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Honorable Scott S. Harris
Office of the Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, DC 20542-0001

Re: *N.Y. State Rifle & Pistol Ass'n, et al. v. City of N.Y., et al.*, No. 18-280

Dear Mr. Harris:

As provided in the Court's order of November 15, 2019, I write on behalf of respondents to address the Solicitor General's letter expressing the views of the United States on whether this case is moot.

The Solicitor General agrees that the only claims petitioners have ever asserted in this lawsuit—those for declaratory and injunctive relief—are now moot. But in a strange twist, he resists dismissal of petitioners' suit on a ground that they have not raised themselves: namely, that petitioners *might* decide to seek damages; and, if they do, they *might* be allowed to pursue such relief. U.S. Letter 1. To be precise: The Solicitor General takes no position on whether petitioners are entitled at this late juncture to raise a new request for damages. *Id.* at 2. Yet the Solicitor General says the case is not moot because there is a "prospect" that petitioners "may" seek damages, and it "may well be" permissible for petitioners to add a damages claim now. *Id.* at 1–2. The Court has never embraced reasoning remotely like this to save a case from mootness and should not do so for the first time now.

1. For starters, the Solicitor General is mistaken in asserting that the Court need not decide whether petitioners could now pursue a damages claim because "questions about whether it is too late for petitioners to seek damages go to the merits, not to jurisdiction." U.S. Letter 2. Questions that determine whether an Article III case or controversy exists cannot be "assum[ed] … for the purpose of deciding the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)

(internal quotation marks omitted). And Article III jurisdiction turns here on whether a court could grant petitioners "effectual relief." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted). That question, in turn, depends entirely on whether petitioners do seek damages, or could seek them in the future. So the Court must either resolve whether petitioners may claim damages, or remand for the lower courts to resolve that question.

The Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), confirms this analysis. There, the plaintiff, a state employee, challenged the constitutionality of a state law, requesting declaratory and injunctive relief. After the plaintiff left her job, those claims became moot. The Ninth Circuit nonetheless pushed ahead and invalidated the state law, holding that the "possibility that [the plaintiff] may seek nominal damages" kept the case alive for Article III purposes. *Id.* at 68 (quoting Ninth Circuit decision). This Court unanimously reversed. It explained that a belatedly raised possibility of nominal damages, "asserted solely to avoid otherwise certain mootness, bore close inspection." *Id.* at 71. This is because the permissibility of bringing a claim for nominal damages in this situation "goes to the Article III jurisdiction of this Court and the courts below, *not to the merits of this case*." *Id.* at 67 (emphasis added). Determining for itself that the plaintiffs' nominal damages claim was not, in fact, permissible, this Court ordered the case dismissed. *Id.* at 80.

2. When the City filed its suggestion of mootness, it emphasized that petitioners sought only "declaratory and injunctive relief." Sugg. of Mootness 12 & n.7. Nowhere in petitioners' 34-page response did they dispute that description of their lawsuit or indicate any desire or intent to try to seek damages. Instead, they reiterated that "what [they] seek" is "a judicial declaration of a constitutional right." Petrs. Response to Sugg. of Mootness 16.

This Court "do[es] not ordinarily address issues raised only by *amici*"—even when the amicus is the Solicitor General. *Kamen v. Kemper Financial Servs.*, 500 U.S. 90, 97 n.4 (1991). All the more so when it comes to entirely new claims for relief. It thus would be inappropriate for the Court to allow the Solicitor General's filing to interject into this case the question whether petitioners may seek damages. No matter what petitioners say from this point forward, they did not try to raise any such claim in a timely manner.

3. Even if petitioners could, and did, now try to raise a damages claim, it would not enable them to avoid mootness.

a. *Compensatory damages.* This Court has never permitted a party that consistently sought only prospective relief to add a new claim for compensatory damages on appeal to avoid mootness. In fact, the Court's precedents point decidedly the other way. In *Murphy v. Hunt*, 455 U.S. 478 (1982) (per curiam), for example, the Court ordered dismissal after the plaintiff's claims for declaratory and

injunctive relief were rendered moot, noting that the plaintiff "had not prayed for damages." *Id.* at 482. The Court did not pause to consider whether the plaintiff might nonetheless be entitled to seek them. Similarly, in *Alejandrino v. Quezon*, 271 U.S. 528 (1926), the Court dismissed as moot a case challenging a legislator's suspension once the period of his challenged suspension expired; it explained that although the legislator might have brought a claim for backpay his complaint did not properly plead such a claim. *Id.* at 533–34. While the Solicitor General cites a couple of cases involving post-complaint requests for relief, U.S. Letter 2, neither involved mootness or an attempt to add a claim on appeal. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65–66 (1978) (district court's remedial powers not limited by form of injunction sought in complaint); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 423–24 (1975) (district court erred by refusing to consider whether plaintiffs could add claim for backpay during ongoing proceedings in that court).

The courts of appeals, too, have overwhelmingly refused to allow a party to save a case from mootness by asserting a "late-in-the-day damages claim." *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1097–98 (9th Cir. 2001). Thus, where a university defendant took voluntary actions that fully addressed the subject of the plaintiff students' request for injunctive relief, the Second Circuit held the case to be moot, notwithstanding the plaintiffs' belated request to add a damages claim. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999). The Ninth Circuit likewise rejected a plaintiff's eleventh-hour attempt to avoid mootness by raising a damages claim for the first time in a supplemental brief on appeal, where the complaint contained no request for damages and the plaintiff repeatedly stated it sought only declaratory relief—including in its first response to the defendant's argument that the case had become moot while the appeal was pending. *Seven Words LLC*, 260 F.3d at 1097–98. Several other circuits are in accord. *See, e.g.*, *Medici v. City of Chicago*, 856 F.3d 530, 532–33 (7th Cir. 2017); *Youngstown Publ'g Co. v. McKelvey*, 189 F. App'x 402, 407–08 (6th Cir. 2006); *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ*, 397 F.3d 77, 90 (2d Cir. 2005); *Harris v. City of Houston*, 151 F.3d 186, 191 (5th Cir. 1998); *Thomas R.W., by & Through Pamela R. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480–81 (1st Cir. 1997).

As the courts of appeals have recognized, the rule against late-breaking attempts to add damages claims is important because the choice to pursue only injunctive relief can have tactical advantages for plaintiffs whose true goal is such relief, so as to help "ensure that the district court would not grant damages as an adequate remedy in lieu of injunctive relief." *Harris*, 151 F.3d at 191; *accord James Luterback Const. Co. v. Adamkus*, 781 F.2d 599, 602 (7th Cir. 1986). Additionally, much in the course of litigation depends on a plaintiff's choice of remedy. In this case, for example, the City forwent all discovery on the understanding that only prospective relief was at issue.

Even if the law sometimes permitted plaintiffs to request compensatory damages for the first time on appeal to avoid mootness, there is no good reason for

allowing petitioners to do so here. The Solicitor General suggests that petitioners' failure previously to raise a damages claim might be excusable for two reasons: (i) the City changed its law "after the grant of a writ of certiorari" and (ii) the City made "additional representations about the future consequences of past regulatory violations" after completion of briefing on mootness. U.S. Letter 2. Neither of these things offers a valid excuse.

First, there is nothing particularly unusual about a governmental entity changing its law after a grant of certiorari—or even after oral argument. This phenomenon occurs with regularity, and this Court has never suggested plaintiffs may respond by changing their demands and raising new claims for damages. *See* Sugg. of Mootness 8–11 & n.6. After all, "[l]egislative grants of relief should be honored and encouraged given the properly limited role of courts in a democratic society." Amicus Br. of Federal Courts Scholars 26; *see id.* at 26–30. When a governmental entity responds to litigation by changing the law to give the plaintiffs what they have requested, that should be the end of the matter—even if the legislature acts later in the day than the plaintiffs or the courts may have liked. At any rate, petitioners had a chance after the City (and State) changed the law to try to assert a claim for compensatory damages, and they did not do so.

Second, when the Solicitor General recently asked, the City indeed explained that it will not give adverse effect to any past failure to comply with the City's former rule, unless the facts alleged would also violate current law (e.g., if a premises licensee possessed a loaded handgun in a vehicle). We were happy to answer the Solicitor General's question. But the Solicitor General is mistaken in suggesting there was any need for the City to make this representation in connection with its suggestion of mootness. Article III standing depends on the plaintiffs' actual allegations of "imminent and concrete" injury, not unasserted hypothetical possibilities. *Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009); *see also Spencer v. Kemna*, 523 U.S. 1, 14 (1998); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479–80 (1990). And *no* petitioner has ever asserted he personally faces any future consequences relating to past behavior. To the contrary, petitioners have said they avoided violating the rule. Petrs. Response to Sugg. of Mootness 17. So the Solicitor General is simply wrong that, "on the record before this Court" after the parties' briefing on mootness, "the possibility of future consequences for past violations" would have kept this case from being moot. U.S. Letter 2. Consequently, he is also wrong that the City's recent representation affords any justification for excusing petitioners' prior failure to raise a damages claim.

b. *Nominal damages.* Nor could petitioners advance a last-minute request for nominal damages to avoid mootness. As with compensatory damages, allowing a party to raise a claim for nominal damages on appeal would contravene this Court's consistent practice that the scope of permissible relief for Article III purposes is defined by the parties' submissions to the district court. And indeed, the courts of appeals have held that a nominal damages claim, like a compensatory damages

claim, may not be raised on appeal in an attempt to insulate a case from mootness. *See Bain v. California Teachers Ass'n*, 891 F.3d 1206, 1213–14 (9th Cir. 2018); *Olson v. City of Golden*, 541 F. App'x 824, 828–29 (10th Cir. 2013); *Fox v Bd. of Trs. of the State Univ.*, 42 F.3d 135, 141–42 (2d Cir. 1994); *County Motors, Inc. v. General Motors Corp.*, 278 F.3d 40, 43 (1st Cir. 2002); *Prato v. Bd. of Educ.*, No. 99-1977, 1999 U.S. App. LEXIS 29976, at *3–4 (7th Cir. Nov. 10, 1999). As the City previously noted, the courts of appeals also have held that a general prayer for relief is insufficient to preserve the claim. *See Bain*, 891 F.3d at 1213–14; *Thomas R.W.*, 130 F.3d at 480; *J.T. ex rel. J.T. v. Newark Bd. of Educ.*, 564 F. App'x 677, 681 n.7 (3d Cir. 2014); *Olson*, 541 F. App'x at 828–29; Sugg. of Mootness 12 n.7.

Even if petitioners could advance a request for nominal damages, it would not matter. The Solicitor General notes that "most courts" have held that a properly preserved claim for nominal damages may sustain a live controversy where other prospective relief is moot. *See* U.S. Letter 1; *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 & n.31 (5th Cir. 2009) (collecting cases). But following an influential opinion by then-Judge McConnell questioning whether that result can be squared with fundamental principles of justiciability, *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1262–69 (10th Cir. 2004) (McConnell, J., concurring), a circuit split has developed on that question, *see Flanigan's Enters., Inc. of Georgia v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) (en banc) (nominal damages claim will not prevent a challenge to a repealed law from becoming moot), *cert. denied sub nom. Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018); *cf. Morrison v. Bd. of Educ.*, 521 F.3d 602, 610–11 (6th Cir. 2008) (nominal damages claim will not preserve standing to challenge repealed law). As Judge McConnell has explained, nominal damages developed historically as a method of securing declaratory relief. *See Utah Animal Rights Coal.*, 371 F.3d at 1264–66. 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); *accord Schilling v. Rogers*, 363 U.S. 666, 677 (1960). So once declaratory relief is unavailable, a request for nominal damages—which is the functional equivalent in a modern case such as this one—should not be able to keep an otherwise moribund case live. If it could, "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." *Flanigan's Enters.,* 868 F.3d at 1270.

If and when this Court needs to resolve this circuit split, it should side with Judge McConnell and the en banc Eleventh Circuit. But this case would seem like a most unlikely candidate for tackling this difficult and sensitive Article III question. The Court has received scant briefing on the issue. The Solicitor General has not even taken a stance on it. And whatever the merit of allowing a nominal damages claim alone to sustain a lawsuit where there is a pressing need for legal guidance regarding the plaintiffs' original claim, a belated request for one dollar should not

be used as justification for issuing a constitutional decision with respect to a legal restriction extant in no jurisdiction *in the entire country*.

Respectfully submitted,

Richard Dearing

cc: All counsel of record