IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

DEBORAH BRUMIT and ANDREW SIMPSON, *Plaintiffs,* v. THE CITY OF GRANITE CITY, ILLINOIS, *Defendant.*	Case No. 3:19-cv-01090-SMY

PLAINTIFFS' RESPONSE TO SECOND MOTION TO DISMISS (ECF 28, 29)

INTRODUCTION

Like the parallel *Barron* case, this case is a challenge to Granite City's compulsory-eviction law. It has been pending since October. On December 17—moments after a closed-session meeting about the *Barron* litigation—the City's "Risk Management Committee" voted to amend the law. Within two hours, the city council affirmed that vote. Twenty-four hours later, the City's litigation counsel announced the "withdrawal" of the eviction demands against the plaintiffs in this case and in *Barron*. Six minutes after that, the City moved to dismiss *Barron* as moot. It filed a near-identical motion in this case the next day.

The City's motion to dismiss should be denied for much the same reasons the motion in *Barron* should be denied. *See* Pls.' Resp. 2d Mot. Dismiss (*Barron*) (ECF 49). As in *Barron*, the City fails even to acknowledge its "'heavy burden' of making 'absolutely clear' that it could not revert" to its allegedly wrongful behavior. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). And as in *Barron*, the record here confirms that that burden is unmet. Nothing (besides this case) would prevent the City from resuming its eviction campaign

against Plaintiffs Debi Brumit and Andy Simpson tomorrow. Last month's amendment is not retroactive. In fact, it still mandates evictions for innocent people. As for the City's "withdrawal" letter, moreover, the letter nowhere renounces acting against Debi and Andy in the future. Both the Supreme Court and the Seventh Circuit have long "resisted labeling cases moot" on the strength of "promises" far worthier than this. *Freedom from Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1051 (7th Cir. 2018).

Equally troubling, the record leaves little doubt that the City's stated reason for its about-face is pretextual. In the City's telling, its scramble to tweak the compulsory-eviction law had everything to do with the Illinois Human Rights Act and nothing to do with this case or *Barron*. But nothing in the Act supports that account. And irregularities memorialized in city documents strongly suggest that the City's actions are a bid to manipulate this Court's jurisdiction. Worse, the City appears to be evicting innocent people still. For all the record shows, only two families have earned "withdrawals" of their eviction demands—the ones suing Granite City in this Court. For everyone else, it's business as usual. Just last month, in fact, the city hearing officer ordered the eviction of a father and his four children based on the mother's allegedly having committed a low-level drug crime across town. Gedge Decl. Ex. 11. Far from embodying a "broad shift in policy," the City's actions make sense only as "an individually targeted effort to neutralize [this] lawsuit." *Ciarpaglini v. Norwood*, 817 F.3d 541, 545 (7th Cir. 2016).

The City's motion is subject to denial for a second reason: Plaintiffs seek not only injunctive relief, but also nominal damages. They have a right to proceed on that ground too. *See generally* 13C Charles Alan Wright et al., Fed. Prac. & Proc. § 3533.3, at 31 (3d ed. 2008).

BACKGROUND

A. Granite City declares Debi Brumit and Andy Simpson in violation of the compulsory-eviction law.

Granite City's compulsory-eviction law has been in place since 2006. Compl. ¶ 16. Over the years, the law has sometimes been tweaked. But throughout, the core has stayed the same: When the City demands it, a landlord must evict her tenants if any member of the tenants' household—or even a guest—commits a crime on the rental property or within city limits. Compl. ¶¶ 22-23, 28. The landlord has no discretion to forgo eviction. *Id.* ¶¶ 29-35. And no matter where the crime takes place, it is no defense that the tenants had nothing to do with it. *Id.* ¶¶ 42-47.

From 2014 to the present, the City has issued more than 300 compulsory-eviction demands. *Id.* ¶ 48. Plaintiffs Debi Brumit and Andy Simpson found themselves added to that number last summer. In the early-morning hours of June 9, Debi's adult daughter Tori and Tori's boyfriend were arrested within city limits for trying to steal a van. *Id.* ¶ 66. Weeks earlier, Debi had told Tori she could no longer stay at Debi and Andy's home. *Id.* ¶ 57. But Granite City's Crime Free Housing Unit issued a compulsory-eviction demand anyway. The car theft, the City declared, "is a clear violation of the Crime Free Lease Addendum and grounds for eviction." Compl. Ex. 2, at 1.

Debi, Andy, and their landlord appeared for a grievance hearing at city hall. Soon after, the City's hearing officer issued a formal order. The order found by a preponderance of the evidence that "[a] violation has occurred" under the compulsory-eviction law. Compl. ¶¶ 84-85. Based on that "finding[] of fact," the order directed Debi and Andy's landlord to "begin eviction proceedings." *Id.* ¶ 90; *see also* Granite City Mun. Code § 5.142.080(G)(4) (providing that such decisions are "based upon the preponderance of the evidence presented").

Then Debi and Andy filed this lawsuit. Within days, this Court entered a temporary restraining order against the City, followed by an agreed preliminary injunction. The Court granted similar relief in the parallel *Barron* case. In the months since, the City has continued issuing new eviction demands. Gedge Decl. Ex. 1, at 37-59.

B. Granite City amends its compulsory-eviction law.

On December 17—moments after a closed-session meeting about the *Barron* litigation—the City's "Risk Management Committee" voted to amend the compulsory-eviction law. Gedge Decl. Exs. 2, 3. Two hours later, the full city council agreed. Gedge Decl. Ex. 4, at 3. With that, the City changed the law for the first time in over a half-decade.

Like past changes, December's amendment was relatively minor. For crimes committed on the rental property, nothing changed. Many other crimes still trigger compulsory eviction also. Under the pre-amendment version, for example, the City would mandate eviction if a tenant, householder, or guest "engage[d] in criminal activity . . . within the city limits." Compl. Ex. 1, at 1; *see also* Compl. ¶¶ 22-23. The City would also mandate eviction if a tenant, householder, or guest "engage[d] in any criminal activity found to be equivalent to a Forcible Felony at any location." Compl. Ex. 1, at 1. Post-amendment, the City still mandates eviction if a "lessee, a member of lessee's household, or a guest of lessee" commits "drug related criminal activity, or a Forcible Felony anywhere in the corporate limits of the City of Granite City." Ex. 2 to 2d Mot. Dismiss, at 6 (ECF 29-2). Now, though, the City will await a conviction before issuing eviction demands based on those off-premises crimes. *Id*.

Last month's amendment does not mention retroactivity. Within 24 hours of the vote, however, the City announced that it had "withdraw[n]" the compulsory-eviction demands issued against two families—Debi and Andy and the plaintiffs in *Barron*. Gedge Decl. Ex. 5, at 1, 4, 7.

Six minutes after that, the City moved to dismiss the *Barron* case as moot. It waited a day, then filed a substantively identical motion here. In neither this case nor *Barron* has the City submitted evidence of having withdrawn eviction demands against anyone else.

ARGUMENT

"[A] case becomes moot 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party,'" *Church of Our Lord & Savior Jesus Christ v. City of Markham*, 913 F.3d 670, 679 (7th Cir. 2019), and here, the City's claim of mootness fails for two reasons. On Plaintiffs' request for an injunction, the City bears what the Supreme Court has called a "heavy," "stringent," and "formidable" burden to prove that it cannot revert to its old ways. The City has failed even to acknowledge that burden, much less meet it (Section I, below). As for Plaintiffs' request for damages, "[c]ourts routinely entertain suits for damages stemming" even from laws that are outright "repealed." *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 804 (7th Cir. 2016). That includes suits, like this one, seeking nominal damages (Section II). Simply put, Plaintiffs have a right to both forward-looking relief and backward-looking relief. The City's second motion to dismiss should be denied.

I. The City's withdrawal of its compulsory-eviction demand does not moot Plaintiffs' request for an injunction.

Having "withdraw[n]" its compulsory-eviction demand against Debi Brumit and Andy Simpson, Granite City says their request for an injunction is moot. Mem. 9. Absent from the City's papers, however, is any mention of its burden. "A defendant's voluntary cessation of allegedly wrongful conduct ordinarily 'does not moot a case or controversy unless "subsequent events ma[ke] it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur."'" *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 719 (7th Cir. 2011), *adopted in relevant part*, 687 F.3d 840, 842-43 (7th Cir. 2012) (en banc). In turn,

"[d]ecisions by the Supreme Court and [the Seventh Circuit] make clear that a defendant seeking dismissal based on its voluntary change of practice or policy must clear a high bar." *Ciarpaglini v. Norwood*, 817 F.3d 541, 545 (7th Cir. 2016). It is the defendant's "'heavy burden' of making 'absolutely clear' that it could not revert" to its allegedly wrongful behavior. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). That burden is "stringent" and "formidable." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 190 (2000). For obvious reasons: Were it otherwise, "any government actor who is being sued 'could cease a challenged practice to thwart the lawsuit, and then return to old tricks once the coast is clear.'" *Kikumura v. Turner*, 28 F.3d 592, 597 (7th Cir. 1994).

Granite City has not carried its burden. Nothing prevents the City from resuming its eviction campaign against Plaintiffs; its motion even seems to keep that option in its back pocket. The record also raises questions about whether the City is trying to manipulate the Court's jurisdiction. Plaintiffs are thus entitled to make their case for injunctive relief on the merits.

A. Outside this lawsuit, there is no barrier to the City's resuming its eviction campaign against Debi and Andy at any time.

By letter, Granite City's litigation counsel has purported to "hereby withdraw[]" the compulsory-eviction demand issued against Plaintiffs last June. Ex. 3 to 2d Mot. Dismiss, at 3 (ECF 29-3). On that basis, the City asserts that Plaintiffs' right to an injunction is moot. That is wrong. The Seventh Circuit has "long recognized" that "a defendant can not moot a claim simply by voluntarily ceasing behavior when it is free to resume that behavior at any time." *Edwards v. Ill. Bd. of Admissions to Bar*, 261 F.3d 723, 728 (7th Cir. 2001). Here, the City points to nothing that would stop it from resuming its campaign against Plaintiffs. Last month's change to the compulsory-eviction law was not retroactive. It reasserted the City's power to evict innocent people. And the "withdrawal" letter only confirms that the City has not met its burden.

1. In the City's telling, its eviction demand against Plaintiffs is "no longer enforceable" given its recent amendment to the compulsory-eviction law. Mem. 8. But the amendment does not affect past violators like Plaintiffs. By its terms, the amendment "t[oo]k effect upon passage" on December 17, 2019. Ex. 2 to 2d Mot. Dismiss, at 5 (ECF 29-2). It does not mention past violations. It does not mention retroactivity. And when, as here, "a statutory change is substantive," Illinois's default rule is that "the change is not to be applied retroactively." *Perry v. Dep't of Fin. & Prof'l Regulation*, 106 N.E.3d 1016, 1027 (Ill. 2018).[1] Whatever the City's amendment might mean going forward, it does not undo past violations. Nor does it give amnesty to past violators. Nor does it check the City's power to punish them.

In circumstances like these, the federal courts are quick to reject appeals to mootness. When a statutory "amendment . . . does not eliminate the possibility of prosecuting and punishing earlier violations," a plaintiff's request for injunctive relief presents a self-evidently live conflict. *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010); *see also id.* at 709 ("[T]he dispute is not moot."). The Seventh Circuit has held as much since at least 1984, when it ruled that plaintiffs could keep challenging an abortion law amended mid-case. *Charles v. Daley*, 749 F.2d 452. "[T]he State of Illinois could prosecute plaintiffs for violation of [the former provision] if plaintiffs violated that section while it remained in effect," the court reasoned. *Id.* at 457. That "possibility of prosecution" sustained "a live controversy within the meaning of Article III." *Id.*[2]

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[1] *See also United City of Yorkville v. Vill. of Sugar Grove*, 875 N.E.2d 1183, 1193 (Ill. App. Ct. 2007) ("'This principle applies to both civil and criminal enactments.'"); *see generally Ferguson v. Patton*, 985 N.E.2d 1000, 1010 (Ill. 2013) ("[W]e use the same rules of construction when interpreting municipal ordinances as we do when construing statutes.").

[2] *See also Sullivan v. Benningfield*, 920 F.3d 401, 411 (6th Cir. 2019); *Jacobus v. Alaska*, 338 F.3d 1095, 1102-04 (9th Cir. 2003), *overruled in part on other grounds by Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) (en banc); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1262-63 (5th Cir. 1980); *accord FTC v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938) (per curiam).

The Seventh Circuit's reasoning reflects the nationwide consensus, and it applies straightforwardly here. Debi and Andy violated the compulsory-eviction law in force in June 2019. The City said so in June. Compl. Ex. 2, at 1 ("clear violation"). It said so again in August, in the hearing-officer order. Compl. ¶¶ 84-90. Nothing in last month's amendment erased that violation. Nothing "irrevocably eradicated" its effects. *Charles*, 749 F.2d at 458; *see also id.* ("Recent Supreme Court cases dealing with the mootness issue suggest that such eradication is an additional prerequisite to mootness."). Nor does anything stop the City from restarting its campaign against Debi and Andy the moment this case is behind it.

2. If anything, last month's amendment magnifies the threat of harm. That is because the law's current version is just as unconstitutional as its predecessor; post-amendment, the City still can evict whole families for the misdeeds of others. *See* page 4, above. For reasons unexplained, the City has adjusted the list of off-premises crimes that will give rise to eviction. *Compare* Compl. Ex. 1, at 1-2, *with* Ex. 2 to 2d Mot. Dismiss, at 5-6 (ECF 29-2). (Post-amendment, for example, stealing a car might not trigger an eviction demand.) And for those off-premises crimes, the City now waits until after a judgment of conviction before issuing its eviction demands. Yet for all that, the City stands firmly on its power to make entire families homeless—the guilty and the innocent alike. Mem. 7.

If last month's amendment bears on this case at all, then, it cements Plaintiffs' right to seek judicial relief. "When a challenged policy is repealed or amended mid-lawsuit—a 'recurring problem when injunctive relief is sought'—the case is not moot if a substantially similar policy has been instituted or is likely to be instituted." *Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 287 (7th Cir. 2014). That's the case here. Far from curing the harm to renters' rights, the City's amendment "disadvantages them in the same fundamental way." *Ne. Fla.*

Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662 (1993). And all the while, the City insists that its "eviction action against Plaintiffs was constitutional." Mem. 7; *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (holding case not moot in part because school district still "vigorously defend[ed] the constitutionality" of the challenged program).

3. That leaves the letter purporting to "withdraw[]" the City's original eviction demand. *See* Mem. 9. The letter does not change the analysis.

First, even if the letter had pledged that the City would no longer try to oust Debi and Andy, such a promise would not moot their claim for an injunction. As discussed, nothing prevents the City from resuming its eviction campaign against them. Its position "could be changed again" tomorrow. *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998). So even outright "voluntary cessation of the challenged conduct does not eliminate the controversy." *Id.*

In fact, both the Seventh Circuit and the Supreme Court have long "resisted labeling cases moot" when handed "promises" far worthier than Granite City's. *Freedom from Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1051 (7th Cir. 2018). Consider *Freedom from Religion Foundation*, where the Seventh Circuit held that a school district's "'repeated and firm policy commitments' . . . failed to meet its stringent burden to establish mootness." *Id.* at 1052-53. Or take *Trinity Lutheran*, where "the [Supreme] Court found that a *governor's* announcement of voluntary cessation was insufficient to meet the heavy burden required to moot a case." *Id.* at 1051 (citing *Trinity Lutheran*, 137 S. Ct. at 2019 n.1). The list goes on,[3] with the

[3] *See, e.g.*, *Horina v. Granite City*, No. 5-cv-79-MJR, 2005 WL 2085119, at *4 (S.D. Ill. Aug. 29, 2005) ("[The plaintiff's] claims are not moot even in light of Granite City's latest representations to the Court that it will not enforce the ordinance."); *see also Sanchez v. Edgar*, 710 F.2d 1292, 1295 (7th Cir. 1983); *Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975); *Hardaway*

decisions tracking a simple principle: "'[W]hen a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot.'" *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 219 (4th Cir. 2017). Whatever its letter might say, Granite City retains the authority and capacity to coerce Debi and Andy's eviction. That means the couple's request for an injunction presents a live issue.

Second, the City's withdrawal letter in truth promises nothing. "[B]efore voluntary cessation of a practice could ever moot a claim, the challenged practice must have *actually ceased*." *Sullivan v. Benningfield*, 920 F.3d 401, 411 (6th Cir. 2019). And here, the City has studiously *not* forsworn resuming its campaign against Debi and Andy. By letter, the City's litigation counsel announced that the City has "withdraw[n]" the original "Notice of Violation." Ex. 3 to 2d Mot. Dismiss, at 3 (ECF 29-3). Yet the letter says nothing about the City's more recent hearing-officer decision, which ordered Debi and Andy's landlord to "begin eviction proceedings" against them. Compl. ¶ 90. Nor does the letter say the City will not re-issue an eviction demand the moment this case goes away.

If anything, the City appears to keep that option carefully in reserve. Throughout, its papers take pains to state only that "Plaintiffs can no longer be evicted . . . due to the *arrest* of [Tori] Gintz and [Tyler] Sears." Mem. 3 (emphasis added); *see also id.* 6-7, 8, 9, 10, 11-12. Yet that sleight of hand raises more questions than answers. After all, Debi and Andy have never faced eviction "due to the arrest" of Tori Gintz and Tyler Sears; they face eviction because Tori Gintz and Tyler Sears stole a van. By its terms, the compulsory-eviction law is violated, not by mere arrests, but by crimes shown "by a preponderance of the evidence." Compl. Ex. 1, at 2; *see*

v. D.C. Hous. Auth., 843 F.3d 973, 979-80 (D.C. Cir. 2016); *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015).

also Granite City Mun. Code § 5.142.080(G)(4). The City's hearing officer found such a violation here. Compl. ¶ 85. And for their part, Debi and Andy do not dispute that the crime took place. That is why they seek to forestall an eviction not based on Tori's "arrest," but "based on the crime" she and her boyfriend are alleged to have committed. Compl. Prayer for Relief ¶ C.

The City's manicured references to "arrests" thus invite questions about what (if anything) it has forsworn. Nothing in its law prevents the City from resuming its campaign against Debi and Andy. The City still claims the power to evict people for the misdeeds of others. Its law still mandates no-fault evictions. And its "withdrawal" letter—an "informal assurance[]" at best, *Freedom from Religion Found.*, 885 F.3d at 1051—nowhere swears off violating Plaintiffs' rights in the future. The most that can be said is that the City has rescinded a notice whose enforcement was preliminarily enjoined months ago. Particularly given the City's "'heavy burden,'" *Trinity Lutheran*, 137 S. Ct. at 2019 n.1, its "position is sufficiently murky" that "a live controversy" persists, *Ragsdale v. Turnock*, 841 F.2d 1358, 1366 (7th Cir. 1988).

B. The record raises grave questions about whether the City's actions seek to manipulate the Court's jurisdiction.

Granite City's motion acknowledges none of the problems detailed above. According to the City, the case is moot because it says so. As a public body, the City says, its representations are entitled to "greater stock" than those of ordinary litigants. Mem. 11 (quoting *Fed'n of Adv. Indus. Representatives v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003)). And that, the City says, should be the end of the matter. *See, e.g.*, Mot. Oral Arg. 7 (*Barron*) (ECF 48).

On this front too, the City's arguments lack merit. To begin with, no amount of "stock" can make up for the fact that the City remains free to resume its campaign against Plaintiffs at any time. *See* pages 6-11, above; *see also* 13C Charles Alan Wright et al., Fed. Prac. & Proc.

§ 3533.7, at 339-41 (3d ed. 2008). If the Governor of Missouri lacked the stock to moot *Trinity Lutheran*, Granite City's maneuvers lack the stock here.

On top of that, the record gives reason to doubt the City's stated basis for its actions. The bar for voluntary cessation is high in large part to stop defendants from manipulating the federal courts' jurisdiction. It "'aims to eliminate the incentive for a defendant to strategically alter its conduct in order to prevent or undo a ruling adverse to its interest.'" *EEOC v. Flambeau, Inc.*, 846 F.3d 941, 949 (7th Cir. 2017). So when circumstances "raise a substantial possibility that 'the defendant has . . . changed course simply to deprive the court of jurisdiction,'" that in itself "prevents [the courts] from finding the controversy moot." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1267 (11th Cir. 2010). The record presents an unusual number of such circumstances here.

1. The City's stated concern with the Illinois Human Rights Act finds no support in the Illinois Human Rights Act.

To start, the City's stated reason for amending its law—a change to the Illinois Human Rights Act—is hard to credit. According to the City, last month's scramble had everything to do with a months-old amendment to the Act and nothing to do with this case. Mem. 3, 7. That explanation raises doubts, however, because the Act appears not to affect laws like the City's.

The City hangs its hat on the Act's recent provision barring landlords from evicting tenants "because of . . . an arrest record." 775 Ill. Comp. Stat. 5/3-102; *see also* 2019 Ill. Legis. Serv. P.A. 101-565. That provision, the City says, "could" have conflicted with its compulsory-eviction law. Ex. 3 to 2d Mot. Dismiss, at 2 (ECF 29-3). But that is almost certainly not the case. For all its other evils, the City's law has never mandated evictions "based on . . . an arrest record." *See* pages 10-11, above. Rather, it mandated (and often, still mandates) evictions based on crimes proven by a preponderance of the evidence. Actions taken on that basis do not appear to implicate the Human Rights Act. The Illinois courts have even said so, explicitly, in applying

the Act's related provision on employment discrimination. *See Decatur Police Benevolent & Protective Ass'n Labor Comm. v. City of Decatur*, 968 N.E.2d 749, 757 (Ill. App. Ct. 2012) (holding that an employer did not rely only on "the fact of an arrest" to fire an employee where the arbitrator found "by a preponderance of the evidence" that the crime in fact occurred).

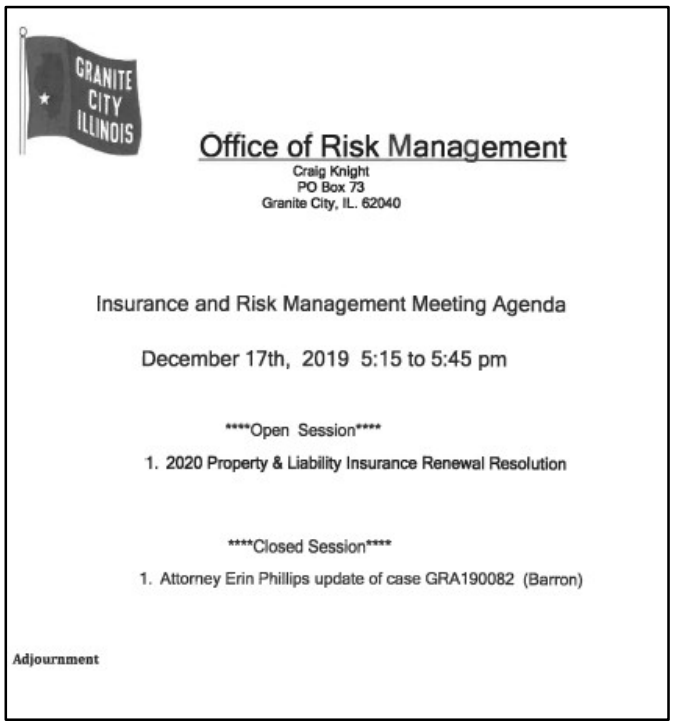
At base, nothing in the Act "remotely supports" the City's stated reason for its about-face. That alone raises "concern[s]" that the City's "position . . . is asserted only in this litigation." *Ragsdale*, 841 F.2d at 1366; *see also United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 202-03 (1968) (similar); *cf. Flambeau*, 846 F.3d at 949-50 ("A decision supported by less evidence or less thought might more reasonably be expected to recur.").

2. The record suggests that the City's stated reasons for changing course are a pretext for trying to moot this case.

The circumstances of last month's amendment raise more questions still. "'[I]f a governmental entity decides in a clandestine or irregular manner to cease a challenged behavior, it can hardly be said that its "termination" of the behavior is unambiguous.'" *Doe v. Wooten*, 747 F.3d 1317, 1325 (11th Cir. 2014) (quoting *Harrell*, 608 F.3d at 1266-67). And in Granite City, irregularity has been the order of the day. When its compulsory-eviction law has been amended in years past, for instance, the process has been relatively consistent and transparent. The topic is identified beforehand on an agenda. *E.g.*, Gedge Decl. Ex. 6, at 1. The amendments are discussed publicly at a committee meeting—typically, the zoning committee. *E.g.*, Gedge Decl. Ex. 7, at 2; Gedge Decl. Ex. 8, at 1. The zoning chair then presents the amendment to the full council for a vote. *E.g.*, Gedge Decl. Ex. 9, at 2.

Last month was different. The amendment was not considered by the zoning committee. It was considered instead by the "Risk Management Committee"—which handles the City's exposure to litigation. Unlike prior amendments, this one was not listed on the committee

agenda. Nor did the agenda mention the Human Rights Act. Instead, it listed two items: (1) insurance, and (2) a closed-session "update" on the parallel *Barron* case. Gedge Decl. Ex. 2, at 1.



GRANITE CITY ILLINOIS

Office of Risk Management

Craig Knight
PO Box 73
Granite City, IL. 62040

Insurance and Risk Management Meeting Agenda

December 17th, 2019 5:15 to 5:45 pm

****Open Session****

1. 2020 Property & Liability Insurance Renewal Resolution

****Closed Session****

1. Attorney Erin Phillips update of case GRA190082 (Barron)

Adjournment

At the meeting, the Risk Management Committee discussed the first item—insurance—in open session. Gedge Decl. Ex. 3, at 1.[4] It then went into closed session for the second. Every councilmember but one appears to have been present. *See id.* And upon exiting the closed session, the members voted immediately on one action alone: amending the compulsory-eviction law. *Id.* ("MOTION by Koberna, second by Koberna to approve the Ordinance to Amend Section 5.142.050(A) of the Granite City Municipal Code. ALL VOTED YES. Motion Carried."). They reaffirmed that vote at the council meeting less than two hours later. Gedge Decl. Ex. 4, at 3. The next evening, the City simultaneously withdrew its compulsory-eviction

[4] The meeting minutes submitted as Exhibits 3 and 4 are subject to judicial notice, and Plaintiffs request that the Court take judicial notice of them under Fed. R. Evid. 201(b)(2) and (c)(2). *See, e.g.*, *Hoffman v. Dewitt Cty.*, 176 F. Supp. 3d 795, 806 (C.D. Ill. 2016).

demands against the *Barron* plaintiffs and Debi and Andy. Gedge Decl. Ex. 5, at 1. Six minutes after that, it moved to dismiss *Barron* as moot; the next day, it filed a near-identical motion here.

To the outside observer, this chain of events points to one conclusion: The City's actions have everything to do with extracting itself from this case and *Barron* with its power intact. Particularly on this record, the City's plea for "greater stock in [its] acts of self-correction" misses the mark. Mem. 11. Whatever special "stock" government defendants might enjoy—and recent precedent signifies none, *Trinity Lutheran*, 137 S. Ct. at 2019 n.1—it "does not equal unquestioned acceptance." *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 604 (2d Cir. 2016). The federal courts' "interest in preventing litigants from attempting to manipulate . . . jurisdiction" thus counsels strongly "against a finding of mootness" here. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000).

3. The aftermath of last month's amendment further suggests that the City is trying to moot out Section 1983 cases.

Unusual circumstances persist. As discussed, no law appears to have authorized the City's withdrawing its eviction demand against Plaintiffs. Nor is there any record that the city council even voted on the withdrawal. *Cf. Freedom from Religion Found.*, 885 F.3d at 1052 ("Though the school board had the authority to adopt official policies, [it] . . . failed to document in any way its decision to make the changes permanent.") (citation omitted). Nor, for that matter, did the withdrawal come from the City at all; it was authored and signed by outside litigation counsel. *Cf. Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008) ("[T]he letter in question is neither sworn nor notarized, and fails to detail the basis for the author's authority.").

Most troubling, nothing in the record suggests that the City has withdrawn eviction demands against anyone else—anyone, that is, who isn't right now suing it in federal court. Since the *Barron* case was filed in August, the City has issued no fewer than twenty new eviction

demands. Gedge Decl. Ex. 1, at 1-59. It has forged ahead with grievance hearings. *See, e.g.*, Gedge Decl. Ex. 10, at 1 ("A Predeprivation Hearing is scheduled for **Monday January 8, 2020 at 4:00 p.m.**"). Its hearing officer has even continued ordering wholesale displacements. On December 3—to give one example—the officer mandated eviction for a father and his four children. Gedge Decl. Ex. 11, at 1-5; *see also id.* at 4 (date indicating that order may have been written in November). The reason: The man's wife was caught across town, last August, allegedly with a user-quantity of drugs. *Id.* at 5, 8, 9; *see also id.* at 5 ("I don't feel that I should be evicted with my 4 children because of something I had absolutely nothing to do with or I didn't have any part of."). Unlike Plaintiffs, that family does not appear to have earned a reprieve. Nor, as far as we know, have any of the others. For all the record shows, the City has rescinded eviction demands against two families alone—the ones before this Court. Far from embodying a "broad shift in policy," these maneuvers are best understood as "an individually targeted effort to neutralize [this] lawsuit." *Ciarpaglini*, 817 F.3d at 545.

* * *

A word on burden. As detailed above, the City's actions over the past month raise grave questions. Its recent amendment to the compulsory-eviction law does not protect past violators like Plaintiffs. The amendment suffers the same constitutional defects as the original. The City's stated reasons for its actions are improbable—even pretextual. The City's "withdrawal" letter is hopelessly vague. The City even appears to be targeting Section 1983 plaintiffs. To be clear, however, it is not Plaintiffs' burden to prove any of this. Rather, it is the City's "'heavy burden' of making 'absolutely clear' that it could not revert" to its wrongful behavior. *Trinity Lutheran*, 137 S. Ct. at 2019 n.1. Everything set forth above confirms that the City's motion falls short of that standard. On this record, there are "simply too many questions" to say the City "has . . . met

its 'formidable burden' of showing that it will not permit the challenged conduct to resume." *Mhany Mgmt., Inc.*, 819 F.3d at 605. Plaintiffs thus remain entitled to seek injunctive relief.

II. The City's withdrawal of its compulsory-eviction demand does not moot Plaintiffs' request for damages.

Separately, Plaintiffs have a live claim for damages. Compl. Prayer for Relief ¶ D. On this ground, too, they may proceed to the merits. When "the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Holder v. Ill. Dep't of Corr.*, 751 F.3d 486, 498 (7th Cir. 2014) (citation omitted). So regardless of Plaintiffs' right to an injunction, "'[a]s long as damages can be claimed, it remains necessary to resolve the issues that control damages liability.'" *Chicago Joe's Tea Room, LLC v. Vill. of Broadview*, 894 F.3d 807, 815 (7th Cir. 2018). Here, those issues are whether Granite City violated Plaintiffs' rights.

A. The City appears not to dispute these general principles. Mem. 10-11. But it asserts that they do not apply to the nominal damages Plaintiffs seek. Alone among damages remedies, the City contends, nominal damages cannot sustain "a live controversy." *Id.* 11.

That contention lacks merit. Nationwide, most Circuits "have consistently held that a claim for nominal damages avoids mootness." *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 & n.32 (5th Cir. 2009).[5] That authority also fits with Article III's case-or-controversy rule more broadly. "Under settled law," a case is moot "only if 'it is impossible for a court to grant any effectual relief whatever.'" *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct.

[5] *See also, e.g.*, *Ermold v. Davis*, 855 F.3d 715, 719 (6th Cir. 2017); *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016); *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005); *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 871-72 (9th Cir. 2002); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001). *But see Flanigan's Enterprises, Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1264 (11th Cir. 2017) (en banc) (holding 7-5 that "in this case, involving a constitutional challenge to legislation that is otherwise moot, a prayer for nominal damages will not save the case from dismissal").

1652, 1660 (2019). And in cases like this one, nominal damages are a form of effectual relief; they are "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986). The Seventh Circuit has echoed this point often—most notably in another Section 1983 case against Granite City. *Horina v. Granite City*, 538 F.3d 624, 638 (7th Cir. 2008).

That disposes of the City's argument root and branch. Under Section 1983, nominal damages are among the "appropriate" remedies available to Plaintiffs. *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 805 (7th Cir. 2016); *see also id.* ("[T]his is exactly the situation for which nominal damages are designed."). That means a controversy persists. For "'[a]s 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).

B. Nothing in the City's motion counsels differently. On the strength of two district-court decisions, the City's analysis reduces to this: "nominal damages are insufficient to prevent mooting of this matter." Mem. 10 (capitalizations altered). Besides breaking with the principles and precedent above, that claim is unpersuasive for two reasons.

First, even within the closed universe of trial courts in the Seventh Circuit, the City's cited opinions are distinctly in the minority. This Court, for instance, has considered itself "obligated" to "award nominal damages when a plaintiff proves a constitutional violation but cannot prove compensatory damages." *Sangraal v. Godinez*, No. 14-cv-661-SMY-RJD, 2018 WL 1318923, at *6 (S.D. Ill. Mar. 13, 2018). Other examples abound.[6] The City's two-case string-cite shows nothing so clearly as the want of precedent on its side.

[6] *See, e.g.*, *Norton v. City of Springfield*, 324 F. Supp. 3d 994, 1000 (C.D. Ill. 2018); *Moro v. Winsor*, No. 5-cv-452-JPG, 2008 WL 4371288, at *2 (S.D. Ill. Sept. 22, 2008); *Marshall v. City of Chicago*, 550 F. Supp. 2d 839, 840-41 (N.D. Ill. 2008); *Trewhella v. City of Lake Geneva*, 249

Second, the City's cited authority conflicts with both Supreme Court and Seventh Circuit precedent. For one thing, both the cited opinions wrote off nominal damages as "symbolic only." *Freedom from Religion Found., Inc. v. Franklin Cty.*, 133 F. Supp. 3d 1154, 1158 (S.D. Ind. 2015) (quoting *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1030 (E.D. Wis. 2008)). Yet the Supreme Court has long since rejected that view. A nominal-damages award bestows not just "moral satisfaction," the Court has said. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (citation omitted). Rather, "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* at 113.

The City's authority parts ways with Seventh Circuit precedent too. In *Six Star Holdings*, for example, the Seventh Circuit observed that the plaintiffs' claims for damages "save[] the case from mootness." 821 F.3d at 799. The court then affirmed one of the plaintiffs' nominal-damages award. *Id.* at 805. In *Crue v. Aiken*, the court likewise noted that the plaintiffs' "request for injunctive relief [is] moot" before affirming their nominal-damages judgment on the merits. 370 F.3d 668, 677-78 (7th Cir. 2004). Again in *Koger v. Bryan*, the court determined that the plaintiff could win—at most—nominal damages on his RLUIPA claim. 523 F.3d 789, 804 (7th Cir. 2008) ("[H]is request for injunctive relief has been rendered moot by his release from prison."); *see also id.* at 805-06 (Evans, J., concurring). Rather than hold the claim moot, though, the court ruled for the plaintiff on the merits and remanded for entry of judgment. *Id.* at 804; Judgment, *Koger v. Bryan*, 2-cv-1177 (C.D. Ill. Sept. 26, 2008). These decisions put paid to the

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F. Supp. 2d 1057, 1062 (E.D. Wis. 2003); *Simonsen v. Bd. of Educ.*, No. 1-cv-3081, 2002 WL 230777, at *4, 12 (N.D. Ill. Feb. 14, 2002); *Lemon v. Tucker*, No. 84-cv-4021, 1987 WL 7480, at *2 (N.D. Ill. Mar. 5, 1987); *Lavin v. Bd. of Educ.*, 73 F.R.D. 438, 440 (N.D. Ill. 1977) (Flaum, J.).

City's view that "nominal damages are insufficient to prevent mooting." This case presents a live dispute on all the relief Plaintiffs seek—injunctive, monetary, and declaratory alike.[7]

III. The City's proposed decretal language is flawed.

Two final points, which would arise only if the Court were to hold that the City's 12(b)(1) motion has merit. First, the City asks that the complaint be dismissed "with prejudice, as moot." *E.g.*, Mem. 10, 11. "[W]hen a suit is dismissed for want of subject-matter jurisdiction," however, "it is error to make the dismissal with prejudice." *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 935 F.3d 573, 581 (7th Cir. 2019) (citation omitted). Second, the City asks that, if its motion be granted, the Court direct "each party to bear its own costs and fees." Mem. 12. That would be error as well; given the interim relief they have secured, Plaintiffs might well be entitled to costs and fees even if the City's 12(b)(1) motion were granted. *See Dupuy v. Samuels*, 423 F.3d 714, 723 n.4 (7th Cir. 2005). If that question arises, it should thus be resolved in the usual course: following a motion under 42 U.S.C. § 1988 and Rule 54.

CONCLUSION

For all these reasons, Granite City's second motion to dismiss should be denied.

Dated: January 21, 2020.

Respectfully submitted,

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[7] Declaratory relief can be paired with an injunction or a damages award. *Powell v. McCormack*, 395 U.S. 486, 499 (1969); *Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004). Plaintiffs' request for declaratory relief thus presents a live controversy for all the reasons set forth above.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically filed this Plaintiffs' Response to Second Motion to Dismiss (along with the accompanying declaration and exhibits) using the CM/ECF system, which will send notification of such filing to the following:

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