No. 17-___

IN THE

Supreme Court of the United States

MELISSA DAVENPORT AND MARSHALL G. HENRY,

Petitioners,

v.

CITY OF SANDY SPRINGS, GEORGIA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the mootness of claims for prospective relief renders federal courts powerless to decide a claim for nominal damages.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-intervenors below) are Melissa Davenport and Marshall G. Henry. Respondent is the City of Sandy Springs, Georgia.

Flanigan's Enterprises, Inc. of Georgia d/b/a Mardi Gras; 6420 Roswell Rd., Inc. d/b/a Flashers; and Fantastic Visuals, LLC d/b/a Inserection were also plaintiffs in the district court and parties on appeal in the Eleventh Circuit. They are not petitioners here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Melissa Davenport and Marshall G. Henry respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1a, is reported at 868 F.3d 1248.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its decision on August 23, 2017. On November 9, Justice Thomas extended until December 15, 2017, the time for filing a petition for certiorari. *See* No. 17A501. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

INTRODUCTION

It is blackletter law that a federal court has power to decide a compensatory damages claim even if a plaintiff's claim for prospective relief has become moot in the interim. It is likewise established that deprivations of constitutional rights are actionable for nominal damages under Section 1983, regardless whether the violation caused the plaintiff any compensable harm. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978). In the four decades since *Carey*, federal courts of appeals have uniformly concluded that the same jurisdictional principle that applies to compensatory damages also applies to nominal damages: The absence of a live claim for prospective relief is irrelevant to courts' power to decide a claim for nominal damages.

In the decision below, a sharply divided en banc Eleventh Circuit rejected that consensus. The court held that federal courts lack power to decide a plaintiff's nominal damages claim when her claims for prospective relief become moot, unless the plaintiff also sought compensatory damages and that claim remains "live."

That decision warrants review. The division it created among the courts of appeals can only be settled by this Court. And there are compelling reasons for doing so now: The question involves bedrock principles

of federal jurisdiction, and, however resolved, affects the behavior of countless individuals and governments.

The reasons the Eleventh Circuit gave for jettisoning the prevailing rule do not withstand scrutiny. The majority posited that nominal damages are analogous to declaratory judgments, which become moot in tandem with injunctive relief. But nominal damages and declaratory judgments are fundamentally different forms of relief. Unlike declaratory judgments, which announce the relative rights and responsibilities of the parties going forward, nominal damages are retrospective: They address past violations of individual rights.

Nor do the principles of judicial restraint invoked by the Eleventh Circuit support the new rule. On the contrary, its rule effectively requires plaintiffs who have suffered deprivations of constitutional rights to pursue compensatory damages despite having good reasons to forego them. When plaintiffs bring a claim for compensatory damages, courts will end up deciding the same constitutional questions they would otherwise decide when resolving claims for nominal damages.

By contrast, only the prevailing rule is faithful to this Court's precedent and the historic practice of common law courts. And only that rule respects the right of individual litigants to choose the relief they wish to pursue. This Court should grant certiorari, reaffirm the longstanding rule, and reject the Eleventh Circuit's unwarranted departure.

STATEMENT OF THE CASE

1. In 2009, the City of Sandy Springs, Georgia amended a number of provisions in its obscenity ordinance. Pet. App. 69a. The amendment at issue here made it a crime when a person "sells, rents, or leases" "[a]ny device designed or marketed as useful primarily for the stimulation of human genital organs . . . ." Sandy Springs, Ga., Code § 38-120(a)(1), (c) (2009) (amended 2017).[1]

2. A number of adult-oriented businesses soon filed suit in federal district court challenging several of the new provisions, including the sexual device ban, as unconstitutional. Pet. App. 66a, 70a. Petitioners Melissa Davenport and Marshall G. Henry were granted leave to intervene in the case.[2] *Id.* 67a.

Petitioner Davenport and her husband Mark had been married for twenty-four years at the time the complaint was filed. Intervenors' Compl. ¶ 5. Several years after they married, Mrs. Davenport was diagnosed with multiple sclerosis. *Id.* Because of her illness, the couple's sexual intimacy was significantly impaired. *Id.* ¶ 6. Mrs. Davenport found that using the devices enabled them to regain intimacy—"saving [their] marriage." *Id.* ¶ 8. In addition to purchasing devices for personal, marital use, Mrs. Davenport sought to help others living with multiple sclerosis, in

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[1] The law also included a provision making it "an affirmative defense" that a device was sold "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." Sandy Springs, Ga., Code § 38-120(d) (2009).

[2] The original challengers, including Flanigan's Enterprises, Inc., whose name was listed first in the appellate caption, remained parties below but are not petitioners here.

Sandy Springs and elsewhere, by selling them the devices. *Id.* ¶¶ 9-10. Petitioner Henry, an artist, sought to use the prohibited devices both for his private sexual activity and to create works of art incorporating them, which he sells commercially. *Id.* ¶¶ 11-13.

Petitioners brought claims under Section 1983 challenging the device ban as, among other things, an unlawful deprivation of their rights under the Due Process Clause. Intervenors' Compl. ¶¶ 1, 20-41; *id.* at 14-15 ("Prayer for Relief"). The petitioners' complaint alleged that, at the time of filing, they were currently suffering harm, and would continue to suffer an injury until the ban was invalidated—namely, that they were "unable to purchase and/or sell sexual devices in Sandy Springs or to use them for intimate sexual activity, and in Henry's case, for his art." *Id.* ¶ 14. The complaint explicitly sought nominal damages on the Section 1983 claim. *Id.* at 14-15 ("Prayer for Relief"). Petitioners elected, however, not to seek compensatory damages from the City. *Id.*

3. In 2014, the district court granted the City's motion for judgment on the pleadings. Pet. App. 100a. In denying plaintiffs' due process claims, the court relied heavily on the Eleventh Circuit's decision in *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004), which had upheld a statute prohibiting commercial distribution of sexual devices after applying rational basis review because that statute served the legitimate purpose of promoting "public morality." Pet. App. 88a-90a.

The district court rejected plaintiffs' contention that *Williams* had been undermined by this Court's subsequent decision in *United States v. Windsor*, 133

S. Ct. 2675 (2013). "Even if . . . *Windsor* requires reexamination of Eleventh Circuit precedent," the district court reasoned, "that precedent still remains binding on this Court until it is overruled." Pet. App. 88a.

4. On appeal, an Eleventh Circuit panel concluded that it, too, was "constrained by [its] prior precedent" in *Williams*, even though the panel was "convinced it is wrong." Pet. App. 60a (internal quotation marks omitted). The panel explained that it read *Windsor* as "cast[ing] serious doubt" on *Williams* and "encourage[d]" petitioners to seek rehearing en banc. *Id.* 59a-60a.

5. Petitioners did so. The Eleventh Circuit granted rehearing en banc on March 14, 2017. Pet. App. 5a.

One week after the order granting en banc review, the Sandy Springs City Council repealed the device ban, and the City immediately asked the court of appeals to dismiss the case as moot. Pet. App. 5a. In response, the court decided it would consider jurisdiction in conjunction with the merits. *See* Mem. to Counsel or Parties, May 11, 2017. In its briefing and at the en banc oral argument, the City continued to assert that the now-repealed ban was within its lawful power to enact and enforce. Pet. App. 22a.

After oral argument, the City Council passed a resolution ostensibly explaining the repeal decision. Pet. App. 5a-6a. The resolution asserted that the City had repealed the ban to "eliminate[] an inconsistency in the City's Code" between that prohibition and preexisting zoning laws, which regulated, but did not forbid, certain commercial sales of devices. *Id.* 6a (quoting Sandy Springs, Ga., Res. No. 2017-06-85

(June 6, 2017)). The resolution further declared that the zoning laws fully served the City's interest in curbing the "secondary effects" attributable to sales of sexual devices. *Id.* And the resolution disavowed "any intent to reenact [the device ban] or any similar regulation." *Id.* (quoting the resolution).

6. By a seven-to-five vote, the Eleventh Circuit held (a) that petitioners' claims for injunctive and declaratory relief were moot, Pet. App. 24a, and (b) that because those claims were moot, the court had no power to decide petitioners' claim for nominal damages, *id.* 26a.

a. The majority acknowledged the "late hour" at which the City had repealed the device ban and "the fact that the City defended its Ordinance for nearly a decade and, even at en banc oral argument, declined to concede that it was unconstitutional." Pet. App. 20a, 22a. But the majority found the City's explanations for the repeal "compelling." *Id.* 18a. The majority, giving great weight to the fact of repeal and to the City's assurance, found the "likelihood that the City will reenact the challenged provision" insufficient to warrant deciding the claims for declaratory and injunctive relief. *See id.* 17a, 24a.

b. The majority then concluded that, because the petitioners' other claims were moot, their claim for "nominal damages alone" could not "save" the "case from mootness." Pet. App. 26a, 28a.

The court acknowledged that "a majority of [its] sister circuits to reach this question have resolved it differently." Pet. App. 28a. Those courts had relied on this Court's decisions in *Carey v. Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District v.*

Stachura, 477 U.S. 299 (1986). *See* Pet. App. 28a-30a. The Eleventh Circuit, however, posited that those decisions did not "control[]" or even provide "any guidance." *Id.* 30a, 32a. The majority acknowledged that both cases had endorsed nominal damages awards for constitutional violations under Section 1983. *See id.* 30a-31a. But neither case, the majority reasoned, decided or was required to decide jurisdiction because "a live claim for actual damages [had] existed at all levels of the litigation" in both. *See id.*

In holding that the claim for nominal damages was no longer justiciable, the majority relied on an analogy first advanced in a concurring opinion by then-Judge McConnell in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004). Pet. App. 32a. That concurrence had viewed nominal damages and declaratory judgments as serving the same "function," citing the example of a landowner suing his neighbor in trespass for nominal damages to settle their boundary dispute. 371 F.3d at 1264-65. Judge McConnell then argued that the rule that declaratory relief claims may not go forward when injunctive claims become moot should also apply to claims for nominal damages. *See id.* at 1265-66.

The Eleventh Circuit majority further asserted that the widely prevailing rule—that the mootness of prospective relief does not affect the court's power to decide a claim for nominal damages—contravenes principles of judicial restraint. Pet. App. 38a. The majority voiced concern that under that rule, federal courts' jurisdiction would be "manipulated," mootness doctrine "circumvented," and courts "required to

decide cases that could have no practical effect on the legal rights or obligations of the parties." *Id.*

Although the majority opinion rejected the prevailing rule, it included footnotes disclaiming a categorical rule that a claim for "only nominal damages" can *never* support jurisdiction. Pet. App. 25a n.12, 39a n.23. In particular, the majority identified two examples from Judge McConnell's concurrence—common law actions for libel and trespass—where courts could adjudicate such claims. *Id.* 25a n.12. The opinion stated, without elaboration, that those "examples" were not exhaustive. *Id.*

c. The opinion drew a vigorous five-judge dissent. Pet. App. 41a-50a (Wilson, J., dissenting). The dissent questioned the new rule's fidelity to this Court's precedent. First, it faulted the majority for ignoring *Carey*'s holding that "the denial of procedural due process should be *actionable* for nominal damages without proof of actual injury." Pet. App. 44a-45a (emphasis added) (quoting *Carey*, 435 U.S. at 266). Then, the dissent observed that the majority's depiction of nominal damages as purely symbolic relief was "difficult, if not impossible" to square with this Court's recognition that an award of "'damages in any amount, whether compensatory or nominal,'" makes a plaintiff a prevailing party under the civil rights attorneys' fees statute, 42 U.S.C. § 1988. Pet. App. 48a n.4 (quoting *Farrar v. Hobby*, 506 U.S. 103, 113 (1992)).

The dissent also expressed concern about the discussion of exceptions laid out in the majority opinion's footnotes. Rather than explaining the court's rule, the dissent observed, the statements in the footnotes rendered the majority's holding opaque and

"unworkable." Pet. App. 43a-44a. By contrast, the dissent noted, the prevailing rule provides courts and litigants a jurisdictional "bright line." *See id.* 42a.

Finally, the dissent emphasized that the prevailing rule reflects the reality that "nominal damages are about remedying past wrongs, not future ones." Pet. App. 46a. The dissent concluded that, by leaving past violations unaddressed, the court's new rule gives governments "one free pass at violating your constitutional rights." *Id.* 50a.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's en banc decision has created an intractable conflict on a fundamental and recurring question of constitutional law.

As the en banc majority acknowledged, the Eleventh Circuit's decision in this case has created a conflict among the courts of appeals as to whether the mootness of claims for prospective relief renders federal courts powerless to decide a claim for nominal damages. Pet. App. 28a-29a ("[W]e are aware that a majority of our sister circuits to reach this question have resolved it differently than we do today . . . .").

1. If anything, the majority opinion understated the breadth and depth of the consensus it has upended. *Every* court of appeals to address the question presented here has "resolved it differently" than the Eleventh Circuit. Pet. App. 28a-29a, 28a n.17. Consistent with the rule that questions of justiciability are determined claim by claim, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), nine circuits recognize that federal courts' power to

adjudicate claims for nominal damages is unaffected by the mootness of claims for prospective relief. *See, e.g.*, *Kuperman v. Wrenn*, 645 F.3d 69, 73 n.5 (1st Cir. 2011); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001); *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008); *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004).

In many circuits, the bright-line rule the Eleventh Circuit rejected has been settled law for decades. *See, e.g.*, *Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986). Those courts have applied the same rule in cases involving a wide spectrum of underlying claims. *See, e.g.*, *id.* (prison conditions); *Morgan*, 589 F.3d 740 (religious speech). And they have held that the same rule applies regardless of the reason the claim for injunctive relief became moot. *E.g.*, *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345-46 (5th Cir. 2017) (holding that nominal damages claim was live despite student's graduation); *Advantage Media*, 456 F.3d at 803 (holding that nominal damages claim was live despite city's amendment of the challenged ordinance).

By contrast, the Eleventh Circuit stands alone. While the D.C. and Seventh Circuits have yet to decide the issue, no other court of appeals has embraced the Eleventh Circuit's novel rule. *See People for the*

Ethical Treatment of Animals, Inc. v. Gittens, 396 F.3d 416, 421 (D.C. Cir. 2005) ("We assume, without deciding, that a district court's award of nominal damages—$1—prevents a case from becoming moot on appeal."); *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1033 (E.D. Wis. 2008) (noting that the Seventh Circuit has not "spoken decisively on the issue").

2. The competing rules are not merely "different[]," Pet. App. 28a—they are stark opposites. The very cases that federal courts in the Eleventh Circuit are now without power to adjudicate are ones that courts in nine other circuits have a "virtually unflagging obligation" to decide, *see Mata v. Lynch*, 135 S. Ct. 2150, 2152 (2015) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

3. The conflict is also intractable. Absent this Court's intervention, the Eleventh Circuit will not reverse course. That court established its new rule in an en banc decision squarely addressing this issue, over a five-judge dissent, and with full "aware[ness]" that the rule it rejected is settled law in most circuits, Pet. App. 28a. It is equally implausible that all nine courts of appeals on the other side of the conflict will abandon their longstanding rule. Judge McConnell's thorough articulation of the position adopted by the Eleventh Circuit here did not persuade the Tenth Circuit to reverse course or even to reconsider its rule en banc. In the thirteen years since then, every court of appeals other than the Eleventh Circuit has adhered to the prevailing rule, despite suggestions from individual judges to reconsider. *See, e.g.*, *Freedom from Religion Found., Inc. v. New*

Kensington Arnold Sch. Dist., 832 F.3d 469, 482 (3d Cir. 2016) (Smith, J., concurring dubitante); *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007) (Jacobs, J., concurring in part and dissenting in part). And because the issue concerns jurisdictional limits imposed by the Constitution, no other branch or rulemaking body can settle the question or otherwise obviate the need for this Court to intervene.

II. The Eleventh Circuit's novel rule is wrong.

A. Nominal damages, unlike declaratory judgments, provide relief for past violations of individual rights.

1. The Eleventh Circuit majority's principal justification for adopting its new rule—and for rejecting the contrary consensus—was its view that nominal damages are fundamentally no different from declaratory relief. *See* Pet. App. 32a-35a. Having equated the two sorts of relief, the Eleventh Circuit then decided that because a claim for declaratory relief becomes moot when a claim for injunctive relief does, the same thing happens to a claim for nominal damages. *See id.* 34a-35a.

The Eleventh Circuit's starting premise is wrong. Whatever their similarities, declaratory judgments and nominal damages differ in the only respect relevant to mootness: Unlike claims for nominal damages, those for declaratory relief are "by definition prospective in nature." *CMR D.N. Corp v. City of Philadelphia*, 703 F.3d 612, 628 (3d Cir. 2013). They "permit[] actual controversies to be settled *before* they ripen into violations of law." 10B Charles Alan Wright et al., *Federal Practice & Procedure* § 2751 (4th ed. 2017) (emphasis added). Because there is no basis for

awarding any kind of prospective relief once it becomes clear that a controversy will never "ripen into [a] violation[]," it follows that declaratory relief becomes moot in tandem with injunctive relief. Deciding a constitutional question at that point would indeed produce "an impermissible advisory opinion," Pet. App. 36a.

But claims for retrospective relief are unaffected by the mootness of claims for prospective relief. A court's power to decide a claim for compensatory damages, for example, is unchanged by "a defendant's change in conduct." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608-09 (2001); *see also* 13C Charles Alan Wright et al., *Federal Practice & Procedure* § 3533.3 (3d ed. 2017).

The same is true of nominal damages. They remedy violations of law that have already occurred. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 20, at 85 (1935) ("Nominal damages are awarded *for the infraction of a legal right*, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage . . . ." (emphasis added)); *Nominal Damages*, *Black's Law Dictionary* (10th ed. 2014) (defining nominal damages as "[a] trifling sum awarded *when a legal injury is suffered* but there is no substantial loss or injury to be compensated" (emphasis added)). When, for instance, a police department engages in a policy of unconstitutional searches, an individual subject to such a search has a claim for nominal damages even if he is never prosecuted. *Cf. Hudson v. Michigan*, 547 U.S. 586, 598 (2006); *id.* at 610 (Breyer, J., dissenting) (acknowledging reported decisions awarding nominal

damages for violations of the Fourth Amendment's "knock and announce" rule). This is true even if the policy is later revoked: There is nothing "hypothetical," Pet. App. 36a, about the violation the individual suffered while the policy was in place. Likewise, in this case, there is nothing hypothetical about deciding whether the City deprived petitioners of their rights under color of law during the time the device ban was in effect.

2. The historical basis for the Eleventh Circuit's analogy does not withstand scrutiny. The majority asserted that courts originally entertained claims for nominal damages *because* those claims had a declaratory effect. *See* Pet. App. 34a n.22. But that assertion is incorrect. The reason such claims were actionable is because they vindicate "absolute" rights—"the right of personal security, the right of personal liberty, and the right of private property," *see* 1 William Blackstone, *Commentaries* *124, *129. *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (noting courts' historic authority to decide cases involving violations of individual rights "even when plaintiffs alleged only the violation of those rights and nothing more").

To be sure, nominal damages had a declaratory effect in common law trespass actions involving boundary disputes between neighboring landowners. But that effect was incidental; it was not necessary to sustain the action. Courts have never relied on the presence of a declaratory effect to hear actions for nominal damages. Indeed, the cases scholars have identified as the earliest examples of such actions make no mention of such an effect. *E.g.*, F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*,

93 Cornell L. Rev. 275, 281, 285-86 (2008). For instance, a 1466 decision held a man liable in trespass for going onto his neighbor's property, irrespective of any damage. *Id.* at 281 (citing *Hulle v. Orynge*, Y.B. 6 Edw. 4, fol. 7, Mich, pl. 18 (1466)). Nothing about *Hulle* suggests that the case was litigated because the plaintiff was trying to establish the boundaries of his property; the boundary was undisputed. *See id.* Rather, *Hulle* reflected the common law understanding that the right to property was "absolute," and the law would "not authorise the least violation of it," *see* 1 William Blackstone, *Commentaries* *138-39.

3. The same failure to distinguish between prospective and retrospective relief led the Eleventh Circuit to mistakenly assert that the per curiam decision in *Hall v. Beals*, 396 U.S. 45 (1969), supports its rule. But *Beals* says nothing about cases involving retrospective relief. There are, to be sure, "significant factual similarities," Pet. App. 36a, between the claims for *injunctive* relief in *Beals* and in this case. Because the election in which the *Beals* plaintiffs had sought to vote had passed and the challenged law had been amended before the case reached this Court, their claim for injunctive relief was moot. 396 U.S. at 48. But if the plaintiffs in *Beals* had sought retrospective relief, the amendment of the challenged law would not have mooted their case. *See Nixon v. Herndon*, 273 U.S. 536, 539, 541 (1927) (awarding damages for unconstitutional deprivation of the right to vote after election had passed). When adjudicating claims for retrospective relief, courts do not look at the law "as it now stands," *see* Pet. App. 37a (quoting *Beals*, 396 U.S. at 48), but "as it once did," *id.*, at the time the

defendant is alleged to have violated the plaintiff's rights. Here, unlike in *Beals*, petitioners have requested retrospective relief. The City's change in course has not made it "impossible to grant [petitioners] the relief they sought in the District Court." 396 U.S. at 48.

B. The Eleventh Circuit's rule cannot be reconciled with this Court's precedent.

This Court's relevant precedent forecloses the Eleventh Circuit's rule. In *Carey v. Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the Court addressed the relief appropriate when a Section 1983 plaintiff suffers a deprivation of a constitutional right without compensable harm. In *Carey*, two students brought suit alleging that their public school had suspended them without due process of law. 435 U.S. at 248-51. The Court held without dissent that the students would be "entitled to recover nominal damages" based on the violation of their due process rights, even if they would have been suspended with proper procedure and had suffered no compensable harm. *Id.* at 266-67. In *Stachura*, the Court affirmed that the same rule governs Section 1983 claims alleging the deprivation of any constitutional right, not just the procedural due process right at issue in *Carey*. *See* 477 U.S. at 308 n.11 (explaining that nominal damages are generally "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury").

The Eleventh Circuit majority brushed these decisions aside, insisting that (1) they stand for no more than that nominal damages may be awarded

when a plaintiff seeks but fails to prove compensatory damages, and (2) they are irrelevant to the jurisdictional question because "a live claim for actual damages [had] existed at all levels of the litigation" in both cases. Pet. App. 30a-31a. Neither assertion is correct. The Eleventh Circuit's reading neglects the central basis for this Court's decisions and produces a jurisdictional regime that *Carey* could not have intended.

To begin, and as the dissent below highlighted, *Carey* held that the plaintiffs' claims would have been "*actionable* for nominal damages without proof of actual injury." 435 U.S. at 266 (emphasis added). That would be a singularly improbable way to convey that a person who desires nominal damages must also press a "live" claim for compensatory relief. Worse still, the Eleventh Circuit majority ignored the reason the Court gave for holding claims for nominal damages actionable: its conclusion that the rights asserted were "absolute." *Id.* As *Carey* explained, "[c]ommon-law courts have traditionally vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." 435 U.S. at 266. In such cases, plaintiffs have never been required to plead compensable damage. *See supra* pp. 15-16. Cases where the plaintiff alleges a violation of her absolute rights—with or without further harm—are "traditionally amenable to, and resolved by, the judicial process," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

While *Carey* did not expressly address the question whether federal courts have jurisdiction over a claim for nominal damages alone, it provided enough

"guidance," Pet. App. 32a, to see that the Eleventh Circuit's rule is untenable. Suppose, for instance, that students like the plaintiffs in *Carey* persuaded a district court that they had suffered a due process violation and were awarded only nominal damages, and the school district sought to appeal the liability determination. If the students chose not to cross-appeal for compensatory damages, there would no longer be a "live claim for actual damages" at that "level[] of the litigation," *id.* 30a. Under the Eleventh Circuit's rule, then, a court of appeals would lack subject-matter jurisdiction over the school district's appeal. *Carey* cannot plausibly be understood as permitting that regime.

C. The Eleventh Circuit's rule improperly constrains federal courts' authority and litigants' freedom while doing nothing to advance judicial restraint.

The Eleventh Circuit did not deny that plaintiffs are "entitled" to nominal damages for constitutional deprivations and that federal courts have the authority to award them, *Carey*, 435 U.S. at 267. *See* Pet. App. 30a, 39a n.23. But it held that when prospective relief becomes unavailable, a federal court loses the power to decide a proper, pending claim for nominal damages unless it is accompanied by a claim for compensatory damages. *See id.* 24a n.11, 31a n.18, 39a n.23.

That requirement impermissibly limits the power of federal courts. And, by effectively requiring persons who have suffered past constitutional deprivations to seek compensatory damages, the rule wrongly limits litigants' freedom to choose what relief to pursue for

violations of their personal rights. Nor, contrary to the Eleventh Circuit's assertions, does the new rule serve judicial restraint: The same constitutional decisions the Eleventh Circuit assumed its rule would avoid will now be adjudicated in the course of proceedings for compensatory, rather than nominal, damages.

1. The Eleventh Circuit did not cite any precedent for its holding that federal courts' power to decide a claim for nominal damages hinges on the presence of claims for other relief. In fact, this Court's precedent establishes the opposite: Questions of Article III jurisdiction are determined claim by claim, not "in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (plaintiff's lack of standing to pursue injunctive relief did not mean that a "claim for damages" could not "meet all Art. III requirements"); *Powell v. McCormack*, 395 U.S. 486, 497 (1969) ("Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy.").

Nor does the fact that claims for declaratory and injunctive relief become moot in tandem provide a counterexample. *See supra* pp. 13-14. No litigant is required to seek one form of prospective relief in order for the court to decide the other.

2. By forcing plaintiffs to litigate unwanted claims, the Eleventh Circuit's rule deprives them of the freedom to make their own litigation choices. And, in cases like this one, it can violate the very privacy interests the underlying right is meant to protect.

Plaintiffs have always had the freedom to choose what relief to seek. *See, e.g.*, *St. Paul Mercury*

Indemnity Co. v. Red Cab Co., 303 U.S. 283, 294 (1938) (noting plaintiff's right to sue for "less than the jurisdictional amount, [even] though he would be justly entitled to more"). Indeed, the principle that plaintiffs could "waive[] all right to more than nominal damages" was "self-evident" at common law. *Daniels v. Bates*, 2 Greene 151, 152 (Iowa 1849). And plaintiffs in Section 1983 suits often have good reasons to make this choice.

To begin, violations of many constitutional rights cause real harm that is difficult to prove. For instance, the "feeling of inferiority" that results from being subject to segregated public education, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), and the "embarrassing, frightening, and humiliating" effects of a strip search on a middle school student, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-75 (2009), are difficult to prove and quantify but undoubtedly real. Indeed, Congress recognized the importance of keeping federal courts open to these types of claims when it eliminated the amount-in-controversy requirement for federal question jurisdiction. Pub. L. No. 96-486, § 2, 94 Stat. 2369 (1980); H.R. Rep. 96-1461, at 1 (explaining that persons whose "Federal rights have been violated" should not be "barred from a Federal forum solely because they have not suffered a sufficient economic injury").

Moreover, where, as here, a plaintiff brings suit to vindicate a right "touching upon the most private human conduct," *see Lawrence v. Texas*, 539 U.S. 558, 567 (2003), she might understandably be reluctant to incur the intrusive scrutiny that adjudicating a compensatory damages claim would entail. Proving

compensatory damages may require parties and experts to testify about the plaintiff's most private, intimate behavior. *See, e.g.*, *Pease v. Ace Hardware Home Ctr.*, 498 N.E.2d 343, 351 (Ill. 1986) (describing cross-examination about the past and present frequency of plaintiff's sexual intercourse).

3. Nor does denying jurisdiction over unaccompanied nominal damages claims actually serve the policies of "judicial restraint" that the Eleventh Circuit invoked in rejecting the prevailing rule, Pet. App. 38a. Although plaintiffs often have good reason to forego claims for compensatory damages, such claims are readily available. In *Carey*, for instance, this Court recognized that students who would be suspended under proper procedures may still recover under Section 1983 for emotional distress attributable to the procedural violation itself. 435 U.S. at 263-64. And other cases decided on a claim for nominal damages could similarly be decided on a claim for compensatory damages. *See Stachura*, 477 U.S. at 307 (noting availability of emotional distress damages resulting from deprivations of constitutional rights); *cf. Fisher v. Univ. of Tex.*, 758 F.3d 633, 663 (5th Cir. 2014) (announcing constitutionality of race-conscious admissions policy in suit claiming refund of university application fee), *aff'd*, 136 S. Ct. 2198 (2016). Judicial restraint is no more served when a court decides the constitutionality of a repealed ordinance on the basis of a compensatory damages claim than if the action had sought nominal damages alone.

In fact, policies of judicial restraint are disserved by the Eleventh Circuit's regime. By requiring plaintiffs seeking vindication of personal rights to present federal courts with unwanted compensatory

damages claims, the rule forces courts to resolve additional, difficult questions in which no party has a "real, earnest, and vital" interest, *see* Pet. App. 35a (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).

The court also asserted that its rule was needed to prevent plaintiffs from "manipulat[ing]" federal courts' jurisdiction by pleading nominal damages. Pet. App. 38a. But seeking relief to which one is entitled is not "manipulation." This Court has expressly held that nominal damages are appropriate relief for plaintiffs whose rights have been violated. *Carey*, 435 U.S. at 266-67. "[T]he law, which creates a right," does not treat "insistence upon its enforcement [as] evidence of a wrong." *Morningstar v. Lafayette Hotel Co.*, 105 N.E. 656, 657 (N.Y. 1914) (Cardozo, J.). And as just explained, there are many valid and important reasons litigants choose to pursue nominal but not compensatory damages.

The only conduct here that should raise manipulation concerns is that of the respondent. As the majority recognized, the City litigated for years and discovered the ostensible inconsistency between its ordinances only after the panel opinion suggested the device ban was unconstitutional and the Eleventh Circuit granted rehearing en banc. Pet. App. 5a, 20a.

D. The Eleventh Circuit's rule is neither workable nor coherent.

As the dissent emphasized, the widely prevailing rule jettisoned by the Eleventh Circuit provides a "bright line." Pet. App. 42a. In nine circuits, the mootness of a claim for prospective relief has no effect on federal courts' power to decide a pending claim for

nominal damages. That rule abides by this Court's instruction that "jurisdictional rules should be clear." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002); *see also Grupo Dataflux v. Atlas Glob. Grp.*, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction is particularly undesirable . . . .").

The body of the Eleventh Circuit majority's opinion appeared to announce the opposite bright-line rule: When claims for prospective relief become moot and there is no "live" claim for compensatory damages, courts have no power to adjudicate pending claims for nominal damages. But as the dissent highlighted, the opinion's footnotes "undermine[]" the clarity of its holding. Pet. App. 43a. Indeed, considering the majority's footnotes and the body of its opinion together, the Eleventh Circuit's rule is internally contradictory and unworkable.

1. The decision below, drawing on Judge McConnell's concurrence, included a footnote offering two "examples"—actions for libel and trespass—where, in the court's view, a claim for nominal damages alone *would* support jurisdiction. Pet. App. 25a n.12. It then purported to identify the principle distinguishing these exceptions from petitioners' Section 1983 claims: A claim for "only nominal damages" *is* justiciable if that relief will have an "effect on the legal rights or obligations of the parties." *Id.* 25a, 38a. But this qualification is unrooted in law. The majority cited no case holding that proof of such an effect is required to sustain jurisdiction over a pending claim for nominal damages.

Indeed, the Eleventh Circuit's explanation fails to describe even its own examples. As discussed above,

some of the earliest common law trespass cases involved one-time invasions across undisputed boundaries and had no "effect on the legal rights and obligations of the parties" going forward. *See supra* pp. 15-16. The majority's libel example fares no better. Many libel actions involve parties with no ongoing legal relationship. *See, e.g.*, *Calder v. Jones*, 465 U.S. 783, 786 (1984) (suit involving a single, allegedly defamatory article). A libel judgment may affect the relationship between the plaintiff and third parties by clearing the plaintiff's name, without any effect on the legal rights of the *parties*. But such third-party effects are precisely the sort the Eleventh Circuit dismissed as irrelevant to Article III jurisdiction. *See* Pet. App. 33a n.21 (rejecting arguments based on effects of the judgment on the behavior of actors in jurisdictions with similar laws). If these broader effects on third-party behavior support jurisdiction under the Eleventh Circuit's rule, however, courts should likewise have jurisdiction over virtually all Section 1983 suits for nominal damages. *See Hudson v. Michigan*, 547 U.S. 586, 596-98 (2006) (noting the deterrent effect of nominal damages and attorneys' fees in Section 1983 suits).

2. Even the meaning of the seemingly bright part of the Eleventh Circuit's rule—that a nominal damages claim survives so long as there is a "live" claim for compensatory damages at the particular "level[] of the litigation," Pet. App. 30a—is unclear in practice.

As previously described, that requirement produces significant jurisdictional anomalies for nominal damages litigation at the appellate level. *See supra* pp. 18-19. But it is not even clear what the

requirement of a "live" compensatory damages claim means for a typical nominal damages claim at the district court "level." In some cases, a jury will award nominal damages and deny compensatory damages simultaneously. The majority opinion below is clear that the district court would have authority to enter judgment in those cases. Pet. App. 39a n.23. But in others, the court will grant summary judgment on the plaintiff's compensatory damages claim without resolving the nominal damages claim—for example, by holding that plaintiffs in a *Carey*-type case would have been suspended even with proper process. At that juncture, it is unclear under the Eleventh Circuit's formulation whether a district court must decide the liability issue or must dismiss the case as moot.

III. It is important that this Court reestablish a uniform, clear, and correct jurisdictional rule.

The question presented here goes to the heart of federal courts' power under Article III. Only one rule can be correct—either federal courts are obligated to adjudicate nominal damages claims like those here, or they are obligated *not* to. Until this Court resolves the question, the power of federal courts in Georgia will differ from those in Mississippi. And since this question goes to subject-matter jurisdiction, it must be decided at the threshold and in every case in which it arises. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

Federal courts regularly confront cases where injunctive relief has become moot but claims for nominal damages remain. *See Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (collecting cases). The issue is not limited to cases where

injunctive relief is moot as a result of defendants' changed conduct. *E.g.*, *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345 (5th Cir. 2017) (holding that graduated student's nominal damages claim remained live). Indeed, the issue has the potential to arise in *every* case in which nominal damages are sought—and nominal damages are a mainstay of American litigation. *See supra* pp. 10-11; *see, e.g.*, *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1377 (2d Cir. 1988) (affirming award of nominal damages in antitrust case and noting that "courts routinely approve the award of such damages" in those cases).

Whatever the right answer to the question presented, there are serious harms to leaving the conflict unresolved. As just explained, if the other nine circuits are right and the Eleventh Circuit is wrong, residents of Alabama, Florida, and Georgia seeking to vindicate constitutional rights will be put to the choice of pressing unwanted compensatory damages claims or risking dismissal. And those who, like petitioners, brought suit before the Eleventh Circuit announced its rule do not even have that choice. By contrast, if the Eleventh Circuit is correct, then government defendants in the nine other circuits have an obvious interest in this Court saying so.

And in the circuits that have yet to take sides, uncertainty will cause both plaintiffs and defendants to make choices—for plaintiffs, whether to seek unwanted compensatory damages, and for defendants, whether to repeal challenged policies—that may be adverse to their interests. It does not benefit the legal system to force parties to make decisions based on

their best guess as to the content of jurisdictional rules.

Nor is there anything to be gained by allowing the issue to further percolate. As discussed above, the lower federal courts will not achieve uniformity without this Court's intervention. And the arguments supporting the contesting positions have all been fully articulated; every opinion questioning the prevailing rule has relied on the theory advanced in Judge McConnell's concurrence thirteen years ago.

IV. This case is the proper vehicle for deciding the issue.

Just as there is no reason for this Court to postpone its consideration of the issue, there is no need to look further than this case for a proper vehicle for addressing it. The case cleanly presents a single, pure question of law. Because petitioners' complaint was dismissed at the pleading stage, the well-pleaded factual allegations of the complaint control. There is no dispute that petitioners' complaint explicitly sought nominal damages at the outset of the litigation. And petitioners do not challenge the Eleventh Circuit's ruling that their claims for prospective relief are moot. The question whether the federal courts have jurisdiction over their claim for nominal damages was briefed and argued by the parties below and comprehensively addressed in the majority and dissenting opinions of the en banc court. There is no other disputed legal or factual issue that could complicate or interfere with the Court's reaching the question.

Finally, the effect of the Eleventh Circuit's rule in this case was conclusive. A decision by this Court

holding that a pending nominal damages claim remains justiciable when claims for injunctive and declaratory relief are moot will enable this case to proceed to a long-awaited resolution of petitioners' constitutional claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[PUBLISH]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15499

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA,
FANTASTIC VISUALS, LLC,

Plaintiffs-Appellants,

MELISSA DAVENPORT,
MARSHALL G. HENRY,

Intervenors-Plaintiffs-Appellants,

versus

CITY OF SANDY SPRINGS, GEORGIA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 23, 2017)

Before ED CARNES, Chief Judge, TJOFLAT, HULL, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JULIE CARNES, JILL PRYOR, and ANDERSON,[*] Circuit Judges.[**]

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[*] Senior Judge R. Lanier Anderson elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

[**] Judge Kevin C. Newson joined the Court on August 4, 2017, and did not participate in these en banc proceedings.

ANDERSON, Circuit Judge:

We granted rehearing en banc to review the constitutionality of a municipal ordinance prohibiting the sale of sexual devices in light of several recent Supreme Court decisions which, it was argued, call into question the continued vitality of this Court's decision in *Williams v. Attorney General* (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004). After we agreed to take the case en banc, the defendant City repealed the challenged portion of its municipal code and, thus, we are confronted with the threshold jurisdictional question of mootness. Because we see no reasonable basis for concluding that the ordinance will be reenacted and because a prayer for nominal damages, by itself, is insufficient to satisfy Article III's jurisdictional requirements, this case is moot. Accordingly, the appeal must be dismissed.

I. Background

In 2009, the City of Sandy Springs, Georgia, (the "City") enacted into law several provisions that, *inter alia*, prohibited the sale of sexual devices within the City. Specifically, Ordinance 2009-04-24 (the "Ordinance"), codified at Section 38-120 of the City's Code of Ordinances (the "Code"), criminalized the commercial distribution of obscene material, which it defined to include "[a]ny device designed or marketed as useful primarily for the stimulation of human genital organs." Sandy Springs, Ga., Code of Ordinances § 38-120(c).

Shortly after its passage, a group of businesses, including, as relevant here, plaintiff-appellant Fantastic Visuals, LLC, d/b/a Inserection

("Inserection"),[1] brought suit to challenge the Ordinance and several other Code provisions. Inserection is an adult bookstore in Sandy Springs that sells sexually explicit materials, including sexual devices. After the City moved for summary judgment, the district court issued an order severing Inserection's challenge to the Ordinance's prohibition on the sale of sexual devices from the remainder of the pending challenges to other Code provisions. As a result, this appeal involves only a challenge to the City's ban on the sale of sexual devices.

Severing the two challenges allowed additional affected parties to intervene in the instant case without slowing the progress of the other litigation. Accordingly, the district court granted a timely motion to intervene by intervenors-appellants Melissa Davenport ("Davenport") and Marshall G. Henry ("Henry"). Davenport is a Georgia resident who suffers from multiple sclerosis and uses sexual devices with her husband to facilitate intimacy. She seeks to

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[1] Inserection was joined in its initial complaint by plaintiffs-appellants 6420 Roswell Rd., Inc. ("Flashers") and Flanigan's Enterprises, Inc. of Georgia ("Flanigan's"). Although both Flashers and Flanigan's noticed an appeal to this Court, neither party provided briefing of its own or indicated that Inserection brought any claim on its behalf. This is likely because, as the en banc briefing indicates, only Inserection purchases and sells sexual devices. In any event, by failing to provide any briefing whatsoever, both Flashers and Flanigan's have abandoned their appeal. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680-81 (11th Cir. 2014) ("When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed."). Accordingly, Inserection is the only original plaintiff that is properly before the Court.

purchase sexual devices in Sandy Springs for her own use and to sell sexual devices to others in Sandy Springs who suffer from the same or a similar condition. Henry, also a Georgia resident, is an artist who uses sexual devices in his artwork. He seeks to purchase sexual devices in Sandy Springs for his own private, sexual activity and for use in his artwork. He also seeks to sell his artwork in the City. Inserection, Davenport, and Henry (collectively, "Appellants") raised several challenges to the Ordinance arising under both the United States and Georgia Constitutions, including, as relevant here, a Fourteenth Amendment Due Process claim.[2] Appellants specifically requested declaratory and injunctive relief striking down the Ordinance as unconstitutional and permanently enjoining its enforcement. Additionally, both Davenport and Henry requested an award of nominal damages against the City.[3]

The City moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil

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[2] Appellants also brought challenges arising under various other provisions of the United States Constitution and corollary provisions of the Georgia constitution. As a result of deficiencies in either their initial appellate briefing, *Sapuppo*, 739 F.3d at 680-81, or their en banc petition and briefing, Fed. R. App. P. 40(a)(2), Appellants have waived all but their Fourteenth Amendment Due Process claim. In any event, given that our ultimate resolution of this case requires dismissal before reaching the merits, the substantive claims before the Court are immaterial.

[3] Inserection's complaint included a prayer for "such other and further relief as the Court deems just and proper." We need not, and expressly do not, consider whether this blanket request would be sufficient to raise the availability of nominal damages. *See Oliver v. Falla*, 258 F.3d 1277, 1280-82 (11th Cir. 2001) (discussing waiver of claims for nominal damages).

Procedure. The district court granted the City's motion and entered an order upholding the Ordinance. Appellants filed a timely notice of appeal, arguing that the district court erred in entering judgment in favor of the City. A panel of this Court, after briefing and oral argument, found that the district court committed no reversible error and affirmed. *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 831 F.3d 1342, 1344 (11th Cir. 2016), *vacated*, __F.3d__, 2017 WL 975958 (11th Cir. Mar. 14, 2017). The panel held that it was bound to follow the holding in *Williams IV* and suggested that Appellants seek rehearing en banc. *Id.* at 1348 ("Therefore, unless and until our holding in *Williams IV* is overruled en banc, or by the Supreme Court, we are bound to follow it . . . . Appellants are free to petition the court to reconsider our decision en banc, and we encourage them to do so.").

On March 14, 2017, a majority of the judges of this Court in active service voted in favor of granting rehearing en banc and the panel opinion was, accordingly, vacated. On March 21, 2017—one week after rehearing was granted—the City Council unanimously voted to repeal the portion of its Ordinance at issue in this appeal. *See* Sandy Springs, Ga., Ordinance 2017-03-05 (Mar. 21, 2017). Citing this repeal, the City subsequently filed a motion to dismiss for mootness in which it, through its attorney, expressly "disavow[ed] any intent to adopt such a regulation in the future." The parties submitted further briefing on the issue of mootness and the City's motion was carried with the case to oral argument.

After briefing on the merits had been completed, oral argument was held before the en banc Court on June 6, 2017. On the same day—in a move it argues

was designed to "endorse" its attorney's representations at oral argument—the City passed a resolution regarding the now-repealed Ordinance. *See* Sandy Springs, Ga., Resolution 2017-06-85 (June 6, 2017). In this resolution, which also passed unanimously, the City: (1) noted that the Ordinance "was never enforced during the years that it was in effect;" (2) "disavow[ed] any intent to reenact [the Ordinance] or any similar regulation;" and (3) claimed that the repeal of the Ordinance "eliminated an inconsistency in the City's Code between the [now-repealed] prohibition on the sale of obscene devices and the City's zoning and licensing ordinances that license and regulate stores which sell them." Moreover, the City conceded that its interest in minimizing the secondary effects of the sale of sexual devices—one of the two grounds on which the City had defended the Ordinance—was effectively served by its existing zoning and licensing regulations. Pursuant to, and in compliance with, Rule 28(j) of the Federal Rules of Appellate Procedure, the City advised the Court of its resolution on the same day it was passed.

II. Standard of Review

We consider the question of mootness *de novo*. *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004).

III. Discussion

It is well established that "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). At a minimum, this requirement means that "a litigant must have suffered, or be threatened with, an actual injury

traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* at 477. Moreover, this "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). As a result, the Supreme Court has routinely cautioned that a case becomes moot "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Thus, even a once-justiciable case becomes moot and must be dismissed "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Addressing our jurisdiction in the instant case requires us to undertake two related inquires. First, we must ask whether the City's repeal of the relevant portion of the Ordinance has rendered moot Appellants' claims for declaratory and injunctive relief. If those claims are moot, we must then consider whether their prayer for nominal damages is sufficient to save an otherwise non-justiciable case. We address each in turn.

A. Declaratory and Injunctive Relief

As discussed above, a case generally becomes moot and must be dismissed, even if already on appeal, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 496. The doctrine of voluntary cessation, however, provides an important exception to

this general rule. Indeed, as the Supreme Court has long recognized, the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Without this exception, the federal courts would be compelled to dismiss a case while leaving the defendant "free to return to his old ways." *Id.* at 632.

However, the voluntary cessation exception to the mootness doctrine does not apply where "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)). Thus, intervening events will render a case moot only when we have "no 'reasonable expectation' that the challenged practice will resume after the lawsuit is dismissed." *Jews for Jesus, Inc. v. Hillsborough Cty. Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). The test for determining that no such reasonable expectation exists is ordinarily a "stringent" one and, accordingly, the party asserting mootness generally bears a "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Laidlaw*, 528 U.S. at 189 (alteration in original) (quoting *Concentrated Phosphate*, 393 U.S. at 203).

While it is true that the burden of proving mootness generally falls heavily on the party asserting it, "governmental entities and officials have been given considerably more leeway than private parties in the

presumption that they are unlikely to resume illegal activities." *Coral Springs*, 371 F.3d at 1328-29. As a result, "once the repeal of an ordinance has caused our jurisdiction to be questioned, [the plaintiff] bears the burden of presenting affirmative evidence that its challenge is no longer moot." *Nat'l Advert. Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005). This is because both this Court and the Supreme Court have repeatedly indicated that "the repeal of a challenged statute is one of those events that makes it absolutely clear that the allegedly wrongful behavior . . . could not reasonably be expected to recur." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1265-66 (11th Cir. 2010) (alteration in original) (quoting *Coral Springs*, 371 F.3d at 1331 n.9); *see also Coral Springs*, 371 F.3d at 1329, 1330, 1331 n.9 (citing "numerous occasions" where the Supreme Court has held that the repeal of challenged legislation mooted a case and noting that our view, under which "the doctrine of voluntary cessation does not apply in cases where challenged laws have been repealed unless there is some reason to believe that the law may be reenacted after dismissal of the suit," is "altogether consonant with that of every other Federal Circuit to address the issue"). Because of the deference with which we view voluntary changes in government action, a plaintiff disputing a finding of mootness must present more than "[m]ere speculation that the City may return to its previous ways." *City of Miami*, 402 F.3d at 1334 ("Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions.").

Indeed, even where the intervening governmental action does not rise to the level of a full legislative repeal we have held that "a challenge to a government policy that has been unambiguously terminated will be

moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1285 (11th Cir. 2004). In *Troiano*, a panel of this Court collected cases from both the Supreme Court and Eleventh Circuit and said:

> When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit. The Court has rejected an assertion of mootness in this kind of challenge *only* when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated.

Id. at 1283-84 (emphasis in original) (citations to multiple Supreme Court cases omitted). The key inquiry in this mootness analysis therefore is whether the evidence leads us to a reasonable expectation that the City will reverse course and reenact the allegedly offensive portion of its Code should this Court grant its motion to dismiss. *See Coral Springs*, 371 F.3d at 1331 ("Whether the repeal of a law will lead to a finding that the challenge to the law is moot depends *most significantly* on whether the court is sufficiently convinced that the repealed law will not be brought back." (emphasis added)).

From both the cases discussed above and those described in more detail below, we can discern the appropriate analysis, including three broad factors to which courts should look for guidance in conducting that inquiry. *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) (Tjoflat, J., suggesting these three broad factors and citing cases from which they are

derived). First, we ask whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate our jurisdiction. *Id.* Thus we will examine the timing of the repeal, the procedures used in enacting it, and any explanations independent of this litigation which may have motivated it. Second, we ask whether the government's decision to terminate the challenged conduct was "unambiguous." *Id.* This requires us to consider whether the actions that have been taken to allegedly moot the case reflect a rejection of the challenged conduct that is both permanent and complete. Third, we ask whether the government has consistently maintained its commitment to the new policy or legislative scheme. *Id.* When considering a full legislative repeal of a challenged law—or an amendment to remove portions thereof—these factors should not be viewed as exclusive nor should any single factor be viewed as dispositive. Rather, the entirety of the relevant circumstances should be considered and a mootness finding should follow when the totality of those circumstances persuades the court that there is no reasonable expectation that the government entity will reenact the challenged legislation.

Before applying this law to the instant facts, we find it instructive to discuss some additional precedent that informs our analysis, focusing particularly on our cases in which the timing of a legislative repeal was at issue. We begin with an opinion, *National Advertising Co. v. City of Fort Lauderdale*, 934 F.2d 283 (11th Cir. 1991), we think is in possible tension with the landscape we describe. In that case, an outdoor advertising company challenged the City of Fort Lauderdale's sign ordinance, alleging a series of constitutional deficiencies. *Id.* at 284. Six weeks after

the company filed suit, the city amended the sign code and, the next day, moved to dismiss the case as moot. *Id.* at 284-85. The district court dismissed the claims as moot but a panel of this Court reversed, based primarily on the Supreme Court's decision in *City of Mesquite v. Aladdin's Castle, Inc. Id.* at 285-86 (citing 455 U.S. 283 (1982)). In so doing, the panel relied on the Supreme Court's observation that there "was no certainty that the City of Mesquite would not reenact the allegedly unconstitutional provision if it defeats federal jurisdiction." *Id.* at 286 (citing *City of Mesquite*, 455 U.S. at 289 ("There is no certainty that a similar course [of reenactment] would not be pursued if its most recent amendment were effective to defeat federal jurisdiction.")).

Considered in isolation—particularly given its lack of any other apparent reason for harboring a reasonable expectation that the city would reenact its sign code—*City of Fort Lauderdale* could be construed to imply that the timing of a city's repeal is dispositive of whether we think it will reenact.[4] We reject that reading. Indeed, the panel did not even mention the timing of the amendment in its sparse rationale; the six-week gap between the filing of the suit and the

[4] The *City of Fort Lauderdale* Court held that "[i]t remains uncertain whether the City would" reenact because it "presently possesses the power and authority to amend the sign code." *Nat'l Advert. Co. v. City of Fort Lauderdale*, 934 F.2d 283, 286 (11th Cir. 1991). Under our case law, the mere power and authority to reenact is plainly an insufficient reason, standing alone, to raise a reasonable expectation that the city would do so. Given that the only other justification for such a belief apparent from the face of the opinion is the timing of the repeal, it could be suggested that this timing played a dispositive role in the Court's decision.

amendatory legislation was mentioned solely in its recitation of the facts.

Rather, the *City of Fort Lauderdale* rationale is based entirely on *City of Mesquite*. That reliance was misplaced. While it is true that the Supreme Court did say that "[t]here is no certainty" that the City of Mesquite would not reenact the challenged provision, *City of Mesquite*, 455 U.S. at 289, the Court's lack of certainty was expressly based upon two crucial facts that are not apparent in *City of Fort Lauderdale*, and are not present in the instant case. First—at oral argument before the Supreme Court—the City of Mesquite expressly conceded its intention to reenact precisely the same provision if the district court's judgment were vacated. *Id.* at 289 n.11. Second, the city had previously reinstated a related restriction in an "obvious" attempt to avoid the effects of an earlier state court ruling. *Id.* at 289. In other words, not only had the city revealed a propensity to repeal and then reenact allegedly offensive legislation when litigation interfered with its policy objectives, it had also expressly stated its intention of doing so in that case. Neither of these factors is apparent in *City of Fort Lauderdale* and, accordingly, that panel's reliance on the well-founded lack of certainty in *City of Mesquite* was misplaced. Nor, given its lack of analysis on the issue, can we conclude that *City of Fort Lauderdale* provides us with much precedent, if any, for the proposition that the timing of repealing legislation, by itself, is sufficient evidence to support a reasonable expectation that the governmental entity will reenact repealed legislation. Certainly, it should not be read to suggest that such timing should be deemed dispositive.

In a case with a similar posture, *National Advertising Co. v. City of Miami*, 402 F.3d 1329 (11th Cir. 2005), the plaintiff—apparently the same National Advertising Company that was the plaintiff in *City of Fort Lauderdale*—brought a constitutional challenge to the sign provisions of the City of Miami's zoning ordinance. *Id.* at 1330-31. Sometime after plaintiff filed suit, the city began the process of amending its zoning regulations pertaining to signs and, ten months after litigation began, adopted amendments addressing "all the complaints" raised by plaintiff. *Id.* at 1331, 1335. Although it squarely confronted the question of timing, and any inference of motivation that could be drawn therefrom, the panel focused instead on the key inquiry guiding these determinations:

> There is some dispute as to when the process of amending the City's zoning ordinance began. However, since we conclude that the City has no intention of re-enacting the allegedly unconstitutional segments of the zoning code, we need not decide what initially motivated the City's comprehensive overhaul of its entire zoning ordinance.

Id. at 1331 n.3. The Court went on to hold that the city's "purpose in amending the statute is not the central focus of our inquiry nor is it dispositive of our decision." *Id.* at 1334. Thus, *City of Miami* suggests—correctly in our view—that the timing of a legislative repeal will not, standing alone, create a reasonable expectation that the government entity will reenact challenged legislation. As that Court noted, "[r]ather, the most important inquiry is whether we believe the City would re-enact the prior ordinance." *Id.*

Lastly, our en banc case in *Tanner Advertising Group, L.L.C. v. Fayette County, Georgia*, 451 F.3d 777 (11th Cir. 2006) (en banc), further persuades us that the timing of repealing legislation should not be dispositive of our inquiry into whether there is a reasonable expectation of reenactment. There the plaintiff, Tanner, challenged a county sign ordinance, alleging several constitutional infirmities. *Id.* at 781. After the district court denied relief and a panel of this Court reversed, we granted a petition for rehearing en banc. *Id.* at 783-84. The day after we agreed to take the case en banc—nearly three years into the litigation—the county repealed its sign ordinance and enacted a new plan substantially changing, with one exception, all of the provisions challenged in Tanner's original complaint. *Id.* at 784.

Regarding those challenged provisions addressed by the new ordinance, our en banc Court unanimously held that "the repeal of the [previous] Sign Ordinance and the enactment of the [new] Sign Ordinance rendered moot the challenges brought by Tanner." *Id.* at 785. The Court reasoned:

> "This Court and the Supreme Court have repeatedly held that the repeal or amendment of an allegedly unconstitutional statute moots legal challenges to the legitimacy of the repealed legislation." *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). A "superseding statute or regulation moots a case . . . to the extent that it removes challenged features of the prior law." *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000).

> If the repeal is such that "the allegedly unconstitutional portions of the [challenged] ordinance no longer exist," the appeal is rendered moot because "any decision we would render would clearly constitute an impermissible advisory opinion." *Nat'l Adver. Co.*, 402 F.3d at 1335.

Id. at 789-90 (alterations in original). The timing of the legislative repeal in *Tanner*—which is very similar to that of the instant case—not only did not drive the inquiry in that case, it did not even warrant mentioning in the rationale for the mootness holding. Moreover, *Tanner*'s heavy reliance on *City of Miami*, and corresponding lack of reliance on *City of Fort Lauderdale*, bolsters our conclusion that the timing of repealing legislation should not control the mootness inquiry. Accordingly, in the context of a full repeal of allegedly unconstitutional legislation, we hold that the timing of the repealing legislation is not dispositive if the court concludes from other evidence that there is no reasonable expectation that the governmental actor will reenact the challenged provisions.[5] To the extent that *City of Fort Lauderdale* suggests otherwise, it is no longer precedential.

We turn now to apply the foregoing principles of law to the instant facts, using the broad factors

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[5] Of course, the timing of the repealing legislation is one of the relevant factors to be considered as a court embarks on the mootness inquiry. *See Harrell v. The Fla. Bar*, 608 F.3d 1241, 1265-68 (11th Cir. 2010) ("timing and content" of a voluntary decision to cease a challenged activity are relevant). We hold only, along with *Tanner* and *City of Miami*, that when other evidence has persuaded a court that there is no reasonable expectation that a government actor will reenact repealed legislation, the timing of repealing legislation, alone, will not avoid mootness.

detailed above to inform our ultimate inquiry into whether the totality of the circumstances indicates that there is a reasonable expectation that the City here will reenact the repealed legislation. We conclude there is no substantial evidence indicating a reasonable likelihood that the City will reenact the challenged provision which it has now repealed. To the contrary, there is very substantial evidence leading us to believe that there is no reasonable expectation that the same or a similar provision will be reenacted.

Considering the first broad factor, Appellants have argued that the timing of this repeal—years into the litigation and after we agreed to rehear the case en banc—is not the result of substantial deliberation but, rather, reflects a plain attempt to manipulate the Court's jurisdiction. We are not unsympathetic to this argument. However, under the full analysis required by this factor we find it instructive that the City has engaged in substantial deliberation—having twice voted on the relevant remedial measures—and has put forth persuasive explanations that are not dependent upon this litigation.

As an initial matter, the facts here are far removed from those cases in which the procedures used to effect a change have given us pause about the level of deliberation attending a change in policy. *Cf. Harrell*, 608 F.3d at 1267 ("[T]he Board acted in secrecy [and] me[t] behind closed doors . . . ."); *id.* ("[I]n doing so, it may have departed from its own procedures."). On the contrary, here the City Council voted on both the Ordinance's repeal and the resolution regarding that repeal in open session during regularly scheduled meetings. Both measures were placed on the Council's published agenda and are reflected in their meeting

minutes. The repeal itself was passed unanimously with all members present and, although a single member was missing for the second vote, the resolution regarding the repeal was likewise passed without objection. In short, the procedures used by the City to repeal the Ordinance reflect the same level of deliberation we would expect for any other change in policy.

Additionally, the City has offered persuasive explanations, not dependent upon this litigation, to explain its course of conduct in repealing the Ordinance. *Compare Troiano*, 382 F.3d at 1285 ("[Defendant's] decision to implement the changes in the voting machines was well reasoned . . . ."), *with Harrell*, 608 F.3d at 1267 ("[T]he Board . . . fail[ed] to disclose any basis for its decision."). Here, the City has provided two compelling explanations. First, it has pointed out that the Ordinance's repeal had the effect of removing an inconsistency between the repealed provision and other applicable regulations. Indeed, while the Ordinance at issue here banned the sale of sexual devices throughout the City, entirely separate provisions of the Code contemplate such sales and regulate the same through license and zoning requirements for stores that would sell such devices.[6] As counsel for the City observed at oral argument, and

[6] Section 26-22 of the City's Code defines an adult bookstore as "a commercial establishment or facility in the city that maintains 25 percent or more of its floor area for the display, sale, and/or rental of . . . [i]nstruments, devices, novelties, toys or other paraphernalia that are designed for use in connection with specified sexual activities as defined herein or otherwise emulate, simulate, or represent 'specified anatomical areas.'" Such bookstores are subject to a series of zoning and licensing restrictions established by other provisions of the Code.

as the City acknowledged in its resolution regarding the repeal, these two provisions are plainly inconsistent.[7]

Secondly, even if the Ordinance were not inconsistent with other provisions of the Code, the City has conceded that it is unnecessary to accomplish one of the key goals of passing it: elimination of the harmful secondary effects of shops that sell the banned devices. Indeed, in the Ordinance itself the City argued that it was being enacted to achieve the City's "substantial government interest in preventing the negative secondary effects of establishments which trade in indecent and obscene materials." It raised this argument before both the district court, ("[T]he Ordinance identifies the City's interest in preventing the negative secondary effects associated with establishments that trade in obscene materials . . . ."), and the initial panel, ("The City's purpose in enacting the Ordinance was to protect order and morality and prevent the negative secondary effects associated with establishments that trade in obscene materials."). However, in its resolution regarding the repeal, the

[7] While the two sets of provisions are inconsistent with each other, they are not flatly contradictory. The repealed Ordinance provided an affirmative defense against the unlawful sale of sexual devices when "done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." It is, of course, possible—although probably not likely—that a store could maintain a sufficient inventory of sexual devices exclusively for these "bona fide" sales that it would be subject to regulation under § 26-22 without running afoul of the Ordinance. Conversely, Davenport—who did not maintain a brick-and-mortar location but still wished to sell these devices—may have been subject to the repealed Ordinance but not § 26-22. Nonetheless, the two provisions are in sufficient tension that we consider the City's proffered explanation for the repeal persuasive.

City has now rejected that justification and conceded, with regard to the feared secondary effects, that the Ordinance is redundant because "[t]h[e] zoning and licensing regulations serve the City's secondary effects interests relative to the sale of [sexual] devices." Thus the City has, apparently, recognized that it has no need for one of the two reasons it offered as justifying the now-repealed Ordinance.

It would certainly have strengthened the City's case if it had been more expedient in its recognition of the contradictory nature of its code provisions and its ability to control the deleterious secondary effects of "sex shops" through licensure and zoning requirements. Nonetheless, the City Council has now twice gathered in open session and unanimously passed measures rejecting the challenged Ordinance. With the first, it repealed the challenged section of the City's Code. With the second, it identified an internal inconsistency warranting the change and conceded one of the two grounds on which it had originally justified the Ordinance. While we might in other circumstances have been skeptical of the late hour at which they have engaged in these measures, such timing is not dispositive and in this case there is persuasive evidence of legitimate explanations for the repeal. *See supra* discussion of *City of Miami* and *Tanner*. We are ultimately convinced that the City has undertaken the "substantial deliberation" required to assure this Court that there is no reasonable expectation that it will reenact the allegedly offensive provision of its Code. Thus, the first prong of our inquiry supports the conclusion that this case is moot.

On the second prong of our inquiry, Appellants fare no better: the City's repeal is plainly an unambiguous

termination of the challenged conduct. As an initial matter, the City has not merely declined to enforce the Ordinance against these Appellants; it has removed the challenged portion in its entirety. *Cf. Harrell*, 608 F.3d at 1268 ("Perhaps the Board . . . has merely decided 'not [to] enforce [the Rule] against [Harrell] in this case.'") (final three alterations in original) (quoting *Graham v. Butterworth*, 5 F.3d 496, 500 (11th Cir. 1993)). Moreover, the City has gone beyond a mere repeal and has assured this Court—now on three separate occasions—that it has no intention of reenacting the Ordinance. First, in its motion to dismiss for mootness, the City's attorney expressly warranted that it "disavows any intent to adopt such a regulation in the future." We have previously relied on such representations in filings with this Court in the very circumstance we consider here. *See Coral Springs*, 371 F.3d at 1333 ("[T]he City's brief repeatedly represented that there was 'no indication whatsoever that the City would reenact the [offending code provisions] in the future.'"). Likewise, at oral argument, counsel reiterated that "when the City authorized [him] to file the motion to dismiss this appeal as moot based on the legislative repeal of this Ordinance, [it] authorized [him] to say the City disavows any intent to reenactment." *Cf. id.* (relying on representations made at oral argument to justify a conclusion that the challenged provisions would not be reenacted). Finally—lest there be any doubt about counsel's ability to bind the City to the representations made in the motion and at oral argument—the City Council itself passed a resolution expressly "disavow[ing] any intent to reenact [the Ordinance] or any similar regulation."

We are cognizant of the fact that the City defended its Ordinance for nearly a decade and, even at en banc oral argument, declined to concede that it was unconstitutional. However, our jurisdiction turns on the presence of a live controversy throughout the litigation and, in this context, that turns on whether there is a reasonable expectation that the City will reenact the challenged legislation. Whether the City defended the Ordinance and/or continues to believe it was constitutional[8] provides only weak evidence, if any, that its repeal was ambiguous and, therefore, that the City will reenact the legislation. The City has unanimously enacted a full and public repeal of the challenged provision; its counsel has—on two separate occasions—warranted its commitment to the repeal; and it has unanimously and publicly adopted a resolution affirming those representations. These actions suggest precisely the type of unambiguous termination from which we are unable to draw a reasonable expectation that the City will reenact the challenged legislation. Accordingly, the second prong of our analysis counsels in favor of dismissing this case as moot.

Finally, under the third factor we would normally consider whether the City has maintained its commitment to the new legislative scheme. Here,

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[8] Our jurisdiction does not turn on a party's beliefs; to hold otherwise would turn the federal courts into glorified debating societies. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) ("[Article III standing] tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").

although we are unable to adequately judge its commitment to the *new* scheme given the late stage at which it has been adopted, we are comforted by the City's persuasive and public commitment not to reenact the repealed provision, as well as its demonstrated lack of commitment to enforcing the *old* scheme. Indeed, although Appellants note that they and others similarly inclined may have complied with the now-repealed Ordinance, they have not suggested that the City ever attempted to enforce the sanctions attending the Ordinance.[9] Thus, where the City has shown no inclination towards enforcing the old scheme, we are inclined to believe that the repeal of an otherwise unenforced code provision and the public embrace of that decision sufficiently serves to underscore the City's commitment to its new legislative scheme.[10]

Beyond the factors we would normally consider when evaluating the question of mootness, our history with cases in a similar posture clearly suggests that dismissal is the proper course. As noted above, our *Tanner* case involved a similar late-stage repeal by a governmental body and we nonetheless dismissed the

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[9] Those in violation of the Ordinance were subject to "a fine not exceeding $1,000.00, imprisonment for a term not exceeding six months, confinement at labor for a period of time not to exceed 30 days, or any combination thereof." Sandy Springs, Ga., Code of Ordinances § 1-10(c).

[10] We do not, of course, mean to suggest that if the City were to reenact the Ordinance a potential plaintiff would be required to wait for the City to levy sanctions before filing suit. That is a different question for a different day. We are merely suggesting that the long history of non-enforcement, coupled with the recent repeal, indicates the commitment to a new legislative scheme that we have traditionally required in these situations.

bulk of the complaint as moot. 451 F.3d at 789. Moreover, the late-stage repeal was not even mentioned in the *Tanner* opinion's discussion of the rationale for its mootness holding. And, in stark contrast to the instant case, it was not apparent that the government actor in *Tanner* had "disavowed" an intent to reenact the challenged ordinance, that it had offered alternative reasons for the repeal, or that there was any history of non-enforcement. We believe that mootness in the instant case finds strong support in *Tanner*.

In short, the City has repealed its Ordinance. It did so unambiguously and unanimously, in open session, and during a regularly scheduled meeting of its City Council. It has offered persuasive reasons for doing so. And it has expressly, repeatedly, and publicly disavowed any intent to reenact a provision that it never enforced in the first place. Against those facts, there is no reasonable expectation that the City will return to its previous Ordinance. Accordingly, we are simply unable to conclude that the claims for declaratory and injunctive relief are properly before us.

B. Nominal Damages

Having determined that the claims for declaratory and injunctive relief are moot, we must decide whether a prayer for nominal damages—Appellants' lone remaining claim[11]—is sufficient to save this otherwise

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[11] Appellants did not request actual or compensatory damages. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978) (finding that a "claim for actual and punitive damages" arising from the challenged conduct will save a case from mootness where "that claim is not so insubstantial or so clearly foreclosed by prior decisions that [it] may not proceed"). Although Appellants did request attorney's fees under 42 U.S.C.

moot constitutional challenge. To be sure, there are cases in which a judgment in favor of a plaintiff requesting only nominal damages would have a practical effect on the parties' rights or obligations.[12] Likewise, there are situations in which nominal damages will be the only appropriate remedy to be awarded to a victorious plaintiff in a live case or controversy.[13] In such circumstances, the exercise of jurisdiction is plainly proper. But there are also situations in which the same award would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized. This case is squarely of that last variety. Appellants have already won. Their victory, while perhaps not expedient, is comprehensive. They have received all the relief they requested and there is nothing of any practical effect left for us to grant them. Because the availability of such a practical remedy is a prerequisite of Article III

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§ 1988, an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990). Accordingly, Appellants' only remaining claim is for nominal damages.

[12] In an opinion we discuss in greater detail below, then-Judge (now-Professor) McConnell of the Tenth Circuit suggests that "[w]hen neighboring landowners wish to obtain a legal determination of a disputed boundary, for example, one might sue the other for nominal damages for trespass." *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1264 (10th Cir. 2004) (McConnell, J., concurring). Likewise, "plaintiffs sometimes seek nominal damages in libel suits in order to vindicate their reputations by proving that the supposed libel was a falsehood." *Id.* We need not add to those examples but, rather, merely acknowledge that our holding here does not foreclose the exercise of jurisdiction in all cases where a plaintiff claims only nominal damages.

[13] *See infra* note 23.

jurisdiction, we must conclude that the prayer for nominal damages will not sustain this case. Accordingly, we hold that in this case, involving a constitutional challenge to legislation that is otherwise moot, a prayer for nominal damages will not save the case from dismissal.

As we have discussed, Article III grants federal courts the power to "adjudicate only actual, ongoing cases or controversies." *Lewis*, 494 U.S. at 477. This requirement "subsists through all stages of federal judicial proceedings" and, at a minimum, requires that "a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant *and likely to be redressed by a favorable judicial decision*." *Id.* at 477 (emphasis added). As a result, "it has frequently [been] repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). Therefore, a previously justiciable case is moot when the requested relief, if granted, would no longer have any practical effect[14] on the rights or obligations of the litigants.[15]

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[14] *See Connell v. Bowen*, 797 F.2d 927, 929 (11th Cir. 1986) (Clark, J., dissenting) ("Generally, an action is considered moot when it no longer presents a justiciable controversy because any determination of the matter will have no practical effect on the parties, as when the issues in the case have been resolved or have for some reason become academic from the point of view of the plaintiff."); *see also Powell v. McCormack*, 395 U.S. 486, 564 (1969) (Stewart, J., dissenting) (arguing that a case is moot where it could not have "any conceivable practical impact"); *City Ctr. W., LP v. Am. Modern Home Ins. Co.*, 749 F.3d 912, 913 (10th Cir. 2014) ("This appeal ceased to have any practical importance, and therefore became moot . . . ."); *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010) ("[P]arties lack [a

In the instant case, the only injury of which Appellants complained, and thus the only one we have the power to remedy, was the existence of a constitutionally impermissible prohibition on their ability to sell (and therefore to buy or use) the banned sexual devices.[16] That their complaints pray predominantly—and, in Inserection's case, exclusively—for declaratory and injunctive relief makes clear that their only goal was removal of the

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legally cognizable] interest when, for example, our resolution of an issue could not possibly have any practical effect on the outcome of the matter." (citing *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000))); *Utah Animal Rights*, 371 F.3d at 1265 (McConnell, J., concurring) ("The award of nominal damages would serve no practical purpose, would have no effect on the legal rights of the parties, and would have no effect on the future.").

[15] *See Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (finding a case non-justiciable within Article III when it would "have no coercive impact on the legal rights or obligations of either party"); *see also Lewis*, 494 U.S. at 478 ("The parties must continue to have a 'personal stake in the outcome' of the lawsuit." (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983))); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) ("The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."); *id.* at 241 (requiring a "concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding" to proceed under the Declaratory Judgment Act).

[16] In their complaint, Davenport and Henry claimed that they "are currently suffering a harm, and will continue to suffer an injury, in being unable to purchase and/or sell sexual devices in Sandy Springs or to use them for intimate sexual activity, and in Henry's case, for his art." Inserection alleged that the Ordinance "violates the substantive due process clause of the Georgia and Federal Constitutions because it unjustifiably infringes on a deeply-rooted privacy interest in one's ability to acquire and self-use a sexual device."

challenged portion of the Ordinance. Appellants have never suggested that they are entitled to actual damages resulting from the operation of the Ordinance. Nor have they made any showing that the Ordinance is likely to be reenacted. *See supra* Section III.A. A fair reading of their complaints reveals that all of their alleged injuries would be remedied by, and therefore all of the possible relief exhausted by, removal of the challenged Ordinance provision. Having already achieved that, there is simply nothing left for us to do. Far from being "likely" that a favorable decision of this Court would have any practical effect on their rights or obligations, *Lewis*, 494 U.S. at 477, in these circumstances it is plainly not possible.

The Supreme Court has never held that nominal damages alone can save a case from mootness and, although we are aware that a majority of our sister circuits to reach this question have resolved it differently than we do today,[17] we are not convinced

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[17] *See*, *e.g.*, *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 & n.32 (5th Cir. 2009) (noting that "[t]his court and others have consistently held that a claim for nominal damages avoids mootness" and collecting cases); *Advantage Media, L.L.C. v. City of Eden Prairie,* 456 F.3d 793, 803 (8th Cir. 2006) (suggesting that a claim was not moot because the plaintiff "might be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures"); *Utah Animal Rights*, 371 F.3d at 1257 (majority opinion) ("It may seem odd that a complaint for nominal damages could satisfy Article III's case or controversy requirements, when a functionally identical claim for declaratory relief will not. But this Court has squarely so held." (footnote omitted)); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) ("A live claim for nominal damages will prevent dismissal for mootness."); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) (stating in dicta that "plaintiffs in election cases could avoid the potential for mootness by simply expressly

that the cases on which they have relied suggest the result that they have reached. Indeed, in neither of the Supreme Court's leading cases on damage awards for constitutional violations was the issue of mootness presented to the Court.

The first of these cases, *Carey v. Piphus*, 435 U.S. 247 (1978), involved two students, in separate circumstances, who were each suspended from school without receiving adequate procedural due process. The district court found that the students had been deprived of their procedural due process rights but did not award damages and did not determine whether the students would have been suspended if those rights had not been violated. *Id.* at 251-52. The Seventh Circuit reversed, holding in relevant part that the district court should have determined whether suspensions would have been imposed even if due process had been afforded. If the suspensions would not have been otherwise imposed, the students would be entitled to actual damages in the amount of the pecuniary value of each day they missed while suspended. *Id.* at 252. The Supreme Court agreed with this holding. *Id.* at 254-55. However, the Seventh Circuit had also held that if the students failed to prove damages based on the value of missed school time, they would still be eligible for substantial "nonpunitive" damages based solely on the deprivation of procedural due process. *Id.* at 252. The Supreme Court disagreed with this latter conclusion and held that if the students' suspensions would have been imposed even if procedural due process had been afforded—and, thus, that actual damages based on the

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pleading that should the election pass before the issuance of injunctive relief, nominal money damages are requested").

value of missed school time were unavailable—they could recover only nominal damages for the deprivation of due process. *Id.* at 266.

As a result, the Supreme Court remanded the case to the district court to determine, in the first instance, whether the suspensions were justified and, thus, whether an award of actual damages for missed school time was appropriate. True enough, if the district court determined on remand that actual damages were not available, the students "nevertheless [would] be entitled to recover nominal damages not to exceed one dollar." *Id.* at 266-67. But at no point was that nominal damages award the only remedy available to them. Rather, the Court considered a case in which a live claim for actual damages existed at all levels of the litigation. Accordingly, it did not address mootness and nothing that it held, or even said, controls the mootness issue before us.

Likewise, in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the Court noted that nominal damages are the appropriate remedy for a constitutional violation that caused no "actual, provable injury" but never confronted a mootness inquiry. *Id.* at 308 n.11. In that case a jury returned a substantial damages award for constitutional violations, arguably based on instructions that permitted such an award to be determined by reference to the "value" of the right that was violated in addition to any actual harm sustained by the plaintiff. *Id.* at 302-03. The Court held that damages based on the "abstract 'value' or 'importance'" of a constitutional right were simply not recoverable in a case brought under 42 U.S.C. § 1983 because § 1983 damages are limited to those designed to compensate injuries

caused by the constitutional deprivation. *Id.* at 309-10. Accordingly, the case was remanded for a new trial on compensatory damages and was, therefore, clearly "alive" when the Supreme Court ruled. The Court's comment that nominal damages—and not some abstract value of the right—are the appropriate remedy for a constitutional violation with no attendant actual damages, *id.* at 308 n.11, says nothing at all about whether nominal damages can save from mootness a case which is otherwise moot.[18]

In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), the Court did mention the Ninth Circuit's conclusion that nominal damages are sufficient to save an otherwise moot claim, but it decided the case without reaching the issue relevant here. There, the Ninth Circuit had determined that the claim at issue was not moot on account of a prayer for nominal damages under § 1983 against the State of Arizona. *Id.* at 61-62. The Supreme Court reversed because § 1983 actions will not lie against a state and, in any event, Arizona was not a party to the litigation. *Id.* at 69-70. Therefore, the claim for nominal damages was simply unavailable. Thus, although it noted in a footnote that what it termed the "nominal damages solution to mootness" did not apply in that case, *id.* at

[18] As noted in the text, in both *Carey* and *Memphis Community School District*, the compensatory damages issue was alive throughout the entire litigation. By contrast, the instant case is moot now *before* the appellate court has decided the constitutional issue. Unlike the situation in *Carey* and *Memphis Community School District*, Appellants ask this en banc court to litigate and decide a constitutional issue *after* the case has become moot, and notwithstanding the fact that even if Appellants are successful in the further litigation, their remedy—nominal damages—would be only a psychic victory.

69 n.24, the Court did not address or decide the issue of whether—assuming it is available—a claim for nominal damages could preserve an otherwise moot claim.

In the absence of any guidance from the Supreme Court—and despite the positions adopted in other circuits[19]—we are in substantial agreement with the views expressed by Judge McConnell in his concurring opinion in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1262-71 (10th Cir. 2004) (McConnell, J., concurring), that a prayer for nominal damages cannot save an otherwise moot case. For the reasons that follow, we are confident that our position finds support in the existing jurisprudence.

As an initial matter, our mootness analysis here is supported by analogy to two related doctrines, both of which the Supreme Court has explored in more detail than the present question: standing and declaratory judgments.

In the context of standing—a doctrine closely connected to that of mootness[20]—the Supreme Court

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[19] We find it worthwhile to note that, while the circuit courts that have reached this issue have taken a position contrary to ours, our holding is not without support among other members of the judiciary. *See Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 482-92 (3d Cir. 2016) (Smith, J., concurring dubitante); *Utah Animal Rights*, 371 F.3d at 1262-71 (McConnell, J., concurring).

[20] The Supreme Court had, at one point, described the doctrine of mootness as "standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)). It has

has observed that "[b]y the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). However, the Court has denied standing to such litigants, finding that this "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* at 107. The same is true here. At this point in the litigation, the only redress we can offer Appellants is judicial validation, through nominal damages, of an outcome that has already been determined. Perhaps more than most, we have no doubt that these particular Appellants—having waged a years-long battle against the City—would enjoy seeing this Court vindicate their cause as a worthy one.[21] They may truly believe that

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since called that description "not comprehensive" given that the "[s]tanding doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake," while the mootness doctrine involves a "case [that] has been brought and litigated, often . . . for years." *Id.* at 190-91. While the fact that parties have invested sometimes substantial resources into litigation "does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest," this is "surely . . . an important difference between the two doctrines." *Id.* at 192; *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980) (noting "the flexible character of the Art[icle] III mootness doctrine"). Accordingly, while cases considering the standing doctrine may be instructive, we rely on them only by analogy and are cautious to avoid importing the more stringent standing analysis into our mootness holdings.

[21] Appellants and amici also suggest that similarly situated individuals in localities with laws similar to the Ordinance would benefit from the judicial imprimatur of a favorable decision. "That may well be so, but the Article III question is not whether the requested relief would be nugatory as to the world at large, but

this purely psychic satisfaction would serve as an effective remedy for their complained-of injuries. However, as in the standing context, absent an accompanying practical effect on the legal rights or responsibilities of the parties before us, we are without jurisdiction to give them that satisfaction.

Likewise, the granting of nominal damages—a trivial sum awarded for symbolic, rather than compensatory, purposes—may be closely analogized to that of declaratory judgments.[22] As has been routinely observed, the Declaratory Judgment Act "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *see also Schilling v. Rogers*, 363 U.S. 666, 677 (1960) ("[T]he Declaratory Judgments Act is not an

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whether [plaintiff] has a stake in that relief." *Lewis*, 494 U.S. at 479.

[22] Indeed, Judge McConnell observed that "nominal damages were originally sought as a means of obtaining declaratory relief before passage of declaratory judgment statutes." *Utah Animal Rights*, 371 F.3d at 1265 (McConnell, J., concurring) (citing Douglas Laycock, *Modern American Remedies: Cases and Materials* 561 (3d ed. 2002) ("The most obvious purpose [of nominal damages] was to obtain a form of declaratory relief in a legal system with no general declaratory judgment act."); 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 3.3(2), at 295 (2d ed. 1993) ("Lawyers might have asserted a claim for nominal damages to get the issue before the court in the days before declaratory judgments were recognized."); 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.3, at 266 (2d ed. 1984) ("The very determination that nominal damages are an appropriate remedy for a particular wrong implies a ruling that the wrong is worthy of vindication by an essentially declaratory judgment.")). For justiciability purposes, we, like Judge McConnell, "see no reason to treat nominal and declaratory relief differently." *Id.*

independent source of federal jurisdiction; the availability of such relief presupposes the existence of a judicially remediable right." (citation omitted)). Accordingly, because the federal courts have no jurisdiction over a case that does not involve an Article III case or controversy, a prayer for declaratory relief is insufficient to save an otherwise moot case. *See Preiser*, 422 U.S. at 401-04; *see also Lewis*, 494 U.S. at 479 ("Even in order to pursue the declaratory and injunctive claims, . . . [plaintiff] must establish that it has a 'specific live grievance' against the application of the statutes . . . ." (quoting *Golden v. Zwickler*, 394 U.S. 103, 110 (1969)). Given the similarities between the two remedies, we believe that the same is true of a prayer for nominal damages. Nominal damages, like declaratory relief, are a remedy that may be granted by the federal courts upon a proper exercise of our jurisdiction; they are not themselves an independent basis for that jurisdiction. Because a prayer for declaratory relief—by itself and in an otherwise moot case—is insufficient to give a federal court jurisdiction, we believe that the Supreme Court's holdings in the declaratory relief context support our position in this case.

Beyond the comfort we draw from analogous doctrines, our decision today reflects the "great gravity and delicacy" inherent in the federal courts' role in passing on the constitutionality of legislative acts. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring). Our recognition of this delicate balance of power counsels in favor of restraint such that we must generally decline to pass on the constitutionality of legislation unless "as a necessity in the determination of real, earnest, and vital controversy between individuals." *Id.* at 346

(quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339 (1892)); *see also id.* at 346-47 ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)). The present question does not even rise to the level of a "controversy," let alone one that is "real, earnest, and vital." The Ordinance itself, and with it the necessity of deciding its constitutionality, has ceased to exist and is now no more real than any other hypothetical statute on which the federal courts should routinely decline to pass judgment. Our view of the judiciary's proper role therefore cautions against a disposition on the merits of the present appeal.

Moreover, the lack of any real controversy surrounding the constitutionality of a now-repealed Ordinance highlights yet another problem with the exercise of our jurisdiction in this case: it would surely constitute an impermissible advisory opinion of the sort federal courts have consistently avoided. *See, e.g.*, *Rice*, 404 U.S. at 246 ("Early in its history, this Court held that it had no power to issue advisory opinions . . . ."). It has long been established that decisions of this, or any, federal court must be grounded in "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* at 246 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

Indeed, *Hall v. Beals*—a case with significant factual similarities to our instant appeal—highlights the advisory nature of any opinion we would render

here. 396 U.S. 45 (1969) (per curiam). There the Supreme Court considered a challenge to a Colorado law requiring six months of in-state residency prior to voting in a presidential election. *Id.* at 46-48. While the appeal was pending, the relevant presidential election occurred, the six months passed, and—most importantly—the Colorado legislature reduced the waiting period to two months. *Id.* at 47-48. The Court concluded:

> The 1968 election is history, and it is now impossible to grant the appellants the relief they sought in the District Court. Further, the appellants have now satisfied the six-month residency requirement of which they complained. But apart from these considerations, the recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in light of the Colorado statute as it now stands, not as it once did. And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law.

Id. at 48 (citations omitted). The Court accordingly vacated the judgment of the district court and remanded with directions to dismiss the case as moot.

We, like the Supreme Court, must "review the judgment below in light of the [City Ordinance] as it now stands, not as it once did." Under the law as it now stands, the ban on sexual devices is nothing more than a novel hypothetical; an abstract proposition of

law on which Appellants urge us to issue an advisory opinion. For more than two centuries, the federal courts have declined to accept such ill-advised invitations. We will not change course now.

Finally, we find it significant that a holding contrary to the one we adopt today would drastically reduce, if not outright eliminate, the viability of the mootness doctrine in the context of constitutional challenges to legislation and other similar suits. Indeed, in both of this Circuit's leading cases on governmental repeal of challenged legislation, *Tanner* and *City of Miami*, *infra* Section III.A, a valid prayer for nominal damages would have negated the fact that the claims for injunctive and declaratory relief were moot and thereby saved the entire case. There, as here, the parties' right to a single dollar in nominal damages is not the type of "practical effect" that should, standing alone, support Article III jurisdiction. If a mere prayer for nominal damages could save an otherwise moot case, the jurisdiction of the court could be manipulated, the mootness doctrine could be circumvented, and federal courts would be required to decide cases that could have no practical effect on the legal rights or obligations of the parties.

For the reasons we have explained, we are simply without power to grant Appellants any practical relief from a cognizable injury within Article III's scope. They requested relief from the Ordinance and they have received it. All that they ask from us here is to label that achievement as laudable. Analogous case law, general principles of justiciability, bedrock tenets of judicial restraint, and the continuing vitality of the mootness doctrine all convince us that such is not a proper function of the federal courts. Accordingly, we

must conclude that nominal damages are insufficient to save this otherwise moot challenge.[23]

IV. Conclusion

For the reasons stated above, this case is MOOT. The appeal is DISMISSED. The panel opinion remains VACATED. The judgment of the district court is VACATED[24] and the case is REMANDED with instructions to dismiss the case.

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[23] Our holding today that a prayer for nominal damages cannot save this case from mootness does not imply that a case in which nominal damages are the only available remedy is always or necessarily moot. This Court has long recognized that "[n]ominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages." *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006) (quoting *Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003)). Thus, where an alleged constitutional violation presents an otherwise live case or controversy, a district court is not precluded from adjudicating that dispute. If that court determines that a constitutional violation occurred, but that no actual damages were proven, it is within its Article III powers to award nominal damages. If that plaintiff appeals the determination that no actual damages were proven, the appellate court likewise has jurisdiction to review that decision, because the claim for actual damages maintains the live controversy. That was precisely the situation in *Carey*. In the same scenario, if the district court had awarded compensatory damages, but the appellate court found some error in the damages award and remanded for a new trial on damages, the claim for damages again would have remained alive throughout the trial, appeal, and remand. This was precisely the situation in *Memphis Community School District*. Today's holding does not, of course, alter this long-standing view. We hold only that a prayer for nominal damages does not, by itself, save from mootness an otherwise moot case.

[24] When a case has become moot, we ordinarily dismiss the appeal, vacate the district court's judgment, and remand with

DISMISSED.

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instructions to dismiss the case. *See Lewis*, 494 U.S. at 483 ("Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss.").

WILSON, Circuit Judge, dissenting, joined by MARTIN, JORDAN, ROSENBAUM, and JILL PRYOR, Circuit Judges:

I dissent because Plaintiffs' request for nominal damages saves this constitutional case from mootness. This conclusion is far from novel; courts have held, in varying types of cases, that nominal damages save a case from mootness. *See, e.g.*, *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748, 748 n.32 (5th Cir. 2009); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004);[1] *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001); *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 72 (4th Cir. 1983); *Murray v. Bd. of Trustees, Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981).

When constitutional rights are violated, it is difficult, if not impossible, to place a monetary value on the infringement. "[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Civil rights litigation "serve[s] the public interest" and "secures important social benefits that are not reflected in nominal or relatively small damages awards . . . ." *Id.* Nominal damages provide a useful

[1] While the majority is "in substantial agreement with the views expressed by Judge McConnell in his concurring opinion in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1262-71 (10th Cir. 2004)," I find Judge McConnell's majority opinion in that same case more persuasive, *see id.* at 1258 (holding that nominal damages save the case from mootness).

mechanism for redressing infringements that cause no actual damages. This is exactly how the Supreme Court has described nominal damages. *See* Maj. Op. at 34-35 (recognizing that the Court noted nominal damages as "the appropriate remedy for a constitutional violation that caused no 'actual, provable injury'"). I believe that the most workable option is a bright line rule allowing nominal damages to save constitutional claims from mootness. When evaluating the significance of nominal damages, "it does not matter whether the underlying claim involves a deprivation of a procedural or substantive constitutionally-based right." *See Harden v. Pataki*, 320 F.3d 1289, 1301 n.15 (11th Cir. 2003) (internal quotation marks omitted). "Quite simply, when constitutional rights are violated, a plaintiff may recover *nominal* damages even though he suffers no compensable injury." *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1261 (11th Cir. 2006) (internal quotation marks omitted).

I.

The majority's concerns about allowing nominal damages to save a constitutional claim from mootness are not as grave as the majority makes them out to be. The majority states:

> If a mere prayer for nominal damages could save an otherwise moot case, the jurisdiction of the court could be manipulated, the mootness doctrine could be circumvented, and federal courts would be required to decide cases that could have no practical effect on the legal rights or obligations of the parties.

Maj. Op. at 42-43. But allowing claims to proceed based on nominal damages would lead to no worse jurisdictional manipulation than what happened here: a city repealed a challenged ordinance years into litigation and just days after we granted en banc review. For nominal damages to save a claim from mootness, the claim would have to be otherwise moot *and* there would have to be no other possible type of damages still available. The cases that meet this checklist would be limited. Indeed, the circuits that have held the opposite of the majority on this issue seem to be weathering the storm. *See, e.g.*, *Morgan*, 589 F.3d at 748, 748 n.32. Finally, in regards to practical effects, protecting a plaintiff's constitutional rights from infringement, no matter how temporary, is a practical effect.

II.

The majority's holding is, at best, undermined and, at worst, contradicted by its footnotes. At first glance, the majority's holding appears to be clear and concise. The majority states that "nominal damages cannot save an otherwise moot case" and that "[nominal damages] are not themselves an independent basis for [Article III] jurisdiction." Maj. Op. at 36, 39. But those two statements have to be reconciled with the majority's statements in footnotes that "our holding here does not foreclose the exercise of jurisdiction in all cases where a plaintiff claims **only** nominal damages" and that "[the majority's holding does] not imply that a case in which nominal damages are the **only** available remedy is always or necessarily moot." Maj. Op. at 28 n.12, 43 n.23 (emphasis added). These latter statements are the result of the majority trying to reconcile its holding with contradictory precedent

(Section A). Also, the majority's holding is unworkable and defies the purpose of nominal damages (Section B). Even if the majority does not concede that its holding is foreclosed by precedent or is unworkable, the holding falters because this case would fall within the confines of whatever exceptions these statements from the footnotes set out (Section C).

A. Contradictory Precedent

In distinguishing *Carey*, a Supreme Court case emphasizing the role of nominal damages, the majority states:

> [W]here an alleged constitutional violation presents an otherwise live case or controversy, a district court is not precluded from adjudicating that dispute. If that court determines that a constitutional violation occurred, but that no actual damages were proven, it is within its Article III powers to award nominal damages. If that plaintiff appeals the determination that no actual damages were proven, the appellate court likewise has jurisdiction to review that decision, because the claim for actual damages maintains the live controversy.

Maj. Op. at 43 n.23. So, according to the majority, nominal damages are appropriate only if actual damages are in play throughout the case but then at the end of the case the plaintiff fails to prove actual damages. And that scenario is different from here because Plaintiffs in this case never requested actual damages. In the other cases awarding nominal damages, the "claim for actual damages maintains the live controversy." Maj. Op. at 43 n.23. However, the

majority fails to address the statement in *Carey* that the Supreme Court "believe[s] that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Carey*, 435 U.S. at 266. Actionable is defined as "furnishing the legal ground for a lawsuit or other legal action." *Actionable*, Black's Law Dictionary (10th ed. 2014). Therefore, under Supreme Court precedent, one can bring a suit solely for nominal damages, which means that nominal damages defy mootness on their own. This precedent cannot be squared with the majority's statement that "[nominal damages] are not themselves an independent basis for [Article III] jurisdiction." Maj. Op. at 39.

The majority dismisses nominal damages as "psychic satisfaction" or akin to an "advisory opinion." Maj. Op. at 37, 42. Yet, the majority acknowledges that the Supreme Court has held that there are situations where the only relief a plaintiff would receive is nominal damages. *See* Maj. Op. at 33-34 ("[I]f the district court determined on remand that actual damages were not available, the students 'nevertheless [would] be entitled to recover nominal damages not to exceed one dollar.'"). This puts the majority in the position of either admitting that we can give "psychic satisfaction" or that nominal damages are something else. Whatever their answer is, we can award this remedy by itself.

If the majority agrees that a case can result in the award of only nominal damages, then it must concede that nominal damages can save a claim from mootness. *See Carey*, 435 U.S. at 266-67 ("We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents

nevertheless will be entitled to recover nominal damages not to exceed one dollar from petititoners."). For without that concession, whenever nominal damages are the last remedy still in play, no matter how late in the case, the case is moot, and there would be no cases where only nominal damages were awarded. But those cases exist. *See Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (affirming the award of only nominal damages). The majority believes that "claim[s] for actual damages maintain[] the live controversy." But "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case." *Burke v. Barnes*, 479 U.S. 361, 363 (1987). If a court has to have a live case or controversy when it decides a case and a court can award only nominal damages, then nominal damages provide the live case or controversy.

B. Unworkable Holding

Under the majority opinion, a claim for nominal damages is not moot if "nominal damages would have a practical effect on the parties' rights or obligations." Maj. Op. at 28. Citing a few libel and trespassing examples, the majority provides very little clarity on what constitutes a sufficient practical effect.[2] The majority rules that this case is moot because the ordinance has been repealed. But as the libel and trespassing examples demonstrate, nominal damages are about remedying past wrongs, not future ones. To be clear, the majority concedes there was an Article III injury in this case by dismissing it on mootness grounds instead of on standing grounds. Under the

[2] Moreover, the majority fails to ground its "practical effect" test in binding law—all of the decisions it cites that refer to the concept of practicality are non-binding.

majority's opinion, declaring that someone's constitutional rights have been violated is not a practical effect. Yet making sure someone does not speak poorly about you or come onto your land are practical effects. The reasons for granting less protection to one's constitutional rights than one's land or reputational rights elude me. While the exact borders of your land and protecting your reputation from harm are surely significant, I am inclined to believe that the penumbra of rights contained in the Constitution are at least worthy of similar protection.

The majority bases its ruling, in large part, on a Tenth Circuit concurrence that states, "I see no reason to treat nominal and declaratory relief differently" and "[l]abeling the requested relief 'nominal damages' instead of 'declaratory judgment' should not change the analysis." *Utah Animal Rights Coal.*, 371 F.3d at 1265-66 (McConnell, J., concurring).[3] But nominal damages are distinct from a declaratory judgment in that nominal damages remedy a past invasion of a right:

> Nominal damages are damages **awarded for the infraction of a legal right**, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage, as in the case of rights of bodily immunity or rights to have one's material property undisturbed by direct invasion. The award of nominal damages is made as a judicial declaration that the plaintiff's right **has been violated.**

[3] *See* Maj. Op. at 36 ("[W]e are in substantial agreement with the views expressed by Judge McConnell in his concurring opinion.")

Charles T. McCormick, Handbook on the Law of Damages § 20, at 85 (1935) (emphasis added). Nominal damages are "[a] trifling sum awarded **when a legal injury is suffered** but there is no substantial loss or injury to be compensated." *Nominal Damages*, Black's Law Dictionary (emphasis added); *see also Brooks v. Warden*, 800 F.3d 1295, 1308 (11th Cir. 2015) (citing *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003) ("[N]ominal damages are not compensation for loss or injury, but rather recognition of a violation of rights.")). Despite the existence of nominal damages, the majority states that "absent an accompanying practical effect on the legal rights or responsibilities of the parties before us, we are without jurisdiction to give them that satisfaction."[4] Maj. Op. at 38. Lower courts are now left with the task of deciding what constitutes a practical effect sufficient to survive mootness. I struggle to comprehend a sufficient practical effect to meet the majority's requirement. The majority's finding that a ruling here would produce no "practical effect" is troubling.

C. Majority Exceptions Apply Here

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[4] The majority's ruling that nominal damages do not adequately alter the legal rights or responsibilities of the parties for purposes of justiciability is difficult, if not impossible, to square with the Supreme Court's ruling in *Farrar* that nominal damages achieve a "material alteration of the legal relationship of the parties" for purposes of determining prevailing-party status for an award of attorney's fees under 42 U.S.C. § 1988. *Farrar*, 506 U.S. at 111 (internal quotation marks and citation omitted). In the Supreme Court's view, "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* at 113.

If we take the time to consider what a ruling in this case would do, it is clear that a ruling would indeed "have a practical effect on the parties' rights or obligations." Maj. Op. at 28. The City of Sandy Springs potentially violated Plaintiffs' constitutional rights by enacting this ordinance. If we dismiss this case now, no ruling would confirm that such violation occurred, the City would be free to reenact the ordinance at a later date, and Plaintiffs would have to relitigate the case. If however we decide this case and determine that the City of Sandy Springs violated the Constitution in enacting the ordinance, then the City would be stopped from even reenacting the ordinance. That is a practical effect on the City's obligations sufficient to save the case from mootness under the majority's holding. *See id.*

Plaintiffs believe that their rights were violated by the enactment of the ordinance. They are asking for judicial recognition of that right so that it is not violated again. Declaring that their rights were violated is of legal significance. Plaintiffs could feel secure in their knowledge that their rights were violated and have protection from future infringement. Instead, we ignore the possible past injury to the Plaintiffs' rights, forcing Plaintiffs to wait until a second violation occurs to seek vindication. Judges need not go in search of rights that need protection, but when a plaintiff claims that her constitutional rights have been violated, we owe her an answer.

III.

The majority ignores Plaintiffs' prayer for nominal damages because, in the majority's view, Plaintiffs have "already won," and "there is simply nothing left for us to do." Except Plaintiffs have not obtained everything they want, and there is something left for us to do—that is to determine whether the Plaintiffs' constitutional rights were violated by the now repealed ordinance.

For a number of civil rights violations (e.g., free speech, procedural due process), compensable damages may not always exist. Under the majority opinion, as long as the government repeals the unconstitutional law, the violation will be left unaddressed; the government gets one free pass at violating your constitutional rights.

I respectfully dissent.

APPENDIX B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15499

D.C. Docket No. 1:13-cv-03573-HLM

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, FANTASTIC VISUALS, LLC,	Plaintiffs - Appellants,
MELISSA DAVENPORT, MARSHALL G. HENRY,	Intervenors - Plaintiffs - Appellants,
versus	
CITY OF SANDY SPRINGS, GEORGIA,	Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 2, 2016)

Before HULL, WILSON, and ANDERSON, Circuit Judges.

WILSON, Circuit Judge:

In this appeal, we review the district court's dismissal of two complaints that challenge the constitutionality of a municipal ordinance prohibiting the sale, rental, or lease of obscene material. After the benefit of briefing and oral argument, we conclude that the Fourteenth Amendment Due Process Clause claim is foreclosed by our prior holding in *Williams v. Attorney General* (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004), and the district court properly entered judgment on the pleadings for the City of Sandy Springs as to Intervenor-Appellant Henry's First Amendment claims that the law burdens his artistic expression. The district court committed no reversible error as to any other claim properly raised on appeal. Accordingly, we affirm.

I

On April 21, 2009, the City of Sandy Springs, Georgia (the City) enacted into law several provisions that, *inter alia*, prohibit the commercial distribution of sexual devices within the City. Multiple adult entertainment establishments and other businesses affected by the provisions sued the City in response. In this severed portion of that litigation, Plaintiffs-Appellants Flanigan's Enterprises, Inc. of Georgia (Flanigan's) and Fantastic Visuals, LLC (Inserection) (collectively, the Plaintiffs), as well as Intervenors-Appellants Melissa Davenport and Marshall Henry (collectively, the Intervenors), brought, in relevant part, a Fourteenth Amendment Due Process Clause challenge to Ordinance 2009-04-24 (the Ordinance),

codified at section 38-120 of the City's Code of Ordinances.[1] Section 38-120 criminalizes the commercial distribution of obscene material and defines "[a]ny device designed or marketed as useful primarily for the stimulation of human genital organs" as obscene. Sandy Springs, Ga., Code of Ordinances ch. 38, § 38-120(a), (c) [hereinafter § 38-120].[2]

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[1] In October 2009, the Plaintiffs sued the City, alleging that recent amendments to the City's Code of Ordinances were unconstitutional. These amendments included licensing and regulating schemes of establishments that serve alcohol in the City, the zoning and licensure of adult entertainment establishments and adult bookstores, and restrictions on the sale of sexual devices. Four years later, after the City moved for summary judgment, the district court issued an order severing the Plaintiffs' challenge to the Ordinance's prohibition on the sale of sexual devices from the other pending challenges. This permitted additional affected parties to intervene in the litigation without slowing the progress of the other challenges. In March 2014, the district court granted Davenport and Henry's motion to intervene.

Although Flanigan's participated in the Notice of Appeal to this court, it neither provided briefing of its own nor indicated that Inserection brings any claim on its behalf. "When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 680 (11th Cir. 2014). In failing to provide any briefing whatsoever, Flanigan's abandoned its appeal.

In addition, Inserection did not brief its state constitution claim on appeal, and the Intervenors did not brief either their overbreadth or state constitution claims. Therefore, those claims are abandoned on appeal. *See id.*

[2] For ease of reference, we attach § 38-120 in an appendix to this opinion.

Inserection is an adult bookstore in Sandy Springs that sells sexually explicit materials and items, including sexual devices. Davenport suffers from multiple sclerosis and uses sexual devices with her husband to facilitate intimacy. She seeks to purchase sexual devices in Sandy Springs for her own use, as well as to sell sexual devices to others in Sandy Springs who suffer from the same or a similar condition. Henry is an artist who uses sexual devices in his artwork. He seeks to purchase sexual devices in Sandy Springs for his own private, sexual activity and for use in his artwork, as well as to sell his artwork in Sandy Springs.

After the Intervenors entered the litigation and filed their complaint, the City filed an answer and moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The district court granted the City's motion and entered an order upholding the Ordinance against each challenge. The Plaintiffs and the Intervenors together filed a timely notice of appeal, arguing that the district court erred in entering judgment in favor of the City.

II

We review de novo the district court's entry of judgment on the pleadings pursuant to Rule 12(c). *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002). "Judgment on the pleadings under Rule 12(c) is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Id.* In reviewing whether judgment was appropriately entered, "we accept the facts in the complaint as true and we view them in the light most favorable to the nonmoving party." *Hawthorne v. Mac*

Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998). A complaint may only be dismissed under Rule 12(c) if "it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations." *See Horsley*, 292 F.3d at 700.

III

The Intervenors and Inserection (collectively, the Appellants) argue that the Ordinance is unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment.[3] The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has long held that the Due Process Clause contains a substantive component that "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *See, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (internal quotation marks omitted). The Appellants contend that they have a fundamental right to engage in acts of private, consensual sexual intimacy, and that the Ordinance burdens this right. The City responds that this claim is foreclosed by our prior holding in *Williams IV*.

In *Williams IV*, the American Civil Liberties Union (ACLU) brought a constitutional challenge against an Alabama statute that prohibited the sale of sexual devices. *See* 378 F.3d at 1233. The ACLU claimed that

[3] The Intervenors raise this claim on behalf of themselves and those similarly situated. Inserection raises this claim on behalf of its customers. For ease of reference, we refer to this claim as belonging to the Appellants, collectively.

the law violated a fundamental right to sexual privacy, which includes a right to use the devices in the privacy of one's home. *See id.* at 1235. We concluded that the Supreme Court's then-recent decision in *Lawrence v. Texas*[4] identified no such fundamental right and, utilizing the *Washington v. Glucksberg*[5] analysis for defining and assessing newly asserted fundamental rights, we concluded that our history and tradition did not support assigning constitutional protection to a right to sell, buy, and use sexual devices. *See Williams IV*, 378 F.3d at 1236, 1239-45. Consequently, we held that the Due Process Clause does not contain a right to buy, sell, and use sexual devices, and reversed the district court's ruling to the contrary. *See id.* at 1250.

The Appellants in this case challenge a law similar to the one at issue in *Williams IV* and present us with, effectively, the same arguments against its enforcement. Under this circuit's prior panel precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (per curiam) (internal quotation marks omitted). The Appellants urge this panel to overrule *Williams IV* in light of the Supreme Court's subsequent decisions in *United States v. Windsor*[6] and *Obergefell v. Hodges*.[7] Their strongest argument is that time has shown that *Williams IV* erred in concluding *Lawrence* did not

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[4] 539 U.S. 558 (2003).

[5] 521 U.S. 702, 720-21 (1997).

[6] 133 S. Ct. 2675 (2013).

[7] 135 S. Ct. 2584 (2015).

announce a constitutional right to engage in acts of private, consensual sexual intimacy, and the Court has changed its analysis of privacy-based constitutional rights such that the remainder of *Williams IV* cannot stand.

To the extent *Lawrence* was ambiguous, the Appellants explain, *Windsor* clarified that *Lawrence* announced a new constitutional right and that that right could be implicated directly or indirectly. In *Windsor*, the Court assessed the constitutionality of the Defense of Marriage Act (DOMA), a federal law that, in relevant part, amended the Dictionary Act to define "marriage" as "a legal union between one man and one woman as husband and wife." *See Windsor*, 133 S. Ct. at 2683; 1 U.S.C. § 7. The Court explained that DOMA's definition was unconstitutional, *inter alia*, because it impermissibly interfered with the federal constitutional right to "[p]rivate, consensual sexual intimacy"—a right the Court indicated it had articulated in *Lawrence*. *See Windsor*, 133 S. Ct. at 2692. This holding made clear that the Texas sodomy statute and DOMA's definitional provision implicated the same liberty interest and that the scope of this liberty interest could extend to invalidate a law that did not directly regulate sexual conduct. Although DOMA did not criminalize any sexual act—it merely supplied a definition to inform other laws—the Court still held it to be unconstitutional because the differentiation it imposed "demean[ed] the couple, *whose moral and sexual choices the Constitution protects*." *Id.* at 2694 (emphasis added) (citing *Lawrence*, 539 U.S. 558). Thus, the Appellants conclude, *Windsor* clarified not only that *Lawrence* announced a right to "[p]rivate, consensual sexual intimacy," *see id.* at 2692, but also that this liberty

interest may be infringed by laws that seek to control moral or sexual choices, *see id.* at 2694.[8] For this reason, the Appellants argue that we erred in ruling that *Lawrence* did not create a "due process right of consenting adults to engage in private intimate sexual conduct." *See Williams IV*, 378 F.3d at 1236.[9]

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[8] We note that the district court did confuse the relationship between due process and equal protection when it stated that "*Windsor* does not change the Supreme Court's jurisprudence on Fourteenth Amendment substantive due process because *Windsor* is a Fifth Amendment equal protection, and not a due process, case." *Flanigan's Enters., Inc. v. City of Sandy Springs*, No. 1:13-cv-03573-HLM, slip op. at 47 (N.D. Ga. Oct. 20, 2014). Constitutional rights are not clause-specific. The rights secured under the promise of equal protection "may be instructive as to the meaning and reach" of due process, and vice versa; "[i]n any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Obergefell*, 135 S. Ct. at 2603; *accord id.* at 2603-04; *Lawrence*, 539 U.S. at 575. Consequently, though the *Windsor* Court concluded that the relevant provision of DOMA violated the equal protection component of the Fifth Amendment's Due Process Clause, the constitutional liberty interest identified was not limited to that holding, and its effects on our jurisprudence are not confined to analyses under the Fifth Amendment. *See Windsor*, 133 S. Ct. at 2695.

[9] The Appellants also cite decisions from our sister circuits holding that *Lawrence* recognized a substantive right to private, consensual sexual intimacy. *See Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (describing the right articulated in *Lawrence* as a "right to engage in consensual intimate conduct in the home free from government intrusion"); *see also Latta v. Otter*, 771 F.3d 456, 466 (9th Cir. 2014) (describing *Lawrence* as "recognizing a due process right to engage in intimate conduct"); *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008) (stating that "*Lawrence* recognized a protected liberty interest for adults to engage in consensual sexual intimacy in the home").

Additionally, the Appellants contend, *Williams IV* cannot stand in light of the Supreme Court's new instruction on how to define and analyze privacy-based rights. In *Obergefell*, the Court explained that a refined *Glucksberg* analysis applies to define privacy-based rights because *Glucksberg*'s requirement that rights "be defined in a most circumscribed manner" was appropriate for the context in which that test arose but was "inconsistent with the approach th[e] Court ha[d] used in discussing other fundamental rights, including marriage and intimacy." *See Obergefell*, 135 S. Ct. at 2602; *cf. id.* at 2620-21 (Roberts, C.J., dissenting). Those asserted rights that reflect "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"—privacy-based rights—need not be described "in a most circumscribed manner." *See id.* at 2597, 2602 (majority opinion). Accordingly, the Appellants conclude, the remainder of *Williams IV*—in which we defined the asserted interest in the narrow, circumscribed manner *Glucksberg* then required, *see Williams IV*, 378 F.3d at 1242—is no longer good law because the analysis upon which it relied is in conflict with the Supreme Court's instruction in *Obergefell*.

In sum, the Appellants would have us conclude today that *Windsor*'s clarification of *Lawrence* and *Obergefell*'s adjustment of *Glucksberg* effected substantive changes in constitutional law that undermine *Williams IV* to the point of abrogation, such that we are free to decide this appeal without *Williams IV* as binding precedent.

Although we are persuaded that *Windsor* and *Obergefell* cast serious doubt on *Williams IV*, we are

unable to say that they undermine our prior decision to the point of abrogation. *See In re Lambrix*, 776 F.3d at 794. We did not review *Williams IV* as an en banc court at the time it was decided, *see* 122 F. App'x 988 (11th Cir. 2004) (mem.); the Supreme Court denied the petition for writ of certiorari, *see* 543 U.S. 1152 (2005) (mem.); and the Court has not expressly held in a subsequent decision that there is a right to engage in acts of private, consensual sexual intimacy, within which would fall a right to buy, sell, and use sexual devices, *see United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." (internal quotation marks omitted)).

IV

Therefore, unless and until our holding in *Williams IV* is overruled en banc, or by the Supreme Court, we are bound to follow it. Although we are sympathetic to the Appellants' Fourteenth Amendment Due Process claim, we are constrained by our prior precedent in *Williams IV*, and we are obligated to follow it "even though convinced it is wrong." *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998).[10] The Appellants are free to petition the court to reconsider our decision en banc, and we encourage them to do so.

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[10] With respect to Intervenor Henry's First Amendment claims, we agree with the district court that his art simply would not be deemed "designed or marketed as useful primarily for the stimulation of human genital organs." *See Flanigan's Enters.*, No. 1:13-cv-03573-HLM, slip op. at 23-24. Thus, the Ordinance does not affect the creation or sale of Henry's art, and Henry failed to state a claim that the Ordinance violates his constitutional rights.

For the reasons stated, we affirm the decision of the district court.[11]

AFFIRMED.

[11] The district court committed no reversible error as to Inserection's First Amendment commercial speech claim, Inserection's vagueness challenge, or the Intervenors' Fourteenth Amendment Equal Protection Clause claim.

APPENDIX

The Ordinance reads as follows:

(a) A person commits the offense of distributing obscene material when the following occurs:

(1) He sells, rents, or leases to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used in this section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter.

(2) A person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material.

(3) The character and reputation for the individual charged with an offense under this law, and the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plats, and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) To the average person, applying contemporary community standards, taken

as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;

(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and

(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined as follows:

a. Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

b. Acts of masturbation;

c. Acts involving excretory functions or lewd exhibition of the genitals;

d. Acts of bestiality or the fondling of sex organs of animals; or

e. Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.

(c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section. However, nothing in this subsection shall be construed to include a device primarily intended to prevent pregnancy or the spread of sexually transmitted diseases.

(d) It is an affirmative defense under this section that selling, renting, or leasing the material was done for a bona fide medical, scientific,

educational, legislative, judicial, or law enforcement purpose.

(e) A person who commits the offense of distributing obscene material shall be guilty of a violation of this Code.

Sandy Springs, Ga., Code of Ordinances ch. 38, § 38-120.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

FLANIGAN'S ENTERPRISES, INC., et al.

Plaintiffs,

MELISSA DAVENPORT and MARSHALL G. HENRY,

Intervenors,

v.

CITY OF SANDY SPRINGS, GA,

Defendant.

CIVIL ACTION FILE
NO. 1:13-CV-03573-HLM

[Signed 10/20/2014]

ORDER

This case is before the Court on Defendant's Motion for Judgment on the Pleadings [23].

I. Standard Governing a Motion for Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure provides for motions for judgment on the pleadings. Fed. R. Civ. P. 12(c). "'Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts.'" *Cunningham v. Dist. Attorney's Office for Escambia County*, 592 F.3d 1237, 1255 (11th Cir. 2010) (quoting *Andrx Pharm., Inc. v. Elan Corp.*, 421 F.3d 1227, 1232-33 (11th Cir. 2005)). When considering a motion for judgment on the

pleadings, the Court accepts all of the facts alleged in the complaint as true and views those facts in the light most favorable to the nonmoving party. *Id.*

A Rule 12(c) motion for judgment on the pleadings is governed by the same standards as a Rule 12(b)(6) motion to dismiss. *Roma Outdoor Creations, Inc. v. City of Cumming*, 558 F. Supp. 2d 1283, 1284 (N.D. Ga. May 14, 2008). Accordingly, "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" are insufficient to avoid dismissal on a motion for judgment on the pleadings. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive a motion for judgment on the pleadings, like a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). In other words, a pleading must contain sufficient "factual content [to] allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

II. Background

A. Procedural Background

On October 5, 2009, Plaintiff Flanigan's Enterprises, Inc. of Georgia (Plaintiff "Flanigan's"), Plaintiff 6420 Roswell Rd., Inc., (Plaintiff "Flashers") and Plaintiff Fantastic Visuals, LLC filed a lawsuit against the City of Sandy Springs, Georgia. (Compl. (Docket Entry No. 1).) On October 29, 2013, Senior District Court Judge Robert Vining issued an order severing Plaintiffs' challenge of Defendant's prohibition of the sale of sexual device from Plaintiffs' other claims against Defendant. (Oct. 29, 2013, Order

(Docket Entry No. 20).) On March 6, 2014 Judge Vining granted a Motion to Intervene from Intervenors Melissa Davenport and Marshall G. Henry. (Mar. 6, 2014 Order (Docket Entry No. 14).) Intervenors filed their complaint on April 16, 2014. (Intervenor Compl. (Docket Entry No. 15).) On August 12, 2014, Defendant filed its Motion for Judgment on the Pleadings arguing that Plaintiff and Intervenors' claims failed as a matter of law. (Docket Entry No. 23.) In the meantime, Judge Vining retired, and the Clerk reassigned the case to the undersigned. (Unnumbered Docket Entry Dated Aug. 29, 2014.) The briefing process for the Motion is complete, and the Court finds the issue ripe for resolution.

B. Factual Background

1. The Parties

Plaintiff Flanigan's is a corporation incorporated in Georgia and with its principal place of business in Georgia. (Compl. ¶ 2.) Plaintiff Flanigan's owns and operates a nude dance entertainment establishment. (*Id.*) Plaintiff Flashers is also incorporated in and had its principal place of business in Georgia. (*Id.* ¶ 4.) Plaintiff Flashers is another establishment with nude dance entertainment. (*Id.*) Plaintiff Fantastic Visuals is a limited liability company under Georgia law with its principal place of business in Georgia. (*Id.* ¶ 6.) Plaintiff Fantastic Visuals does business as Inserection and owned and operated a retail store selling "sexually explicit, non-obscene media" including books, videos, devices, toys, lubricants, and novelty items. (*Id.*) Each of these establishments are or were located within the border of Defendant. (*Id.* ¶ 7.)

Intervenor Davenport is a Georgia resident. (Intervenor Compl. ¶ 2.) Intervenor Davenport has been married for twenty-four years. (*Id.* ¶ 5.) In 1996, she was diagnosed with Multiple Sclerosis ("MS"). (*Id.*) The progression of Intervenor Davenport's MS negatively impacted the quality of her and her husband's sexual relations which almost entirely ceased by 2003. (*Id.* ¶ 6.) MS affects the body's central nervous system which can effect [sic] a person's sexual arousal and orgasm. (*Id.* ¶ 7.) Intervenor Davenport and her husband have found that certain sexual devices significantly enhance their ability to be physically intimate. (*Id.* ¶ 8.) No medical practitioner or psychiatrist has prescribed or advised Intervenor Davenport to use these devices. (*Id.*) Intervenor Davenport claims that these devices saved her marriage. (*Id.*) Intervenor Davenport advocates for others suffering from MS to use these devices and also sells them. (*Id.* ¶ 9.) She can no longer sell or purchase these items in Sandy Springs. (*Id.* ¶ 10.)

Intervenor Henry is also a Georgia resident. (Intervenor Compl. ¶ 3.) Intervenor Henry wants to but cannot purchase sexual devices within Sandy Springs for use in his own private, intimate sexual activity. (*Id.* ¶ 12.) Intervenor Henry is also an artist and uses sexual devices in his art displays. (*Id.* ¶ 13.) Defendant's ordinance prevents him from buying sexual devices with the purpose of using them in artwork, and it prevents him from selling his artwork in Sandy Springs. (*Id.*)

Defendant Sandy Springs is a municipality within the State of Georgia. (Compl. ¶ 8; Intervenor Compl. ¶ 4.)

2. The Ordinance

On April 21, 2009 Defendant amended its Obscenity Ordinance and § 38-119 and § 38-120 ("the Ordinance") of Chapter 38, Offenses and Miscellaneous Provisions, of the City's Code of Ordinances by adopting Ordinance 2009-04-24. (Compl. ¶¶ 106-107.) Section 38-120 now defines "obscenity and related offenses" as follows:

> (a) A person commits the offense of distributing obscene material when the following occurs:
>
> (1) He sells, rents, or leases to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used in this section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter.
>
> (2) A person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material.
>
> . . .
>
> (c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section. However, nothing in this subsection shall be construed to include a device primarily intended to prevent pregnancy or the spread of sexually transmitted diseases.
>
> (d) It is an affirmative defense under this section that selling, renting, or leasing the material

> was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.

(Ordinance No. 2009-04–24 (Docket Entry No. 6-1); Compl. ¶ 107; Intervenor Compl. ¶¶ 17-19.) According to Plaintiffs, neither on nor before amending § 138-20, did Defendant's City Council put forth any evidence indicating that a restriction on marketing a device as primarily useful for the stimulation of human genital organs advances a legitimate government interest. (Compl. ¶ 108.)

III. Discussion

Plaintiffs and Intervenors have challenged the Ordinance on a number of grounds. Together they have brought vagueness, overbreadth, First Amendment, Fourteenth Amendment substantive due process, Fourteenth Amendment equal protection, and Georgia constitutional privacy claims.

When plaintiffs make facial overbreadth and vagueness challenges of a statute, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982) (footnotes omitted). The Court will thus address Plaintiffs' and Intervenors' First and Fourteenth Amendment arguments first in

order to ascertain "whether the enactment reaches . . . constitutionally protected conduct."

A. First Amendment Free Speech Claims

1. Plaintiffs' Commercial Speech

In Plaintiffs' Response to Defendant's Motion for Judgment on the Pleadings, Plaintiffs argue that § 38-120(c) is unconstitutionally vague. In doing so, Plaintiffs attempt to bolster that argument by arguing that subsection (c) regulates commercial speech and is thus subject to First Amendment scrutiny. (Pl. Resp. Def. Mot. J. on Pleadings (Docket Entry No. 27) at 3-8.) Plaintiffs' Complaint, however, fails to raise First Amendment issues with regard to § 38-120. (*See generally* Compl.)[1] Plaintiffs cannot amend their Complaint through statements in their response brief. The Court therefore need not, and does not, consider Plaintiffs' arguments concerning § 38-120's alleged infringement on commercial speech. *Payne v. Ryder Sys., Inc. Long Term Disability Plan*, 173 F.R.D. 537, 540 (M.D. Fla. 1997).

Even if Plaintiffs had properly raised a First Amendment argument, they have not established that their conduct is constitutionally protected. "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech.'" *United States v. Stevens,* 559 U.S. 460, 468, (2010) (omission

[1] Plaintiffs pleaded a First Amendment claim against § 38-129 in paragraph 121(i) of the Complaint which incorporates the allegations from paragraph 117(e), involving the section of the Obscenity Ordinance dealing with the exposure of "'genitals'" or "'breasts, if female'", and argues that the Ordinance chills expression. (Compl. ¶¶ 121(i), 117(e).) This claim is not part of the challenge to § 38-130 and is properly addressed in the companion case to this one.

in original). "'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (alteration in original) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). It is not clear, however, that the Ordinance restricts any "expression" by Plaintiffs. The Ordinance only criminalizes selling, renting, or leasing obscene material, and Plaintiffs are only challenging subsection (c) dealing with devices primarily used for stimulating human genital organs. Plaintiffs do not appear to argue, and the Court cannot find, a reason why the sale of sex toys is expressive. (*See generally* Pl. Resp. Def. Mot. J. on Pleadings.) This case is different from an obscenity case dealing with adult movies or books. *State v. Hughes*, 246 Kan. 607, 610 (1990) ("As this case deals with *devices* rather than books or movies, it is different from the great majority of the published obscenity cases, which are typically argued and decided under the First Amendment's guarantee of freedom of speech." (emphasis in original)).

Plaintiffs instead attempt to bootstrap in a First Amendment issue because the Ordinance defines devices that count as obscene material, in part, on how they are marketed. (Pl. Resp. Def. Mot. J. on Pleadings at 7 ("By tying the 'marketing' of a device to the device's legality, § 38-120(c) triggers at least commercial-speech level scrutiny."). The cases cited by Plaintiffs can be distinguished from the facts of this case. *Lorillard Tobacco Co. v. Reilly* involved Massachusetts regulations restricting the advertising and sale of tobacco products, specifically restricting outdoor advertising within 1,000 feet of a school or playground, the placement of indoor, point-of-sale

advertisements, and the placement of tobacco products. 533 U.S. 525 (2001). The Supreme Court did not discuss whether there was a cognizable speech interest in the placement of products within the store, and only assumed that such an interest existed for the sake of analyzing the First Amendment issue. *Id.* at 569. Furthermore, the Supreme Court upheld these regulations against First Amendment scrutiny. *Id.* The Court concluded that Massachusetts was regulating "the placement of tobacco products for reasons unrelated to the communication of ideas," had "demonstrated a substantial interest in preventing access to tobacco products by minors," and had "adopted an appropriately narrow means of advancing that interest." *Id.* The Supreme Court did not conclude or assume that the mere sale of tobacco products was expressive, and in the present case Defendant is not regulating the means, methods, or content of advertisements or sales but only what products may be sold.

The other cases cited by Plaintiffs can also be distinguished. *City of Cincinnati v. Discovery Network, Inc.* involved a city's regulation of newsracks, which the Supreme Court struck down "because the ban is predicated on the content of the publications distributed by the subject newsracks" and the city's professed interests were "unrelated to any distinction between" the types of content allowed or not allowed on newsracks. 507 U.S. 410, 430 (1993). Finally, *Doctor John's, Inc. v. City of Sioux City, Iowa*, dealt with a zoning ordinance regarding adult stores, but the court in that case only analyzed the parts of the ordinance dealing with the sale of adult media under First Amendment scrutiny, while it applied substantive due process to the ordinance's provisions about the sale of

sex toys. 438 F. Supp. 2d 1005, 1032 (N.D. Iowa 2006) *and see also Doctor John's Inc. v. City of Sioux City, Iowa*, 389 F. Supp. 2d 1096, 1105 (N.D. Iowa 2005) (distinguishing, in an earlier ruling on the same case, between the media and non-media related portions of the zoning ordinance).

The United States Circuit Court of Appeals for the Eleventh Circuit has addressed First Amendment challenges to a statute similar to the Ordinance. The Eleventh Circuit struck down a law for violating the First Amendment when it not only limited the sale of sexual devices but also included a per se prohibition on the advertising of sexual devices. *This That And The Other Gift And Tobacco, Inc. v. Cobb Cnty., Ga.*, 439 F.3d 1275, 1284 (11th Cir. 2006). Again, in that case, only the ban on advertising violated the First Amendment, not the limitations on selling sexual devices. Here, Plaintiffs are allowed to advertise these products and to lawfully sell them in certain situations. Plaintiffs have pointed to, and the Court has found, no cases finding that the sale of sexual devices or other similar objects is an expressive act of speech falling under the First Amendment.[2] In fact, courts have typically found that commercial speech includes proposing a commercial transaction as well as advertising but not sale of non-expressive material. Ann K. Wooster, Annotation, *Protection of Commercial Speech Under First Amendment-Supreme Court Cases*, 164 A.L.R. Fed. 1 (2000) (discussing the scope of

[2] Even Intervenors appear to concede that no free speech issue is raised by Plaintiffs' actions when they urge the Court to distinguish between expressive and non-expressive uses of sexual devices. (Intervenor Br. in Opp'n to Def. Mot. J. on the Pleadings (Docket Entry No. 26) at 15-16.)

commercial speech and citing examples of types and forms of advertisements subject to First Amendment scrutiny).

Given the above precedents, the Court is unable to find that the Ordinance implicates Plaintiffs' First Amendment free speech rights because the Ordinance does not prohibit commercial speech.

2. Intervenor Henry's Artistic Speech

Count II of Intervenors' Complaint asserts that the Ordinance interferes with Intervenor Henry's First Amendment right (1) to sell his artwork and (2) to purchase the items used in his artwork. (Intervenor Compl. ¶¶ 27-32.) Intervenor Henry apparently uses sexual devices in his artwork in a way that is not obscene and has serious artistic value. (*Id.* ¶ 29.)

Addressing Intervenors' first argument, the Court finds that the Ordinance does not prohibit Intervenor Henry from selling his artwork. Intervenors argue that § 38-120(c) makes Intervenor Henry's sale of artwork containing sexual devices illegal because it does not include a safe harbor or affirmative defense for artistic purposes or value. For the purposes of a motion for judgment on the pleadings, the Court defers to Intervenor Henry's assertion that his artwork is not obscene and possesses serious artistic value. § 38-120(c) only applies to devices "designed or marketed as useful primarily for the stimulation of human genital organs." If Intervenor's artwork has significant artistic value—and no one suggests that it does not—then it is likely not a device and it is likely not used to stimulate human genital organs. As long as Intervenor Henry does not market his artwork as being used primarily for stimulating human genital organs then the

Ordinance would not prohibit selling the artwork. Intervenors, however, have not pleaded sufficient facts to demonstrate that Intervenor Henry's sale of artwork containing sexual devices falls under the Ordinance because Intervenors have not pleaded facts indicating that Intervenor Henry's artwork is designed or marketed for use in stimulating human sexual organs.

Intervenors next argue that the Ordinance violates Intervenor Henry's First Amendment rights by preventing him from purchasing a sexual device with the purpose of using it for an expressive purpose—putting it in a piece of art. In other words, Intervenors claim that because Intervenor Henry wants to use the restricted item in his artwork, the Ordinance is subject to First Amendment scrutiny solely because of his intentions. Intervenors, however, have not pointed to any cases indicating that a regulation of the purchase of a non-expressive, non-content item raises a free speech issue or can be subject to First Amendment scrutiny.

Intervenors suggest two cases support their position: *United States v. Stevens* and *Schacht v. United States*. Stevens, however, dealt with a statute criminalizing the creation, sale, or possession of an item with expressive contention, namely depictions of animals being "'intentionally maimed, mutilated, tortured, wounded, or killed.'" 559 U.S. 460, 465 (2010) (quoting 18 U.S.C. § 48). That statute restricted the actual expressive content—the depictions—not the underlying materials used to create them, which distinguishes from the present case where there is no restriction on actual expression being challenged. Furthermore, Intervenors' characterization of *Stevens* is misleading. The Supreme Court did not reach the

question of whether the statute was constitutional with respect to its application to instances of animal cruelty—such as animal fighting—but, instead, found it unconstitutional as overbroad because it prohibited many other types of permissible, protected speech. *Stevens*, 559 U.S. at 481-82. Thus, *Stevens* does not assist Intervenors in arguing that the Ordinance regulates speech with respect to Intervenor Henry.

Intervenors similarly mischaracterize the holding in *Schacht*. The Supreme Court's holding was not that the First Amendment requires the government to allow an actor in a theatrical production to wear a military uniform. The Court specifically stated that "previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face." *Schacht v. United States*, 398 U.S. 58, 61 (1970). Instead, the Court only found the last clause of one subsection of another statute unconstitutional where the provision allowed actors in a theatrical production to wear military uniforms but the last clause limited that allowance to when "'the portrayal does not tend to discredit that armed force.'" *Id.* at 60 (quoting 10 U.S.C. § 772(f)). The Supreme Court concluded that the clause unconstitutionally limits free speech by outlawing criticism of the government. *Id.* at 63 ("[H]is conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech . . . . To preserve the constitutionality of § 772(f) that final clause must be stricken from the section.").

If anything, Schacht suggests that merely wearing a military uniform without authorization is not protected by the First Amendment and only when such a rule is tied to a content based restriction on other speech does a free speech issue arise. The Court thus concludes that *Schacht* does not indicate that regulating Intervenor Henry's purchase of a sex toy restricts his speech. Intervenor Henry's purchase of sexual devices also does not qualify as expressive conduct. For non-speech to qualify for First Amendment protection it must be combined with speech. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968) (discussing whether burning a draft card constitutes 'speech'). "[C]onduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (internal quotation marks and citations omitted) (concluding that flag burning constituted expressive conduct). The Supreme Court has cautioned, however, that it "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. Furthermore, even if the "conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the [conduct] is constitutionally protected activity." *Id.* "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Supreme Court says to look at "whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (alterations in original) (internal quotation marks omitted).

Intervenors are unable to demonstrate that Intervenor Henry's conduct "brings the First Amendment into play." By purchasing sexual devices, Intervenor Henry does not intend to send a message and does not plead to the contrary. Nor would it appear that those who viewed his purchase would understand it to have a message—presumably a store clerk would assume this was just an average purchase. Intervenor Henry's conduct is quite different than burning an American flag or a draft card. In those situations the protest message is clear even without literal, physical speech by the protestor. The conduct Intervenor Henry complains is prohibited by the Ordinance—selling sexual devices—is not combined with other expressive elements. Intervenor Henry's creation, display, and sale of his artwork containing sexual devices is another matter and one that this Court has already concluded is not prohibited by the Ordinance. The situation could be different if Intervenor Henry had zero access to sexual devices for use in work with serious artistic value, but Intervenors have neither pleaded facts to allege that situation, expressly argued the possibility in their briefs, nor cited to any cases suggesting the limiting of access to certain non-expressive items could restrict free speech. The Court declines to raise and address this scenario on Intervenors' behalf.

Intervenors are unable to show that the Ordinance infringes on Intervenor Henry's free speech rights either by prohibiting his purchase of sexual devices or his sale of artwork containing such devices. The Court therefore concludes that Defendant is entitled to judgment on the pleadings with respect to Intervenor's First Amendment claims.

B. Fourteenth Amendment Substantive Due Process

Both Plaintiffs and Intervenors allege that the Ordinance violates the Fourteenth Amendment by interfering with their right to privacy. Their claim is that the Ordinance interferes with private, sexual conduct in the home by prohibiting the sale of sexual devices.

"The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). "The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 720. Courts must exercise great caution in labeling a right as fundamental because "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013) (alteration in original) (quoting *Robertson v. Hecksel*, 420 F.3d 1254, 1256 (11th Cir. 2005)). Courts "must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (quoting *Glucksberg*, 521 U.S. at 720 (internal quotation marks omitted)).

"The analysis of any claim to a substantive due process right should begin with 'a careful description' of the asserted fundamental liberty interest." *Tinker v. Beasley*, 429 F.3d 1324, 1327 (11th Cir. 2005) (quoting

Glucksberg, 521 U.S. at 721). Plaintiffs and Intervenors ask the Court to extend this protection in order to strike down the Ordinance restricting the sale of sexual devices. Intervenors suggest, however, that the right to be examined is not whether there is a fundamental right to use sexual devices but for a fundament [sic] right to control a personal relationship—and that the sale of such devices "are crucial to the personal relationships between Intervenor-Plaintiffs and their life partners." (Intervenor Br. in Opp'n to Def. Mot. J. on the Pleadings at 5.)

The Eleventh Circuit has previously addressed the constitutionality of a statute quite similar, and nearly identical, to the Ordinance. In a lengthy case challenging an Alabama statute that made it unlawful to distribute sexual devices, the Eleventh Circuit issued three separate opinions.[3] Those three opinions are: *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) ("*Williams I*"), *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004) ("*Williams II*"), and *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007) ("*Williams III*"). The Alabama statute at issue in that case prohibits "the commercial distribution of 'any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.'" *Williams II*, 378 F.3d at 1233 (quoting Ala. Code § 13A-12-200.2 (2003)). The Eleventh Circuit repeatedly rejected challenges to the statute, refusing to find that the either the Due

[3] There was, in actuality, a fourth, and first, opinion issued by the Eleventh Circuit that was withdrawn. *Williams v. Pryor*, 229 F.3d 1331 (11th Cir. 2000) *opinion withdrawn and superseded on denial of reh'g*, 240 F.3d 944 (11th Cir. 2001).

Process Clause or the constitutional right to privacy included a right to use sexual devices or to commercially distribute them. *Id.* at 1250. The Court then concluded that the statute withstood scrutiny under the rational basis test. *Williams III*.

Intervenors admit that if the Eleventh Circuit's decisions in *Williams* controlled the present case, the due process clause claims would fail. Instead, Intervenors put forth three arguments for why *Williams*, which is binding authority on this Court, does not control the outcome of this case.

1. Whether Intervenors Have Pleaded a Different Claim

First, Intervenors argue that they have made a different claim than that in *Williams* by focusing the question on the connection between sexual devices and personal relationships as opposed to a mere right to use sexual devices. Intervenor's Complaint states that the Ordinance infringes on their rights to privacy which includes "a right to be free from governmental intrusion regarding the most private human conduct: their consensual sexual behavior in the privacy of their own homes." This formulation resembles the description at one point given by the district court in *Williams*: "a generalized 'right to sexual privacy,'" that was limited to "*consenting adults*". *Williams II*, 378 F.3d at 1239-40 (emphasis in original) (quoting *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1277 (N.D. Ala. 2002) *rev'd and remanded sub nom.*, *Williams II*, 378 F.3d 1232). *Williams II* rejected that description as overly broad because it "potentially encompasses a great universe of sexual activities, including many that historically have been, and continue to be, prohibited" such as adult incest, prostitution, and obscenity. *Id.* at

1239-40. Plaintiffs described the issue at hand as a both a "privacy interest in one's ability to acquire and self-use a sexual device" (Pl. Resp. Def. Mot. J. on Pleadings at 10 (quoting Compl. ¶ 117(g))) and as a "due process right to sexual privacy" (*id.* at 11.).

In addition, in order to demonstrate a constitutional violation as applied to them, Intervenors and Plaintiffs must show that the restriction on obtaining sexual devices impinges on their right to sexual privacy. They therefore must argue that the right to sexual privacy encompasses a right to use sexual devices, which is the exact issue the Eleventh Circuit discussed:

> [T]he scope of the liberty interest at stake here must be defined in reference to the scope of the Alabama statute . . . . The statute invades the privacy of Alabama residents in their bedrooms no more than does any statute restricting the availability of commercial products for use in private quarters as sexual enhancements. Instead, the challenged Alabama statute bans the commercial distribution of sexual devices. At a minimum, therefore, the putative right at issue is the right to sell and purchase sexual devices.

Williams II, 378 F.3d at 1241-42 (footnotes omitted). When conducting constitutional analysis, a restriction on buying and selling sexual devices also constitutes a restriction on using them, which can also be part of the right protected by the Constitution. *Id.* at 1242. Thus, the Eleventh Circuit adopted a careful description of the proposed constitutional right, asking "whether the concept of a constitutionally protected right to privacy protects an individual's liberty to use sexual devices

when engaging in lawful, private, sexual activity." *Id.* at 1239 (internal quotation marks and citation omitted). Plaintiffs and Intervenor's claim for a right of privacy is either the same claim already presented to the Eleventh Circuit or is too broad to be acceptable given the directive of the appellate courts to exercise great caution when considering arguments for new constitutional rights.

2. Whether Intervenor Davenport Has a Unique Claim

In Intervenor's second argument to distinguish this case from *Williams*, they argue that Intervenor Davenport is differently situated from the *Williams* plaintiffs because she suffers from MS. (Intervenor Br. in Opp'n to Def. Mot. J. on the Pleadings at 5-7.) Intervenor Davenport pleads that she does not use the device for a medical purpose but for an intimate one and thus her purchasing of sexual devices does not fall under the Ordinance's affirmative defense which provides a defense when the sexual device is sold for a bona fide medical purpose. (*Id.* at 5.) If Intervenor Davenport only claims that the Ordinance interferes with her right to use sexual devices in her home for sexual intimacy, then she does not state a different claim than that claimed by the plaintiffs in *Williams*, where some of the plaintiffs were also users/customers.

On the other hand, if Intervenor Davenport has a special need for sexual devices given her medical condition then she is protected by the affirmative defense and does not have a claim for violation of her constitutional rights. Intervenors cite two cases from other jurisdictions where plaintiffs similarly situated to Intervenor Davenport, or raising similar concerns, were able to successfully challenge similar statutes

because those statutes did not contain a medical purpose exemption. *See e.g.*, *State v. Hughes*, 246 Kan. 607, 619 (1990) ("We hold the dissemination and promotion of such devices for purposes of medical and psychological therapy to be a constitutionally protected activity.") *and People ex rel. Tooley v. Seven Thirty-Five E. Colfax. Inc.*, 697 P.2d 348, 370 (Colo. 1985) ("The statutory scheme, in its present form, impermissibly burdens the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices.").

Additionally, Intervenor Davenport has not pleaded sufficient facts to demonstrate that she has a plausible claim. The Court does not have to accept as true Intervenor Davenport's contention that she does not use sexual devices for a medical purpose because that is not a fact but a legal conclusion. Intervenor Davenport does not plead that she has attempted to purchase sexual devices within Sandy Springs using the medical purpose defense, nor has she pleaded that she attempted to sell them to other people with similar medical needs. Furthermore, Defendant states that selling a sexual defense [sic] to someone in Intervenor Davenport's situation would be permitted under the statute. In *Hughes* the court found a need for a medical exemption based on expert testimony that sexual devices can often be useful treatment for women who are, for medical or psychological reasons, anorgasmic because [sic]. 246 Kan. at 607-09. Several such devices can be used to treat medical conditions by, for example, stimulating sensory endings. *Id.* Intervenor Davenport likewise suffers from a neurological disorder, and she alleges that sexual devices can help alleviate complications created by that disorder.

Based on the foregoing reasons, the Court concludes that Intervenor Davenport is either not differently situated than the plaintiffs in *Williams* or is not prevented from being sold sexual devices by the ordinance. In either case, the Eleventh Circuit's opinion in *Williams* remains controlling.

3. Whether Recent Supreme Court Decisions Undermine *Williams*

Intervenors' third and final argument for why *Williams* does not control this case is that Supreme Court precedent post-*Williams* undercuts it to the point that *Williams* is no longer binding on the Court. Specifically, Intervenors argue that *United States v. Windsor* interpreted *Lawrence* to mean that the Constitution protects all "moral and sexual choices" of intimate couples. 133 S. Ct. 2675, 2694 (2013). On its face, however, *Windsor* does not change the Supreme Court's jurisprudence on Fourteenth Amendment substantive due process because *Windsor* is a Fifth Amendment equal protection, and not a due process, case. *Id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.").

In the Eleventh Circuit, "only the Supreme Court or [the Court of Appeals] sitting en banc can judicially overrule a prior panel decision." *Smith v. Ford Motor Credit Co.*, 301 B.R. 585, 588 (N.D. Ala. Nov. 12, 2003) (quoting *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997) (internal quotation marks omitted)). It has

been suggested that in the Eleventh Circuit that [sic] when a Supreme Court decision's "rationale and holding abrogate the rationale and holding of" an earlier Eleventh Circuit decision, without directly overruling it, the Eleventh Circuit's precedent "requires that [it] follow the Supreme Court's intervening law." *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1063 (11th Cir. 2001) (Barkett, J. concurring), *reh'g en banc granted, opinion vacated* (Dec. 19, 2001). The Supreme Court's two citations to *Lawrence* in *Windsor* are insufficient to cause this Court to ignore binding Eleventh Circuit precedent as they are only used to demonstrate "one element" of an enduring and important personal bond between two consenting adults. *Windsor*, 133 S. Ct. at 2692, 2694. Intervenors read *Windsor* too broadly, arguing that the Supreme Court interpreted *Lawrence* to protect *all* moral and sexual choices. Such an interpretation would mean that laws against prostitution or incest are constitutionally invalid. Furthermore, the Supreme Court specifically limited the holding of this Fifth Amendment equal protection case, stating that "[t]his opinion and its holding are confined to those lawful marriages" that were allowed by state law but not respected under the Defense of Marriage Act. 133 S. Ct. at 2695-96.

While the Eleventh Circuit has not yet interpreted *Windsor*, its reading of *Lawrence* is clear and says that there is no fundamental right to sell, purchase, or use sexual devices. The Eleventh Circuit "concluded that, although *Lawrence* clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy, 'it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right'—whether to

homosexual sodomy specifically or, more broadly, to all forms of sexual intimacy." *Williams II*, 378 F.3d at 1236 (quoting *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 815 (11th Cir. 2004)). That the Supreme Court did not find a fundamental right to sexual intimacy is demonstrated by the fact that the *Lawrence* decision did not discuss two fundamental elements of a *Glucksberg* fundamental rights analysis. *Lofton*, 358 F.3d at 816. In addition, "the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated." *Id.* at 817. In *Williams II*, the Eleventh Circuit concluded that "we decline to extrapolate from *Lawrence* and its dicta a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny. Moreover, it would be answering questions that the *Lawrence* Court appears to have left for another day." 378 F.3d at 1238. The Supreme Court's two references to *Lawrence* in *Windsor* do not state that there is a fundamental right or undermine the reasoning put forth by the Eleventh Circuit in *Williams II* and *Lofton*. This Court therefore finds that it is bound by that precedent and cannot find that there is a fundamental right to use sexual devices.

Even if, as Intervenors argue, *Windsor* requires re-examination of Eleventh Circuit precedent, that precedent still remains binding on this Court until it is overrruled. Simply put, it is not this Court's place to "reexamine" the Eleventh Circuit's previous, binding decisions. The Court declines to do so here.

4. Rational Basis Review

Because the Court has concluded that no fundamental right is at issue, it engages in a rational basis review of the Ordinance. *Williams III*, 478 F.3d at 1320. "A statute is constitutional under rational basis scrutiny so long as 'there is *any reasonably conceivable state of facts* that could provide a rational basis for the [statute].'" *Williams III*, 478 F.3d at 1320 (alteration and emphasis in original) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). "The rational-basis test is applied in two steps . . . .: The first step . . . is identifying a legitimate government purpose . . . . The second step of rational-basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose." *Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000).

Satisfying the first prong of the rational basis test, Defendant has a legitimate government purpose in creating the Ordinance. In Defendant's resolution passing the Ordinance, Defendant states that its purpose is to preserve public order and morality and prevent negative secondary effects. In *Williams III*, the Eleventh Circuit upheld the law under rational basis scrutiny, finding that protecting public morality was a legitimate government interest despite the Supreme Court's decision in *Lawrence*. *Williams III*, 478 F.3d at 1323 ("[W]e find that public morality survives as a rational basis for legislation even after *Lawrence*, and we find that in this case the State's interest in the preservation of public morality remains a rational basis for the challenged statute."). The Eleventh Circuit also concluded that "a statute banning the commercial distribution of sexual devices is rationally related to this interest." *Williams III*, 478 F.3d at 1321 (internal quotation marks and citation omitted).

Because according to *Williams*, Defendant has a legitimate government purpose in passing the Ordinance and the Ordinance is rationally related to achieving that purpose, the Court finds that Plaintiffs' and Intervenors' due process challenges to the Ordinance fail.

C. Fourteenth Amendment Equal Protection

Intervenors' next claim is that Defendant makes an unconstitutional distinction between users of sexual devices and non-users in violation of the Fourteenth Amendment Equal Protection Clause. (Intervenor Compl. ¶¶ 42-47.) "The Equal Protection Clause requires the government to treat similarly situated persons in a similar manner." *Leib v. Hillsborough Cnty. Public Transp. Comm'n*, 558 F.3d 1301, 1305 (11th Cir. 2009). "When legislation classifies persons in such a way that they receive different treatment under the law, the degree of scrutiny the court applies depends upon the basis for the classification." *Id.* at 1306 (internal quotation marks and citation omitted). "If a law treats individuals differently on the basis of race or another suspect classification, or if the law impinges on a fundamental right, it is subject to strict scrutiny." *Id.* "Otherwise, the law need only have a rational basis—i.e., it need only be rationally related to a legitimate government purpose." *Id.*

Intervenors' claim fails under equal protection analysis. Intervenors have not shown they are part of a suspect class or that a suspect class is being treated differently. In fact, the Ordinance makes no distinction between classes of people. It prohibits anyone from selling sexual devices unless one of the affirmative defenses applies. Intervenors do not suggest one of those purposes is a suspect class. No fundamental

right is at issue here. *See supra* Part III.B. Thus, the Ordinance is only subject to rational basis review, and the Court has concluded it meets that standard. *See supra* Part III.B.4.

The Court therefore concludes that Intervenors' equal protection claim fails, and Defendant is entitled to judgment on that count.

D. Overbreadth

Intervenors plead that the Ordinance is constitutionally overbroad under the First Amendment. A statute is unconstitutional under the First Amendment doctrine of overbreadth upon a showing that the law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Such a showing "invalidate[s] *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Id.* (emphasis in original).

In *Virginia v. Hicks*, the United States Supreme Court explained that it "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions," and because "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole,

which is deprived of an uninhibited marketplace of ideas." 539 U.S. at 119 (citations omitted). "However, the 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *United States v. Dean*, 635 F.3d 1200, 1206 (11th Cir. 2011) (quoting *United States v. Williams*, 553 U.S. 285, 303 (2008)). "The overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists." *Id.* at 1203 (alteration in original) (quoting *Hicks*, 539 U.S. at 122).

Intervenors' overbreadth claim must fail because Intervenors have not established that the Ordinance reaches a substantial amount of protected speech. In fact, Intervenors have not shown that the Ordinance reaches any speech at all. *See supra* Part III.A. Even if the Ordinance punishes some speech, Intervenors have not pleaded facts showing that such speech is "substantial." Intervenors also have not pointed out language in the Ordinance making it overbroad, as opposed to arguing that it is entirely unconstitutional.

In their response brief to the instant Motion, Intervenors argue that the overbreadth claim is also based on privacy as well as free speech. Intervenor's Complaint, however, only talks about overbreadth in terms of the First Amendment. (*See* Intervenor Compl. ¶¶ 33-38.) Intervenors failed to include this claim in their Complaint, and they cannot amend their Complaint through statements in their response brief. The Court therefore need not, and does not, consider Intervenors' arguments concerning that claim. *Wilchombe*, 555 F.3d at 959; *Payne*, 173 F.R.D. at 540.

Based on the above reasons, the Court concludes that Intervenors' overbreadth claim fails, and Defendant is entitled to judgment on that count.

E. Vagueness

Count I of Plaintiffs' Complaint asserts that § 38-120 is unconstitutionally vague in three ways. (Compl. ¶ 117.) First, because the statute does not say whose intent matters for deciding whether the device is "designed or marketed as useful primarily for the stimulation of human genital organs." Second, because § 38-120(d) conflicts with § 38-120(c) by arbitrarily changing the meaning of "primary use" of the device. Third, because the affirmative defense is vague.

With respect to vagueness, "the Constitution does not require precision; 'all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding.'" *This That & Other Gift & Tobacco, Inc. v. Cobb Cnty., Ga.*, 285 F.3d 1319, 1325 (11th Cir. 2002) (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957) (internal quotation marks omitted)). The court, if "the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates. Inc.*, 455 U.S. 489, 494-95 (1982). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Id.* at 498. "Thus, economic regulation is subject to a less strict vagueness test." *Id.* Additionally, "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct

is proscribed." *Id.* at 499. "Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Id.*

Plaintiffs' first vagueness argument is that for § 38-120(c) there are many possible sources of intent for whether deciding the purpose for which a device is "designed or marketed." Plaintiffs argue that the necessary intent could come from anywhere in the supply chain: the manufacturer, the wholesaler, the retailer, or a customer. Plaintiffs argue that if sale of sexual devices is permissible in some situations—as when the affirmative defense applies—then the question of whose intent matters is important because it could affect whether a retailer can buy from a wholesale or a wholesaler can buy from a manufacturer when in Sandy Springs. Furthermore, Plaintiffs argue that because the legality of selling the devices hinges, in part, on how they are marketed, the Ordinance raises First Amendment commercial speech issues.

The Supreme Court has already rejected a vagueness challenge to a statute with the exact same language as Plaintiff challenges in this case. In *Sewell v. Georgia*, the Supreme Court dismissed an appeal "for want of a substantial federal question" that included a challenge to a Georgia statute stating that "'any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.'" 435 U.S. 982, 983 (1978) (quoting O.C.G.A. § 26-2101(c)) *compare with* § 38-120(c) ("Any device designed or marketed as useful primarily for the stimulation of human genital organs

is obscene material under this section."). The Supreme Court's dismissal of the appeal is binding precedent on the issue. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) ("[V]otes to affirm summarily, and to dismiss for want of a substantial federal question . . . are votes on the merits of a case." (internal quotation marks and citation omitted)). According to the Supreme Court, "the lower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not." *Id.* at 344-45 (alterations in original) (internal quotation marks and citation omitted).

An exception to deference to the Supreme Court's dismissal for want of a substantial federal question exists "when doctrinal developments indicate otherwise." *Id.* at 344 (internal quotation marks omitted). Plaintiffs suggest that such doctrinal developments have occurred, making this vagueness claim, because it affects First Amendment speech rights, more substantial. The Ordinance, however, does not directly regulate commercial speech. It defines the regulated devices by how they are marketed and designed, but it only makes it a crime to sell, rent, or lease obscene material. The Ordinance does not implicate First Amendment speech rights, either commercial or artistic speech. *See supra* Part III.A.

Because no constitutionally protected conduct is implicated, Plaintiffs and Intervenors must show a greater amount of vagueness. This is difficult because other courts have upheld both the "designed for use" and the "marketed for use" language. The "designed for use" language is not vague but refers to the design of the manufacturer and not the intent of the seller or the purchaser. *Hoffman*, 455 U.S. at 501 ("A business

person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer."); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 518 (1994) ("The objective characteristics of some items establish that they are designed specifically for use with controlled substances . . . . Accordingly, the 'designed for use' element of § 857(d) does not establish a scienter requirement with respect to sellers.") (citations omitted); *and United States v. Biro*, 143 F.3d 1421, 1428 (11th Cir. 1998) ("We are persuaded that an ordinary person would understand that § 2512 prohibits a vendor from selling a device to a customer designed by the manufacturer primarily for the purpose of the surreptitious interception of communications . . . . The statute makes no reference to the customer's intended use of the product."). Likewise, the "marketed for use" is not vague and refers only to how the product is marketed or advertised by to [sic] the purchasers. *Hoffman*, 455 U.S. at 502 ("[T]he alternative 'marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise.'") *and Posters 'N' Things*, 511 U.S. at 519 ("On the other hand, there is greater ambiguity in the phrase 'primarily intended . . . for use' than in the phrase 'marketed for use.' The term 'primarily intended' could refer to the intent of nondefendants, including manufacturers, distributors, retailers, buyers, or users."). It is thus quite clear that defining which devices count as obscene according to how they are marketed and designed is not sufficiently vague to make the Ordinance unconstitutional.

Plaintiffs' second vagueness argument is that subsection (d), the affirmative defense, of the

Ordinance conflicts with subsection (c), defining obscene devices, by allowing the purchaser's intent to change the meaning of the primary use of the device. Such an interpretation of the Ordinance is based on a misreading of the plain language of the Ordinance. While subsection (c) defines which devices count as obscene based on how the manufacturer designs them or the seller markets them, subsection (d) does not address which devices are obscene. Instead, subsection (d) provides an affirmative defense for "selling, renting or leasing the material" in certain instances. Those instances occur when the seller has one of several, listed bona fide purposes. Thus, there is no conflict between subsections (c) and (d) of the Ordinance.

Plaintiffs' third vagueness argument is that the meaning of a "bona fide" purpose is vague and that what qualifies as a scientific, judicial, or educational purpose is vague. Plaintiffs cite to no case law supporting this vagueness argument. In contrast, there is case law upholding similar statutory language against vagueness challenges. The term "bona fide" has been found to not be vague. *4000 Asher, Inc. v. State*, 290 Ark. 8, 14 (1986) ("This argument is hardly worth discussion, for the settled meaning of bona fide as synonymous with its literal translation, 'good faith,' is so familiar that the average person could not be misled."); *Cafe 207, Inc. v. St. Johns Cnty.*, 856 F. Supp. 641, 650 (M.D. Fla. June 23, 1994) (finding that an obscenity statute's exception for "bona fide live communication" was not unconstitutionally vague and case-by-case adjudication is sufficient), *aff'd*, 66 F.3d 272 (11th Cir. 1995).

Other courts have upheld, as not vague, similar language listing purposes. *Castle News Co. v. Cahill*,

461 F. Supp. 174, 179 (E.D. Wis. Nov. 13, 1978) ("There is no vagueness in the commonly-accepted meaning of the terms 'literary, artistic, political or scientific value.'"); *This That And The Other Gift*, 285 F.3d at 1324-25 (rejecting argument that medical necessity exemption to prohibition on selling sexual devices was vague even where the "exception is not precise in all respects."); *Osborne v. Ohio*, 495 U.S. 103, 112 & n.9 (1990) (finding that a proper purposes exemption including "for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose" helped to prevent the child pornography statute from being overbroad).

Plaintiffs have pleaded no facts demonstrating that the Ordinance has or will be discriminatorily or arbitrarily enforced. *Hoffman*, 455 U.S. at 503 ("Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech. The language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness."). Furthermore, Plaintiffs do not plead that their sales of sexual devices fall within one of the protected purposes or that any definition of those protected purposes could encompass Plaintiffs' actions. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* at 495.

The Court thus concludes that Plaintiffs are unable to sustain a vagueness challenge to the Ordinance because the language of the statute is clear as applied to them.

F. Privacy under the Georgia Constitution

Intervenors' Complaint also alleges state law claims. (Intervenor Compl. ¶¶ 42-47.) Because Intervenors and Defendant are considered residents of Georgia for purposes of diversity jurisdiction, the Court does not possess jurisdiction under 28 U.S.C.A. § 1332 to adjudicate these claims.

Consequently, Intervenors may assert their state law claims only under the Court's supplemental jurisdiction as provided in 28 U.S.C.A. § 1367(a). Under 28 U.S.C.A. § 1367(c), however, a district court has discretion to decline to exercise further jurisdiction over pendent state law claims if the court has dismissed all claims over which it had original jurisdiction. 28 U.S.C.A. § 1367(c); *Pintano v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1242 (11th Cir. 2007); *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006). A court should consider factors such as "judicial economy, convenience, fairness, and comity" when determining whether to decline supplemental jurisdiction over state law claims after dismissing all of the claims over which the court has original jurisdiction. *Parker*, 468 F.3d at 745-46; *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1288 (11th Cir. 2002). The Eleventh Circuit encourages district courts to dismiss remaining state claims where the district courts have dismissed all of the pending federal claims prior to trial. *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1089 (11th Cir. 2004).

Here, the Court has dismissed all the claims over which the Court has original jurisdiction. Applying the standard set forth above, the Court exercises its discretion under § 1367(c) to decline further supplemental jurisdiction over Intervenors' state law

claims. Because the Court has not reached the merits of those claims and dismisses the claims without prejudice, Intervenors may re-file the claims in state court within six months of the date of this Order.

IV. Conclusion

ACCORDINGLY, the Court **GRANTS** Defendant's Motion for Judgment on the Pleadings [23] and **DISMISSES WITHOUT PREJUDICE** Plaintiffs and Intervenors' claims against Defendant. Because this Order resolves all of Plaintiffs' and Intervenors' claims, the Court **DIRECTS** the Clerk to **CLOSE** this case.

IT IS SO ORDERED, this the 20th day of October, 2014.

Harold L. Murphy
United States District Judge