No. 17-869

# 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 Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether a challenge to a repealed ordinance that was never enforced is made justiciable by a prayer for nominal damages.

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## STATEMENT OF THE CASE

1. The City of Sandy Springs, a suburb of Atlanta located in Fulton County, Georgia, became a new municipal corporation on December 1, 2005. R. 1 at 13, ¶37.[1] Upon its inception, the City adopted ordinances, including those governing where and how adult establishments operate. *Id.* at 17, ¶48. The ordinances defined "adult bookstore" according to the floor space used for selling sexual devices and sexually explicit media. Inserection, a party in the lower courts, "is an adult bookstore in Sandy Springs that sells sexually explicit materials and items, including sexual devices." Pet. App. 54a, Panel Opinion; *see also* Pet. App. 3a n.1, En Banc Opinion ("Inserection purchases and sells sexual devices.").) Inserection has continuously sold sexual devices throughout all litigation below. R. 1 at 7, ¶19.

In June 2006, Inserection and two strip clubs sued Sandy Springs, challenging the City's adult establishment licensing code, zoning regulations, and alcohol code. R. 1 at 25, ¶77. The primary issue in the 2006 case was the City's ban on alcohol in strip clubs. Inserection, being too close to residential areas, challenged the licensing and zoning regulations, but continued to sell sexual devices.

In August 2006, the City adopted an obscenity ordinance that prohibited, under certain

[1] "R." refers to record entries in the district court docket. The complaint in the present case, N.D. Ga. Case No. 1:13-cv-3573, was filed by the district court pursuant to its severance order in a prior, related case, N.D. Ga. Case No. 1:09-cv-2747 (the "2009 case"). The 2009 case stemmed from the voluntary dismissal and re-filing of N.D. Ga. Case No. 1:06-cv-1562 (the "2006 case").

circumstances, the selling or renting of sexual devices, i.e., devices designed for "stimulation of human genital organs." R. 1 at 25, ¶¶76-78. The ordinance tracked a Georgia statute and a separate Alabama statute that had repeatedly been upheld against challenges. *See Sewell v. State*, 233 S.E.2d 187 (Ga. 1977), *dismissed for want of a substantial federal question*, *Sewell v. Georgia*, 435 U.S. 982 (1978); *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) (rejecting challenges to Alabama law brought by sexual device sellers and users); *Williams v. Att'y Gen. of Alabama*, 378 F.3d 1232, 1250 (11th Cir. 2004) (rejecting claim that *Lawrence v. Texas*, 539 U.S. 588 (2003), announced a new, fundamental sexual privacy right that encompasses commercial distribution of sex toys); *see also Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007) (upholding Alabama law).

In April 2009, the City amended its adult establishment licensing code, zoning regulations, and alcohol code. It also amended its obscenity ordinance to delete a reference to advertising sexual devices, and to clarify that the ordinance did not apply to sexual device sales done for bona fide purposes such as medical or educational purposes. Pet. App. 69a-70a; R. 1 at 37, ¶107.

Later in 2009, Inserection and the strip clubs dismissed and refiled their lawsuit. In the refiled 2009 case, the focus remained the City's alcohol ban for strip clubs. Inserection and the City devoted scant attention to the obscenity ordinance, and Inserection continued to sell sexual devices. *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 703 F. App'x 929, 931 (11th Cir. 2017) ("Inserection is both a store that sells sexually

explicit media, sexual devices, and other sex-related products, and an arcade at which patrons can pay to view sexually explicit videos.").

2. The district court, however, gave the obscenity ordinance challenge a life of its own. Four years after Inserection filed the 2009 case, and after summary judgment motions were filed, the judge in October 2013 severed, *sua sponte*, Inserection's obscenity ordinance challenge and directed the clerk to open a new case. R. 2 at 6.

Although the *Williams* decisions had adjudicated claims of sexual device buyers and users, the judge ordered severance because "the court believes that potential buyers of the sexual devices in question should be offered an opportunity to intervene in this action." R. 2 at 4. And although the 2004 *Williams* decision had held that *Lawrence* did not undermine Alabama's law, the judge stated that "additional briefing on the impact of *Lawrence*" justified severance. R. 2 at 5. The judge set a time period for Inserection to find sexual device users. R. 2 at 5.

As the ordinance had never been enforced (and sexual devices were readily available at Inserection, on Amazon, and elsewhere), no Sandy Springs residents elected to intervene. *After* the set period passed, Inserection moved for additional time to find intervenors and, over the City's objection, the court granted additional time. R. 9. In April 2014, petitioners Davenport and Henry intervened. R. 15.

Ms. Davenport is from Kennesaw, Georgia, and Mr. Henry is from Atlanta. *Id.* at 2. Ms. Davenport suffers from multiple sclerosis and as a result presently uses

sexual devices; she credits "the devices with saving her marriage." *Id.* at 3-4, ¶ 8. She also presently "sells such devices" to others in the MS community. *Id*. at 4, ¶ 9. Mr. Henry "is a bisexual man and an artist." *Id*. at 4, ¶ 11. He has used sexual devices in art displays, and would like to sell such artwork in Sandy Springs. *Id*. at 5, ¶ 13.

Using nearly verbatim phrasing, Davenport and Henry asserted that they "sought to" buy sexual devices in the City but "cannot do so because of the challenged Ordinance." *Id.* at 4-5, ¶¶10, 12. Neither alleged any factual content showing that a Sandy Springs city official, or any other person, enforced or threatened to enforce the ordinance against them or anyone else. Nor did they allege any specific facts concerning any attempted sale in Sandy Springs. They did not plead factual content showing that they were unable to purchase sexual devices from the sources where they were already purchasing them at the time they filed their complaint. Finally, they did not allege that they could not buy sexual devices at Inserection, which has been selling them continuously since before the litigation began. R. 1 at 7, ¶19.

3. The City moved for judgment on the pleadings as to both Inserection's and the intervenors' claims. In October 2014 the district court,[2] applying the *Williams* trilogy, granted judgment for the City. Pet. App. 65a-100a.

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[2] Because the judge who instigated the severed case retired in August 2014, a different judge resolved the motion. Pet. App. 67a.

The district court also held that intervenors "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." Pet. App. 76a.

The district court likewise held that "Intervenor Davenport has not pleaded sufficient facts to demonstrate that she has a plausible claim." Pet. App. 85a. She "does not plead that she has attempted to purchase sexual devices within Sandy Springs using the medical purpose" rationale, or "that she attempted to sell them to other people with similar medical needs." Pet. App. 85a. Moreover, the court noted the City's consistent position that selling a sexual device "to someone in Intervenor Davenport's situation would be permitted under the statute." Pet. App. 85a.

4. Inserection and the intervenors appealed. They argued that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), upended substantive due process analysis and effectively overruled the *Williams* decisions. Pet. App. 59. The Eleventh Circuit disagreed, holding that the "Fourteenth Amendment Due Process Claim is foreclosed by our prior holding in *Williams v. Attorney General* (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004)," and that "the district court properly entered judgment" for the City. (Pet. App. 52a.) But reminiscent of the district court's severance order, the panel invited further litigation: "Appellants are free to petition the court to reconsider our decision en banc, and we encourage them to do so." (Pet. App. 60a.)

5. Appellants sought rehearing en banc, which the Eleventh Circuit granted on March 14, 2017. Pet. App. 5a. On March 21, the court issued its briefing notice. That same day, the Sandy Springs City Council unanimously voted to repeal the sexual device portion of the obscenity ordinance. *Id*. On March 30, 2017, the City moved to dismiss the appeal of the ordinance, which had never been enforced, as moot. In the motion, the City "disavow[ed] any intent to adopt such a regulation in the future." *Id*.

The court carried the motion to oral argument, which occurred on June 6, 2017. At a regular City Council meeting that evening, the Council unanimously passed Resolution 2017-06-85. In the resolution, the City: (1) observed 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) explained that the repeal "eliminated an inconsistency in the City's Code between the [repealed] prohibition on the sale of obscene devices and the City's zoning and licensing ordinances that license and regulate stores which sell them." Pet. App. 6a. The City also explained that the City's zoning and licensing ordinances effectively serve the City's interest in minimizing the secondary effects of the sale of sexual devices. *Id*. In compliance with Federal Rule of Appellate Procedure 28(j), the City advised the court of its resolution that same day. *Id*.

The Eleventh Circuit issued its ruling on August 23, 2017. Pet. App. 1a-41a. The court observed that, by that stage in the proceedings, the appellants had waived all claims except for the Fourteenth Amendment substantive due process claim. Pet. App.

4a n.2. On that claim, appellants had sought declaratory and injunctive relief and nominal damages. Pet. App. 7a. Observing that Article III requires a live, justiciable controversy at all stages of the proceeding, the court noted 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." *Id.* (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895))).

The court first addressed the request for declaratory and injunctive relief. Pet. App. 7a-24a. The court explained that these were moot:

> 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.

Pet. App. 24a.

The court then analyzed whether, in this case, the prayer for nominal damages was sufficient to make this "otherwise moot constitutional challenge" justiciable. Pet. App. 24a-25a. The court concluded that it was not.

Pet. App. 25a-40a. Contrary to petitioners' repeated suggestion, the court did not hold that the justiciability of a request for nominal damages necessarily turns on the justiciability of a request for declaratory or injunctive relief. Rather, the justiciability of nominal damages *in an otherwise moot case* turns on whether that relief would have any "practical effect on the parties' rights or obligations." Pet. App. 25a; *see also id.* 26a ("[The Supreme Court] has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.") (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

From the outset, the court observed that in some cases, nominal damages will have such an effect, Pet. App. 25a & n.12, while in others—such as this one, where the repeal completely removed the ordinance to which intervenors objected—it would not. Pet. App. 25a. "Far from being 'likely' that a favorable decision of this Court would have any practical effect on their rights or obligations, *Lewis* [*v. Cont'l Bank Corp*.] 494 U.S. [472,] at 477 [(1990)], in these circumstances it is plainly not possible." Pet. App. 28a. A plaintiff's desire for judicial imprimatur on his claim is not sufficient, as "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." Pet. App. 33a (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)).

Judge Wilson, writing for the dissenters, argued that "nominal damages defy mootness on their own." Pet. App. 45a. Attempting to identify the injury that nominal damages would relieve, he stated: "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" could help the plaintiffs "feel secure in their knowledge that their rights" were violated. Pet. App. 49a (emphasis added).

The dissent argued that adjudicating this case "would indeed 'have a practical effect on the parties' rights or obligations'" because "[t]he City of Sandy Springs *potentially* violated Plaintiffs' constitutional rights *by enacting this ordinance*." *Id*. (emphasis added). Thus, he argued, "[i]f 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." *Id*. If, however, "we decided 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." *Id.* (emphasis added). That, the dissent argued, is a "practical effect" sufficient "to save the case" from mootness. *Id*.

## REASONS FOR DENYING THE WRIT

### I. Petitioners lack standing to bring a claim for nominal damages against a repealed ordinance that was never enforced.

Petitioners claim that this case "cleanly presents a single, pure question of law." (Pet. 28.) But this is, and has always been, a case in search of a controversy. Petitioners lack both injury-in-fact and redressability to bring this suit.

Petitioners' alleged injury was the mere existence of the ordinance. Pet. App. 49a. This is plainly insufficient to satisfy standing. *Poe v. Ullman*, 367 U.S. 497 (1961). The ordinance was never enforced, and sexual devices have been openly sold in the City since its inception. Moreover, the district court found that intervenors could have purchased sexual devices under the ordinance when it was in effect.

Petitioners also lack redressability. As the dissent below observed, adjudicating this otherwise moot case based on the prayer for nominal damages would simply provide "judicial recognition" of an alleged right and a feeling of "secur[ity] in the knowledge" that a court agreed with petitioners' claim. Pet. App. 49a. But the potential for such "psychic satisfaction" does not satisfy constitutional standing requirements. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

### A. Petitioners lack an injury-in-fact because the mere existence of a law does not show a specific harm or imminent threat of harm.

To establish Article III standing, a plaintiff bears the burden of demonstrating: (1) an injury-in-fact that is "(a) concrete and particularized" and "(b) actual or imminent, not 'conjectural' or 'hypothetical,'" (2) "a causal connection between the injury and the conduct complained of," and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (markings and citations omitted).

"It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1883), but rather 'must affirmatively appear in the record.' *Mansfield C. & L. M. R. Co. v. Swan*, 110 U.S. 379, 382 (1884)." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (vacating ruling on ordinance provision because no plaintiff demonstrated standing to challenge it). It is the burden of the "party who seeks the exercise of jurisdiction in his favor," *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

"Thus, petitioners in this case must 'allege … facts essential to show jurisdiction. If [they] fail to make the necessary allegations, [they have] no standing. *McNutt*, *supra*, at 189." *FW/PBS*, 493 U.S. at 231. Each element of standing "must be supported in the same

way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561. Thus, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, 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.* A court does not credit pleadings that are "no more than conclusions," unadorned by factual allegations. *Id*. at 679. "When there are well-pleaded factual allegations," then the court must "determine whether they plausibly give rise to an entitlement to relief." *Id*.

The mere existence of a regulation is insufficient to demonstrate an injury-in-fact for Article III standing. *Younger v. Harris*, 401 U.S. 37, 41-42 (1971) (holding that appellees who alleged that they "feel inhibited" in their advocacy by "the presence of the Act 'on the books'" lacked standing where they had "no fears of state prosecution except those which are imaginary or speculative"); *Golden v. Zwicker*, 394 U.S. 103, 110 (1969) (holding that the power of courts to pass upon the constitutionality of a law "arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference," and that "[a] hypothetical threat is not enough") (quoting *United Public Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89-90 (1947)). There is no "realistic fear of prosecution" where the regulation at issue has a history of non-enforcement. *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (dismissing, for lack of justiciability, challenge to anti-contraceptive law

that remained on the books but had never been enforced).

Here, petitioners' conclusory allegations do not show that the ordinance caused them an injury-in-fact. Petitioners, who live in other cities, lack injury-in-fact because the City never enforced, or even threatened to enforce, the law against them or anyone else. Nor do petitioners allege otherwise. Indeed, petitioners' fellow plaintiff, Inserection, openly sold sexual devices in Sandy Springs throughout the litigation, and the City's adult establishment regulations specifically authorized the licensure of adult bookstores, like Inserection, which are regulated by virtue of their trade in sexual devices. Additionally, as the district court found, Ms. Davenport, could have legally bought sexual devices for medical reasons, Pet. App. 85a, and Mr. Henry could have legally sold his artwork under the repealed ordinance because it is not "designed or marketed for use in stimulating human sexual organs." Pet. App. 76a.

Petitioners' injury-in-fact cannot be "'inferred argumentatively from averments in the pleadings,'" *FW/PBS*, 493 U.S. at 231, but rather, petitioners must clearly allege facts showing that they are proper plaintiffs to invoke judicial resolution of the repealed ordinance. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Petitioners do not supply "well-pleaded factual allegations" that "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

Instead, their complaint—as correctly observed by the dissent below—was directed toward the existence of the ordinance. Pet. App. 49a ("Plaintiffs believe that their rights were violated by the enactment of the

ordinance."). But neither the existence of a law on the books, nor a "hypothetical threat" of enforcement, is sufficient to confer standing. *Younger*, 401 U.S. at 41-42; *Golden*, 394 U.S. at 110; *Poe*, 367 U.S. at 504-05 ("The party who invokes the [judicial] power (to annul legislation on grounds of its unconstitutionality) must be able to show not only that the statute is invalid, but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement.") (internal citation and quotation marks omitted).

Contrary to petitioners' contention, there are "other disputed legal" issues, Pet. 28, that make this petition an improper vehicle for addressing the question presented. Petitioners lack an injury-in-fact, and thus standing, to challenge the repealed ordinance.

### B. Nominal damages, like a declaratory judgment, would not redress any harm supposedly stemming from the repealed ordinance.

Even if petitioners could establish an injury-in-fact, the City Council has repealed the ordinance. That legislative repeal provides all of the meaningful relief that petitioners could obtain. An award of nominal damages, which are "damages in name only," 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 3.3(2), at 294 (2d ed. 1993), would supply only "psychic satisfaction" that is insufficient to establish standing.

"The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499

(1975). For an injury to be redressable, a plaintiff must show that she "personally would benefit *in a tangible way* from the court's intervention." *Id*. at 508 (emphasis added). It is not enough that a plaintiff would be gratified by the ruling she seeks, or that the ruling will "deter the risk of future harm…. Obviously, such a principle would make the redressability requirement vanish." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). "[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id*. at 107.

Petitioners do not explain how a nominal damages award would redress even their supposed, but unsubstantiated, injury of being "unable to purchase and/or sell sexual devices" in Sandy Springs. The legislative repeal of the ordinance fully redressed that alleged harm. Thus, petitioners do not show that an award of nominal damages would "benefit them in a tangible way," *Warth*, 422 U.S at 508, i.e., that one dollar would have a practical effect in terms of redressing their grievance.

The only attempt to show redressability was in the dissenting opinion below, which repeatedly argued that the City "potentially" violated petitioners' constitutional rights by merely "enacting this ordinance," and that a ruling on the ordinance would provide "judicial recognition" of the right and help plaintiffs "feel secure in their knowledge that their rights were violated." Pet. App. 49a.

This analysis reveals two key defects in petitioners' argument. First, it shows that the goal of continuing this litigation over a never-enforced, repealed ordinance is to gain the "psychic satisfaction," *Steel Co.*, 523 U.S. at 107, provided by a "judicial seal of approval [on] an outcome that has already been realized." Pet. App. 25a. Of course, psychic satisfaction does not satisfy redressability requirements.

Second, it shows that even the dissent below recognized that nominal damages function in the same way as a declaratory judgment—here, to provide "judicial recognition" of the broad sexual privacy right that petitioners sought to have recognized by bringing their case in the first place.

To obscure this obvious reality, petitioners assert that "[n]ominal damages, unlike declaratory judgments, provide relief for past violations of individual rights." Pet. 13-14 (Sec. II.A.). But petitioners' own authorities show otherwise.

Petitioners quote *Black's Law Dictionary*'s definition of nominal damages, which in turn quotes Charles T. McCormick's *Handbook on the Law of Damages* § 20 at 85. Petitioners, however, omit the last sentence from McCormick: "The award of nominal damages *is made as a judicial declaration* that the plaintiff's right has been violated." *Id*. (emphasis added).

This judicial declaration is the "vindication" of an alleged right that a nominal damages award provides. But the judicial declaration that is the essence of a nominal damages award does not remedy, or undo, the past invasion of the right, or make the plaintiff whole

as though the invasion never occurred. Nor does one dollar accomplish these things. Rather, an award of nominal damages intimates that the law is on the recipient's side. In this case, however, the law is no more.

Petitioners cite *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612 (3d Cir. 2013) for their proposition that declaratory judgments differ from nominal damages with respect to mootness. Pet. 13. But *CMR* directly undermines their argument.

*CMR* involved a developer's challenge to the city's adoption of a zoning ordinance that governed his ongoing project. *Id.* at 618-19. During litigation, the city repealed the ordinance insofar as it applied to the plaintiff's property. *Id*. at 621. The developer argued that his claims against the repealed ordinance were not moot because he sought declaratory relief, compensatory damages, and nominal damages against the ordinance. *Id*. at 627-28.

The court treated the claims for declaratory relief and nominal damages similarly, declining to reach them on mootness grounds. The court concluded that the compensatory damages claim was not moot, but held that it could not proceed because the claim would not lie against the zoning ordinance based on the plaintiff's theory of facial invalidity, and that an as applied claim was not ripe. *Id*. at 622-27.

The *CMR* court's treatment of the nominal damages claim is particularly instructive here. The court held that the plaintiffs in cases like *Carey v. Piphus*, 435 U.S. 247 (1978), "were subjected to *actual* violations of constitutional rights." *CMR*, 703 F.3d at 628. In "sharp

contrast" to plaintiffs who have "suffered a specific deprivation pursuant to the unconstitutional statute or procedures," CMR "was never subjected to unconstitutional procedures, wrongfully denied a permit under an ordinance that was potentially unconstitutional, or otherwise subjected to a constitutional deprivation." *Id*. The court stated:

> The only arguable harm that Waterfront has been subjected to is the mere existence of a law that it alleges is unconstitutional. We find no authority, and Waterfront has provided none, for the proposition that a plaintiff is entitled to nominal damages simply based on the existence of a zoning law that has never been applied to it. That a legislature may enact a zoning law that if applied to someone would violate due process does not entitle any individual who finds it offensive, including those never subjected to the ordinance, to nominal damages.

*Id.*

*CMR* is on all fours with this case. Petitioners complain merely about the existence of the law, not that it was enforced against them. Thus, nominal damages do not preserve this case from mootness. *See also id.* at 628 (holding that "a declaration of unconstitutionality" directed against the objectionable features of a repealed ordinance "would serve no purpose today. Where a law is amended so as to remove its challenged features, the claim … becomes moot as to those features.").

Petitioners' own authorities show that nominal damages function like, and are akin to, declaratory judgments.[3]

## II. There is no circuit split over whether a nominal damages claim makes a challenge to a never-enforced, repealed law justiciable.

The petition fails to demonstrate a split in the circuits on the precise question presented by this case. The Eleventh Circuit properly applied this Court's precedents to hold that justiciability requires the ability of a court to grant relief that will have a practical effect on the rights and obligations of the parties. Even if the Eleventh Circuit correctly stated but mistakenly applied the relevant law, that would not justify granting the intervenor's petition. Finally, cases from the circuits that are allegedly on the other side of the question show that they would have reached the same result as the Eleventh Circuit reached in this case.

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[3] Although the proposition that nominal damages vindicate—i.e., establish or declare—past violations of rights is not disputed, Petitioners' citations to *Hulle v. Orynge*, Y.B. 6 Edw. 4, fol. 7, pl. 18 (1466), and *Nixon v. Herndon*, 273 U.S. 536 (1927), are inapposite. *Hulle* held that a person making entry onto another's land for a lawful purpose (to retrieve thorns that had fallen on it) was nevertheless liable for damage to the landowner's vegetation that occurred during the entry. *Nixon* did not involve a claim for nominal damages, but rather compensatory damages. *Stachura*, 477 U.S. at 311 n.14 ("In *Nixon*, the Court held that a plaintiff who was illegally prevented from voting in a state primary election suffered compensable injury.").

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Pet. App. 7a (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Courts have jurisdiction to resolve only "real and substantial controvers[ies]," *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975), and may not issue "advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969). "[F]ederal 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).

As an initial matter, the Eleventh Circuit did not announce a novel, categorical rule about nominal damages and mootness as petitioners argue. Nor did the court determine that nominal damages necessarily rise or fall with the availability of compensatory damages. Rather, the court applied the longstanding and unremarkable rule that Article III requires a court to be able to grant effectual relief; i.e., relief that will have a practical effect on the rights and obligations of the parties. While a live compensatory damages claim necessarily prevents a claim from being moot, nominal damages may or may not prevent mootness. Pet. App. 25a. In certain cases (e.g., trespass and libel), a nominal damage award will have a practical effect on the rights of the parties. *Id*.

In cases like this one, however, where petitioners sought relief from an ordinance and obtained it through a complete legislative repeal, an award of nominal damages would have no practical effect. That is not a question on which the circuits are split.

### A. Cases cited in the petition do not establish a conflict over the specific question presented by this case.

The question presented by this case is whether federal courts may address a claim for nominal damages against a repealed ordinance that was never enforced.

1. The cases that petitioners claim show a circuit split, Pet. 11-12, do not demonstrate a conflict over this question because they did not involve a nominal damages claim against a never-enforced, repealed ordinance. Rather, those cases involved challenges to government policies that were actually enforced, and thus presented claims of actual deprivations of constitutional rights.

In several of the cases, plaintiffs sought nominal damages for the application of speech regulations. *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007) (enforcement of former sign regulation and untimely consideration of sign permit application); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802–03 (8th Cir. 2006) (denial of sign permit applications); *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416 (D.C. Cir. 2005) (denial of organization's entry in a public art project); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004) (denial of demonstration permit).

Other cases arose when policies were enforced against prisoners. *Kuperman v. Wrenn*, 645 F.3d 69, 73 n.5 (1st Cir. 2011) (application of beard length policy

during incarceration); *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008) (assessment levied against prisoner's inmate account in disciplinary matter); *Green v. McKaskle*, 788 F.2d 1116, 1125-26 (5th Cir. 1986) (various prison policies enforced against former inmate while in custody).

Still other cases cited by petitioners reflected enforcement of school policies, election law, or local governmental policy affecting civil rights claimants. *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345–46 (5th Cir. 2017) (student given lower grade than classmates in alleged retaliation for objecting to Mexican Pledge of Allegiance); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (students prevented by school policy from distributing pencils, candy canes, and program tickets with religious messages); *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007) (nullification of student government election); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981) (termination of university student newspaper editor); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) (voters prevented from voting); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 866, 872 (9th Cir. 2002) (recognizing live claim for compensatory, punitive, and nominal damages against county policy that interfered with plaintiff's right to obtain counsel).

These cases are unlike the one here. As discussed in Section I.A., the petitioners were never subjected to an enforcement of the obscenity ordinance. The City made no threat and took no action against them, or anyone, to enforce the obscenity ordinance before it was repealed. Because petitioners seek to continue

challenging a policy that was never applied or enforced, their cited authorities—which all involved enforcement of a challenged policy—are inapposite.

2. The petitioners' circuit split cases also do not uniformly show that a nominal damages claim, standing alone, will avoid mootness when claims for injunctive relief are moot. As in *Carey v. Piphus* and *Memphis Community School District v. Stachura*, several of petitioners' cases involved nominal damages along with live claims for compensatory or punitive damages. *Kuperman v. Wrenn*, 645 F.3d 69, 73 (1st Cir. 2011) (nominal and punitive damages); *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007) (nominal and compensatory damages); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 866, 873 (9th Cir. 2002) (compensatory, punitive, and nominal damages); *Green v. McKaskle*, 788 F.2d 1116, 1124 (5th Cir. 1986) (nominal and punitive damages); *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, (D.C. Cir. 2005) (nominal and compensatory damages). The compensatory damages claims in these cases served to independently maintain their justiciability, making reliance on a nominal damage claim unnecessary. Here, of course, the intervenors never sought compensatory damages.

### B. The Eleventh Circuit's position is consistent with other circuits addressing the same question.

When federal courts have considered nominal damages requests against repealed regulations that were not enforced against the plaintiff, they have held that such claims are not justiciable. If this case were to

arise in these circuits (all of which are cited in petitioners' alleged circuit split), those courts would reach the same result as the Eleventh Circuit here.

As discussed in Section II.B., *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612 (3d Cir. 2013), involved a challenge to a 2006 ordinance that, *inter alia*, imposed a building height restriction on its site. The developer never applied for (or was denied) a permit under the ordinance, and it did not seek a variance. Like the intervenors here, the developer argued that the ordinance "was unconstitutional on its face as applied to [plaintiff] and that [plaintiff] was harmed by the mere enactment of the ordinance." *Id.* at 626. The Third Circuit dismissed the developer's challenge as moot, distinguishing *Carey v. Piphus* on the grounds that the students there suffered an actual deprivation of a constitutional right.

Thus, *CMR D.N. Corp.* demonstrates that the Eleventh Circuit's decision here is in line with how the Third Circuit would view a nominal damages claim against an unenforced, and subsequently repealed, ordinance.

The Eighth Circuit, sitting en banc, has applied the same rule. In *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012), the court considered challenges to a funeral protest ordinance, which was twice amended. While the earlier versions of the ordinance were in effect, the plaintiffs did not picket at funerals in that city. Although the plaintiffs sought nominal damages, that request "does not give them standing to challenge the first two versions of the ordinance because they cannot revive an otherwise moot claim against 'a regime no longer in existence.'"

*Id.* at 687 (internal citation omitted). Of note, the en banc opinion was authored by Judge Murphy, who six years earlier had written the opinion in one of the petitioners' circuit split cases, *Advantage Media*, 456 F.3d 793 (8th Cir. 2006).

The ruling below is also consistent with Sixth Circuit authority. In *Morrison v. Board of Education of Boyd County*, 521 F.3d 602 (6th Cir. 2008), a Kentucky high school student sought nominal damages against a replaced school policy that had allegedly "chilled" his speech about his religious beliefs while the policy was in effect. The court concluded that there was no injury-in-fact because the student's subjective chill from the mere existence of the policy was not supported by some specific action by the defendant. *Id.* at 608–09. It also explained that a concrete harm, such as enforcement or threatened enforcement, must have occurred or have been imminent. *Id.* at 610. Because it was only speculative whether the student would have been disciplined under the former policy, the student's nominal damages claim did not render his challenge to the repealed policy justiciable. *Id.*

The Sixth Circuit explained that a nominal damages award concerning the former school policy would not redress the student's alleged injury. "No readily apparent theory emerges as to how nominal damages might redress past chill." *Id.* at 610. "This case should be over. Allowing it to proceed to determine the constitutionality of an abandoned policy—in the hope of awarding the plaintiff a single dollar—vindicates no interest and trivializes the important business of the federal courts." *Id.* at 611.

The Fourth Circuit is in accord. In *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566 (4th Cir. 2007), a town sent two letters directing a company to remove an unlawful electronic sign, but the town never cited, fined, or charged the company with a violation of the sign ordinance. After the company sued, the town revised its ordinance. The Fourth Circuit held that the company's nominal damages claim against the former ordinance did not preserve a live controversy because the ordinance "was never enforced against it and it has not suffered any constitutional deprivation." *Id.* at 571. "[T]he fact that Chapin could have suffered some constitutional deprivation if the Town had enforced the Ordinance does not save its claim for nominal damages—such damages are reserved for constitutional deprivations that have occurred, not those that are merely speculative." *Id.* at 572.

Second Circuit decisions also correspond with the Eleventh Circuit's decision here in that, for a nominal damages claim to be justiciable, a challenge to a law must have some practical effect on the legal relationship between the parties. For example, in *Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971), a week-to-week lodger challenged the constitutionality of a statute that allowed his boarding house operator to seize his personal effects when his rent was in arrears. The plaintiff received his property back sometime after filing the action, the landlord never appeared, and the plaintiff eventually moved elsewhere. Even though the challenged law—unlike in this case—had been enforced against the plaintiff, the Second Circuit held that there was no basis to issue a declaration on the constitutionality of the statute and that the incidental claim for nominal damages could not provide "a case or

controversy where none in fact exists." *Id.* at 489–90. *See also Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973) (holding constitutional challenge to automobile lien law's detention provision not justiciable for nominal damages where the automobile had been sold there was no continuing live controversy over automobile detention).

The foregoing cases show that, on the question presented by this case, there is not "intractable conflict on a fundamental and recurring question of law." Thus, the petition should be denied.

## III. The Eleventh Circuit correctly applied this Court's jurisdictional rules, which need no clarification by certiorari.

In its redressability discussion above (Section I.B.), the City has already refuted petitioners' claim, Pet. 13-18, that nominal damages are "unlike declaratory judgments" in that they provide "relief" for past violations of individual rights. On the contrary, petitioners' own authorities show that nominal damages act as a "judicial declaration" that a party's rights have been violated. Charles T. McCormick, *Handbook on the Law of Damages* § 20 at 85.

That understanding is consistent with the decision below that a nominal damages award could have no practical effect here, where an unenforced ordinance had been repealed. Nothing in this Court's nominal damages cases holds otherwise.

### A. The Eleventh Circuit correctly held that *Carey* and *Stachura* do not govern questions of justiciability, as none were raised in those cases.

Petitioners fail to refute the Eleventh Circuit's straightforward observation that neither *Carey* nor *Stachura* addressed mootness or justiciability questions.

Instead, petitioners argue that "[w]hile *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." Pet. 18-19. This argument is unpersuasive.

A case in which jurisdiction is not questioned cannot be precedent governing a jurisdictional question. The only case, other than *Carey* and *Stachura*, that petitioners cite for their argument—*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998)—proves the point.

In *Steel*, the Court held that an environmental group lacked redressability, and thus standing, because none of the relief it sought against a steel company for failing to timely file environmental reports would redress the group's alleged injury-in-fact. Distinguishing cases that decided a statutory standing question before a constitutional standing question, the Supreme Court held that "drive-by jurisdictional rulings," i.e., where jurisdiction has been "assumed without discussion" by the Court, "have no precedential effect." *Id*. at 91 (citing *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[S]tanding was neither challenged nor

discussed in that case, and we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.")).

This is an a fortiori case, because neither *Carey* nor *Stachura* produced even a "drive-by" jurisdictional ruling. Neither case presented a jurisdictional question because both involved actual deprivations of constitutional rights for which compensatory damages were sought. Here, in contrast, no actual deprivation occurred, and (probably for that reason) no compensatory damages were sought.

Finally, contrary to petitioners' suggestion, Pet. 18, *Steel Co.* makes no mention of "absolute" rights. In any event, whether a right is "absolute" is relevant to whether a claim for nominal damages will lie, not whether the presence of a nominal damages claim will preserve an otherwise moot case from dismissal.[4]

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[4] *Carey* explains that the "right to procedural due process is 'absolute' in the sense that it does not depend on the merits of a claimant's substantive assertions," 435 U.S. at 267, a characterization that does not apply here. Petitioners sought recognition of a *new* substantive due process right to sexual privacy that was foreclosed by governing Eleventh Circuit law when Petitioners filed their complaint. Pet. App. 81a-82a (observing that the Eleventh Circuit has "repeatedly rejected challenges to [a nearly identical] statute, refusing to find that either the Due Process Clause or the constitutional right to privacy included a right to use sexual devices or to commercially distribute them").

### B. The Eleventh Circuit's decision properly prevented the court from issuing an advisory opinion.

Petitioners wrongly assert that the Eleventh Circuit adopted a per se rule that the unavailability of prospective relief deprives a federal court of the power to decide a nominal damages claim absent a compensatory damages claim. Pet. 19. As explained above, the Eleventh Circuit's position is that nominal damages may be awarded when the grant of that relief has a practical effect on the parties. Here, where the never-enforced ordinance has been repealed, giving the petitioners all of the effective relief they sought, no such practical effect is possible.

Moreover, the Eleventh Circuit's holding in this case—even as incorrectly stated by petitioners—does not "effectively require[e]" plaintiffs "to seek compensatory damages," and thus "limit litigants' freedom to choose what relief to pursue for violations of their personal rights." Pet. 19-20.

*Amici* DKT Liberty Project and Reason Foundation build on this false premise, arguing that "[t]he Eleventh Circuit's decision reads an amount-in-controversy requirement into Article III for all claims seeking retrospective relief." DKT Amici Br. 2.

But nothing in the Eleventh Circuit's holding requires a plaintiff to plead compensatory damages claims. In pre-enforcement challenges like this one, most civil rights litigants seek only the removal of the law. That can be accomplished by a declaration that it is unconstitutional, by an injunction, or—as here—by the full legislative repeal of the law. The removal of the

law by any of these means accomplishes the goal of the litigation. Thus, it is pure speculation for petitioners to argue that "[t]he 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." Pet. 20.

Presumably, compensatory damages will be brought only in cases where, unlike this case, the law has actually been enforced and has caused some compensable damage. Had the obscenity ordinance actually been enforced against petitioners to block their sales of sexual devices, they could have pleaded the basic facts of the enforcement and sought damages in the form of the lost profits (even just $20) on those sales. That litigants may choose to pursue such claims is not, as *amici* suggest, a "requirement" that federal cases present a certain "amount-in-controversy." A compensatory damages claim does not have to be of a certain magnitude to be actionable, and *amici* offer no authority that holds otherwise.

Petitioners suggest that only compensatory damages claims will trigger discovery that "may require parties and experts to testify about the plaintiff's most private, intimate behavior." Pet. 21-22. That is illogical. Testimony about economic damage itself does not involve "private, intimate behavior." And whatever discovery could be obtained from parties about their sexual practices, specifically, their use of sexual devices, could have just as easily been obtained in this case where petitioners sought a declaratory judgment, injunctive relief, and nominal damages

against an ordinance regulating the commercial distribution (though not the use) of sexual devices.[5]

Last, petitioners never explain how the Eleventh Circuit, had it exercised jurisdiction, would have avoided issuing a forbidden advisory opinion. Petitioners never identify the practical effect that a ruling against the repealed ordinance would have on the parties to this case, now that the ordinance is long gone. Since it was never enforced, there is no need to "vindicate," or declare, that it actually deprived a person of a constitutional right. A ruling on the constitutionality of the ordinance could provide, at most, a "psychic satisfaction" that is not an acceptable Article III remedy. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)).

Petitioners thus do not dispute the Eleventh Circuit's observation that, when nominal damages have no practical effect on the parties, allowing such claims to create jurisdiction to resolve academic questions is inconsistent with Article III's case or controversy requirement.

### C. The decision below did not create an unworkable rule, but rather faithfully applied longstanding jurisdictional principles.

Petitioners argue that the Eleventh Circuit "jettisoned" the "widely prevailing rule," and that "[i]n nine circuits, the mootness of a claim for prospective relief has no effect on federal courts' power to decide a

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[5] As the case was resolved on the pleadings, no discovery was taken.

pending claim for nominal damages." Pet. 23-24. Both arguments are wrong.

As the City has shown, the Eleventh Circuit held only that the ability to reach a claim for nominal damages, *in an otherwise moot case*, depends on whether such an award would have a practical effect on the litigants in that case. That position is consistent with the longstanding rule that a case becomes moot if an event makes it impossible for the court to grant "'effectual relief'" 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)).

As the City has also shown, in five of the nine circuits cited by petitioners, cases analogous to this one—i.e., those involving challenges to repealed laws or policies, or laws having no practical effect on the plaintiff's rights—hold that a nominal damages claim will not avoid mootness. *See* Sec. II.B., *supra*.

Petitioners likewise argue that requirement of such a practical effect "is unrooted in law." But as the cases cited above, and throughout this brief, show, the requirement goes back to at least 1895. *Mills*, 159 U.S. at 653 (holding that the duty of every court is "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it," such that if the court is unable to grant "effectual relief" to a prevailing plaintiff, "the court will not proceed to a formal judgment, but will dismiss the appeal").

This authority also disposes of petitioners' argument about libel cases. Even if a favorable libel judgment principally benefits the plaintiff by clearing his name before third parties (potential employers, neighbors, etc.), it still satisfies the requirement that the judgment provides "effectual relief" in "favor of the plaintiff." *Mills*, 159 U.S. at 653. Petitioners simply conflate this practical effect in favor of the libel plaintiff with what they advance here: "undifferentiated public interest" in "vindicate[ng] the rule of law." *Steel Co.*, 523 U.S. at 106 (quoting *Lujan*, 504 U.S. at 577).

Petitioners' argument that the decision below creates "significant jurisdictional anomalies for nominal damages litigation at the appellate level" flows from their mistaken belief that the justiciability of nominal damages claims necessarily turns on the presence of a live claim for compensatory damages. As explained above, the Eleventh Circuit did not so hold. The fact that nominal damages cases will arise in various scenarios that will yield different outcomes under the same established jurisdictional rules does not undermine the Eleventh Circuit's application of those rules here. Pt. App. 31a ("Unlike the situation in *Carey* and [*Stachura*], 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.".)

Because the Eleventh Circuit's decision is faithful to and consistent with governing law, this Court should deny the petition.

## IV. This case is an improper vehicle to decide the question presented.

The intervenors' case—which was initiated entirely by the initial district court judge—fails twice on standing, seeks a new substantive due process right, and improperly seeks nominal damages for a right that is not "absolute."

Petitioners face two standing problems. They do not show "well-pleaded factual allegations" that establish a plausible injury-in-fact, i.e., an actual deprivation of a constitutional right. *See* Sec. I.A. Petitioners also lack redressability because they have already obtained what that they sought by bringing suit: the removal of the ordinance. *See* Sec. I.B.

Additionally, to resolve this case as petitioners desire, the Court must decide whether nominal damages would even attach to a substantive due process claim. In *Carey*, the Court recognized that procedural due process is an "absolute" right because it applies independent of the merits, of the underlying claim, and because of its importance to organized society. 435 U.S. 247, 266 (1978). The Court explained that certain "absolute" rights were also recognized at common-law. *Id.*

Here, however, petitioners seek recognition of a broad substantive due process right to sexual privacy that would encompass commercial distribution of sexual devices. The lower courts are in disagreement over whether such a right exists. *Compare Williams v. Att'y Gen. of Alabama*, 378 F.3d 1232, 1250 (11th Cir. 2004) (refusing to recognize such a right under *Lawrence v. Texas*, 539 U.S. 588 (2003)) *with Reliable*

*Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (recognizing the right).

Indeed, the lower courts are also split over whether a prayer for nominal damages will save a substantive due process claim—as opposed to a procedural due process claim—from mootness. The Eleventh Circuit holds that they will not. *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1259 (11th Cir. 2007) ("Damage claims can save a § 1983 claim from mootness, *but only where such claims allege compensatory damages or nominal damages for violations of procedural due process*.") (emphasis added); *but see Davis v. W. Cmty. Hosp.*, 755 F.2d 455 (5th Cir. 1985) (holding that plaintiff would have been entitled to nominal damages for substantive due process violation if he had preserved the issue on appeal).

This case does not present a "single, pure question of law" on which lower courts are helplessly split. Rather, it represents a lower court's correct application of longstanding justiciability rules. Moreover, the case is encumbered with ancillary issues concerning the petitioners' standing and unresolved issues of substantive law.

## CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Dated: February 15, 2018