy as compared to the potential benefits of the strategy.
> >
> > **Recommendation 33.2**: MPD should continue voluntary collection of traffic stop data, a practice that is to be commended.
> >
> > **Recommendation 33.3**: MPD should, as part of its data driven practices, provide quarterly trends and analysis of traffic stop enforcement and searches to district supervisors, analyzing data across the city, districts, and peer groups.
> >
> > **Recommendation 33.4:** MPD should task supervisors with ensuring accuracy of data reported and reviewing and analyzing traffic stop data to identify trends and potential bias-based behaviors at an early stage.
> >
> > **Recommendation 33.5:** MPD should, publicly and on a quarterly basis, report at the FPC the outcomes of its traffic enforcement strategy, including the demographic trends and crime trends, identified for the quarter.
> >
> > **Recommendation 33.6:** MPD should require the training currently provided on fair and impartial policing and procedural justice to be delivered to all officers in the Department.

Recommendation 33.7: MPD should communicate throughout the ranks that a traffic stop quota is prohibited.

Finding 34: Pedestrian stops by MPD lack proper oversight and accountability.

Recommendation 34.1: MPD should immediately modify its policy on field interviews to require that officers notify MPD dispatch that the officer has engaged in a field stop and notify dispatch when that stop has completed.

Recommendation 34.2: MPD should develop a training bulletin for all MPD officers reinforcing the requirements for a field interview, including establishing reasonable suspicion for the stop, which should be reinforced through roll call training conducted by supervisors.

Recommendation 34.3: MPD officers should be required to clearly define the reasonable suspicion of the stop within the Field Interview card.

Recommendation 34.4: MPD supervisory personnel should be held accountable for ensuring timely, accurate submission of Field Interview cards.

Recommendation 34.5: Supervisors should be provided training on identifying trends and patterns that give rise to potentially biased practices regarding vehicle and pedestrian stops and vehicle searches.

Recommendation 34.6: MPD should conduct an audit of its field interviews to review the timely and accurate completion of Field Interview cards, proper explanation for the reasonable suspicion giving rise to the stop, and as a cross-reference against the CAD data for the pedestrian stop.

Finding 35: Community members are concerned that MPD engages in stop practices that are inflammatory to the community ethos, particularly the reported practice of "curbing" individuals.

Recommendation 35.1: MPD should establish a policy that the curbing of individuals during routine traffic stops is prohibited.

Recommendation 35.2: MPD should provide training for officers on how to safely conduct routine traffic stops and practices for ensuring appropriate containment of individuals.

Recommendation 35.3: MPD should begin collecting data on "curbing" as part of its traffic and pedestrian stop data collection.

Finding 36: MPD's traffic stop information system is cumbersome and time-consuming, which results in traffic stops taking a significant amount of time.

> **Recommendation 36:** MPD should conduct a review of its technology and processes for traffic stops to identify and address the reasons for the amount of time it takes to conduct a traffic stop.

Russell Decl., Ex. I at 10-11. The same day the CRT-TA Report was made public, the ACLU issued a press release in which it embraced the CRT-TA Report findings and recommendations: "It reflects many of the concerns that we have heard, especially from communities of color, about the MPD's aggressive pedestrian and traffic stop policies and practices, as well as about use of force, transparency and accountability." Russell Decl., Ex. J. Tellingly, the ACLU acknowledged the CRT-TA Report addressed the same issues contained in the instant lawsuit: "Our lawsuit is an effort to address some of the problems that the COPS report appears to corroborate." *Id.*

Notwithstanding the recent policy changes announced by the U.S. Department of Justice on September 15, 2017 (*see* Russell Decl., Ex. K), the MPD and FPC has been actively working on implementing the COPS Office recommendations. Russell Decl., Ex. L. For example, a MPD memo dated October 4, 2017 (the "CRT-TA Memo"), explicitly addresses the COPS Office's citizen-stop-and-search recommendations in light of an information request, made by Milwaukee Alderman Russell Stamper, regarding the costs of implementing the recommendations made by the COPS Office. *Id*. The CRT-TA Memo explains, in particular, how nine of the citizen-stop-and-search recommendations would not require costs, technical assistance or best practice research (33.5, 33.7, 34.2, 34.4, 34.6, 35.1, 35.3 and 36); four of the recommendations would require a consultant that the MPD estimates would cost $600 per day (33.4, 34.4, 34.5, 34.6); and one recommendation (33.1) would require technical assistance and/or a consultant that the MPD estimates would cost between $60,000-$100,000. *Id*. The CRT-TA Memo states that, "[a]s many of the items included may require substantial investment

of City resources, policymakers will need to participate in the planning and prioritization of any future investment of resources." *Id.* at 2.

Most significantly, the CRT-TA Memo sets forth that the "MPD is committed to working with stakeholders to find solutions to implement the recommendations from the [CRT-TA Report] despite DOJ no longer providing the technical assistance that was originally supposed to be provided over an 18-month period." *Id.* at 1. Chief Flynn, at his deposition, reviewed and corroborated the accuracy of this statement:

> Q: Looking at what's been marked as Exhibit 286, do you recognize this document?
>
> A: Yep.
>
> Q: Okay. Did you review and approve it?
>
> A: It wasn't a question of approving it. I reviewed it. Yeah.
>
> Q: On – so if you take a look at page – so this is a – essentially a response to an alder's request for information on what aspects of the COPS report's recommendations the department would be willing to implement; correct?
>
> A: Yeah.
>
> * * *
>
> A: Correct. Yeah.
>
> Q: And in the fourth paragraph [of the CRT-TA Memo] it says "MPD is committed to working with stakeholders to find solutions to implement the recommendations from the original draft report, despite DOJ no longer providing the technical assistance that was originally supposed to be provided over an 18-month period." Is that right?
>
> A: That's correct.
>
> Q: Okay. And despite your concerns about the quality of the COPS report, is it true that the department has committed to making as many of the changes as possible that the COPS report has recommended?
>
> * * *

A: Yeah. I mean, despite the fact that I thought it was a badly written report and inaccurate in many places, the recommendations for reforms and changes are fairly straightforward and boilerplate. You know, recommendations that we memorialize certain things or do them more often or do them better, I never -- even when we had the press conference announcing the intervention, I said I was predisposed to accept whatever recommendations they made. Sure.

* * *

. . . And so, number one, we're going to engage in a community process that the City Council is putting together with the Fire and Police Commission to solicit community feedback and input on the recommendations that have been made because their priorities – my priority would be do the stuff I can do, because that's fairly straight forward.

The community's priorities might be something altogether different. They might say "No, no, no, we need you to do this thing over here you'll need a consultant for."

So before – you know, some of this stuff we're already undertaking, you know, the low-hanging fruit, if you will. Some of the other stuff is going to have a cost component. Th[e] next several months is going to be about getting that community feedback.

Q: So then would you be willing to use some of the money that is ultimately budgeted for a community policing consultant in an independent traffic consultant?

A: Theoretically, sure.

Russell Decl., Ex. M at 305:18-310:12. Chief Flynn's testimony regarding "[t]he community's priorities" closely echoes the ACLU's expressed desire that the collaborative reform process focus on such priorities: "It is important to the credibility of your efforts that the scope of the investigation be determined with input from the community about its highest priority concerns with MPD." Russell Dec., Ex. G at 1. In his public statements to the press, Chief Flynn has been consistent regarding his commitment to the reforms proposed and recommended in the CRT-TA Report:

. . . Flynn recently reiterated that he agrees with most of the draft [CRT-TA] report's recommendations.

> "I am embracing the recommendations for MPD because, like any other police department, we could always improve," he said in a written statement last week.
>
> "It's important to demonstrate to the community our willingness to examine our systems and processes and look for ways to improve them."

Russell Decl., Ex. N at 1.

The recipient of the CRT-TA Memo, Leslie Silletti (director of MPD's Office of Management, Analysis and Planning ("OMAP")) similarly testified regarding the MPD's commitment to implementing the recommendations of the CRT-TA Report, while also addressing the intimately related issues of cost and community involvement:

> Q: Okay. Another thing you mentioned is the lack of funding and technical assistance related to implementing the COPS recommendations. If you did, in fact, have the technical assistance needed, would you be willing to implement -- would MPD be willing to implement all of the recommendations?
>
> * * *
>
> A: My understanding is that if -- in these community conversations that will happen, if those are prioritized to be implemented and resources were available, then the answer would be yes. However, if MPD says, "Yes, this is our number one priority, we want this to be implemented," and the community of interest says, "You know what, we don't see the cost-benefit analysis" -- and I'm very much generalizing and making this up for -- exaggerating for the point of discussion -- that might never get funded, even if there was a pot of $2 million sitting there. You know, they might -- the community of interest might say, you know, resources are limited and priorities compete and maybe this $2 million should be spent in this direction.

Russell Dec., Ex. O.

The executive director of the FPC, MaryNell Regan, also confirmed at her deposition that the FPC is committed to working with community stakeholders to find solutions to implement the recommendations from the CRT-TA Report, to the extent those solutions have not already been implemented:

> A: . . . We've just pulled out the recommendations [of the CRT-TA Report] for purposes of going forward on our community-led review.

Q: And are you moving forward on any of those recommendations?

A: We are moving forward with allowing the community to have a process to discuss the recommendations.

* * *

. . . [F]or example, many of their recommendations have already been implemented, and that's part -- going to be part of the community-led discussion to educate and inform the residents about that.

* * *

Q: What's the timeline for this community engagement that you're talking about?

A: It's hopefully to be wrapped up by next September [2018].

Q: Has it -- has that engagement already begun?

A: Yes.

Q: Who is being invited to contribute to that process?

A: The council president has reached out to Markasa Taylor to chair a citizen – I'm sorry – a citizen committee, and then the plan or thought is to have 10 to 15 organizations join with the recommended person. And the thought is some of those people would be trained as facilitators. The FPC would staff that board. There would be five or six hubs in the community to facilitate community-led conversations about the recommendations that would be pared – they would all remain, but they would be pared down into digestible chunks.

Russell Decl., Ex. P at 212:22-213:124; 217:25-218:18. In fact, community-led discussions have been occurring to discuss the CRT-TA Report findings and recommendations since the Fall of 2017, under the guidance of Markasa Taylor. *See, e.g.*, Russell Decl., Ex. Q. These are exactly the types of community-led discussions the ACLU wanted to see occur when collaborating with the COPS Office. Russell Decl., Ex. G at 1 ("We also hope you stay true to the commitment you made at the NAACP offices to have conversations with community stakeholders prior to determining the scope, goals and objectives of this [CRT-TA] investigation.").

Chief Flynn announced his retirement on January 8, 2018, which is to be effective February 16, 2018. Russell Decl., Ex. A at 1. The Milwaukee Fire and Police Commission ("FPC") issued a media release on the same day as the retirement announcement, in which the FPC addressed the selection of an interim successor—someone who has "earned the confidence and trust" of community stakeholders:

> After a process, the FPC will select an Acting Chief from within the department and will pay particular attention to those members that have an intricate familiarity with the department structure, possess a vision of a 21st century Milwaukee Police Department, and have earned the confidence and trust of the department members and the community at large.
>
> * * *
>
> . . . [S]tate law made the FPC responsible for setting employment standards, testing candidates for positions in the Fire and Police Departments, and appointing both chiefs. This wise and forward-analysis of the state of Wisconsin legislature has endured through the present date. We at the FPC wish to assure the Milwaukee community that we are committed to serving the community's best interests as we begin the important task of selecting a successor.

Russell Decl., Ex. B. The FPC subsequently released the job announcement for the acting/interim Police Chief for the MPD. Russell Decl., Exs. R, S. As the FPC explained:

> This candidate search is specifically focused on the selection of an Interim Chief whom will lead the department upon the retirement of Chief Flynn on February 16th. The person selected in this process will serve on a waiver basis until a permanent Chief is selected for a renewable term of office consistent with City of Milwaukee Code and State Law. Candidates for Acting/Interim Chief of Police may also apply for the permanent Chief position when it is posted, and the timeline and process for the selection of a permanent Chief will be communicated by the FPC as soon as practicable.
>
> The FPC has already received numerous communications from community members and groups advising us on their desired qualifications for the next Chief of Police. We appreciate that the community is engaged in this process and we encourage other interested people/organizations to share their opinions and suggestions with us by emailing our office at fpc@milwaukee.gov. Letters to the FPC on this topic will be publicly posted to our website and will be reviewed by the board of fire and police commissioners.

> We encourage the public to also engage with us via written communication as we select the Interim Chief. We assure the public that the selection process for the permanent Chief will include ample opportunity to meet and discuss the desired qualities that our community has for our City's next permanent Chief of Police.
>
> Our commission is comprised of seven independent, civilian members of the Milwaukee community and is statutorily tasked with this important duty. We take this responsibly seriously and will make our decisions based upon what each of us feels is in the best interest of the City of Milwaukee. That this process if free from politics or favoritism is the essential reason that this independent commission was created in State Law in 1885. We intend to prove that the wisdom of that decision is not lost during this important time in our City's history.

Russell Decl., Ex. R. The deadline for receipt of application submissions was January 19, 2018. *Id*. As the FPC works towards the selection of a new police chief, the FPC has welcomed input from community stakeholders, many of whom have already provided input to the FPC regarding the selection of a new police chief. Russell Decl., Ex. T (identifying, among others, the African-American Roundtable, the Coalition for Justice, the Milwaukee Police Association, the Peace Garden Project, and the Sherman Park Community Association).

It is clear from public statements made by Milwaukee's leaders that the interim and the permanent police chief will not continue the law enforcement strategies implemented by Chief Flynn of which Plaintiffs complain. For instance, Milwaukee Common Council President Ashanti Hamilton has said "It is an opportunity for the city of Milwaukee to move in a different direction." Russell Decl., Ex. U. Milwaukee Alderman Bob Donovan, who serves as Public Safety Committee Chair, expressed similar—though much more blunt—sentiments at a public address he held following Chief Flynn's resignation, which he described as "the State of Public Safety in the City of Milwaukee":

> Let me say that I am frankly pleased to say that Chief Flynn has chosen to resign . . . Chief Flynn has lost the confidence of the rank and file of his department. He has lost the faith of the wide majority of the Common Council. He has clearly alienated the board of fire and police commissioners – and he has lost the confidence of a growing number of state legislators on both sides of the aisle . . . I wish Chief Flynn no ill. I do however believe it is in the best interest in the City

> of Milwaukee that he move on. When it comes to public safety, Milwaukee needs a fresh start and a new direction.

Russell Decl., Ex. W. The FPC will make its decision on who will be the acting chief—from a group of finalists—on February 15, 2018. Russell Decl., Ex. X. The acting chief will take over on February 16, 2018, the day on which Chief Flynn officially retires. *Id*.

ARGUMENT

I. LEGAL STANDARD

A motion brought pursuant to Federal Rule of Civil Procedure 12(b)(1) raises the fundamental question of whether a federal district court has subject-matter jurisdiction over the action before it. Dismissal pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction includes dismissal on the basis of the justiciability doctrine of mootness, as mootness is an issue concerning the subject-matter jurisdiction of the federal courts. *See, e.g., Cornucopia Inst. v. U.S. Dep't of Agric*., 560 F.3d 673, 676 (7th Cir. 2009) ("It is well established that the federal courts have no authority to rule where the case or controversy has been rendered moot.").

In evaluating a challenge to subject matter jurisdiction, the court must first determine whether a factual or facial challenge has been raised. *Silha v. ACT, Inc*., 807 F.3d 169, 173 (7th Cir. 2015) (omitting citation). A factual challenge contends that there is in fact no subject matter jurisdiction, even if the pleadings are formally sufficient. *Apex Dig., Inc. v. Sears, Roebuck & Co*., 572 F.3d 440, 443 (7th Cir. 2009). In reviewing a factual challenge, the court may look beyond the pleadings and view any evidence submitted to determine if subject matter jurisdiction exists. *Id*.

"The objection that a federal court lacks subject-matter jurisdiction, *see* Fed. Rule Civ. Proc. 12(b)(1), may be raised at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp*., 546 U.S. 500, 506 (2006).

II. ANALYSIS

A. Chief Flynn's Retirement Renders Plaintiffs' Lawsuit Moot

On February 16, 2018, Chief Flynn's retirement will become effective and he will no longer exercise supervisory authority over MPD officers and MPD operations. Nor will he have the power to continue implementing his allegedly unconstitutional law-enforcement strategy of having MPD officers conduct a high volume of traffic and pedestrian stops. As such, Plaintiffs' claims for declaratory and injunctive relief can no longer be sustained absent a showing by Plaintiffs that Chief Flynn's successor will continue employing the same law-enforcement strategies of which Plaintiffs complain. *See Spomer v. Littleton*, 414 U.S. 514, 521-22 (1974) (remanding for determination whether claims against former State's Attorney are moot and whether Plaintiffs should be permitted to amend their complaint to include claims for injunctive relief against the successor State's Attorney, where there is no record that the successor State's Attorney intended to continue the asserted practices of the former State's Attorney of which Plaintiffs complained) (omitting citations); *Mayor v. City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 622 (1974) ("Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor.").

The burden is now firmly on the Plaintiffs to show that their suit for equitable relief can continue in light of Chief Flynn's retirement. As the Seventh Circuit has explained:

> A demand for present or prospective (declaratory or injunctive) relief imposes a substantial burden on the plaintiff to show survival of the controversy. Thus, 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 predecessors.

Kincaid v. Rusk, 670 F.2d 737, 741 (7th Cir. 1982) (citing *Spomer*, 414 U.S. at 520–523), *abrogation on other grounds recognized by Salazar v. City of Chi*., 940 F.2d 233 (7th Cir. 1991). Plaintiffs' burden in this regard has been repeatedly articulated by district courts within the Seventh Circuit in circumstances similar to those here. *See, e.g., Hoffman v. Jacobi*, No. 4:14-cv-12, 2014 WL 5323952, *3 (S. D. Ind. Oct. 17, 2014) ("Where the plaintiff has failed to meet that burden, the suit against that official is moot and must be dismissed for lack of subject matter jurisdiction.") (omitting citation); *Moore v. Watson*, 838 F.Supp.2d 735, 762 (N. D. Ill. 2012) ("Because Plaintiffs have not met their burden [that the complained-of policies or practices will continue], declaratory and injunctive relief against Defendants for these practices is improper."); *Plotkin v. Ryan*, No. 99-C-53, 1999 WL 965718 (N. D. Ill. Sept. 29, 1999) ("The burden is on the complainant to establish the need for injunctive relief by demonstrating that the successor in office will continue the relevant policies of his predecessor.") (omitting citation); *Newsome v. Daley*, No. 84-C-4996, 1987 WL 9311, *2 (N. D. Ill. April 7, 1987) ("The predecessor is without means to render injunctive relief, and hence such a claim against him is moot.").

Fed. R. Civ. P. 25(d), as it pertains to substitution of parties, does not help Plaintiffs sustain their lawsuit in the face of a mootness challenge, as multiple authorities amply establish. *See, e.g.*, 20 Fed. Prac. & Proc. Deskbook § 82 ("When the suit is against a state officer, however, the mere fact that [Fed. R. Civ. P. 25(d)] purports to authorize substitution cannot make substitution proper . . . the action must be dismissed as moot unless the plaintiff makes the needed showing that the [successor] officer threatens to continue the policy of the predecessor") (omitting case citations); *see also* 7C Fed. Prac. & Proc. Civ. § 1960 ("Rule 25(d) should be held applicable and to permit the automatic substitution both of federal and state officers, but the

burden of showing whether there is a substantial need for continuing the action, if challenged by an assertion that the suit is moot, will be on plaintiff if a state officer is involved") (omitting case citations); 25 Fed. Proc., L.Ed. § 59.468 ("Although it has been said that the automatic substitution provision of Fed. R. Civ. P. 25(d) eliminates the requirement that a plaintiff demonstrate the need for continuing an action upon substitution, a moot controversy will not be kept alive by substitution.") (omitting case citations); 2 Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* § 6:56, n. 1 ("there must be proof that the successor will engage in the same unconstitutional conduct as the predecessor") (citing *Spomer* and *Mayor of Philadelphia*).

Here, Plaintiffs cannot meet their burden to continue this lawsuit. With the retirement of Chief Flynn (the primary target of Plaintiffs' complaint and allegations) there is no longer a live case or controversy. Even when a new interim/acting or permanent police chief is sworn into office—following the input provided by community stakeholders—Plaintiffs cannot substitute that individual for Chief Flynn absent a clear showing that he or she will continue the complained-of law-enforcement strategies implemented by Chief Flynn and that the FPC will continue to ratify or otherwise sanction such strategies. Plaintiffs cannot make such a showing because the City, MPD and FPC have or are implementing changes to the policies, practices and customs of which Plaintiffs complain.

B. The Changes the MPD and FPC Have and Are Implementing Regarding Traffic and Pedestrian Stops Renders Plaintiffs' Lawsuit Moot

The City of Milwaukee, the MPD and the FPC have committed to substantively change the traffic-stop and pedestrian-stop strategies that were implemented under Chief Flynn and which were already being addressed by the COPS Office, the MPD and the FPC well prior to the filing of Plaintiffs' complaint. *See supra* 7-15. This commitment is clearly established by the

documentary evidence and the sworn testimony of Chief Flynn, MPD OMAP Director Silletti and FPC Executive Director Regan that the citizen-stop-and-search recommendations made in the CRT-TA Report—recommendations that mirror Plaintiffs' requested equitable relief—have or will be implemented. *See, e.g.*, Russell Decl., Exs. L, M, N, O, P. This evidence refutes Plaintiffs' allegations that Defendants are "deliberately indifferent" to the alleged unconstitutional practice of high-volume, suspicionless traffic and pedestrian stops. Am. Compl. ¶¶ 306, 318. With regard to the FPC, such evidence also refutes the allegation that "Defendant FPC is aware of, and has effectively ratified and sanctioned, the MPD's high-volume, suspicionless stop-and-frisk program." Am. Compl. ¶ 223. In short, the FPC can no longer be "ratifying" or "sanctioning" a law-enforcement strategy of a police chief who has retired and whose replacement will not continue to implement his or her predecessor's complained-of law-enforcement strategies.

To plead deliberate indifference, Plaintiffs must allege facts suggesting that "'a reasonable policymaker [would] conclude that the plainly obvious consequences' of the Defendants' actions would result in the deprivation of a federally protected right." *Gable v. City of Chicago*, 296 F.3d 531, 537 (7th Cir. 2002) (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 411 (1997)). However, the evidence here shows the opposite. Defendants, based on the CRT-TA Report, are now voluntarily implementing changes in the MPD (not even required by the current COPS Office) to assure traffic stops and pedestrian stops are conducted in a constitutional manner in Milwaukee. *See, e.g.*, Russell Decl., Exs. L, M, N, O, P. *Strauss v. City of Chicago*, 760 F.2d 765, 768 n.4 (7th Cir. 1985) (recognizing that police departments may take actions to address constitutional concerns).

By implementing such changes, Defendants have rendered Plaintiffs' suit—which is limited to equitable relief—moot. *Fed. of Advertising Ind. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2007) ("[a] question of mootness arises when as here, a challenged [policy or practice] is repealed during the pendency of litigation, and a plaintiff seeks only prospective relief"). Although it may be true that voluntary cessation of allegedly unconstitutional conduct by private parties may not negate a claim for equitable relief, "[w]hen the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine." *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991) (omitting citation). Here, the genuineness of the Defendants' implementation of the changes the CRT-TA Report recommended cannot be seriously questioned in light of the evidence. *See, e.g.*, Russell Decl., Exs. L, M, N, O, P. In addition, courts must not "presume[] bad faith" regarding a defendant's voluntary cessation of a challenged activity "unless there is evidence creating a reasonable expectation" that the defendants will reenact the challenged policy, practice or custom. *Federation*, 326 F.3d at 930 ("We disagree with [plaintiff's] characterization of the City's actions as disingenuous; rather, they just as likely reveal the City's good-faith attempts to initially maintain an effective ordinance that complies with the Constitution, and then its desire to avoid substantial litigation costs by removing a potentially unconstitutional law from the books."). Indeed, the Seventh Circuit has explained that "[i]n a string of cases, the [U.S. Supreme] Court has upheld the general rule that repeal, expiration, or significant amendment to challenged legislation ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief." *Fed. of Advertising*, 326 F.3d at 930 (omitting citations). Here, Defendants' implementation of the CRT-TA Report's recommendations

regarding traffic stops and pedestrian stops constitute such "significant amendment." Accordingly, Plaintiffs' suit has been rendered moot.

CONCLUSION

Defendants respectfully request the Court to dismiss Plaintiffs' claims as moot because (1) Chief Flynn—whose law-enforcement strategies provide the foundation for all of Plaintiffs' claims—is retiring and because (2) the evidence shows Defendants have been and will continue implementing CRT-TA Report's recommendations—which mirror Plaintiffs' requested relief—regarding the manner in which traffic stops and pedestrian stops are conducted by Milwaukee police officers.

Dated this 25th day of January, 2018.

Respectfully submitted,

/s/ Joseph M. Russell
JOSEPH M. RUSSELL
State Bar No. 1092211
DAVID A. FRANK II
State Bar No. 1090058
von Briesen & Roper, S.C.
411 E. Wisconsin Ave., Suite 1000
Milwaukee, WI 53202
Telephone: (414) 287-1414
Fax: (414) 276-6532
jrussell@vonbriesen.com
dfrank@vonbriesen.com
Attorneys for Defendants

GRANT F. LANGLEY
JAN A. SMOKOWICZ
NAOMI E. GEHLING
Milwaukee City Attorney's Office
800 City Hall
200 East Wells Street
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550
jsmoko@milwaukee.gov
ngehli@milwaukee.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2018, a true and correct copy of the foregoing was served on Plaintiffs via the Court's CM/ECF system, through their following counsel below:

SHANYA DINGLE
JON-MICHAEL DOUGHERTY
Covington & Burling LLP
One City Center 850 Tenth Street, NW
Washington, DC 20001

NUSRAT J. CHOUDHURY
JASON D. WILLIAMSON
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004

KARYN L. ROTKER
LAURENCE J. DUPUIS
American Civil Liberties Union of Wisconsin Foundation
207 E. Buffalo Street, Suite 325
Milwaukee, WI 53202
krotker@aclue-wi.org
ldupuis@aclu-wi.org

s/ Joseph M. Russell
JOSEPH M. RUSSELL