IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MATTHEW MONFORTON,

Plaintiff,

vs.

JONATHAN MOTL, in his official capacity as Commissioner of Political Practices, TIM FOX, in his official capacity as Attorney General of the State of Montana, LEO GALLAGHER in his official capacity as Lewis and Clark County Attorney, and MARTY LAMBERT, in his official capacity as Gallatin County Attorney,

Defendants.

CV 14–2–H–DLC

ORDER

Pending before the Court is Plaintiff Matthew Monforton's motion for preliminary injunction seeking to enjoin enforcement of Montana Code Annotated § 13-35-225(3)(a). Defendants Jonathan Motl, Tim Fox, Leo Gallagher, and Marty Lambert concede that § 13-35-225(3)(a) is unconstitutional and should be permanently enjoined. Despite this concession, Plaintiff maintains that his motion is not moot, and asks the Court to issue a permanent injunction to prevent future enforcement of the statute against him and to clarify that the statute is unconstitutionally vague. Plaintiff's motion will be granted and a permanent

injunction will be issued based on the parties' agreement that the statute is unconstitutional.

I. Background

Plaintiff is an attorney who intends to run in the GOP primary race in House District 69 in Gallatin County, Montana. As a part of his campaign, he plans to run ads discussing his opposing candidate Representative Ted Washburn's voting record on the issue of the Affordable Care Act. Plaintiff plans to mail letters to voters in House District 69 and has rented a billboard on I-90 west of Belgrade where his advertisement will be posted beginning on February 26, 2014. Although Plaintiff asserts that Rep. Washburn's voting history regarding the Affordable Care Act has been conflicting, he does not intend to describe all of the alleged flip-flopping in his advertisements because "doing so would improperly camouflage Rep. Washburn's overall support for Obamacare." (Doc. 5 at 10.)

Montana Code Annotated § 13-35-225(3)(a) provides:

> Printed election material described in subsection (1) that includes information about another candidate's voting record must include the following:
> (i) a reference to the particular vote or votes upon which the information is based;
> (ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if the contrasting votes were made in any of the previous 6 years; and
> (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

Plaintiff argues that his proposed political advertising will violate § 13-35-225(3)(a) because he will not publish and explain all of Rep. Washburn's voting history. He says it is nearly impossible to comply with the statute, in any event, because he does not know how broadly to interpret the "issue" of the Affordable Care Act. If enforced, his statutory violation could lead to penalties including forfeiture of the political nomination should he win the primary. Mont. Code Ann. §§ 13-37-128, 13-35-106. Plaintiff therefore moves to enjoin Defendants' enforcement of § 13-35-225(3)(a) against him and asks the Court to declare the statute unconstitutional. Defendants concur that § 13-35-225(3)(a) is unconstitutional, and offered to enter into a stipulation with Plaintiff ensuring that it would not be enforced against him for his planned political speech. Defendants also agree to entry of a permanent injunction and declaratory judgment against § 13-35-225(3)(a). Given Defendants' position on the preliminary injunction motion, they contend that the motion is now moot. Plaintiff disagrees, arguing that a mere promise by the government not to enforce a statute is no assurance at all.

II. Mootness

Defendants argue that Plaintiff's motion for preliminary injunction is moot because they concede that § 13-35-225(3)(a) is unconstitutionally vague. Defendants point to *Lair v. Murry* which held that a prior version of § 13-35-

225(3)(a) was unconstitutionally vague based on the disclosure requirements for votes "closely related in time" and on "the same issue." 871 F.Supp.2d 1058 (D. Mont. 2012). In *Lair*, the defendants conceded that both of these phrases were unconstitutionally vague, and United States District Judge Charles Lovell entered a permanent injunction against enforcement of that provision of the statute. Because the 2013 Montana Legislature failed to amend the language "the same issue" within the current statute, Defendants recognize that the statute is still constitutionally deficient and cannot be enforced.

Plaintiff does not believe the motion is moot because no injunction has yet been issued; a live issue remains before the Court; and without more than promises from Defendants, nothing precludes them (or their successors) from changing their minds and enforcing the statute.

"[T]he standard for proving that a case has been mooted by a defendant's voluntary conduct is stringent: a case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000)(internal quotations omitted). The party asserting mootness bears the heavy burden of convincing the court that the challenged conduct cannot reasonably be expected to recur. *Id.* This burden of proof remains even if the party alleging mootness is a government entity that has changed its allegedly illegal policy. *Bell v. City of*

Boise, 709 F.3d 890, 899 (9th Cir. 2013). While legislative repeal or expiration of a challenged statute renders a case moot, repeal or amendment of an ordinance by a local government does not. *Id.* For example, in *Bell*, a city police department's issuance of a special order clarifying its policy not to enforce a city ordinance affecting homeless persons at night when shelter space was limited did not render the case moot.

Although Defendants' assertions that § 13-35-225(3)(a) is unconstitutional and they will not enforce it are unequivocal, that does not make it "absolutely clear" that Defendants' successors will agree with their analysis or that the statute will never be enforced. *See Northwest Forest Resource Council v. Pilchuck Audubon Soc'y*, 97 F.3d 1161, 1168 (4th Cir. 1999)(the State's promise that an organization will not face criminal penalties for its political speech is not sufficient to prevent First Amendment violation). Plaintiff intends to run as a candidate in future legislative races and publish similar advertisements in future elections. (Doc. 1 at 9.) The Defendants' response brief stating its intention not to enforce the statute does not permanently enjoin use of the statute, nor does it repeal or amend the unconstitutional phrase "on the same issue." This Court's Order is needed to give effect to Defendants' promises. Thus, Plaintiff's motion is not moot at this point. However, this dispute is largely meaningless because the parties agree that a permanent injunction should be entered prohibiting

enforcement of § 13-35-225(3)(a) because it is unconstitutionally vague.

III. Permanent Injunction

A plaintiff seeking a permanent injunction must demonstrate: (1) actual success on the merits; (2) irreparable injury; (3) remedies available at law are inadequate; (4) the balance of hardships justify a remedy in equity; and (5) a permanent injunction would benefit the public interest. *Independent Training and Apprenticeship Program v. Cal. Dept. of Industrial Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Id.* (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)).

Plaintiff has achieved actual success on the merits here because Defendants concede that the statute he challenged is unconstitutional and should not be enforced. He has established that he will suffer irreparable harm absent an injunction because he would be forced to either speak and suffer the consequences or refrain from his planned political advertising. "The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011). The remedies available under the law are inadequate, and the balance of hardships presumptively tips in favor of plaintiffs who have established likely merits success

in First Amendment cases. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002). Plaintiff has received his requested remedy here so the balance of hardships clearly favors him. Finally, the public interest favors a permanent injunction because the challenged statute is unconstitutional. *Id.* at 974. Plaintiff's motion for preliminary injunction will therefore be granted and a permanent injunction and declaratory judgment will be entered in favor of Plaintiff.

IT IS ORDERED that Plaintiff's motion for preliminary injunction (Doc. 4) is GRANTED. Montana Code Annotated § 13-35-225(3)(a)(ii) is unconstitutionally vague and Defendants are PERMANENTLY ENJOINED from enforcing this provision of the statute.

IT IS FURTHER ORDERED that this Order and permanent injunction is the final judgment as to the issues addressed herein. Judgment shall be entered in favor of the Plaintiff and this case shall be closed pursuant to Federal Rule of Civil Procedure 58. Plaintiff may file his motion for attorney's fees and costs pursuant to Rule 54(d)(2).

DATED this 11th day of February, 2014.

Dana L. Christensen, Chief Judge
United States District Court