No. ____

In The
Supreme Court of the United States

RENTBERRY, INC., and DELANEY WYSINGLE,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rentberry, which operates a website that allows landlords and potential tenants to communicate through an auction-style bidding process, and Delaney Wysingle, a Seattle landlord, sued under 42 U.S.C. § 1983 to challenge Seattle's ban on rent-bidding websites as violating their First Amendment rights. On the eve of oral argument in the Ninth Circuit Court of Appeals, Seattle repealed the ordinance and replaced it with an ordinance ordering studies of the effect of rent-bidding websites on the rental housing market. The intent of the studies is to justify further regulation to limit or prohibit rent-bidding websites. The Ninth Circuit dismissed the case as moot, holding that it applied a presumption of "good faith" to the city's voluntary cessation of the challenged practices and that Rentberry and Wysingle were not entitled to rely on nominal damages to avoid mootness because they were only implicitly requested via a prayer for "any such further relief that the court deems proper." The questions presented are:

1. Is a government defendant that voluntarily ceases challenged unconstitutional action entitled to a greater presumption of "good faith" than a private defendant who voluntarily ceases challenged conduct?

2. Under Fed. R. Civ. Proc. 54(c), are successful civil rights plaintiffs proceeding under 42 U.S.C. § 1983 entitled to recover nominal damages as symbolic vindication of their rights regardless of whether they specifically request them in the prayer for relief?

PARTIES TO THE PROCEEDINGS AND RULE 29.6

Petitioners Rentberry Inc. and Delaney Wysingle were the plaintiffs-appellants in all proceedings below.

Respondent City of Seattle was the defendant-appellee in all proceedings below.

CORPORATE DISCLOSURE STATEMENT

Rentberry, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

RULE 14.1(b)(iii) STATEMENT OF ALL RELATED CASES

The proceedings in the trial and appellate court identified below are directly related to the above-captioned case in this Court.

Rentberry, Inc. v. City of Seattle, No. 2:18-cv-00743-RAJ (W.D. Wash. Mar. 15, 2019).

Rentberry, Inc. v. City of Seattle, No. 19-35308 (9th Cir. 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Rentberry, Inc. and Delaney Wysingle respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS

The panel opinion of the Ninth Circuit Court of Appeals is unpublished and included as Petitioners' Appendix (App.) 1a. The decision of the district court is published at 374 F. Supp. 3d 1056 (W.D. Wash. 2019), and is included at App. 4a.

JURISDICTION

The district court had jurisdiction over this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court granted the defendant's motion for summary judgment on March 15, 2019, and entered final judgment on March 18, 2019. Rentberry, Inc. and Wysingle filed a timely appeal to the Ninth Circuit Court of Appeals. On July 30, 2020, a panel of the Ninth Circuit vacated the district court opinion and remanded for the district court to dismiss the case as moot. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const., amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Article III, Section 2, Paragraph 1, provides in pertinent part: "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 pertinent 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 . . . ."

Federal Rule of Civil Procedure 54(c) states: "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

In 2018, the City of Seattle forbade landlords from using rent-bidding websites to communicate with potential tenants. App. 4a-5a. In so doing, it deprived the city's housing market of an innovative method of communication that enables communication between and among landlords, tenants, and potential tenants not only with regard to leasing rental space but also between landlords and the tenants they select as the business relationship continues. App. 57a-58a. In short, the rent-bidding website facilitates speech among willing speakers. And the city banned landlords from using it.

Why? Because Seattle was concerned that such speech *might* affect landlords' ability to comply with "affordable housing" regulations. App. 4a. There was no evidence of such an effect, which the city forthrightly acknowledged in the text of the ordinance by requiring city staff to conduct a study to determine what, if any, effects resulted from use of the websites. App. 66a-67a. The flaw in this plan was obvious: how does the city study something that cannot legally be used?

Petitioners Rentberry (a rent-bidding website) and Delaney Wysingle (a Seattle property owner seeking to rent a single-family home) sued to overturn this ordinance as violating their First Amendment free speech rights. App. 56a. The federal district court dismissed the case on the grounds that the plaintiffs lacked standing. App. 10a, 12a. Notwithstanding that holding, the court went on to hold that plaintiffs lost on their First Amendment claims as well, on the grounds that the ordinance regulated conduct, not speech. App. 14a. Rentberry and Wysingle appealed, fully briefing both justiciability and merits issues before the Ninth Circuit Court of Appeals.

Two weeks before the scheduled oral argument at the Ninth Circuit, Seattle's counsel informed the court that the city planned to repeal the ban on using rent-bidding websites and replace it with a new ordinance and suggesting, therefore, that oral argument should be taken off calendar because the case would soon be moot.[1] The court vacated the argument date,[2] and, at Rentberry's and Wysingle's request, ordered supplemental briefing on mootness after the new

[1] Ninth Circuit No. 19-35308, docket no. 42 (Feb. 21, 2020).
[2] Ninth Circuit No. 19-35308, docket no. 40 (Feb. 24, 2020).

ordinance was enacted and this Court decided *New York State Rifle and Pistol Ass'n (NYSRPA) v. City of New York*, 140 S. Ct. 1525 (2020). App. 16a-17a. Effective April 13, 2020, the new ordinance repealed the ban and required city staff to conduct another study, this time with the websites in operation, and with the clearly expressed intent to generate results to justify regulation of the websites up to and including prohibition "in perpetuity." App. 103a.[3] After supplemental briefing on mootness, the Ninth Circuit dismissed the appeal as moot on two grounds: First, the court held that the city was entitled to a "good faith" presumption that it would not renew the ordinance. App. 2a. Second, the court held that the usual rule that the potential for nominal damages defeats a claim of mootness does not apply here because Rentberry and Wysingle did not separately list nominal damages in their prayer for relief, leaving it implicitly in their final prayer for "any such further relief that the court deems proper." *Id.*

Both holdings raise cert-worthy questions on which the Circuit Courts are divided. A government actor should not be permitted to evade a decision on the merits of a constitutional question by repealing an ordinance and then be accorded a presumption of good faith that no other litigant enjoys. When the government is a party to litigation, it engages in the same strategic choices as other parties. When one party to a case perceives a loss on the horizon, that is usually enough to prompt settlement discussions.

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[3] The ordinance and legislative history are available at: http://seattle.legistar.com/LegislationDetail.aspx?ID=4347682&GUID=BBF4AC18-6093-4F74-8700-2C43F7881148&Options=ID%7cText%7c&Search=%22housing+bidding+platforms%22.

When the government ends a case unilaterally, on the eve of oral argument in an appellate court, the court should not presume that it acted in good faith when the record evidence suggests a plan to resume the offending conduct. Minus the "good faith" presumption, the court below would have retained jurisdiction and issued a decision that would guide defendant's actions. Instead, two years of litigation and extensive briefing vanished without a trace and plaintiffs' constitutional rights remain the intended target of regulation. The "good faith" presumption undermines constitutional litigation and wastes judicial resources. This Court should eliminate it.

Moreover, as most recently reflected in this Court's opinions in *NYSRPA*, 140 S. Ct. at 1526-27, *id.* at 1535 (Alito, J. dissenting), the lower courts need a clear rule as to when nominal damages will prevent a case's dismissal as moot. In *Uzuegbunam v. Preczewski*, docket no. 19-968, this Court will decide whether nominal damages, in the absence of compensatory damages, will save a case from mootness when they are explicitly sought. This Petition asks whether nominal damages are implicitly included in a request for any other "proper" relief. Petitioners believe that Federal Rule of Civil Procedure 54(c) requires an answer in the affirmative, particularly in a Circuit that, like several others, generally provides that nominal damages are *mandatory* relief for plaintiffs who prove violations of their civil rights. *See George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992).

The petition for writ of certiorari should be granted.

STATEMENT OF THE CASE

1. Seattle's Rent-Bidding Website Ban

On March 19, 2018, Seattle enacted a "one-year prohibition on use of rental housing bidding platforms." App. 66a (the Ordinance). During that year, "[l]andlords and potential tenants are prohibited from using rental housing bidding platforms for real property located in Seattle city limits." App. 68a. The Ordinance defines a "rental housing bidding platform" as "a person that connects potential tenants and landlords via an application based or online platform to facilitate rental housing auctions wherein potential tenants submit competing bids on certain lease provisions including but not limited to housing costs and lease term, to landlords for approval or denial." *Id.* The ban went into effect on April 29, 2018.

The Ordinance calls upon city agencies to investigate whether rent-bidding websites comply with fair housing laws and what impact such websites might have on "equitable access to Seattle's rental housing market." App. 69a. Staff was instructed to submit the results of the study to the City Council before the ban expired. *Id.* However, if they requested more time to complete the study or the City Council needed more time to review it, the Council could extend the ban for another year. *Id.* The Ordinance acknowledged that the City had not studied whether rental bidding platforms harm the rental housing market or defy local regulations, App. 67a, and that "it is unclear" whether these new services comply with Seattle's code. App. 66a. The City also confessed that "it is uncertain whether and how these services impact Seattle's rental housing market, as these services may have different effects on markets

depending on the scarcity of housing supply." App. 67a.

This absence of evidence did not dissuade Seattle from censoring rent-bidding communication. The city banned use of the websites until it decided whether to allow landlords and tenants to communicate that way. A city staff memo to a Council committee said the moratorium serves three purposes: "(1) to study whether these types of services are compliant with the City's current laws; (2) to give the City time to create a regulatory framework if necessary before use of such services proliferates; and (3) to determine current and potential impacts on Seattle's Housing Market." App. 72a. The memo explicitly identifies Rentberry and another website as targets of the ban. App. 71a.

Seattle's staff had not completed the study when the initial ban expired at the end of April 2019. Instead of renewing it as provided in the original Ordinance, Seattle enacted a substantially similar moratorium which took effect on July 17, 2019. App. 79a. The new ordinance was virtually identical to the prior Ordinance, including the findings regarding the City's uncertainty about rent bidding's impact on housing or compliance with local law. App. 76a-77a. The new ordinance contained another one-year extension option. App. 74a. Although city staff submitted the mandated study prior to the new ordinance's effective date, App. 81a, the one-year ban remained in place and Seattle expressed its intent to continue regulating rent-bidding websites by noting its district court success in the findings section of the new ordinance. App. 76a.

2. Petitioners' Constitutional Challenge to the Ban

Rentberry is a rental listing website that facilitates communication between landlords and tenants about housing and related services. The website simplifies and reduces the costs of the rental process by offering a venue for landlords to advertise available rental properties and for potential tenants to communicate the rent they are willing to pay and to see competing offers. App. 57a-58a. The website allows landlords to post asking prices for rent and security deposits and solicit bids. Applicants communicate their bid above or below the asking prices. Users can see details about the highest bid and characteristics about the high bidder such as credit score, monthly salary, whether they have pets, and the number of roommates. They can also see the average credit score of individuals interested in that property, as well as an estimation of the overall demand for the posted unit. Landlords can view all submitted bids and application details, including background check information communicated by Rentberry. Landlords may select any bidder or no bidder. *Id*. *See also* Ninth Circuit ER 45-46 (describing variety of communications functions).

Rentberry's website contains a search engine that allows potential tenants to filter searches for housing by price range, housing type, number of bedrooms, amenities, and so on. Search results display customized advertisements posted by landlords, which can include photographs, descriptions, and rental criteria. After finding a desirable listing, potential tenants submit their bids and complete the application process on the Rentberry site. Rentberry

also provides a forum for landlord-tenant communication, maintenance requests, and rent payment. App. 58a.

Delaney Wysingle owns and rents a single-family home in Seattle. He rented it to a single tenant from June 2015 to February 2018. Upon that tenant's departure, he renovated the house from March through August 4, 2018, during which time the house was vacant. If not for the ban, Wysingle would have advertised his property and selected his next tenant through a rent-bidding website. Because of the ban, he used Zillow (a competing website that lacks a bidding component) to advertise his property and find a tenant who occupied the property starting in August 2018. Ninth Circuit ER 41-42.

3. The City's Studies and Hearings

On July 3, 2019, the Office of Housing issued the report mandated by the original and renewed Ordinances. App. 81a. Drawing on data obtained in other markets—mostly the city of Melbourne, in Victoria, Australia—the report draws no conclusions about either rent-bidding websites' compliance with housing laws or whether they will inflate housing costs. App. 92a–98a. Despite this lack of evidence, the report recommended that the City modify the moratorium "to be effective *in perpetuity*, or until rental bidding platforms can affirmatively demonstrate compliance with all federal, state and local laws, and fair and equitable operations." App. 103a (emphasis added).

4. The Repeal-and-Replace Ordinance

Consistent with the staff recommendation that the ban on using rent-bidding websites be effective *in*

perpetuity, Seattle made clear its intent to enact future regulation unless rent-bidding website companies "affirmatively demonstrate" compliance with the law and Seattle's undefined demand for "fair and equitable operations." *Id*. In short, Seattle's Office of Housing recommended mandating how a private company communicates with its users and facilitates communication among them. The sponsor of the rent-bidding ban explained that the city needs to "get ahead of the technology" to "ensure our values are met." App. 23a (citations omitted).

The staff report concludes:

> If the data shows that the platforms are functioning for bidding purposes and if there is an impact on equitable access to rental housing, then the Council via CB 119752 would request that [Office of Housing] and [Office of Civil Rights] work with the Council to determine whether and how the recommendations outlined in the Rent Bidding Study should be implemented, including mitigating any unintended consequences.

Id. at 23a-24a. The ordinance thus seeks to obtain data to determine whether communication between landlords and tenants via rent-bidding websites has "an impact on equitable access to rental housing." App. 111a. "Impact" and "equitable" are undefined, giving Seattle plenty of leeway for further regulation. The repeal-and-replace ordinance exemplifies Seattle's view that speech rights exercised by landlords and prospective tenants are privileges that

the city can revoke, rather than fundamental, individual rights that are constitutionally protected.

5. The Decisions Below

The parties filed cross-motions for summary judgment in late 2018. On March 15, 2019, the district court granted Seattle's motion. The court held that plaintiffs lacked standing to bring a First Amendment claim, and the First Amendment was not implicated because the moratorium regulated conduct, not speech. The district court erroneously concluded that Wysingle lacked standing because he "was not a member of Rentberry"—although Rentberry is a service provider, not a membership organization—and because his rental house was undergoing renovations and Wysingle could not state with absolute precision the date on which the contractors would finish and he would be ready to rent the property.[4] App. 10a. It then held that Rentberry lacked standing because the ordinance prohibits landlords' use of the website rather than banning the website directly, and because it found "speculative" Rentberry's claims that the resulting lack of customers in Seattle harms its economic interests. App. 12a. Notwithstanding the rulings on standing, the district court proceeded to the merits and held that the ban on using rent-bidding websites was a restriction on conduct, not speech, and therefore did not implicate any First Amendment rights. App. 14a.

Rentberry and Wysingle appealed both the district court rulings on justiciability and on the

[4] Wysingle predicted that the property would be available at the end of July 2019 and it became available on August 4. Ninth Circuit ER 41-42.

merits. In December 2019, the Ninth Circuit scheduled oral argument for March 4, 2020. One month before argument, the court ordered supplemental briefing on Rentberry's standing.[5] Both parties filed their briefs on February 18, 2020. Three days later, Seattle moved the court to postpone oral argument in light of the City Council's consideration of a bill to repeal and replace the challenged ordinance.[6] The court granted the motion and explained that oral argument would be rescheduled by separate order if necessary.[7] After Seattle adopted the new ordinance, Petitioners moved for supplemental briefing on the issue of mootness, which the court granted. The court ordered the parties to address (1) the "reasonable expectation" that Seattle will reenact the same or similar legislation, and (2) the extent to which this Court's decision in *NYSRPA* applied.[8] Briefing concluded on July 10, 2020.

Twenty days later, the court issued a short unpublished opinion concluding that the case was moot. It held first that "[n]either the language of the repeal ordinance nor Appellee's efforts to gather data on the impact of rent-bidding platforms are sufficient to overcome the presumption that 'the government is acting in good faith' when it voluntarily ceases challenged activity.'" App. 2a. The court then rejected Petitioners' claim for nominal damages because they were not explicitly sought before the district court and

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[5] Ninth Circuit No. 19-35308, docket no. 31, Order dated Feb. 5, 2020.

[6] Ninth Circuit No. 19-35308, docket no. 42.

[7] Ninth Circuit No. 19-35308, docket no. 43, Order dated Feb. 24, 2020.

[8] Ninth Circuit No. 19-35308, docket no. 49, Order dated April 28, 2020.

would not be considered as part of the "catch-all general prayer for relief." *Id.* The court vacated the district court opinion and remanded with instructions to dismiss the case. App. 3a.

Rentberry and Wysingle and their counsel spent two years and substantial sums of money and effort litigating fundamental First Amendment issues while the survival of Rentberry's business in a major city was thrown into uncertainty and Rentberry's potential customers, including Wysingle, lost a valuable means of advertising their properties and communicating with their tenants and potential tenants. While Seattle continues to defend its ban, all the effort in challenging it came to nothing because the Ninth Circuit erred in holding the case moot.

REASONS FOR GRANTING THE PETITION

I

CIRCUIT COURTS CONFLICT AS TO WHETHER GOVERNMENT DEFENDANTS ARE SUBJECT TO THE SAME VOLUNTARY-CESSATION STANDARD AS EVERYONE ELSE

This Court has repeatedly applied the general rule that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Any lower standard would enable a defendant to "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Normally, a case "becomes moot only when it is impossible for a court to grant any

effectual relief whatever to the prevailing party. . . . As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). To establish mootness, defendants have a heavy burden to meet *Chafin*'s "demanding standard." *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019).

This Court has accordingly emphasized that voluntary cessation of illegal conduct is not alone sufficient to render a case moot; it must be "*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) (emphasis added). The burden lies squarely on the defendant to "demonstrate that there is no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (internal quotations omitted). The "absolutely clear" standard for the voluntary cessation doctrine is rooted in skepticism that a party would act other than logically and strategically.[9] It cannot be squared with a presumption that relieves government defendants of the "heavy burden" of showing that they

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[9] Skepticism of government action has a long pedigree in American constitutional law and this Court's jurisprudence. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (citation omitted); *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005) ("[D]eference is fundamentally at odds with [strict judicial scrutiny]. We put the burden on state actors to demonstrate that their race-based policies are justified."); *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (noting "presumptive skepticism of all racial classifications").

will not resume their unlawful conduct. *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. Rev. 1, 27 (1984) ("[W]here the defendant has suspended challenged conduct, the [Supreme] Court's mootness cases instead have established a powerful presumption favoring adjudication.").

Under this approach, unless Seattle could prove that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Parents Involved in Cmty. Schs. (PICS) v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007), its voluntary cessation via repeal of the constitutionally challenged rent-bidding ban would not render the case moot. However, the court below held that, unlike private defendants, a government defendant that voluntarily ceases challenged conduct is entitled to a "good faith" presumption that it will not resume that conduct. App. 2a. In this respect, the Ninth Circuit joins six Circuits in granting a special presumption of "good faith" to the government. *See Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (For a government defendant, the court "presume[s] that it acts in good faith, though the government must still demonstrate that the change in its behavior is 'entrenched' or 'permanent.'") (citation omitted). Meanwhile, three Circuit courts hold government defendants to the same standards as private litigants, entitled to no "good faith" presumption.

A. Circuit Courts Conflict as to Whether a Government's Cessation of Challenged Conduct is Entitled to a "Good Faith" Presumption

In most Circuits, when the defendant is a government entity whose "voluntary cessation" consists of changing a challenged law, policy, or practice, courts require plaintiffs to prove that it is "virtually certain" that the old law "will be reenacted." *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013) (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)). This flips the usual burden of proof, which requires the party advocating for mootness to prove that it is absolutely clear that the challenged activity will not be resumed. *Mission Product Holdings*, 139 S. Ct. at 1660. The Third and Fifth Circuits defer to government promises on the theory that government defendants are "public servants, not self-interested private parties," *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009), and presume they will "act in good faith," rather than litigate strategically. *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (quoting *Bridge v. U.S. Parole Comm'n*, 981 F.2d 97, 106 (3d Cir. 1992)). The Sixth Circuit also grants government defendants—and only government defendants—this presumption of good faith. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) ("Although the bar is high for when voluntary cessation by a private party will moot a claim, the burden in showing mootness is lower when it is the government that has voluntarily ceased its conduct."); *Jones v. Haynes*, 736 Fed. App'x 585, 589 (6th Cir. 2018) ("We have treated 'cessation of the allegedly illegal conduct by government officials . . . with more

solicitude . . . than similar action by private parties.'") *quoting Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012).

The Eleventh Circuit is similarly deferential. *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004) ("[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."); *Troiano v. Supervisor of Elections in Palm Beach Cty.*, 382 F.3d 1276, 1283 (11th Cir. 2004) ("[W]hen the defendant is not a private citizen but a government[al] actor, there is a rebuttable presumption that the objectionable behavior will not recur."); *Nat'l Assn. of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1310 (11th Cir. 2011) ("[G]overnment actors receive the benefit of a rebuttable presumption that the offending behavior will not recur.") (citation omitted). This allows last-minute policy changes to render meritorious claims moot, depriving lower courts, government officials, and civil rights plaintiffs of much-needed decisions. *See* Joseph C. Davis and Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L. J. Forum 325, 328 (2019).

While nodding at this Court's precedents that view voluntary cessation with suspicion, the Seventh Circuit nonetheless grants government defendants special deference to their cessation of challenged conduct. In *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003), the court noted the "general principle that a defendant's voluntar[y] cessation of

challenged conduct will not render a case moot because the defendant remains 'free to return to his old ways,'" *id.*, citing *W. T. Grant Co.*, 345 U.S. at 632-33, but stated that "this proposition is the appropriate standard for cases between private parties." The Seventh Circuit thus concluded that "this is not the view we have taken toward acts of voluntary cessation by government officials. Rather, 'when the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine.'" *Id.*, citing *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991).

In contrast to these courts, other Circuits treat government defendants as having the same burden as private defendants under the voluntary cessation standard. The D.C. Circuit holds government defendants to the "absolutely clear" standard without any "good faith" presumption. *See Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 661 (D.C. Cir. 2019) (a government defendant must show with "certainty" that it will "forego reinstating the" challenged policy in order to moot a pending appeal of that policy; having failed to do so, the case was not moot); *United States DOJ Fed. Bureau of Prisons Fed. Corr. Complex Coleman v. Fed. Labor Rels. Auth.*, 737 F.3d 779, 783 (D.C. Cir. 2013) (federal Bureau of Prisons held to "heavy burden" of demonstrating there was "no reasonable expectation" it would resume the complained-of conduct); *Lake Pilots Ass'n v. U.S. Coast Guard*, 257 F. Supp. 2d 148, 157 (D.D.C. 2003) (finding that defendants had not shown that it is absolutely clear there could be no reasonable expectation that the alleged violation would recur even after the defendants "conceded that they erred"

and issued a temporary final rule designed to resolve plaintiffs' claims).

The Second Circuit takes a similar approach, holding that a voluntary cessation claim requires a government defendant to "demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Mhany Mgmt. v. Cnty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (citation omitted). Under this standard, the court rejected the government's "suspicious timing and circumstances" in announcing its decision to change course, which occurred "only on the eve of summary judgment motions." *Id.* at 604. The court held it was not "absolutely clear" that the county would not resume its challenged conduct in this circumstance. *Id.* at 605.

The First Circuit also places the burden of demonstrating mootness squarely on governmental defendants without any presumptions in their favor. *Am. Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 56 & n.10 (1st Cir. 2013) (giving "some weight . . . to the fact that the defendants are high-ranking federal officials" but refusing "to join the line of cases holding that when it is a government defendant which has altered the complained of regulatory scheme, the voluntary cessation doctrine has less application unless there is a clear declaration of intention to re-engage"); *Conservation Law Found. v. Evans*, 360 F.3d 21, 25-27 (1st Cir. 2004) (the burden to demonstrate mootness rests with defendant and applying no presumption in favor of, or deference to, government defendant).

The circuit split has drawn notice among the lower courts. *See Wall v. Wade*, 741 F.3d 492, 497-98 (4th Cir. 2014) ("[D]efendants invite us to adopt an approach employed by several of our sister circuits, in which governmental defendants are held to a less demanding burden of proof than private defendants," but this is "a question which we expressly do not decide"); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 n.15 (10th Cir. 2010) (while some circuits employ voluntary cessation rules that "effectively place[] a comparatively lighter burden of proof on governmental officials," . . . "[w]e need not definitively opine here on what explicit measure—if any—of greater solicitude is due administrative agencies in the application of the voluntary-cessation exception.").

B. Government Defendants Engage in Strategic Litigation to the Same Degree as Private Defendants

This Court's general rule is that defendants face a "heavy" and "formidable" burden to show that they have rendered a case moot by voluntarily ceasing the illegal act. *Friends of the Earth,* 528 U.S. at 189-90. The realities of litigation offer no foundation for presuming that government defendants act with any lesser degree of self-interest than private defendants in such circumstances. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) ("[A] court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack.") (cleaned up). Government agencies have interests adverse to their litigation opponents, and, like private parties, will take legal positions and actions in defense of their prerogatives. *See Wilkie v.*

Robbins, 551 U.S. 537, 557-58 (2007) (government "may stand firm on its rights" and "drive a hard bargain" "[j]ust [like] a private landowner"). Indeed, government counsel acting on behalf of the public can be expected to litigate in defense of the particular public interest that constitutes their authority, and to seek to protect the public treasury that funds their agency, so long as they act responsibly and within constitutional boundaries. *See* Paul Figley, *Ethical Intersections and the Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. St. Thomas L.J. 347, 374 (2011) (arguing that this allegiance to the agency and its mission is a public trust that rises to the level of a fiduciary duty).

Even in pursuit of these goals, government defendants should not be empowered to "manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000).[10] And government counsel, like all other litigators, make strategic choices to their client's advantage. *S.E.C. v. NIR Group, LLC*, 283 F.R.D. 127, 134 (E.D.N.Y. 2012) (noting "strategic choice" by government counsel to delay civil litigation until after "commencement or conclusion of parallel criminal proceedings"); *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (government attorney's advice on "political, strategic, or policy issues" is not shielded from disclosure by the attorney-client privilege);

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[10] Manipulation frequently manifests in the timing of a decision to cease a challenged activity or repeal a challenged policy. *Burns v. Penn. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008) (the "timing and content" of a voluntary decision to cease a challenged activity are critical in determining the motive for the cessation and therefore "whether there is [any] reasonable expectation . . . that the alleged violation will recur") (cleaned up).

Ahrens v. Bowen, 852 F.2d 49, 52-53 (2d Cir. 1988) (ceasing conduct "on the eve of Plaintiffs' summary judgment" suggests "a strategic maneuver . . . to conjure up an argument for mootness and thwart adjudication of the issue"); *see also* Tyler Blint-Welsh & Melanie Grayce West, *New York City Moves to Repeal Ban on Conversion Therapy in Effort to Protect Such Bans Elsewhere*, Wall St. J. (Sept. 12, 2019).[11]

Government entities often try to moot cases through "predictable protestations of repentance and reform." *Gwaltney of Smithfield, Ltd. u. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 (1987) (internal quotations omitted). Without strict enforcement of the standards for proving mootness, the government—no less than private litigants—would have an incentive to shield any colorable claim to authority from judicial review by "ceas[ing] a challenged practice to thwart the lawsuit, and then return[ing] to old tricks once the coast is clear." *Kikumura v. Turner*, 28 F.3d 592, 597 (7th Cir. 1994) (quoting *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991)). In *Wilderness Society v. Kane County*, 581 F.3d 1198 (10th Cir. 2009), *rev'd on other grounds*, 632 F.3d 1162 (10th Cir. 2011) (en banc), the Tenth Circuit noted a press release from the defendant County Commission explaining that it made changes to the challenged law as an "express[]" attempt to "secure the most successful legal resolution to current federal roads litigation." *Id*. at 1214. The County's change in the law was nothing more than a "deliberate attempt to render the pending litigation moot." *Id*. at 1215. Moreover, while government defendants have "unlimited resources" to defend themselves in

[11] https://perma.cc/6EPH-B2LW.

litigation, and to "litigate[] for principle or policy," a private litigant typically cannot afford to pursue litigation on principle in the face of a defendant stopping and starting an illicit activity. Loren A. Smith, *Why a Court of Federal Claims?*, 71 Geo. Wash. L. Rev. 773, 782 (2003). If courts have "rightly refused to grant [private] defendants such a powerful weapon against public law enforcement," *W. T. Grant*, 345 U.S. at 632, they should also refuse to grant government defendants such a powerful weapon against constitutional enforcement.

The need for this Court's resolution of whether government is entitled to a "good faith" presumption is all the more pressing given its broad application to elected and unelected officials at all levels of state and federal government. In this case, Petitioners presented uncontested evidence that Seattle intends further regulation—up to and including a permanent ban—preventing landlords and tenants from using rent-bidding websites to communicate about the availability of rental housing and the terms for making a deal. App. 103a. But the presumption of "good faith" sufficed to override the clarity of Seattle's expressed intentions.

Presuming that the government's voluntary cessation suffices to ensure that wrongful conduct will not recur violates ordinary rules of evidence. It is generally unfeasible for a party to make a negative showing, which is why this Court usually places the burden of persuasion on the party that is in the better position to satisfy it. *See Shinseki v. Sanders*, 556 U.S. 396, 410 (2009). The government—but not private litigants—can access "vast stores of information—including police reports, personnel, and disciplinary

files, court records" and has "the ability to withhold or seriously delay litigants' access to that information." Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buff. L. Rev. 1275, 1336 (1999). Thus where the question in dispute is whether the government is going to abide by the law, the burden should rest with the government, which has better access to the information necessary to prove that it will comply, and not on the individual plaintiff to prove that the government will not resume its illegal conduct. The latter can be an impossible task.

There is also "a public interest in having the legality of the [government's] practices settled" which "militates against a mootness conclusion." *W. T. Grant*, 345 U.S. at 632. Indeed, the public interest in determining the constitutionality of the government's conduct is often greater than the public interest in the resolution of a private dispute involving private defendants. In *NYSRPA*, neither the per curiam nor concurring opinions addressed the "good faith" presumption. The dissenting opinion nonetheless called out the government's timing of the cessation as manipulation of the Court's docket. *NYSRPA*, 140 S. Ct. at 1527-28 (Alito, J., dissenting) ("Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed its ordinance."). The effect on substantive law is clear. As Justice Kavanaugh noted in his concurring opinion, the refusal to answer the questions presented by NYSRPA meant that lower courts could continue to misapply the Court's precedents in Second Amendment cases, *id.* at 1527 (Kavanaugh, J., concurring), a matter of direct concern to millions of Americans.

There is no reason to accord government defendants a special presumption of "good faith," particularly when those defendants insist that the challenged actions are entirely constitutional, as is the case here. App. 45a. *See Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (it is "not clear why the [defendant] would necessarily refrain" from resuming the challenged conduct when it "continues to defend the legality" of that conduct).

II

CIRCUIT COURTS CONFLICT AS TO WHETHER CIVIL RIGHTS PLAINTIFFS SHOULD RECOVER NOMINAL DAMAGES AS A MATTER OF LAW AND WHEN SUCH DAMAGES ARE NOT EXPLICITLY SOUGHT

Circuit courts' approaches to nominal damages reflect a multi-faceted conflict among them, and often intra-Circuit conflicts as well. The Second, Eighth, Ninth, and Tenth Circuits hold that nominal damages are mandatory relief for past completed constitutional injuries, but some cases accord this relief only if they are explicitly pled in the complaint. The Seventh and Eleventh Circuits are at the opposite end of the spectrum, holding that nominal damages have no intrinsic value and can be dismissed if a plaintiff's case is otherwise moot. The Third Circuit has not ruled on the question, but one Judge on that court shares the view of the Seventh and Eleventh Circuits. The First Circuit also has not ruled and its district courts conflict in their approach. In short, between and within Circuits, there is no consistency whatsoever in the judicial approach to the value and import of nominal damages in civil rights cases.

A. Courts Conflict Over Whether Successful Civil Rights Plaintiffs are Entitled to Recover Nominal Damages as a Matter of Law

The Ninth Circuit has held that nominal damages are a mandatory entitlement for successful civil rights plaintiffs. *See, e.g.*, *George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992) ("In this Circuit, nominal damages *must* be awarded if a plaintiff proves a violation of his constitutional rights.") (emphasis added). In so doing, the Ninth Circuit follows the suggestion of this Court that nominal damages are required in cases of proven constitutional injury. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) ("*Carey* [*v. Piphus*, 435 U.S. 247, 266 (1978)] *obligates* a court to award nominal damages when a plaintiff establishes the violation of his right to procedural due process but cannot prove actual injury.") (emphasis added). The *Carey* rule extends beyond procedural rights to substantive rights. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986). Recognizing the importance of nominal damages, several circuit courts in addition to the Ninth Circuit also hold that such damages are mandatory for past, proven constitutional violations. *See Kerman v. City of New York*, 374 F.3d 93, 123 (2d Cir. 2004) (district court erred in instructing the jury that an award of nominal damages was permissible rather than mandatory if they concluded that the plaintiff's constitutional rights were violated); *Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000) (because "the rationale of *Farrar requires* an award of nominal damages upon proof of an infringement of the first amendment right to speak," it was plain error to give the jury discretion not to award nominal damages on

a finding of a violation of free speech rights) (emphasis added); *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) (nominal damages are mandatory upon a finding of a constitutional violation, even in the absence of compensatory or punitive damages, and with no explicit request for nominal damages).

The Circuit courts that view nominal damages as mandatory for vindication of constitutional rights acknowledge their role beyond a trivial sum of money, "incidental" to declaratory or injunctive relief, or compensatory damages. "Recovery of nominal damages is important not for *the amount* of the award, but for *the fact* of the award." *Cummings v. Connell*, 402 F.3d 936, 945 (9th Cir. 2005) (emphasis added). First, nominal damages provide "moral satisfaction" to a plaintiff that a federal court agrees that his or her constitutional rights were violated. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Second, an award of nominal damages "holds [the government] responsible for its actions and inactions." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 318, 320 (2d Cir. 1999) ("Precisely because nominal damages afford a litigant vindication of the deprivation of his constitutional rights, the decision to dismiss a plaintiff's claim against a municipality because only nominal damages are at stake is error.").

Other courts do not treat nominal damages as mandatory, however, when plaintiffs prove a violation of their constitutional rights. In the Sixth Circuit, plaintiffs must explicitly request nominal damages in their prayer for relief in the complaint; if they are not pled, successful plaintiffs will not recover them. *See, e.g.*, *Ealy v. City of Dayton*, 103 F.3d 129, *5 n.2 (6th Cir. 1996) (nominal damages unavailable if plaintiff

does not expressly request them). The Eleventh Circuit does not consider nominal damages to be an independent basis for retaining jurisdiction in an otherwise moot case. *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia*, 868 F.3d 1248, 1268–69 (11th Cir. 2017).[12] The Eighth and Sixth Circuits similarly find cases moot after a challenged law is repealed even when nominal damages are sought to vindicate past constitutional violations. *See Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 687 (8th Cir. 2012); *Morrison v. Bd. of Educ.*, 521 F.3d 602, 611 (6th Cir. 2008). And the Tenth Circuit holds it harmless error if a district court denies a civil rights plaintiff an award of nominal damages unless "justice" requires otherwise. *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1243 (10th Cir. 2010).

District courts in the Seventh Circuit likewise see no independent value in nominal damages to vindicate past constitutional violations, viewing claims as equivalent to a declaratory judgment. Those courts will dismiss a case that does not contain ongoing violations as moot. This approach has the Seventh Circuit court's apparent approval. *See Freedom from Religion Found., Inc., v. Concord Cmty. Schs.*, 207 F. Supp. 3d 862, 874 n.7 (N.D. Ind. 2016) (noting that multiple district courts have held claims for nominal damages insufficient to save an otherwise moot constitutional claim), *aff'd*, 885 F.3d 1038 (7th Cir. 2018). Courts in the First Circuit are inconsistent in their approach to nominal damages, but some reflect that court's position that nominal damages are

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[12] The Court's decision in *Uzuegbunam* may determine the continued validity of *Flanigan's*.

"clearly incidental" to other relief. *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971). As a result, some district courts within the Circuit will hold a case moot when a civil rights plaintiff alleges a past completed constitutional harm that would justify an award of nominal damages. For example, in *Soto v. City of Cambridge*, 193 F. Supp. 3d 61, 71 (D. Mass. 2016), the court held that the plaintiff's claims for injunctive and declaratory relief were moot because the city repealed the ordinance and nominal damages were insufficient to save the otherwise moot case. The Third Circuit has not ruled on the issue, but Chief Judge Smith has written that he is "doubtful that a claim for nominal damages alone suffices to create standing to seek backward-looking relief." *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 482 (3d Cir. 2016) (Smith, C.J., concurring).

Finally, nominal damages create an enforceable judgment requiring the alteration of defendant's behavior. *Farrar*, 506 U.S. at 113 ("A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages."). This change in the legal relationship between the parties also makes it possible for prevailing civil rights plaintiffs to seek attorneys' fees under 42 U.S.C. § 1988. *Id.* at 112; *Lewis v. County of San Diego*, 798 Fed. App'x 58, 62 (9th Cir. 2019) (awarding fees after a case resulted in nominal damages and "a deterrent effect" against the county's continuing an unconstitutional policy); *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030, 1033–35 (8th Cir. 1984) (Section 1983 plaintiff who proves a constitutional violation is entitled to nominal damages and attorneys' fees).

Congress included this fee-shifting provision in the Civil Rights Act to encourage people to defend their rights in court, and to encourage lawyers to represent people pro bono whose rights are violated by the government. The fee shift effectively gives victims of civil rights violations access to the courts regardless of their wealth or connections. As Justice O'Connor explained, Section 1988 is "a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring). Thus, potential liability for attorney's fees under 42 U.S.C. § 1988 "provides additional—and by no means inconsequential—assurance that the agents of the State will not deliberately ignore [constitutional] rights." *Carey*, 435 U.S. at 257 n.11.[13]

Courts must hear cases where there is still an available remedy, regardless of whether the remedy is forward-looking injunctive relief or backward-looking, "incidental" nominal damages. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The minority rule applied by the court below ignores the salutary purpose of nominal damages in constitutional law, allows past constitutional violations to go unvindicated, and wastes judicial resources. *Cf.* Don B. Kates, Jr. and William T. Barker, *Mootness in Judicial Proceedings: Towards a Coherent Theory*, 62 Calif. L. Rev. 1385, 1433-34 (1974) (judicial economy is concerned with the allocation of resources that have not been used

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[13] The potential for fees does not guarantee an award of fees. *See Amato*, 170 F.3d at 317 n.5 ("[A] nominal damage award can be grounds for denying or reducing an attorney's fee award."); *Bos.'s Children First v. City of Boston*, 395 F.3d 10, 18 (1st Cir. 2005).

rather than resources that have already been expended).

B. Courts Conflict Over Whether an Award of Nominal Damages Depends on Whether They Are Expressly Sought in the Complaint's Prayer for Relief

Federal Rule of Civil Procedure 54(c) says that "[e]very other final judgment should grant the relief to which each party is entitled." The rule is not limited to relief that is specifically requested in the complaint—in fact, it is specifically designed to cover relief that is *not* explicitly pled and thereby protect plaintiffs from a "technical oversight" in a pleading that "might deprive [them] of a deserved recovery," *USX Corp. v. Barnhart*, 395 F.3d 161, 165 (3d Cir. 2004) (rule covers damages, attorneys' fees and costs, and interest), and to ensure "a just result in light of the circumstances of the case." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25 (1975) (internal quotes omitted). Under this rule, a "party should experience little difficulty in securing a remedy other than that demanded in his pleadings when he shows he is entitled to it." *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 455 (1997) (Ginsburg, J., concurring in the judgment and dissenting in part), citing 10 Charles A. Wright, et al., *Federal Practice and Procedure* § 2662, p. 135 (2d ed. 1983). *See also Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 249 (3rd Cir. 1999) (awarding specific performance as "just and proper" relief); *Fed. Sav. and Loan Ins. Corp. v. Texas Real Estate Counselors, Inc.*, 955 F.2d 261, 269-70 (5th Cir. 1992) (prejudgment interest included in "any other

relief, both special and general, to which [plaintiff] may be justly entitled.").

Seeking to cover all bases as permitted under this rule, complaints frequently contain a prayer for "such additional relief as may be just and proper." *See* App. 65a. Although drafted with catch-all language, this prayer for relief is not mere boilerplate; it provides notice to the court and defendants that the plaintiff seeks relief beyond that explicitly requested—as authorized by Rule 54—to which he or she would be entitled to recover under the law.[14] *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978) (per Rule 54(c), "a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one"); *Z Channel Ltd. P'ship v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991) (a party does "not foreclose relief in damages by failing to ask for them"); *Equal Employment Opportunity Commission v. Massey-Ferguson, Inc.*, 622 F.2d 271, 277 (7th Cir. 1980) (applying Rule 54(c) to authorize backpay during conciliation in Title VII case although no such relief sought in the complaint); *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) ("it need not appear that the plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted").

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[14] Whether nominal damages are available is established at the filing of the lawsuit, as a matter of standing, long before it is known whether the plaintiff will prevail. *See Amnesty Intern., USA v. Battle*, 559 F.3d 1170, 1177 (11th Cir. 2009); *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421, 428 (4th Cir. 2007).

So long as a complaint gives notice of a plaintiff's claims and their grounds, omissions in a prayer for relief are no barrier to redress of meritorious claims. As Judge DeMoss explained in *Harris v. City of Houston*, 151 F.3d 186, 195 (5th Cir. 1998) (DeMoss, J., dissenting), because federal courts "operate under a system of notice pleading," the general, catch-all relief prayer ensures that the "failure to recite magic words should not preclude relief." *See also Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 61 (1st Cir. 2016) (Under Rule 54(c) and pursuant to the complaint's "general prayer for relief," a court may award restitution not specifically requested.). Thus, in *State of Idaho Potato Commission v. G&T Terminal Packaging, Inc.*, 425 F.3d 708, 720 (9th Cir. 2005), although a district court erred in awarding one dollar as a "civil penalty" because it lacked authority under the civil penalty statute, the dollar was more accurately "viewed as nominal damages" and was therefore within the court's power to award even though nominal damages were not requested in the complaint.

Beyond relief that is "noticed," Rule 54 covers relief to which a plaintiff is "entitled," and that must include relief that is mandatory upon proving the plaintiff's case. *See Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981) (equating the definition of a "constitutional entitlement" with a "mandated 'shall'"). As noted above, many Circuit courts apply a general rule based on *Carey* and *Farrar* that nominal damages are mandatory upon a finding of a constitutional violation. *See supra* at 26–27.

The dissenting opinion in *NYSRPA*, 140 S. Ct. at 1535 (Alito, J., dissenting), supports this argument.

The dissenting justices noted that the operative complaint's prayer for relief sought to enjoin New York's travel restrictions, a declaration that the challenged restrictions violated the Second Amendment, attorneys' fees, costs of suit, and "[a]ny such further relief as the [c]ourt deems just and proper." (citation omitted). Based on this last claim for relief, the dissenters explained that should the petitioners prevail, they would be entitled to damages under 42 U.S.C. § 1983 even without expressly requesting them. *Id*. The dissent's opinion on this point—which reflects the majority view among lower courts—was not addressed in the *NYSRPA* per curiam majority opinion or Justice Kavanaugh's concurrence.

Monetary relief in the form of nominal damages mitigates the problem of selective mootness—a sort of gamesmanship, discussed above—where the government provides eleventh-hour relief after lengthy litigation when unfavorable precedent is on the horizon. The Court should grant this petition to decide whether civil rights plaintiffs are entitled to nominal damages if they prevail and, if so, whether such entitlement is contingent on specifically praying for such relief in the complaint.

CONCLUSION

The petition for writ of certiorari should be granted.

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