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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OGNIBENE, *et al.*,

***Plaintiffs*,**

-against-

C.A. No. 08 CV 01335 (LTS) (TDK)

PARKES, *et al.*,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO PARTIALLY VACATE THE STAY OF PROCEEDINGS

Introduction

At issue before this Court is a simple question: should the Court delay litigation that could be decided as a matter of law in the Plaintiffs' favor simply because one of the Defendants, the Campaign Finance Board, is evaluating the law the Plaintiffs challenged and might (or might not), someday, recommend that the City Council change it to make it constitutional (which the Council then might, or might not, at some future point, do)?

The Plaintiffs have moved this Court to partially vacate the stay of proceedings so that they might seek summary judgment as to Counts XI, XII, XIII, and XIV of their Amended Complaint. (Doc. 115.) The Plaintiffs noted in their motion their belief that the Supreme Court's recent decision in *Arizona Free Enterprise Club' Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011), resolves all issues in these counts in their favor. (Doc. 115 ¶ 2.) The Defendant City of New York (the "City") opposes the Plaintiffs' motion. (Doc. 118.) In support of its opposition, the City asserts that its Campaign Finance Board is "currently reviewing" the law the Plaintiffs challenged and will "soon" submit proposed changes to the City Council "that will, in all likelihood," alter or moot the Plaintiffs' challenge. (*Id*. ¶ 4.) As explained below, the Campaign Finance Board's intended, possible action does not moot the Plaintiffs' challenge, nor provide grounds to deny the Plaintiffs' motion. This Court should therefore grant the Plaintiffs' motion to partially vacate the stay of the proceedings so that their action may proceed.

Argument

It is important to note at the outset two facts. First, the Campaign Finance Board does not have authority to make law for the City of New York. Only the City Council, which is the legislative body for the City of New York, has that authority. NEW YORK CITY CHARTER

("CHARTER"), Ch. 2 §§ 21, 28. The Campaign Finance Board, meanwhile, has no legislative authority. Rather, it only has authority to ensure compliance with the campaign finance laws enacted by the City Council, and issue advisory opinions concerning how the law applies in given situations. NEW YORK ADMIN. CODE ("CODE"), Ch. 7 § 3-708(5), (7). It also has the power to promulgate rules and regulations for enforcing the laws enacted by the City Council. *Id*. § 3-708(8). And it may take all other actions that are "necessary and proper" to carry out the campaign finance law enacted by the City Council. *Id*., § 3-708(11). But it may not make law—only the City Council may do that.

Second, the authorized lawmaking body for the City of New York—i.e., the City Council—does not currently have legislation pending that would, if passed, make the City's law constitutional. No such legislation has been introduced. No study commissions have been established, nor have any public hearings been held. In fact, there is no evidence that the City Council is even *considering* such legislation. Rather, the evidence offered by the City is that the Campaign Finance Board, which has no lawmaking ability, is reviewing the challenged provisions, and may make recommendations to the City Council as to changes the Board believes should be made. (Doc. 118 ¶ 4; 118-1 ¶ 3.) There is no evidence, however, that the City Council will ever enact the legislation that the Board may (or may not) someday propose.

I. The Possibility That the City Might Someday Change Its Law Is Not Grounds For Postponing the Current Litigation.

A. The Supreme Court Has Ruled That Courts Should Not Postpone Deciding Cases Because Government Considers Changing Its Law.

In the Supreme Court's recent *Humberto Leal Garcia, aka Humberto Leal v. Texas*, 131 S.Ct. 2866 (2011) ("*Humberto*"), the Court ruled that courts should not postpone matters before

them merely because Government is considering changing its law. *Id*. at 2867. Rather, the Court explained that the task of courts is to "rule on what the law is, not what it might eventually be." *Id*.

The issue in *Humberto* was literally one of life and death. The petitioner, Leal, was a Mexican citizen convicted of murder and sentenced to death by a Texas court. He asked the Supreme Court to stay his execution, arguing that his conviction was illegal under "The Vienna Convention on Consular Relations," a treaty to which the United States of America is subject, because he had not been advised of his right to consular assistance. *Id*. at 2867. Leal relied on a decision from the International Court of Justice ("ICJ"), *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I.C.J. 12 (Judgment of Mar. 31). In that case, the ICJ ruled that the United States had violated the Vienna Convention by failing to notify another defendant, Avena, of his right to consular assistance. *Humberto*, 131 S.Ct. at 2867. But the Supreme Court ruled that Leal's argument was foreclosed by a 2008 Supreme Court decision known as *Medellin* that held that "neither the *Avena* decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law." *Id*. (*citing Medellín v. Texas*, 552 U.S. 491 (2008)).

Probably anticipating that result, both Leal and the United States asked the Supreme Court to stay the execution while Congress considered whether to enact legislation that would implement the *Avena* decision, thereby creating "directly enforceable federal law." *Humberto*, 131 S.Ct. at 2867. Leal made his request on due process grounds, arguing that his due process rights would be violated if he were executed while legislation implementing the *Avena* decision was pending. *Id*. But the Supreme Court found his argument "meritless," explaining that "[t]he

Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment." *Id*.

The United States made its request to stay the execution on the grounds that Senator Leahy, with the support of the Executive Branch, had introduced legislation implementing the *Avena* decision. *Id*. Consequently, the United States argued, the Court should stay Leal's execution until such time that it could exercise jurisdiction to review Leal's challenge to his conviction under Sen. Leahy's yet-to-be-enacted legislation. *Id*. The Court forcefully responded forcefully: "We reject this suggestion[,]" explaining that it was "doubtful that it is ever appropriate to stay a lower court judgment in light of unenacted legislation." *Id*. Regardless, the Court ruled, courts have a duty to decide controversies based on the law as it currently is, not as it someday might be. *Id*.

Humberto thus stands for the proposition that courts are not to be swayed by hypothetical, unenacted legislation. Nor should they delay proceedings as a result of such hypothetical legislation. Rather, they should make their rulings based on what the law currently is.

In *Humberto*, legislation had actually been introduced in the Senate that would amend the law, and yet even that was not a sufficient reason to delay proceedings. In the case at bar, however, no legislation has not been introduced. (Doc. 118 ¶ 4; 118-1 ¶ 3.) If the "hypothetical legislation" was not enough to stay proceedings in *Humberto*, *id*. at 2868, legislation that is even more "hypothetical" (in that it has not even been introduced) should not be enough to stay proceedings in this Court, either. The Federal Rules of Civil Procedure provide that this Court should allow the Plaintiffs to pursue summary judgment as to some, but not all, of their claims if the Court determines that there is "no just reason for delay." Fed. R. Civ. P. 54(b). The fact that

the City *might, someday*, get around to introducing legislation that would cure its unconstitutional law does not create a "just reason for delay." This Court should therefore grant the Plaintiffs' motion to partially vacate the stay, thereby allowing the Plaintiffs to pursue summary judgment as to Counts XI, XII, XIII, and XIV of their Amended Complaint.

B. The Supreme Court Has Ruled That Challenges to Laws Are Not Necessarily Mooted When Government Changes the Law.

Interestingly, the Plaintiffs' challenge would not be moot even if the City had already amended its law to cure it of its constitutional defects. The Supreme Court has ruled that Government's voluntary cessation of unconstitutional practices does not moot challenges to those practices. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In that case, the district court below held the defendant city's law containing the phrase, "connections with criminal elements," void for vagueness. *Id*. at 287-88. The Fifth Circuit Court of Appeals affirmed. *Id*. Unbeknownst to the Fifth Circuit, however, while the appeal was before it the law was amended to remove the phrase "connections with criminal elements." *Id*. at 288. The Supreme Court recognized that, had the Fifth Circuit been made aware of the change to the law, it "[a]rguably" might have regarded the challenge as moot. *Id*. Regardless, the Supreme Court stated that the Fifth Circuit would have been "under no duty to do so." *Id*. Rather, "[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." *Id*. at 289. This is because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id*.[1] Therefore, the Court declared that

[1] The Court noted that the defendant city had announced its intention to reenact similar language to that which it had voluntarily changed. *City of Mesquite*, 455 U.S. at 289 n.11. But

the city's voluntary amendment of its law had not mooted the challenge of the plaintiff below, and the Court "must confront the merits of the vagueness holding." *Id*.

The same is true in the case at bar. While the Plaintiffs believe that the Supreme Court's *Bennett* decision renders the City's rescue funds provisions unconstitutional, the City's law is not an exact carbon copy of Arizona's law that was declared unconstitutional in *Bennett*. It should be noted, too, that the City has asserted its belief that its law differs "significantly" from the law declared unconstitutional in *Bennett*.[2] Regardless of whether that is true, there is not currently a bar to the City continuing to enforce its law. And even if the City chooses to amend its law to cure what the Plaintiffs believe are the constitutional defects, there is nothing to prevent the City from someday deciding to reenact the current version of its law. It takes a court's declaration to prevent that. Without a declaration that the City's law is unconstitutional, the City remains free to enforce its law now, and reenact it in the future even if it does (someday) amend it.

Even if the City had already amended its law, under *City of Mesquite* this Court should review the law anyway. But the City has not amended its law. It has not even introduced legislation to amend its law. Because there is no "just reason for delay" for this litigation, *see* Fed. R. Civ. P. 54(b), this Court should therefore grant the Plaintiffs' motion.

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that fact was not dispositive to the Court's holding that the city's voluntary amendment of its law had not rendered the plaintiff's challenge moot. Rather, the fact that, absent a court judgment, the city had the power to reenact its offensive legislation was the dispositive fact. *Id*. at 289.

[2] STATEMENT OF CFB EXECUTIVE DIRECTOR AMY LOPREST ON THE U.S. SUPREME COURT RULING IN MCCOMISH V. BENNETT (June 27, 2011), *available at* http://www.nyccfb.info/press/news/press_releases/2011-06-27-2.htm?sm=press_ (last visited August 11, 2011) (emphasis added).

II. The City's Opinion of the Urgency of This Litigation Is Immaterial.

In its opposition to the Plaintiffs' motion, the City asserts that this litigation is not "urgent." (Doc. 118-1 ¶ 4.) The City also offers its opinion that the rescue funds, with its challenged triggering provision, is "unlikely to be invoked in advance of the 2013 elections[.]" (*Id*.) But whether the City believes the litigation is urgent is immaterial. Both the Second Circuit Court of Appeals and the Supreme Court have declared that litigation is *always* urgent when one's First Amendment rights are infringed, because irreparable harm occurs. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991). *See also Bronx Household of Faith v. Board of Educ. of City of New York*, 331 F.3d 342, 349 (2d Cir. 2003) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." Thus, the City's opinion that this litigation is not urgent should be of no import to this Court.

Additionally, the City offers its opinion that it is "unlikely" that the challenged triggering provision of its rescue funds will be invoked prior to the 2013 election. "Unlikely," though, does not mean impossible. Nor does it mean that it will not happen. The City has not assured this Court that the triggering provision cannot infringe any candidate's First Amendment rights in the current and future election cycles. Thus, the City's assessment that it is "unlikely" the triggering provision will be invoked should likewise be of no import to this Court.

Rather, under the Federal Rules of Civil Procedure, what matters is whether there is any just reason to delay resolving the issues before the Court. *See* Fed. R. Civ. P. 54(b). The Plaintiffs have asserted that their First Amendment rights are violated by the triggering provision. They have also moved this Court to partially vacate its stay so that they might move for summary

judgment on issues that can be decided now as a matter of law. The Federal Rules of Civil Procedure counsel the Court to grant the Plaintiffs' motion unless there is "just reason to delay." Because there is not, this Court should grant the Plaintiffs' motion to partially vacate the stay.

Conclusion

As explained *supra*, this Court should not delay litigation that can be decided as a matter of law in the Plaintiffs' favor simply because one of the Defendants, the Campaign Finance Board, is evaluating the law the Plaintiffs challenged and might (or might not), someday, recommend that the City Council change it to make it constitutional (which the Council then might, or might not, at some future point, do). Rather, this Court should grant the Plaintiffs' motion to lift the stay of the proceedings as to Counts XI, XII, XIII, and XIV of their Amended Complaint.

Dated: August 12, 2011

Respectfully Submitted,

/s/ Joe La Rue

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