No. 20-6118

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Wendi C. Thomas,

Plaintiff-Appellant,

v.

CITY OF MEMPHIS, TN; JIM STRICKLAND, Individually; URSULA MADDEN, Individually

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
DISTRICT COURT NO. 2: 20-cv-02343-JTF-cgc
JUDGE JOHN T. FOWLKES, JR.

BRIEF OF PLAINTIFF-APPELLANT WENDI C. THOMAS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6 Cir. R. 26.1, Plaintiff-Appellant, Wendi C. Thomas, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

No.

/s/ Paul R. McAdoo
Paul R. McAdoo
Counsel for Plaintiff-Appellant
Wendi C. Thomas

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Wendi C. Thomas believes that oral argument would be beneficial and would assist the Court with disposition of this case, including by permitting counsel to address questions the Court may have regarding the record and application of the voluntary cessation doctrine. Accordingly, Thomas respectfully requests that the Court hold oral argument in this case.

JURISDICTIONAL STATEMENT

Award-winning journalist Wendi C. Thomas ("Thomas") brought this lawsuit pursuant to 42 U.S.C. § 1983 for violations of her constitutional rights after the City of Memphis, Tennessee (the "City") repeatedly refused to add her to its Media Advisory List in retaliation for her critical coverage of the City and its Mayor, Jim Strickland ("Mayor Strickland"). (Compl. R1 PageID#2-4, 11-13.) The district court had jurisdiction over Thomas's federal constitutional claims pursuant to 28 U.S.C. § 1331. (*Id.* PageID#3.) The district court had supplemental jurisdiction over Thomas's Tennessee constitutional claim pursuant to 28 U.S.C. § 1367. (*Id.* PageID#3.) The City, below, moved to dismiss this case for lack of subject-matter jurisdiction on the basis of mootness. (Mot. to Dismiss R11 PageID#103.)

The district court entered its final order granting the City's motion to dismiss and judgment on September 16, 2020. (Order R20 PageID#214; Judgment R21 PageID#224.) The Order and Judgment entered by the district court disposed of all of Thomas's claims. Thomas timely filed her Notice of Appeal on September 29, 2020. (Notice of Appeal R22 PageID#225.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Over an approximately one-year period, the City repeatedly ignored Thomas's requests to be added to the City's Media Advisory List in retaliation for her critical coverage of the City and Mayor Strickland. After the Complaint was filed, the City, without explanation, eliminated the Media Advisory List and promulgated a new Media Relations Policy with the approval of two members of the Mayor's Senior Leadership Team. Based on a totality of the circumstances, should this Court conclude that the voluntary cessation doctrine applies and reverse the district court's ruling that the case is moot?

Plaintiff-Appellant Thomas answers "yes."

STATEMENT OF THE CASE

I. The Parties and Claims.

Thomas is an award-winning journalist and the founder, editor, and publisher of *MLK50: Justice Through Journalism* ("*MLK50*"). (Compl. R1 PageID#1-2.) *MLK50* is a Memphis-based, award-winning news website that focuses its coverage on "the intersection of poverty, power, and public policy." (*Id.* PageID#1.) The City is a home rule municipality in Tennessee. (*Id.* PageID#2.) Mayor Jim Strickland is the City's Mayor. (*Id.* PageID#2-3.) Ursula Madden ("Madden") is the City's Chief Communications Officer and reports to Mayor Strickland.[1] (*Id.* PageID#3.)

Pursuant to 42 U.S.C. § 1983, Thomas brought civil rights claims for violation of her constitutional rights of speech and press under the First and Fourteenth Amendments and her due process rights under the Fifth and Fourteenth Amendments. (*Id.* PageID#13-16.) Thomas also brought a claim for violation of her rights under Article 1, Section 19 of the Tennessee Constitution. (*Id.* PageID#16.) Thomas sought injunctive and declaratory relief, as well as costs and fees pursuant to 42 U.S.C. § 1988(b). (*Id.* PageID#17.)

[1] As noted in her Civil Appeal Statement of Parties and Issues, Thomas is only appealing the district court's finding that the case is moot. (Doc. 7 at 1.) Because the district court dismissed the case as to Mayor Strickland and Madden on other grounds, this appeal is limited to Thomas's claims against the City.

II. The City's Repeated Refusal to Add Thomas to its Media Advisory List.

Through at least May 26, 2020, the City used a list of email addresses to communicate with members of the news media and others about City events and actions that the City considered newsworthy (the "Media Advisory List"). (*Id.* PageID#4-5.) Through January 2018, Thomas was included on the Media Advisory List, but she was removed without notice at some point after that. (*Id.* PageID#5.) As of January 2019, nearly 150 individual email addresses were included on the Media Advisory List; the Media Advisory List included email addresses for numerous journalists and media organizations, as well as for an insurance agency, the local film and television commission, and individuals using Gmail and Yahoo! email accounts. (*Id.* PageID#5; Compl. Ex. A R1-3 PageID#27-28.) The City had no written policy or criteria for determining who would be included on (or removing a person from) the Media Advisory list. (Compl. R1 PageID#11.) Among other things, the Media Advisory List was used to "alert members of the press about newsworthy events and actions involving the City" and to provide the media with login information for virtual press conferences held jointly by the City and Shelby County as part of their Joint Task Force for dealing with the ongoing COVID-19 pandemic. (Compl. R1 PageID#4, 9.)

On May 13, 2019, Thomas requested that her *MLK50* email address and two other *MLK50* email addresses be added to the Media Advisory List. (*Id.*

PageID#5; Compl. Ex. B R1-4 PageID#30.) On May 14, 2019, a member of the City's Communications staff indicated in a response email to Thomas that the three *MLK50* email addresses would be added to the Media Advisory List. (Compl. R1 PageID#6; Compl. Ex. C R1-5 PageID#32.) Despite the City's positive response, however, Thomas was not added to the Media Advisory List in May 2019. (Compl. R1 PageID#6.)

Thomas learned that she had not been added to the Media Advisory List in October 2019. (*Id.* PageID#6.) From October 29, 2019, to January 14, 2020, Thomas sent six emails to members of the City's Communications staff, including Madden, requesting that she be added to the Media Advisory List. (*Id.* PageID#6-8; Compl. Ex. D R1-6 PageID#34; Compl. Ex. E R1-7 PageID#37; Compl. Ex. F R1-8 PageID#40; Compl. Ex. G R1-9 PageID#44; Compl. Ex. H R1-10 PageID#49; Compl. Ex. I R1-11 PageID#55.) During the same time period, Thomas also left voicemails and sent text messages to the City's Communications staff, including Madden, requesting that she be added to the Media Advisory List. (Compl. R1 PageID#7.) Thomas did not receive a response to any of the emails, voicemails, and text messages she sent from October 2019 to January 2020. (*Id.* PageID#8.)

The undersigned sent letters on behalf of Thomas to the City's Chief Legal Officer Jennifer Sink on March 16, 2020, and April 13, 2020, urging the City to

add Thomas's *MLK50* email address and the other two *MLK50* email addresses to the Media Advisory List. (*Id.* PageID#8; Compl. Ex. J R1-12 PageID#61-66.) The only response the undersigned received to the two letters sent on behalf of Thomas was a perfunctory acknowledgement on April 15, 2020. (Compl. R1 PageID#8; Compl. R1-12 PageID#67.)

On April 6 and 7, 2020, the Chief of Staff to the Mayor of Shelby County requested via email that the City add Thomas to the Media Advisory List when that list was used to provide login information for virtual press conferences about the COVID-19 pandemic jointly held by the City and Shelby County. (Compl. R1 PageID#9-10; Compl. Ex. L R1-14 PageID#72-73.) The City did not comply with Shelby County's request. (Compl. R1 PageID#10.)

"The City's repeated refusal to add Ms. Thomas to the Media Advisory List appears motivated by Defendants' disapproval of Ms. Thomas's coverage of the City." (*Id.* PageID#10.) The basis for this allegation is an email Madden sent to Thomas in June 2017. (*Id.* PageID#11.) In that email string, Thomas requested an interview with Mayor Strickland to discuss a meeting Mayor Strickland held with people protesting the police killings of Black men and women across the country. (*Id.* PageID#11; Compl. Ex. M R1-15 PageID#76-79.) Madden refused Thomas's request for an interview with Mayor Strickland. (Compl. Ex. M R1-15 PageID#76, 78.) Madden's reason for the refusal was: "[o]bjectivity dictates if the mayor does

one on one interviews. You have demonstrated, particularly on social media, that you are not objective when it comes to Mayor Strickland." (Compl. R1 PageID#11; Compl. Ex. M R1-15 PageID#76.) Madden continued, "I won't say that he will never do an interview with MLK50Memphis, but I will say that you've never given him a reason to consider it." (Compl. Ex. M R1-15 PageID#76.)

On May 13, 2020, Thomas filed the Complaint in this case. Thomas alleged that the City's refusal to add her to the Media Advisory List was "in retaliation for her reporting about the City." (Compl. R1 PageID#11.)

III. The City's Change to its Media Relations Policy.

Prior to May 26, 2020, the City had no written policy related to the Media Advisory List. It had only a general "Media Relations Policy" unrelated to the Media Advisory List. (Compl. R1 PageID#11-12; Compl. Ex. N R1-16 PageID# 82-83.) On May 26, 2020, thirteen days after the Complaint was filed, the City announced a new Media Relations Policy that changed how the City would distribute information to the press. (Mot. to Dismiss R11 PageID#103; Mem. in Supp. of Mot. to Dismiss R11-1 PageID#105; Sink Decl. R11-2 PageID#115-116; Sink Decl. Ex. A R11-3 PageID#119-120.)

The new Media Relations Policy provides that "[m]edia advisories from the Mayor's Communication Office regarding news briefings, news conferences, and written statements will be posted on the City of Memphis (COM) website at

www.memphistn.gov and designated COM social media platforms." (Sink Decl. Ex. A R11-3 PageID#120; Mem. in Supp. of Mot. to Dismiss R11-1 PageID#109.) The new Media Relations Policy, like the old one, warns that "[e]mployees who violate this policy will be subject to disciplinary action." (Compl. Ex. N R1-16 PageID#83; Sink Decl. Ex. A R11-3 PageID#120.) Although the City's Chief Legal Officer Jennifer Sink ("Sink") claimed in her declaration that the City "will not be disseminating any further media advisories through the Media Advisory List or any other media email listserv," (Sink Decl. R11-2 PageID#116), the new Media Relations Policy does not discuss the Media Advisory List or prohibit its use.

Sink also averred that "[i]n order to adopt the amended Media Relations Policy in the Personnel Policy and Procedure Manual, the City needed to obtain formal written approval from the City's Chief Legal Officer and Chief Human Resources Officer. Both approvals were obtained to adopt the policy." (*Id.* PageID#116.) The City's Chief Legal Officer and Chief Human Resources Officer are both members of Mayor Strickland's Senior Leadership Team, which is "patterned after a corporate 'C-suite' [and] meets weekly to advise the mayor and tackle significant issues." (Opp'n to Mot. to Dismiss R14 PageID#150-151; Opp'n to Mot. to Dismiss Ex. C R14-3 PageID#167-170.)

The Forward to the City's Personnel Policy and Procedure Manual (the "City's Personnel Manual") provides that the City "reserves the right to suspend,

revise or revoke any of its policies, procedures, and/or practices at any time without notice." (Opp'n to Mot. to Dismiss R14 PageID#145; Opp'n to Mot. to Dismiss Ex. B R14-2 PageID#165.) PM-10-01 of the City's Personnel Manual further provides that "[t]he Director of Human Resources promulgates, publishes, and interprets all policies set forth in the Personnel Manual . . . ." (Opp'n to Mot. to Dismiss R14 PageID#145; Opp'n to Mot. to Dismiss Ex. A R14-1 PageID#163.)

IV. Procedural History.

Thomas filed her Complaint in the Western District of Tennessee on May 13, 2020. (Compl. R1 PageID#1.) Defendants moved to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted on June 12, 2020. (Mot. to Dismiss R11 PageID#103-104.) Thomas responded to the motion to dismiss on July 9, 2020. (Opp'n to Mot. to Dismiss R14 PageID#141.) Defendants filed their reply on July 23, 2020. (Reply in Supp. of Mot. to Dismiss R15 PageID#175.) The Honorable John T. Fowlkes, Jr. issued an Order Granting Defendants' Motion to Dismiss along with the Judgment granting the motion to dismiss on September 16, 2020. (Order R20 PageID#214; Judgment R21 PageID#224.) Thomas timely filed her Notice of Appeal on September 29, 2020. (Notice of Appeal R22 PageID#225.)

V. The District Court's Opinion.

The district court granted the City's motion to dismiss for lack of subject matter jurisdiction, concluding that Thomas's claims were moot because "Defendants . . . stopped using the Media Advisory List and adopted a new Media Relations Policy, [that became] effective on May 26, 2020." (Order R20 PageID#217, 221.) While the district court acknowledged that "[v]oluntary cessation of a challenged practice does not automatically render a case moot," it concluded that because the City was a governmental entity, two people working in different offices in the City's executive branch were involved in approving the policy change, and the City said it would "not be disseminating any further media advisories through the Media Advisory List," the case was moot. (*Id.* PageID#217-221.) The district court did not analyze the totality of the circumstances of this case in making its decision.

The district court limited its inquiry to two questions. First, was the City's policy change formal and legislative-like or ad hoc, discretionary, and easily reversible? (*Id.* PageID#218-220.) And second, if it was formal and legislative-like, did the City "sufficiently represent[] that the City will not return to the challenged practice of disseminating information through the Media Advisory List[?]" (*Id.* PageID#220.)

Relying upon the fact that the policy change was approved in writing by "two different individuals working in two different offices," the district court concluded that the City's policy change was "the result of implementing written policy and procedure," and "[t]hus [was] not ad hoc or discretionary." (*Id.* PageID#220.) Based on this conclusion, the district court held that the "policy change was 'effected through formal, legislative-like procedures.'" (*Id.* PageID#220.)

Having found that the policy change was made with formal, legislative-like procedures, the district court held that the case was moot because the City "stated that they will not be using the Media Advisory List or any other email listserv." (*Id.* PageID#221.) As a result, the district court dismissed the case based on lack of subject matter jurisdiction. (*Id.* PageID#221.)

SUMMARY OF THE ARGUMENT

Thomas is an award-winning journalist with *MLK50* who drew the ire of the City, Mayor Strickland, and Madden with her aggressive coverage. In retaliation for her critical coverage, the City repeatedly refused to add Thomas to the City's Media Advisory List, which the City used to communicate with journalists and others in Memphis about newsworthy events and actions involving the City. After approximately a year of refusals by the City, Thomas sued the City for violation of her constitutional rights of speech, press, and due process. Rather than respond to

the merits of her lawsuit, the City sought to moot the case by promulgating a new Media Relations Policy that called for the City's Communications Department to circulate media advisories via its website and social media account. But it is only in the rarest of cases that a party can render a case moot by voluntarily ceasing the challenged practice. This is not one of those rare cases.

The burden of proving mootness is a heavy one, even for a government entity. To show mootness, the City is required to show (1) that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur and (2) that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. The City has done neither.

The first prong of the voluntary cessation test is evaluated based on a totality of the circumstances. The totality of the circumstances here support reversal.

The City's actions in this case are not isolated or unintentional. First, the City removed Thomas from the Media Advisory List. When Thomas requested to be added after learning she had been removed, the City misleadingly said she would be added, but she was not. Then, upon learning that the City had not done what it said it would, Thomas asked six more times via email and additional times by text and voicemail. The City never responded. The City also refused two requests from Thomas's attorney and requests from the Chief of Staff for Shelby County's Mayor, the latter of which was specifically related to joint press

conferences the City was holding with Shelby County related to the COVID-19 pandemic. The City's continual refusal was not accidental, but instead was purposeful and in retaliation for critical coverage of the City and Mayor Strickland by Thomas.

Thirteen days after Thomas filed suit for violation of her speech, press, and due process rights under the federal and Tennessee Constitutions for the City's repeated refusal to add her to the Media Advisory List, the City abruptly eliminated the Media Advisory List and promulgated a new Media Relations Policy. Under the new Media Relations Policy, media advisories would be posted on the City's website and its social media accounts. The new policy was not the result of action by the City's legislative body, but instead was approved, behind closed doors, by two members of Mayor Strickland's Senior Leadership Team. The City provided no justification or explanation for the change and has not disavowed its prior unconstitutional acts.

The timing of the City's cessation of the challenged practice, the continuing and deliberate nature of the City's actions, the lack of justification and transparency regarding the cessation, and the City's failure to disavow its actions all weigh in favor of a finding that this case is not moot. The public interest in ensuring that the City is complying with the federal and state constitutions also supports this conclusion.

The City would have the Court ignore these facts and focus exclusively on two things. First, that the City is a governmental entity and, second, that the City said it would not be using the Media Advisory List again. This Court has found that governmental entities receive some solicitude in the voluntary cessation analysis, even though the Supreme Court has never applied such deference. The amount of solicitude depends upon the manner in which the policy change is made. On one end of the spectrum is legislative or legislative-like action that receives more deference. On the other end of the spectrum are ad hoc, discretionary, and easily reversible actions that receive minimal deference.

The City argued that written approval of the new policy by two members of Mayor Strickland's Senior Leadership Team is a legislative-like action. But a comparison between what happened in this case and what is required for the City's legislative body to enact an ordinance suggests otherwise. Because the City's policy change is not legislative-like, but instead was an ad hoc, discretionary, and easily reversible decision, the fact that the City is a governmental entity and said it would stop the challenged practice deserves minimal weight in the totality of the circumstances analysis on the first prong of the voluntary cessation test and is far outweighed by the facts supporting a finding that this case is not moot.

Finally, the City made no showing of any kind that this change in policy completely and irrevocably eradicated the effects of the City's repeated refusal to

add Thomas to the Media Advisory List. In fact, given the facts of the case and that the City's actions denied Thomas access to the same information as that of her peers in retaliation for her coverage of the City, it is highly unlikely that such eradication is possible. The City's failure on this prong alone justifies reversal.

The district court's decision almost completely defers to the City and ignores both the totality of the circumstances in this case and the fact that the City made no showing of any kind related to the second prong of the voluntary cessation test. For the reasons herein, the district court's order granting the City's motion to dismiss should be reversed and this case remanded for further proceedings.

STANDARD OF REVIEW

This Court reviews dismissals based on mootness de novo. *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001) (citation omitted). "[T]he party asserting mootness bears the '"heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again.'" *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008) (quoting *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003)).

ARGUMENT

I. The City Fails to Meet its Heavy Burden to Demonstrate Mootness Based on the Two-Part Voluntary Cessation Test.

"Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling v. Helmerich & Payne,*

Inc., 323 U.S. 37, 43 (1944). In that vein, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Id.* at 289 n.10 (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203-04 (1968)); *see also Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 723 n.3 (2010) (Alito, J., dissenting) (discussing same standard); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (discussing the same standard). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth*, 528 U.S. at 189 (quoting *Concentrated Phosphate*, 393 U.S. at 203); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (discussing the "heavy burden" that a party seeking to moot a case by voluntary cessation must satisfy to demonstrate mootness).

The test for determining whether a case is moot when a defendant voluntarily ceases the challenged practice has two parts. First, the City must show that it is "absolutely clear that the allegedly wrongful behavior could not

reasonably be expected to recur." *City of Mesquite*, 455 U.S. at 289 n.10 (quoting *Concentrated Phosphate*, 393 U.S. at 203-04); *see also Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (quoting *Friends of the Earth*, 528 U.S. at 189) (explaining that "voluntary cessation of a challenged practice does not moot a case unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'"). "In assessing the likelihood that a defendant will reinflict a given injury, the chain of potential events leading to recurrence need not 'be air-tight or even probable' to justify a finding of non-mootness." *McBride v. Mich. Dep't of Corr.*, 294 F. Supp. 3d 695, 720 (E.D. Mich. 2018) (quoting *Barry v. Lyon*, 834 F.3d 706, 716 (6th Cir. 2016)). "Instead, it is enough if the controversy 'possibly could' arise again." *Id.* (quoting *Barry*, 834 F.3d at 716).

Second, the City must also show that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979).

Given the stringent nature of the voluntary cessation analysis, the Supreme Court has noted that "voluntary cessation of a challenged practice rarely moots a federal case." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001); *see also Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019) (discussing rarity of mootness based on voluntary cessation). This is not one of the

rare cases that should be mooted by the City's cessation of the challenged practice because, based on the totality of the circumstances, the City cannot bear its heavy burden of demonstrating that it has met both of the prongs of the voluntary cessation test.

II. Based on the Totality of the Circumstances, the City Has Not Carried Its Heavy Burden of Demonstrating that It Is Absolutely Clear that the Challenged Practice Could Not Be Reasonably Expected to Recur.

When deciding if a party has carried its heavy burden of making "it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur," *Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (emphasis added) (citation omitted), courts look at the totality of the circumstances, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019); *see also Doe v. Wooten*, 747 F.3d 1317, 1323 (11th Cir. 2014) (citing *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)) (explaining that when analyzing a voluntary cessation mootness question "the analysis may vary depending on the facts and circumstances of a particular case"). "[A]s a fact-specific analysis under the totality of the circumstances would suggest, not every case automatically becomes moot by an alteration in the law at issue." *Amalgamated Transit Union v. Chattanooga Area Reg'l Transp. Auth.*, 431 F. Supp. 3d 961, 975 (E.D. Tenn. 2020) (citing *Cam I, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 460 F.3d 717, 720 (6th Cir. 2006)). Despite this framework, the district court restricted its

examination to three facts, while ignoring numerous others that weigh against a finding of mootness.

Specifically, the district court ignored the City's repeated refusal to add Thomas to the Media Advisory List from 2019 into 2020 (Compl. R1 PageID#5-8), and ignored the fact that the change upon which the City relies for its mootness argument took place thirteen days after the Complaint was filed (Mot. to Dismiss R11 PageID#103). The district court also ignored that the City's policy change was made behind closed doors without any transparency or even explanation. Moreover, the City specifically reserves that right to change the new policy at any time without notice and has not disavowed the challenged practice. (Opp'n to Mot. to Dismiss R14 PageID#150, 154.)

In contrast, the district court relied on three facts. First, that the City is a government defendant. (Order R20 PageID#218.) Second, that the change in policy was formally approved by two members of the Mayor's Senior Leadership Team. (*Id*. PageID#219-220.) Finally, that the City Attorney claimed the City "will not be disseminating any further media advisories through the Media Advisory List or any other media email listserv." (Sink Decl. R11-2 PageID#116; *see also* Order R20 PageID#219.) These facts cannot overcome the City's heavy burden and are outweighed by the other facts in this case.

Based on the totality of the circumstances, which were not considered by the district court, the City has not carried its heavy burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (citation omitted).

A. The City's Refusal to Add Thomas to the Media Advisory List Was a Continuing and Deliberate Practice, Which Supports Reversing the District Court.

The district court ignored the fact that the City's conduct was a continuing practice over a period of a year or more when it incorrectly held that this case is moot. "In determining whether an offending policy is likely to be reinstated, the Court is 'more likely to find that the challenged behavior is not reasonably likely to recur where it constituted an isolated incident, was unintentional, or was at least engaged in reluctantly.'" *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 594 (11th Cir. 2013) (quoting *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007)). "Conversely, we are more likely to find a reasonable expectation of recurrence when the challenged behavior constituted a 'continuing practice' or was otherwise deliberate." *Id*. (quoting *Sheely*, 505 F.3d at 1184-85).

The record before the district court demonstrated that there was nothing isolated, unintentional, or reluctant about the City's refusal to add Thomas to the Media Advisory List. It was deliberate and continued for a year or more. (Compl. R1 PageID#5-8.)

The City removed Thomas from the Media Advisory List without notice. (*Id.* PageID#5.) Then, when first asked to add her back to the Media Advisory List, the City said it would but did not. (*Id.* PageID#5-6; Compl. Ex. B R1-4 PageID#30; Compl. Ex. C R1-5 PageID#32.) From October 2019 to January 2020, Thomas asked the City to add her to the Media Advisory List another six times by email and additional times by voicemail and text, but the City did not even give her the professional courtesy of a response. (Compl. R1 PageID#6-8; Compl. Ex. D R1-6 PageID#34; Compl. Ex. E R1-7 PageID#37; Compl. Ex. F R1-8 PageID#40; Compl. Ex. G R1-9 PageID#44; Compl. Ex. H R1-10 PageID#49; Compl. Ex. I R1-11 PageID#55.) Thomas's attorney sent two letters on her behalf requesting that she be added and explaining the constitutional issues with the City's refusal, but those letters only elicited a perfunctory acknowledgment from the City. (Compl. R1 PageID#8; Compl. Ex. J R1-12 PageID#61-67.) The City even refused two requests from the Chief of Staff for the Mayor of Shelby County to add Thomas to the Media Advisory List when it was used to distribute login information for joint City and County COVID-19 virtual press conferences. (Compl. R1 PageID#9-10; Compl. Ex. L R1-14 PageID#72-73.) And by its repeated refusals to add Thomas to the Media Advisory List, the City disrupted and interfered with her ability to cover the City and Mayor Strickland, which ultimately

harms Thomas's readers who rely upon her for news related to the City. (Compl. R1 PageID#9.)

The motivation for the City's refusal is apparent from an email Madden sent to Thomas refusing to grant a one-on-one interview with Mayor Strickland. (Compl. R1 PageID#10-11; Compl. Ex. M R1-15 PageID#76.) The City's refusal to add Thomas to the Media Advisory List was in retaliation for her critical coverage of Mayor Strickland and the City. (Compl. R1 PageID#4, 11.) In that email, Madden stated that "[o]bjectivity dictates if the mayor does one on one interviews. You have demonstrated, particularly on social media, that you are not objective when it comes to Mayor Strickland." (Compl. R1 PageID#11; Compl. Ex. M R1-15 PageID#76.) "I won't say that he will never do an interview with MLK50Memphis, but I will say that you've never given him a reason to consider it." (Compl. Ex. M R1-15 PageID#76.)

The facts alleged in the Complaint are the epitome of a continuing and deliberate practice. There was nothing isolated, unintentional, or reluctant about the City's custom and practice of purposefully and repeatedly refusing to add Thomas to the Media Advisory List. And it was in retaliation for coverage the City did not like. These facts were ignored by the district court and weigh against a finding of mootness.

B. The Timing of the City's Policy Change Weighs Heavily Against Mootness Because It Shows a Greater Likelihood that the City May Resume the Challenged Practice.

Despite Thomas's repeated requests over a year to be added to the Media Advisory List, the City only took action when it no longer could do nothing. But the heavy burden a party, including a government party, must overcome to show mootness is "increased by the fact that the voluntary cessation only appears to have occurred in response to . . . litigation, which shows a greater likelihood that it could be resumed." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342-43 (6th Cir. 2007); *see also Schlissel*, 939 F.3d at 769 (holding that timing of change after suit was filed increased government's burden). In this case, the City did not change how it distributed information to the press after Thomas repeatedly requested that she be added to the list—or even after two letters by Thomas's attorney. (Compl. R1 PageID#5-9.) Instead, the City waited until thirteen days after the lawsuit was filed before it acted. (Mot. to Dismiss R11 PageID#103.) The City's policy change, however, has all the hallmarks of an attempt to defeat the jurisdiction of the district court rather than a genuine change in policy.

In *Northland*, the government took action that it later argued mooted the plaintiffs' claims only "once th[e] lawsuit was filed." 487 F.3d at 343. The same was true in *Schlissel* where this Court held that the timing of the government's change "raises suspicions that its cessation is not genuine" and, therefore

"increases the [government's] burden to prove that its change is genuine." 939 F.3d at 769; *see also A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016), *rev'd on other grounds*, 138 S. Ct. 1833 (2018) (holding that changing the challenged policy on the day the merits briefs were due in the district court "makes the [defendant's] voluntary cessation appear less genuine"). The timing of the change by the City here raises the same suspicions and increases the City's burden of proving that the change is genuine.

The timing of the cessation is pertinent is "because it weighs on whether a party's disengagement from alleged illegal conduct is genuine." *Amalgamated Transit Union*, 431 F. Supp. 3d at 976 (citing *Schlissel*, 939 F.3d at 769-70; *Northland*, 487 F.3d at 342-43). In *Amalgamated Transit Union*, the government defendant refused on three occasions to permit plaintiff's president to speak at its meetings, but "approved [her] fourth request, reversing course fewer than three weeks after receiving her attorney's threat of federal litigation, and [the government defendant] rescinded [the complained-of resolution] only after this litigation began." *Id.* Based on this timing, the Eastern District of Tennessee held that "[t]he proximity between [the government defendant's] acts of cessation and the advent of this litigation increases [the government defendant's] burden in illustrating mootness, even as a governmental entity." *Id.* at 976-77 (citing *Schlissel*, 939 F.3d at 769). The district court in that case continued: "[t]he

obvious inference from the timing of [the government defendant's] cessation is that it changed its ways in response to the prospect of litigation and to the initiation of litigation, particularly in light of the evidence showing that it had consistently rejected Ms. Smith's requests beforehand." *Id.* at 977.

In this case, the district court ignored a far more egregious set of facts. The City removed Thomas from the Media Advisory List in early 2018. (Compl. R1 PageID#5.) When Thomas requested that her *MLK50* email address be added to the Media Advisory List in May 2019, she was told by a member of the City's Communications staff that she would be added. (*Id*. PageID#5-6.) The City did not add her. (*Id*. PageID#6.) When she discovered that the City had not added her, Thomas requested six more times via email and additional times via text message and voicemail that she be added from October 2019 through January 2020. (*Id*. PageID#6-8.) She received no response of any kind from the City to these requests. (*Id*. PageID#8.) Counsel for Thomas wrote the City in March 2020 and again in April 2020 requesting that she be added to the Media Advisory List and, again, she was not added. (*Id*. PageID#8.) The only response the undersigned received from the City was a perfunctory response that did not address the issue. (*Id*. PageID#8.) The City also refused a request by the Chief of Staff for Shelby County's Mayor to add Thomas to the Media Advisory List for the limited purpose

of distributing login information for joint virtual press conferences the City and Shelby County were holding related to the pandemic. (*Id.* PageID#9-10.)

And the request in all of Thomas's communications was a simple one: add three more emails from a bona fide journalism organization covering the City to a list with almost 150 email addresses. (Compl. R1 PageID#1-2, 5-6.) The City took no action related to Thomas's request until thirteen days after this suit was filed, more than a year after the City had lied to Thomas about adding her to the list and more than two years after removing Thomas from the Media Advisory List without notice. These facts are even more outrageous than those in the *Amalgamated Transit Union* case and severely undermine the City's mootness argument.

Other circuit courts likewise consider the timing of a voluntary cessation to be an important factor in deciding whether a case is moot. The Eleventh Circuit has explained that "the 'timing and content' of a voluntary decision to cease a challenged activity are *critical* in determining the motive for the cessation and therefore 'whether there is [any] reasonable expectation . . . that the alleged violation will recur." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010) (emphasis added) (quoting *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008)). "[A] defendant's cessation before receiving notice of a legal challenge weighs in favor of mootness, while cessation that occurs 'late in the game' will

make a court 'more skeptical of voluntary changes that have been made.'" *Id.* (citations omitted); *see also Wooten*, 747 F.3d at 1325 (holding that timing of voluntary cessation days before trial was to begin "suggests a change was made simply to deprive the District Court of jurisdiction" (citations omitted)); *Atheists of Fla.*, 713 F.3d at 595 (holding that cessation of challenged policy a few days after the City was asked to do so and prior to filing of lawsuit supported finding of mootness). As discussed above, the City did not act after the first demand letter sent by Thomas's attorney or the second. (Compl. R1 PageID#8.) The City waited until thirteen days after the Complaint was filed in this case before it stopped using the Media Advisory List and changed the policy it relies upon to claim mootness. (Mot. to Dismiss R11 PageID#103.)

Similarly, the Second Circuit has found it significant that the voluntary cessation of a challenged practice occurred "on the eve of plaintiffs' motion for summary judgment" and found that this was a "strategic maneuver [that] suggests an attempt by [the government defendant] to conjure up an argument for mootness and thwart adjudication of the issue." *Ahrens v. Bowen*, 852 F.2d 49, 53 (2d Cir. 1988) (citation omitted); *see also Hilton v. Wright*, 235 F.R.D. 40, 49 (N.D.N.Y. 2006) (explaining that the "swift change in policy, as argument was swiftly approaching in a case challenging the same policy . . . prompts questions of defendants' credibility and gives rise to suspicions that defendants have simply

manufactured an argument of mootness"). The Third and Fourth Circuits have reached similar conclusions. *Fields v. Speaker of Pa. House of Reps.*, 936 F.3d 142, 161 (3d Cir. 2019) (holding that the fact the government "only changed the [challenged practice] in response to this litigation…weighs against mootness"); *Wall v. Wade*, 741 F.3d 492, 498 n.8 (4th Cir. 2014) (noting in its voluntary cessation discussion that the timing of a change in policy after suit was filed in one case and in the midst of another case "strongly indicates that the change was at least somewhat related to the two pending lawsuits").

While the district court did briefly recount the timeline of events in this case (Order R20 PageID#215), it ignored the timing of the City's alleged voluntary cessation and the impact it has on the voluntary cessation analysis. The timing of the City's alleged voluntary cessation significantly increases its burden in this case and weighs against a finding of mootness.

C. The Lack of Well-Reasoned Justification for the New Policy Weighs Against Mootness.

In this case, the City changed its policy behind closed doors, without public notice, and without explanation. While no case in the Sixth Circuit has addressed the issue, the Eleventh Circuit has discussed how the manner in which a change is made should be weighed as part of a voluntary cessation mootness analysis. "[W]e look for a well-reasoned justification for the cessation as evidence that the ceasing party intends to hold steady in its revised (and presumably unobjectionable)

course." *Harrell*, 608 F.3d at 1266. In *Harrell*, "the Board acted in secrecy, meeting behind closed doors and, notably, fail[ed] to disclose any basis for its decision." *Id.* at 1267. "As a result, we have no idea whether the Board's decision was 'well-reasoned' and therefore likely to endure." *Id.* (citations omitted). These same facts are present here.

The City provided no justification for the change it bases its mootness argument on, let alone a well-reasoned justification. After ignoring Thomas's requests to be added to the Media Advisory List for more than a year, the City, thirteen days after the Complaint was filed, suddenly decided it was going to "chart[] an entirely new course" and begin using social media and its website to distribute information. (Mem. in Supp. of Mot. to Dismiss R11-1 PageID#109-110.) The City did not explain the impetus behind this "new course" and made the change as part of a revision to its written personnel policies, which it reserves the right to change at its discretion without notice. (Sink Decl. R11-2 PageID#115-116; Opp'n to Mot. to Dismiss Ex. B R14-2 PageID#165.) The City's lack of a well-reasoned justification for its voluntary cessation, thus, weighs against a finding of mootness.

D. The City's Failure to Disavow Its Refusal to Add Thomas to the Media Advisory List Weighs Against Mootness.

While it is not mandatory for a party asserting mootness to disavow their challenged behavior, such a failure should be considered under the totality of the

circumstances test that applies when a defendant seeks to moot a case. "[A] defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains." *Sheely*, 505 F.3d at 1187; *see also Schlissel*, 939 F.3d at 770 (holding that university's continued defense of challenged definitions weighed against finding of mootness). Here, there has been no disavowal by the City of its refusal to add Thomas to the Media Advisory List. This fact should weigh against a finding of mootness in this case.

E. The Public Interest in Resolving the First Amendment Issues Here Militates Against a Finding of Mootness.

"[A] public interest in having the legality of the practices settled[] militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citing *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309-10 (1897)); *see also DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (per curiam) (discussing public interest as a factor to be considered in a voluntary cessation mootness analysis); *Familias Unidas v. Briscoe*, 544 F.2d 182, 190 (5th Cir. 1976) ("When the court views the public interest as substantial, a lesser possibility of repetition may suffice for jurisdiction." (citing *Moore v. Ogilvie*, 394 U.S. 814 (1969))); *Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 140 (S.D.N.Y. 2019) (holding that when a government defendant "is 'free to return to [its] old ways[, this,] together with a public interest in having the legality

of the practices settled, militates against a mootness conclusion'" (quoting *W.T. Grant Co.*, 345 U.S. at 632)). "Public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law." *Bennett v. Metro. Gov't of Nashville & Davidson Cty.*, 977 F.3d 530, 539 (6th Cir. 2020) (quoting *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (per curiam)). In this case, the issue is whether the City was acting constitutionally when it repeatedly refused to add Thomas to the Media Advisory List. The public interest in having this decided is strong and militates against a finding of mootness.

F. The City Should Receive Little or No Solicitude in the Voluntary Cessation Analysis.

Despite the facts that weigh in Thomas's favor, the City has argued that its policy change is due so much solicitude that all it needs to do to moot this case is to assure the Court that it will not be using the Media Advisory List again. (Mem. in Supp. of Mot. to Dismiss R11-1 PageID#110.) The foundation of this argument is this Court's statement that "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)). The Sixth Circuit has similarly noted that a government party receives a "presumption that it acts in good faith." *Schlissel*, 939 F.3d at 767-68. But, since the *Mosley* holding in 1990, the Supreme Court has decided cases involving the voluntary

cessation doctrine with government defendants and has never found that the government should receive solicitude or any other weight in the analysis based on its identity. And even if *Mosley* and *Schlissel* are correct, that government parties should receive some deference, the City still bears the heavy burden of proving mootness,[2] and the weight of any solicitude in the totality of the circumstances analysis here should be minimal because the change made by the City did not involve legislative-like procedures, but instead "were ad hoc, discretionary, and easily reversible actions." *Schlissel*, 939 F.3d at 768.

1. Sixth Circuit Precedent Granting Solicitude or a Presumption in Favor of Government Defendants under the Voluntary Cessation Doctrine Is Inconsistent with Supreme Court Precedent.

In *Trinity Lutheran*, Chief Justice Roberts rejected a mootness argument proffered by a government defendant. 137 S. Ct. at 2019 n.1. In that case, the Governor of Missouri had announced the end of the challenged practice at the heart of the case. *Id*. Despite this fact, the Supreme Court explained that the

[2] This Court has held that even with the solicitude due to government defendants, "a party still bears a heavy burden to show that a case is mooted." *Northland*, 487 F.3d at 342 (citing *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003)); *see also Husted*, 838 F.3d at 713 (holding that government bears the burden of producing evidence to demonstrate mootness, not the plaintiff); *Nat. Res. Def. Council*, 362 F. Supp. 3d at 141 (citing *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 n.15 (10th Cir. 2010)) (explaining that even where government defendants get solicitude in the voluntary cessation analysis, *Friends of the Earth*'s heavy burden standard still applies).

government defendant had "not carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy" that was challenged as unconstitutional. *Id*. (citing *Friends of the Earth*, 528 U.S. at 189). There is no mention of solicitude, deference, or a presumption in favor of the government defendant. Instead, the Supreme Court applied the exact same standard it applies to all litigants. *Compare id. with Friends of the Earth*, 528 U.S. at 189. The *Trinity Lutheran* decision is also consistent with the Supreme Court's other decisions on the voluntary cessation doctrine involving government defendants, which do not mention or discuss solicitude for or a presumption in favor of government parties under the voluntary cessation doctrine. *Christian Legal Soc'y*, 561 U.S. at 723 n.3 (Alito, J., dissenting) (no discussion of solicitude, deference, or a presumption in favor of government parties); *City of Mesquite*, 455 U.S. at 289 (same); *Davis*, 440 U.S. at 631-32 (same); *DeFunis*, 416 U.S. at 318 (same); *see also Husted*, 838 F.3d at 713 (noting that "the Supreme Court has declined to defer to a governmental actor's voluntary cessation, even where that cessation occurred pursuant to legislative process"). Based on *Trinity Lutheran* and the other cited Supreme Court cases, the City should be given no solicitude or presumption in the totality of the circumstances mootness analysis.

2. Even if Solicitude Is Proper, the City Should Receive Minimal Solicitude Because the New Media Relations Policy Was an Ad Hoc, Discretionary, and Easily Reversible Decision.

Despite the *Trinity Lutheran* holding and others from the Supreme Court that do not factor in the government's identity in the voluntary cessation totality of the circumstances analysis, the Sixth Circuit continues to do so, including in its decision last year in *Schlissel*. In that case, for the first time in Sixth Circuit voluntary cessation jurisprudence, this Court applied a presumption that the government parties act in good faith when they change a policy. 939 F.3d at 767-68. But the solicitude and presumption due the City depend on the facts of the case and, here, the solicitude due the City is minimal and any presumption of good faith it is due has been overcome.

"While all governmental action receives some solicitude, not all action enjoys the same degree of solicitude." *Id.* at 768; *see also Amalgamated Transit Union*, 431 F. Supp. 3d at 975 ("A determination of how much solicitude that a governmental entity is entitled to varies with the facts of each case and 'takes into account the totality of the circumstances surrounding the voluntary cessation.'" (quoting *Schlissel*, 939 F.3d at 768)). "Legislative action ordinarily moots a case midstream, when a challenged provision is repealed or amended during the pendency of the litigation," *Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017), but the same cannot be said of executive action that is ad hoc, discretionary, or easily

reversible, *Schlissel*, 939 F.3d at 768; *see also Nat. Res. Def. Council*, 362 F. Supp. 3d at 141-42 ("Any deference owed because [an executive branch defendant] is a government entity is limited, as illustrated by the countless cases finding an executive actor's voluntary cessation insufficient to moot ongoing litigation." (citations omitted)). In fact, as the First Circuit has explained, while legislatures are given considerable deference, "the Supreme Court has not hesitated to invoke the voluntary cessation exception when considering the conduct of private, municipal, and administrative defendants." *Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016).

"[W]here a change is merely regulatory, the degree of solicitude the voluntary cessation enjoys is based on whether the regulatory processes leading to the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions." *Schlissel*, 939 F.3d at 768. The rationale for this distinction is that "[t]he rigors of the legislative process 'bespeak . . . finality and not . . . for-the-moment, opportunistic tentativeness.'" *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1038 (9th Cir. 2018) (quoting *Libertarian Party of Ark. v. Martin*, 876 F.3d 948, 951 (8th Cir. 2017)).

"Where regulatory changes are effected through formal, legislative-like procedures, we have found that to moot the case the government need not do much more than simply represent that it would not return to the challenged policies."

Schlissel, 939 F.3d at 768. Conversely, where the change is effected through ad hoc, discretionary, and easily reversible action "the solicitude does not relieve the [government] of much of its burden to show that the case is moot." *Id.* at 769; *see also Husted*, 838 F.3d at 713 (explaining that "solicitude does not carry much of an official's burden" on voluntary cessation). While the district court correctly held that this case involved a regulatory change, it misapplied the *Schlissel* standard to the facts of this case.

Courts have even gone so far as to find that "if a governmental entity decides in a clandestine or irregular manner to cease a challenged behavior, it can hardly be said that its 'termination' of the behavior is unambiguous." *Harrell*, 608 F.3d at 1266-67. Similarly, where a government party has not shown substantial deliberation when changing a challenged practice should also weigh against mootness. *See Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1310 (11th Cir. 2011) (explaining that "whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction" should be considered under the voluntary cessation doctrine (citations omitted)). These two perspectives are consistent with the *Schlissel* Court's legislative-like versus ad hoc, discretionary, and easily reversible dichotomy.

The district court erred when it found that the policy at issue here was "effected through formal, legislative-like procedures" and that, as a result, the City "need not do much more than simply represent that it would not return to the challenged policies" in order to carry its burden of showing mootness. (Order R20 PageID#218-221 (quoting *Schlissel*, 939 F.3d at 769).) If the City is due any solicitude, it is minimal and does not outweigh the facts supporting reversal of the district court.

a. The District Court Incorrectly Held that the City's Policy Change Was a Legislative-Like Action.

The district court improperly held that the City's policy change was "effected through formal, legislative-like procedures." (*Id*. PageID#220 (quoting *Schlissel*, 939 F.3d at 769).) A comparison between the procedures the City would have to utilize to repeal or replace an ordinance, a typical legislative action, with the City's actions in this case demonstrates that the procedures used to cease the challenged practice here are far from legislative-like, but instead are ad hoc, discretionary, and easily reversible in nature.

The legislative body for the City is the City Council, which is made up of thirteen members. Memphis, Tenn., Home Rule Amendments, Ordinance No. 4346 (adopted 1995), https://perma.cc/E2VA-GVXM. To pass an ordinance, a majority of the City Council must vote in favor of the proposed ordinance at "three regular meetings" of the City Council. Memphis, Tenn., Charter & Related Laws

("City Charter"), art. 40, § 354, https://perma.cc/8CCE-KXM2. Between the date of the first and second meetings of the City Council at which the proposed ordinance is voted on, the Memphis City Charter requires publication of the proposal in a Memphis newspaper. *Id.* Moreover, the Mayor has limited veto powers related to ordinances passed by the City Council. City Charter, art. 6, § 40, https://perma.cc/XNV6-7T3E.

Both the City Charter and the Tennessee Open Meetings Act (the "OMA") also require that the City Council's meetings be open to the public, except in very limited circumstances. *See* Tenn. Code Ann. § 8-44-102(a) ("All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee."); City Charter, art. 7, § 43, https://perma.cc/LVB7-E6S6 ("All such regular meetings or special called meetings, as hereinabove described, of the City Council shall be public."). In addition to the meetings being public, the OMA also requires public notice of the meetings, that the minutes of the meetings be made public, and that votes be made in public. Tenn. Code Ann. § 8-44-103(a)-(b) (requiring public notice of regular and special meetings); *id.* § 8-44-104(a) (requiring that minutes of governing bodies' meetings be open to public); *id.* § 8-44-104(b) (requiring votes of governing bodies be public). In fact, any action taken at a meeting in violation of OMA is null and void and could lead to other remedies against the City Council as

well. Tenn. Code Ann. § 8-44-105 (nullification provision); *id.* § 8-44-106 (other remedies for OMA violations).

There is nothing similar about the legislative process by which the City passes ordinances and the process by which the City changed the Media Relations Policy here. First, according to the City, two people, not seven or more, approved the new policy, the City's Chief Legal Officer and its Chief Human Resources Officer (Mem. in Supp. of Mot. to Dismiss R11-1 PageID#110; Sink Decl. R11-2 PageID#116), both of whom are part of Mayor Strickland's Senior Leadership Team (Opp'n to Mot. to Dismiss R14 PageID#150-51.) Second, there were no public meetings at which the proposed policy change was discussed, let alone three of them. And since there were no public meetings, there was no public notice of such meetings and no public votes. The proposed changes were also not published in a newspaper circulated in Memphis. In fact, on the record before the Court, there was no public debate, discussion, or even mention of a change to the City's Media Relations Policy at all until it was announced by the City on May 26, 2020.

The City's policy procedures also differ from the City Council's in another way. The City expressly "reserves the right to suspend, revise or revoke any of its policies, procedures, and/or practices," including the Media Relations Policy, "*at any time without notice*." (Opp'n to Mot. to Dismiss R14 PageID#145 (emphasis added); Opp'n to Mot. to Dismiss R14-2 Ex. B PageID#165 (emphasis added).) A

central feature of legislative processes is notice to the public. Whether by multiple votes at public meetings, public announcements in the media, or both, notice of potential changes are critical for an action to be "legislative-like." Yet that notice was lacking here, and the City specifically disclaims any such notice for implementing its policy changes. (Opp'n to Mot. to Dismiss R14 PageID#145; Opp'n to Mot. to Dismiss Ex. B R14-2 PageID#165.)

There is nothing legislative-like about the changes touted by the City in favor of mootness. They were made by two members of the executive branch, behind closed doors without public notice or discussion of any kind. And they can be changed on the same spur of the moment. As a result, the district court erred when it found that the City's actions were "legislative-like" and entitled to substantial solicitude.

b. The District Court Erred When It Found that Formal Approval by Two Members of the Mayor's Staff Was Legislative-Like Action.

Rather than focus on whether the City's proffered change to its media policies was "legislative-like," the district court relied upon a different portion of the *Schlissel* decision: "[i]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." (Order R20 PageID#220 (quoting *Schlissel*,

939 F.3d at 768).) Based on this quote, the district court focused its analysis on the fact that the decision "was not up to the discretion of one agency or one individual" but instead was made by "two different individuals working in two different offices." (*Id.* PageID#220.) As a result, the district court held that "Defendants' regulatory action is the result of implementing written policy and procedure," "is not ad hoc or discretionary," and was "effected through formal, legislative-like procedures." (*Id*. PageID#220.) These conclusions are not only factually flawed and incomplete, but also make a tenuous logical leap from formality to legislative-like that is unsupported by *Schlissel*.

"Formal" processes are not necessarily "legislative-like." To begin with, the district court's statement that the City's decision was not ad hoc or discretionary is at odds with the record in this case. The City expressly "reserves the right to suspend, revise or revoke any of its policies, procedures, and/or practices *at any time without notice*." which includes the Media Relations Policy. (Opp'n to Mot. to Dismiss R14 PageID#145 (emphasis added); Opp'n to Mot. to Dismiss Ex. B R14-2 PageID#165 (emphasis added).) In other words, the City maintains the discretion to change the policies whenever it wants for whatever reason it wants. This is the epitome of an ad hoc and discretionary action.

That same reservation by the City also makes clear something that was erroneously omitted from the district court's analysis: that the City's policy change

is easily reversible. According to the City, the only thing that is needed to change a policy is the approval of the Chief Legal Officer and Chief Human Resources Officer. (Mem. in Supp. of Mot. to Dismiss R11-1 PageID#110; Sink Decl. R11-2 PageID#116; Order R20 PageID#220.) And if those approvals are provided, the City's policies can be changed "at any time without notice." (Opp'n to Mot. to Dismiss R14 PageID#145; Opp'n to Mot. to Dismiss Ex. B R14-2 PageID#165.) In fact, this, by itself, weighs against a finding of mootness. *See Wall*, 741 F.3d at 497 (holding that "when a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot" (citations omitted)); *U.S. Dep't of Justice v. Fed. Labor Relations Auth.*, 737 F.3d 779, 783 (D.C. Cir. 2013) (discussing fact that Bureau of Prisons retained discretion on an issue as weighing against a finding of mootness); *Akers*, 352 F.3d at 1035 (noting that where a change "appears to be solely within the discretion of the [government defendant], there is no guarantee that [the government defendant] will not change back to its older, stricter Rule as soon as this action terminates"); *Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 529 (8th Cir. 1993) (explaining that reservation of the right to change back to a prior policy undercuts a mootness argument based on voluntary cessation).

Formality is not a substitute for legislative or legislative-like action in the voluntary cessation doctrine. Where, as here, a regulatory decision is made that is

ad hoc, discretionary, and easily reversible, "significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Schlissel*, 939 F.3d at 768. As such, the City is owed minimal, if any, solicitude in the voluntary cessation analysis. With little or no solicitude due it, the City cannot overcome the heavy presumption against mootness and the totality of the circumstances supports reversal of the district court's ruling.

III. The City Made No Showing that It Had Satisfied the Second Prong of the Voluntary Cessation Analysis.

The City made no showing at all on the second prong of the voluntary cessation analysis: that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631; *Schlissel*, 939 F.3d at 767 (quoting *Davis*, 440 U.S. at 631). The secretive change made by the City through its executive branch did not and could not irrevocably eradicate the negative impact of Thomas not receiving more than two years' worth of Media Advisory List emails that were received by nearly 150 of her peers. (Compl. R1 PageID#5.) Each email was important enough to the City to push out to journalists across the area. Simply changing the Media Relations Policy so that, moving forward, the information is available on social media does not eradicate the effect of the City's persistent refusal to add Thomas. As such, the district court should be reversed.

This Court has held that "[t]he protected right to publish the news would be of little value in the absence of sources from which to obtain it." *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975). As such, "[n]ews gathering . . . qualifies for First Amendment protections." *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972)). In the context of access to deportation hearings, this Court explained that "no subsequent measures can cure this loss [of access], because the information contained in the appeal or transcripts will be stale, and there is no assurance that they will completely detail the proceedings." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710-11 (6th Cir. 2002); *see also N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) ("[D]issemination delayed is dissemination denied."); *State ex rel. Miami Herald Publ'g Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976) ("News delayed is news denied. To be useful to the public, news events must be reported when they occur.").

The City's unconstitutional actions cut off Thomas from an important source of information that was provided to a large number, if not all, of her peers. Thomas has alleged that this was, among other things, done in retaliation for her coverage of the City. (Compl. R1 PageID#11.) And even the provision of those emails now would not eradicate the effects of the City's prior acts because any events for which they were sent to alert the media have long passed. The City has made no showing that the creation of the new Media Relations Policy and the

elimination of the Media Advisory List "completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631. As such, the City has not carried its burden of demonstrating the second prong of the voluntary cessation mootness analysis.

CONCLUSION

The district court misapplied this Court's precedent under the voluntary cessation doctrine and failed to take into account the totality of the circumstances, which weigh heavily against a finding of mootness. Because the City has not carried its heavy burden of showing that this case is moot, the Court should reverse the Order and remand this case to the district court for further proceedings on the merits of Thomas's claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 6 Cir. R. 32(a), the undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions in Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1), the Brief contains 10,645 words.

2. The Brief has been prepared in proportionally spaced typeface using Times New Roman, 14-point font.

3. The undersigned understands a material misrepresentation in completing this certificate, of circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b)(1) may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Plaintiff-Appellant Wendi C. Thomas was filed electronically on December 7, 2020, through the Court's Electronic Filing System, which will send notice of the filing by operation of the Court's Electronic Filing System to all parties indicated on the electronic filing receipt, at the addresses listed below. Parties may access this filing through the Court's electronic filing system.

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ADDENDUM

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