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

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

PLAINTIFFS' SURREPLY IN OPPOSITION TO CITY'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In its reply brief supporting its cross-motion for summary judgment ("City's Reply Br.") (ECF No. 152), the City of Indianapolis ("City") relies on two (2) City policies that were not previously filed or cited to the Court (ECF Nos. 153-1 & 153-2)—and thus that could not have been addressed by the plaintiffs in initially opposing the City's Cross-Motion for Summary Judgment (ECF No. 137). Under these circumstances, Rule 56.1(d) of this Court's local rules permits the plaintiffs to "file a surreply brief . . . within 7 days after movant serves the reply," although the surreply brief "must be limited to the new evidence." S.D. IND. L.R. 56-1(d). As the Seventh Circuit has held, in construing this rule, "leave of court is not required to file such a surreply." *Bell v. DaimlerChrysler Corp.*, 547 F.3d 796, 806 (7th Cir. 2008).[1] The City's reliance on its own belatedly submitted policies serves not to excuse it from municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), but rather to

[1] Although this Court's local rules have been amended since the Seventh Circuit's decision in *Bell*, Local Rule 56-1(d) has been altered only cosmetically.

underscore its discretionary choice to enforce the state laws that are challenged in this case. This short surreply brief addresses the import of these policies.

ISSUES CONCERNING THE FACTS

I. THE CITY'S STATEMENT OF ADDITIONAL FACTS NOT IN DISPUTE

In the City's reply brief, the City alleges additional material undisputed facts that were not alleged previously (City's Reply Br., at 2). The plaintiffs do not dispute any of the City's additional allegations.

II. THE PLAINTIFFS' STATEMENT OF ADDITIONAL FACTS NOT IN DISPUTE

The plaintiffs are not providing any additional evidentiary support in opposition to the City's Cross-Motion for Summary Judgment (or in support of their own Motion for Summary Judgment) that was not previously filed with the Court. However, the plaintiffs designate a more detailed account of the City's policies than did the City, and the following facts concerning these policies are thus material and undisputed:

General Order 1.11: IMPD General Order 1.11 ("General Order 1.11") (ECF No. 153-1) was last modified on February 3, 2011 (ECF No. 153-1, at 2). Under the heading "Arrest With and Without a Warrant," General Order 1.11 contains the following language in bold-type:

> **NOTE: The rules of arrest are perpetually under review by the courts. It is incumbent upon members of the department to maintain a contemporary understanding of the laws of arrest in order to fulfill the obligations and mission of the department.**

(ECF No. 153-1, at 2). Then, under the sub-heading "Warrantless Arrest," General Order 1.11 indicates that a law enforcement officer may arrest a person for any of the reasons enumerated in Indiana Code § 35-33-1-1(a), with the exception of the three (3) arrest provisions that are challenged in this case (Indiana Code § 35-33-1-1(a)(11)–(13)). (*Compare* ECF No. 153-1, at 2–3 *with* IND. CODE § 35-33-1-1(a)). In other words, General Order 1.11 permits officers employed

by the City to arrest individuals for all reasons allowed by Indiana law that were in effect at the time that General Order 1.11 was created.

General Order 7.5: IMPD General Order 7.5 ("General Order 7.5") (ECF No. 153-2) has an effective date of January 1, 2007 (ECF No. 153-2, at 2). Pursuant to General Order 7.5, officers employed by the City are given discretion to issue a ticket to persons who are alleged to have committed state infractions (ECF No. 153-2, at 3). At that time, alleged violators will be asked to sign the back of the ticket and the officer will establish the individual's identity—either through identification carried by the person or through a thumb print (*id.*).

ARGUMENT

I. INTRODUCTION

As indicated previously, the Seventh Circuit in *Bethesda Lutheran Homes & Services, Inc. v. Leean*, 154 F.3d 716 (7th Cir. 1998), held that a municipality may be held liable for the enforcement of state law when it is afforded discretion to enforce (or not enforce) that law (ECF No. 145, at 2–5). The City does not dispute this fundamental point, instead highlighting the principle—undisputed by the plaintiffs—that municipalities may only be held liable for their "deliberate choices" (City's Reply Br., at 1–3). The City's argument that it may not be held liable under *Bethesda Lutheran*, however, is without merit for two (2) reasons. *First*, it erroneously confuses the inquiry under *Monell*'s "practice or policy" requirement with the ripeness inquiry previously rejected by this Court. This issue was previously addressed by the plaintiffs and will not be reiterated herein (*see* ECF No. 145, at 5–7). *And second*, the City's own policies evince the discretionary nature of the state laws that are challenged in this case, and thus the City's deliberate choice to enforce these laws.

II. THE IMPORT OF THE CITY'S POLICIES

As indicated above, the City attached to its reply brief two (2) general orders of the Indianapolis Metropolitan Police Department. These orders doubtless constitute municipal policy for which the City may be held liable, *see, e.g.*, *Monell*, 436 U.S. at 690 (municipal liability may attach when "the action that is alleged to be unconstitutional implements or executes a policy statement"), and the City does not argue to the contrary. Rather, the City argues that these policies "unambiguously prohibit any arrest under the challenged portions of Senate Enrolled Act 590 ['SEA 590']." City's Reply Br., at 4. This is not so with respect to either policy.

A. General Order 1.11

The City argues that General Order 1.11 is explicit in "enumerating when its officers may arrest individuals, and the challenged provisions of Indiana's Immigration Act are not among the enumerated reasons." *Id.* What the City does not mention, however, is that this policy was last modified in February of 2011—before SEA 590 was passed or took effect—and the policy permits officers employed by the City to arrest a person for any reason provided by the then-current version of Indiana Code § 35-33-1-1(a). This, of course, is owing entirely to the fact that this Court enjoined the enforcement of Indiana Code § 35-33-1-1(a)(11)–(13)—the statutory provisions challenged in this case—before they took effect, and the City thus had no opportunity to update its policies to account for these new provisions (and, indeed, was prohibited from doing so by this Court's preliminary injunction). Moreover, the policy itself is explicit that it is *not* the last word on when an officer employed by the City may make arrests: it encourages "members of the department [IMPD] to maintain a contemporary understanding of the laws of arrest in order to fulfill the obligations and mission of the department" (ECF No. 153-1, at 2).

The City nonetheless asserts that this policy "unambiguously prohibit[s] any arrest under the challenged portions of Senate Enrolled Act 590." City Reply Br., at 4. This is simply not so, for the policy makes no mention whatsoever of these provisions (it having been drafted prior to their enactment). As the plaintiffs have previously noted, were the City to come forward with and expressly disavow any intention to enforce the challenged provisions, take all reasonable steps necessary to ensure that its officers and employees abide by this dictate, and provide assurances that the City will not revert to enforcing the challenged provisions following this litigation (lest it be susceptible to the "voluntary cessation" doctrine), the City could be dismissed from this case (ECF No. 145, at 7). This is the conclusion that this Court reached in issuing its preliminary injunction, *see Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 917 (S.D. Ind. 2011), and the City has presented no reason to revisit that holding. The City may be held liable unless and until it "indicate[s] affirmatively that it will *not* enforce the statute." *Id.* This it has not done.

B. General Order 7.5

Next, the City relies on General Order 7.5 to argue that it "has an explicit policy stating its officers may not arrest for infractions." City's Reply Br., at 4. This is true, but it is also irrelevant. The plaintiffs have not raised a Fourth Amendment claim with respect to Indiana Code § 34-28-8.2-1, *et seq.*—which does not create a criminal penalty but rather creates a civil infraction—but have instead argued that the prohibition on the use of consular identification cards is preempted by federal law and international treaties and is irrational in violation of the Fourteenth Amendment. Pursuant to City policy, in enforcing this statute police officers will issue tickets instead of making arrests, but the fact that enforcement looks different than it does for a criminal statute does not relieve the City of liability. In their complaint, the plaintiffs asked

this Court to simply "enjoin[] the defendants from enforcing the challenged provisions of SEA 590" (ECF No. 1, at 18). The City may be ordered to refrain from issuing tickets to persons for allegedly violating the consular identification provisions of SEA 590 even if it does not formally arrest persons who commit a civil infraction.

Indeed, as indicated above, General Order 7.5 itself affords officers employed by the City discretion to issue a ticket to persons who are alleged to have committed state infractions (ECF No. 153-2, at 3). Rather than relieving the City from liability under *Monell*, this policy underscores the discretionary nature of enforcement of Indiana law. As noted previously, this more than suffices to render the City liable for its enforcement of Indiana Code § 34-28-8.2-1, *et seq.*

III. GENERALIZED ENFORCEMENT OF STATE LAWS

Finally, based on its belatedly submitted policies, the City argues—relying on the Second Circuit's decision in *Vives v. City of New York*, 524 F.3d 346 (2d Cir. 2008)—that a generalized municipal directive to enforce all state laws does not constitute a policy for which the City may be held liable. *See* City's Reply Br., at 4. The *Vives* court, however, focused on the precise issue highlighted by the Seventh Circuit and the plaintiffs as controlling: whether municipal officials have discretion to enforce—or not enforce—state law. *See* 524 F.3d at 354–55 (describing the controlling issue as "whether the Police Department's policy makers can instruct its officers not to enforce a given section—or portion thereof—of the penal law"). In the present case, there is no doubt that the City has this discretion (*see* ECF No. 145, at 5–7). As such, it may be held liable.[2]

[2] The City argues that the cases previously cited by the plaintiffs "analyzing municipal liability for discretionary state laws look[] at whether the municipality made the conscious or deliberate choice to enforce an unconstitutional statute." City's Reply Br., at 3. Of course, the

CONCLUSION

For the foregoing reasons, as well as those stated previously, the City's Cross-Motion for Summary Judgment must be denied.

/s/ Gavin M. Rose
Gavin M. Rose
No. 26565-53
Kenneth J. Falk
No. 6777-49
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059
fax: 317/635-4105
kfalk@aclu-in.org
grose@aclu-in.org

Angela D. Adams
No. 24959-49
LEWIS & KAPPES, P.C.
One America Tower, Suite 2500
Indianapolis, IN 46282-0003

Lee Gelernt, *Pro Hac Vice*
Omar C. Jadwat, *Pro Hac Vice*
Andre I. Segura, *Pro Hac Vice*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, New York 10004

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reason this is so is that—with the exception of *Vives*, where the plaintiff sought both damages and prospective relief, *see* 524 F.3d at 349—each of these cases was exclusively a damages case wherein the previous enforcement of the allegedly unconstitutional statutes was necessary for the plaintiff to have standing. *See, e.g.*, *Garner v. Memphis Police Dep't*, 8 F.3d 358, 360 (6th Cir. 1993) (wrongful death action under 42 U.S.C. § 1983); *Lederman v. United States*, No. 99-3359, 2007 WL 1114137, at *1 (D.D.C. Apr. 13, 2007) (damages action under 42 U.S.C. § 1983 based on allegedly unconstitutional prosecution).

Cecillia D. Wang, *Pro Hac Vice*
Katherine Desormeau, *Pro Hac Vice*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, California 94111

Linton Joaquin, *Pro Hac Vice*
Karen C. Tumlin, *Pro Hac Vice*
Shiu-Ming Cheer, *Pro Hac Vice*
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, California 90010

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2012, a copy of the foregoing was filed electronically with the Clerk of this Court. The following parties will be served by operation of the Court's electronic system:

Betsy M. Isenberg
Deputy Attorney General
betsy.isenberg@atg.in.gov

Wade Dunlap Fulford
Deputy Attorney General
wade.fulford@atg.in.gov

Robert Howard Schafstall
CUTSINGER & SHAFSTALL
robhschafstall@gmail.com

Lynnette Gray
lynng@embarqmail.com

Patricia Erdmann
Deputy Attorney General
patricia.erdmann@atg.in.gov

Adam Clay
Deputy Attorney General
Adam.Clay@atg.in.gov

Justin F. Roebel
Assistant Corporation Counsel
jroebel@indy.gov

Alexander Will
Assistant Corporation Counsel
alex.will@indy.gov

/s/ Gavin M. Rose
Gavin M. Rose
Attorney at Law