WILMERHALE

December 4, 2019

VIA ECF

Alan E. Schoenfeld

+1 212 937 7294 (t)
+1 212 230 8888 (f)
alan.schoenfeld@wilmerhale.com

The Honorable Raymond J. Dearie
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Schwartz v. City of New York et al.*, No. 1:19-cv-00463

Dear Judge Dearie,

Pursuant to Section III.A of the Court's Individual Motion Practices, I write on behalf of the City of New York and New York City Department of Consumer Affairs[1] Commissioner Lorelei Salas (in her official capacity) ("Defendants") to request a pre-motion conference concerning Defendants' anticipated motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

This lawsuit seeks relief from a New York City ordinance ("Local Law 22") that the City Council has repealed. *See* ECF Nos. 34, 35. On November 4, 2019, the Court denied as moot Plaintiff's motion for a preliminary injunction against the enforcement of Local Law 22. For the reasons below, the Court now lacks subject-matter jurisdiction over this lawsuit and should dismiss the complaint in its entirety.[2]

I. Plaintiff's Claims for Declaratory and Injunctive Relief Are Moot

Plaintiff's equitable claims are all moot. He brought this lawsuit principally to obtain (1) a declaration that Local Law 22 violated his (and his patients') free speech and free exercise rights, both facially and as applied; and (2) preliminary and permanent injunctions prohibiting Defendants from enforcing Local Law 22. *See* ECF No. 1 (the "Complaint" or "Compl."), at 33-34 (Prayer for Relief ¶¶ A-C). But because Local Law 22 has been repealed through the legislative process, there is no ordinance left for the Court to declare unconstitutional—nor any threat of enforcement for the Court to enjoin. The Court thus lacks jurisdiction over the equitable claims and does not have the power to "rule on [Plaintiff's] entitlement to relief"

[1] The New York City Department of Consumer Affairs was recently renamed the Department of Consumer and Worker Protection.

[2] The Court may conclude that it lacks jurisdiction either on a party's motion or "on its own initiative." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) (citing Fed. R. Civ. P. 12(h)(3)); *see also United Republic Ins. Co., in Receivership v. Chase Manhattan Bank*, 315 F.3d 168, 170-71 (2d Cir. 2003) ("We have also urged counsel and district courts to treat subject matter jurisdiction as a threshold issue for resolution[.]").

simply because he "won't take 'yes' for an answer." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 678, 683 (2016) (Roberts, C.J., dissenting).

Federal subject-matter jurisdiction extends only to "actual, ongoing cases or controversies" brought by litigants who "have suffered, or [are] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990); *see also Raines v. Byrd*, 521 U.S. 811, 818 (1997) (stating that "[n]o principle is more fundamental to the judiciary's proper role in our system of government" than Article III's case-or-controversy limitation) (citation omitted). That "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71-72 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). The repeal of Local Law 22, the ordinance whose enforcement Plaintiff sought to enjoin, is an "intervening circumstance" that has deprived him of any extant "personal stake" in the Complaint's equitable claims—which must therefore be dismissed as moot. *Id.* at 72 (quoting *Lewis*, 494 U.S. at 478). Courts "routinely" find constitutional claims moot when a challenged law has been amended or repealed in a manner that obviates the requested equitable relief. *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61 (2d Cir. 1992); *see also Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972) (per curiam) (requests for declaration that Florida statute was unconstitutional as applied, and for injunction against statute's application, were "inappropriate" and moot after Florida Legislature's repeal of statute); *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 375-79 (2d Cir. 2004) (Sotomayor, J.) (affirming dismissal of First Amendment claims mooted by town's repeal of relevant ordinance).[3]

II. Plaintiff Lacks Standing to Pursue His Damages Claims

Plaintiff also makes a passing reference to "actual and nominal damages" in his Prayer for Relief. Compl. at 34 (Prayer for Relief ¶ D). That damages claim, an afterthought that is

[3] The "voluntary cessation" doctrine, which prevents a finding of mootness in certain circumstances, is inapplicable here. Nothing whatsoever in the record suggests that the Council might reinstate Local Law 22, or any substantially similar ordinance, regardless of the outcome of this lawsuit. *Compare City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982) (proceeding to merits of claims because city had announced intention to "reenact[] precisely the same provision if the District Court's judgment were vacated"), *with Lamar Advert.*, 356 F.3d at 375-77 (finding claims moot after repeal, in "deference [to] the legislative body" and in the absence of "evidence that the defendant intends to reinstate the challenged statute after the litigation is dismissed"), *and Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc) ("[L]egislative actions should not be treated the same as voluntary cessation of challenged acts by a private party. … [W]e should presume that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it. … [A] determination that such a reasonable expectation exists must be founded in the record, as it was in *City of Mesquite*, rather than on speculation alone.").

notably absent from the Complaint's substantive allegations,[4] should also be dismissed. At the time he filed the Complaint—the time when standing is measured, for damages purposes—Plaintiff lacked standing to pursue the damages claims because his "speculation about potential government action" to enforce Local Law 22 establishes only a "subjective chill" and does not suffice to confer standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013).

Local Law 22 was never enforced against Plaintiff. The Complaint alleges that some of Plaintiff's patients desired counseling that might have implicated Local Law 22 (¶ 76), that he wished to provide such counseling to those patients (¶ 99), that he feared becoming "the target of an enforcement action" and incurring fines if he did so (¶¶ 100-101), and that these fears chilled his speech (¶ 102). But at the time he filed the Complaint, Plaintiff simply feared that he "*m[ight] be*" an enforcement target. Compl. ¶ 100 (emphasis added). When attempting to establish *pre-enforcement* standing, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991) (alteration in original) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)); *see also, e.g.*, *Clapper*, 568 U.S. at 409 ("[W]e have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." (second alteration in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))). Plaintiff's allegations rely instead on "speculation" about potential enforcement actions during the roughly eighteen months Local Law 22 was in effect, *Clapper*, 568 U.S. at 420, which does not establish an "actual or imminent" injury-in-fact, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 564 (1992).

The Complaint also does not allege that Local Law 22 was *ever* enforced against anyone. That silence undercuts any argument that there was a "substantial risk" that Plaintiff would be the subject of an enforcement action. *Compare Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (finding threat of future enforcement "substantial," largely because of "history of past enforcement"), *and Holder v. Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (similar), *with, e.g.*, *Clapper*, 568 U.S. at 420 (finding threat of future enforcement too speculative, in absence of evidence that government had ever enforced).

Respectfully submitted,

/s/ Alan E. Schoenfeld
Alan E. Schoenfeld

[4] *See* Compl. ¶ 14 ("Dr. Schwartz brings this action seeking a declaration that [Local Law 22] is unconstitutional, and injunctive relief against its enforcement."); *id.* ¶ 17 (mentioning declaratory relief, injunctive relief, costs, and attorneys' fees—but not damages); *see also id.* ¶¶ 116, 132, 144, 156, 162 (requesting "declaratory and injunctive relief" only, on each of the Complaint's five counts).