IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEFINA LOZANO, ROBERT PIERCE, DORICE PIERCE, AND DELLA SIMS	)	
Plaintiffs,	)	Case No. 1:19-cv-06411
v.	)	
	)	Hon. Mary M. Rowland
CITY OF ZION, a municipal corporation, Mayor BILLY MCKINNEY, Commissioner of Building and Public Property JACQUELINE HOLMES, Director of the Zion Building Department, RICHARD IANSON, and Inspector WARREN FERRY, in their official capacities,	)	Magistrate Judge Hon. Young B. Kim
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Josefina Lozano, Robert Pierce, Dorice Pierce, and Della Sims respectfully submit this response in opposition to *Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint* (ECF No. 27 ("Mem.")) of Defendants City of Zion, Billy McKinney, Jacqueline Holmes, Richard Ianson, and Warren Ferry (collectively, "Zion").

INTRODUCTION

Plaintiffs—a landlord, Josefina Lozano, and her tenants—filed this lawsuit to protect their Fourth Amendment rights from the City of Zion's rental-inspection program. Plaintiffs have a Fourth Amendment privacy interest in preventing Zion's warrantless searches of their homes and allege that the city has a pattern and practice of punishing residents who resist such searches. This is not mere speculation; Zion has threatened each plaintiff pursuant to this policy. Plaintiffs allege that the rental-inspection regime threatens them with economic loss, litigation, liability, or eviction as punishment for exercising their Fourth Amendment rights.

Zion moves to dismiss under Rule 12(b)(1) on the grounds that: (1) Plaintiffs lack standing to seek an injunction of Zion's inspection procedures because they cannot allege a real and imminent threat of future injury; (2) Plaintiffs' allegations of past harms are insufficient to state a claim for money damages; and (3) therefore, Plaintiffs' lack standing to seek a declaratory judgment on the unconstitutionality of Zion's rental-inspection ordinance. (Mem. 7–11).

As demonstrated below, Zion's arguments are without merit. Plaintiffs have alleged that they did not consent to an inspection of their homes, and Zion withheld a certificate of compliance accordingly. Zion could have sought a warrant; it chose instead to threaten to fine landlord Josefina Lozano and threaten her tenants with penalties for illegal occupancy. Josefina and her tenants sued just days before Zion was scheduled to refer the matter to their City Attorney for initiation of legal proceedings. Zion demonstrated what these legal proceedings would look like, fining one similarly situated landlord $114,000 just weeks before Plaintiffs sued. Zion supported the fines with a written legal opinion, taking the position that no search warrant is necessary for non-consensual searches. Faced with threats under this unconstitutional policy, Plaintiffs have alleged a reasonable fear—and a substantial risk—of being subjected to warrantless searches and punitive measures.

But Zion believes dismissal is warranted because it amended its ordinance in the face of this litigation, providing the city with the option to obtain a search warrant. This does not affect Plaintiffs' standing. Under the amended ordinance, if the tenant lawfully refuses an inspection, as Plaintiffs did here, and will do in the future, then the code official is not required to obtain a warrant to conduct an inspection—and remains entitled to withhold the certificate of compliance because no inspection has been conducted. In short, the substantial risk of a constitutional violation remains.

Accordingly, Plaintiffs have standing to assert their claims for injunctive relief against future harms, for past damages, and for a declaratory judgment that the ordinance is unconstitutional.

STATEMENT OF FACTS

Below, Plaintiffs will describe: I. The mechanics and breadth of Zion's rental-inspection program; II. Enforcement of that program against plaintiffs; and III. Zion's policies and practice of punishing people—including Plaintiffs—who stand up for their Fourth Amendment rights.

I. Zion's Municipal Code and Rental-Inspection Program.

In 2015, Zion enacted a rental-inspection ordinance, requiring landlords to obtain a certificate of compliance for all rental properties. 2d Am. Compl. ¶¶ 20, 26. To obtain a certificate, Zion must inspect the property at least every two years. Without a certificate, occupancy is unlawful. Municipal Code of the City of Zion, Illinois ("Zion Code" or the "Code") § 10-180(2) (2019), *attached as* Exhibit A to the 2d Am. Compl. (ECF No. 25).

These inspections allow for sweeping action by inspectors charged to search homes for compliance with Zion's "code." § 10-180(5)(b). Zion defines the term "code" broadly—"the Municipal Code of the City of Zion, as amended, all city rules, regulations, and policies, and all state laws rules, regulations, and policies . . . [u]nless otherwise expressly stated or clearly indicated by context . . . " § 10-180(1); 2d Am. Compl. ¶ 27.

Proving the breadth of Zion's "code" enforcement, tenant Julia Patterson testified before the City Council that during a routine rental inspection of her home, a Zion inspector reported her to the Department of Children and Family Services ("DCFS") without proper grounds. *See* City of Zion, Illinois City Council Meeting for August 6, 2019, https://www.youtube.com/watch?v=yRbVvQbRDi0&t=1706s; 2d Am. Compl. ¶ 77.

The unamended ordinance reserved to Zion numerous remedies against those who object to an inspection, including "seeking an administrative search warrant **or** suspending or revoking an owner's certificate of compliance." Unamended Ordinance § 10-180(5)(g) (Exhibit A) (emphasis added). The amended ordinance emphasizes that "[n]othing in this section shall restrict, limit, or

alter the city's authority to legally inspect any property nor impose penalties for violations of the code." Amended Ordinance § 10-180(8) (Exhibit A(i)).

The Code does not require the City to pursue an administrative warrant when a tenant objects to an inspection. It instead permits punitive measures against objecting citizens: failure to comply with the City's demands is punishable by a fine ranging from $100 per day up to $750 per day. *Compare* Unamended Ordinance § 10-180(9)(a), *with* Amended Ordinance § 10-180(9)(a) ("Each day a violation continues shall be a separate offense."). Zion thus avoids the warrant requirement by coercing tenants and landlords into "consenting" to inspections.

Along with passing the ordinance, the City held an open forum to explain the new program and answer landlord questions, and the forum was filmed. 2d Am. Compl. ¶¶ 21–23; *see* CITY OF ZION, DEPARTMENT OF BUILDING, Rental Property Information, https://www.cityofzion.com/building-department/rental-property-information/ (last visited Feb. 3, 2019). The mayor presented the program as a response to Zion's severe financial distress, brought on, in his opinion, by the "overabundance of nonowner-occupied residential rental properties." *Id.* at 9:22. The City found it disquieting that "over 60% of the residential living spaces in [Zion] are rental[s]." *Id.* at 9:37. A "healthy city should be 23–30% rental property," the mayor said, citing studies that communities were better with fewer rentals, that high taxes are driven by low-quality, low-income rental housing, and that renters do not care for their property like homeowners. *Id.* The mayor explained that he was elected to "change what this town looks like," and that he was there "to represent the resident *taxpayers* of our community." *Id.* at 39:13 (emphasis added). He acknowledged that, under the ordinance, the City *could* get a warrant if tenants refused to consent to an inspection, but in practice that never happens; Zion prefers to strong-arm landlords into forcing their tenants to waive their constitutional rights.

Faced with this lawsuit, the City of Zion amended its municipal code but did not remedy the unconstitutionality of its rental-inspection regime. The amended ordinance purports to remove one form of punishment—daily fines and fees[1]—but preserves another—making occupancy and renting illegal without a rental inspection. *See* Amended Ordinance § 10-180(9); § 10-180(2) (Exhibit A(i)). Although the amended ordinance now provides a process for obtaining an administrative warrant to inspect properties, it still does not *require* that the city obtain one to enforce its inspection regime. Amended Ordinance § 10-180(5), (6). In sum, the ordinance still punishes landlords and tenants if they assert their Fourth Amendment rights. And it does not require that the City obtain a warrant. Punishing the exercise of Fourth Amendment rights is still unconstitutional, whether the punishment is monetary or proprietary.

II. Zion Attempts Inspections and Threatens Plaintiffs.

Plaintiffs are victims of the policies and practices described above. Plaintiff Josefina Lozano is a landlord in Zion, Illinois. She immigrated to the United States from Mexico as a child, became a U.S. citizen, obtained her law degree as a second career in 2004, and manages her own residential rental properties. Since 1990, she has owned and managed two multi-family buildings at 1503 and 1509 27th St., in Zion. 2d Am. Compl. ¶ 7. Plaintiffs Robert, Dorice, and Della are three of Josefina's tenants. Robert and Dorice have rented from Josefina since June of 2000, Della since 1998. Robert is an accountant with a family services agency, Dorice is retired, and Della is retired as well. These tenants value their personal privacy and will not consent to inspections of their homes, let alone wall-to-wall searches of their most private spaces. 2d Am. Compl. ¶¶ 8–9.

In 2016, Josefina began registering her rental properties. Most of her tenants consented. But Robert, Dorice, and Della never have, instead sending letters to the City each year informing them a

[1] And it is not clear that Zion's ordinance removes the threat of fines. It does for refusing an inspection, Amended Ordinance § 10-180(9)(b), but it still allows fines for not having a certificate of compliance, *see* Amended Ordinance § 10-180(9)(c), which is, in turn, conditioned on a rental inspection.

warrant is required to conduct a rental inspection of their homes. 2d Am. Compl. ¶¶ 44–49; Exhibit C. From 2016 through 2019, the City did not inspect Robert, Dorice, and Della's homes and did not seek an administrative warrant. But on August 30, 2019, the City sent Josefina a letter giving her 30 days (until September 29, 2019) to compel her tenants to "consent" to an inspection. If she did not, her renewal application "will be referred to the city attorney for review and possible initiation of legal proceedings." 2d Am. Compl. ¶ 50; Exhibit D.

III. Zion has Recently Imposed Ruinous Fines on Landlords Whose Tenants Assert their Fourth Amendment Rights.

Zion's threats are not idle. Another landlord in Zion, Terry Boone, recently had an experience like Josefina's that resulted in Zion putting its bad-faith policies in writing. Terry filed an application, scheduled inspections, and informed his tenants of their inspection date and their Fourth Amendment rights. His tenants refused to consent to inspections, and the City issued fines against Terry that accrued at a rate of $750 per property, per day, totaling $114,000. 2d Am. Compl. ¶¶ 53–60; Exhibit F. An administrative hearing officer upheld these fines, endorsing Zion's rejection of the Fourth Amendment: "While the code contemplates that the City *may wish* to seek an administrative warrant, it reserves to seek out whatever remedy is deemed appropriate under the law." 2d Am. Compl. ¶ 57; Exhibit E (emphasis added).

The amended ordinance still threatens Josefina and her tenants with the same irreparable injuries that motivated their motion for a Temporary Restraining Order. If Zion continues to enforce its ordinance, Josefina is immediately engaged in illegal renting, and her tenants' occupancy is illegal—only because they asserted their Fourth Amendment rights.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) governs a motion to dismiss for lack of subject matter jurisdiction. "In evaluating a challenge to subject matter jurisdiction, the court must first determine whether a factual or facial challenge has been raised." *Silha v. ACT, Inc.*, 807 F.3d 169, 173

(7th Cir. 2015). Zion has not controverted any of Plaintiffs' facts through declarations or documentary evidence. Rather, Zion mounts a facial attack, "challeng[ing] whether subject matter jurisdiction is evident on the face of the Complaint." (Mem. 4). In analyzing a facial subject matter challenge, "courts apply the same analysis used to review whether a complaint adequately states a claim: 'Courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Silha*, 807 F.3d at 173 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). These factual allegations must only "cross the line from conceivable to plausible" and "[o]nce they have crossed this threshold, [they are accepted] for purposes of a motion to dismiss as true." *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 968 (7th Cir. 2016).

ARGUMENT

Zion's legal grounds for their motion are narrow. Zion does not disagree that the Fourth Amendment requires city inspectors to obtain consent or an "administrative warrant" before conducting a rental inspection of tenants' homes. (Mem. 5); *cf. Camara v. Mun. Court*, 387 U.S. 523, 538–39 (1967). And Zion does not challenge the sufficiency of Plaintiff's allegations under Rule 12(b)(6). Instead, it argues that Plaintiffs lack standing. Zion posits that Plaintiffs must submit to the challenged unconstitutional conduct before they can mount a challenge to that conduct in federal court. That position is without merit and has been roundly rejected by the case law.

First, Zion misapprehends the governing legal standard, which does not require that Plaintiffs submit to unconstitutional conditions before challenging them in court. A "substantial risk" of harm is required, and that is what Plaintiffs have pled.

Second, Zion ignores the weight of rental-inspection authority, which holds that the threat of warrantless inspections as a condition for legal occupancy is enough to confer standing.

Third, Zion separately challenges damages and declaratory relief. It does so without citing the governing legal standard, and instead rests on the same meritless arguments it uses to attack Plaintiffs' claim for injunctive relief.

I. Plaintiffs Have Sufficiently Alleged Substantial Risk of Constitutional Harm.

Under Article III, a plaintiff has standing if her alleged injury is: (1) "concrete, particularized, and actual or imminent"; (2) "fairly traceable to the challenged action"; and (3) "redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). Zion only challenges whether Plaintiffs meet the first of these, the "injury in fact" requirement. (Mem. 7–11). Zion argues that Plaintiffs do not have standing to seek injunctive relief because "[t]he future injuries alleged in the SAC, i.e., denials of COCs, are not *certainly impending*, but merely *possible*. Although Plaintiffs have declared their refusal to consent to warrantless rental-inspection searches, the City has not indicated that it will decline to seek administrative warrants to authorize the inspections." (Mem. 8). Zion reaches the wrong conclusion—that Plaintiffs must submit to a violation of their rights before suing—because it starts with the wrong premise—the "certainly impending" standard.

Zion chiefly cites *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), in arguing that the standard for an imminent injury is whether it is "certainly impending." (Mem. 8, 11). In *Clapper*, the Supreme Court ruled that a human rights organization did not have standing to challenge the Foreign Intelligence Surveillance Act based on "their highly speculative fear that . . . the Government will decide to target the communications of non-U.S. persons with whom they communicate." 568 U.S. at 410. Since its decision in *Clapper*, the Supreme Court has recognized that that it is not the only standard for a future injury, and that the alternative standard is whether there is a "substantial risk" that the harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). As discussed below, this "substantial risk" test allows claims like the ones here to proceed.

The Seventh Circuit has clarified that "*Clapper* does not . . . foreclose any use whatsoever of future injuries to support Article III standing." *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 693 (7th Cir. 2015). Rather, the "substantial risk" test asks whether the aggrieved party has been threatened by the challenged conduct. The *Remijas* plaintiffs were a putative class of department store credit card holders who alleged "that the hackers deliberately targeted Neiman Marcus in order to obtain their credit-card information." *Id.* The company obtained dismissal on the ground that there had not been actual acts of fraud committed against the plaintiffs. The Seventh Circuit reversed because "customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur." *Id.* The plaintiffs were under no obligation "to wait for the threatened harm to materialize in order to sue." *Id.* It was enough that the harm was threatened.

Josefina and her tenants are similarly under no obligation to "wait" and see whether Zion will punish them for exercising their rights—they too have already been threatened. Accordingly, Plaintiffs had standing the instant Zion threatened to sue them. Zion acknowledges that its ordinance conditions lawful occupation on rental inspections. (Mem. 6 ("In other words, no [certificate of compliance] may be issued without a rental inspection.")). But Zion attempts to evade litigating this case on its merits by recasting its prior threats as "hypothetical": "Plaintiffs fear that upon their refusal to consent to a warrantless inspection, the City will (presumably in bad faith) decline to seek an administrative warrant, conduct no inspection, and be precluded from issuing a [certificate of compliance], leaving both continued leasing and occupation unlawful." *Id.* Zion is wrong. This is not a "hypothetical"—it accurately describes the facts of this case, as alleged by Plaintiffs, which must be accepted as true. Zion has *already* denied Josefina and her tenants their right to rent and lawfully occupy the homes they have lived in for decades. When Josefina's tenants asked the City to obtain a warrant to inspect their properties, the City refused and instead declined

to issue them a certificate of compliance, making their occupancy illegal. 2d Am. Compl. ¶¶ 44–49. And on August 30, 2019, Zion threatened to prosecute Josefina, as it had just done with her neighbor. 2d Am. Compl. ¶¶ 50–52; Exhibit D.

The amended ordinance empowers Zion to continue doing this, and Plaintiffs have sufficiently alleged a substantial risk that it will continue to do so based on both past harms and current threats. Plaintiffs' noncompliance with the code rests solely on their refusal to consent to warrantless inspections. One thing stands between Plaintiffs and a finding that they are illegally renting out (Josefina) or occupying (Robert, Dorice, and Della) their apartments—the agreed order that Zion entered into with Plaintiffs on the record before this Court in response to Plaintiffs' TRO. (ECF No. 14 (Order)). That continued threat presents a "substantial risk."

II. Rental-Inspection Jurisprudence Makes Clear that Plaintiffs Have Standing

In the rental-inspection context, federal courts around the country have consistently conferred standing on parties seeking to vindicate "the general principle that the government may not penalize individuals for exercising their constitutional rights" in Fourth Amendment matters. *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218, 1230 (N.D. Ill. 1998) (invalidating $60 fee imposed on tenants requesting a search warrant). To mount such a challenge, "plaintiffs need not establish that the [condition] is unreasonable or that it has already chilled the exercise of Fourth Amendment rights. Rather the mere threat that the [condition] may deter the exercise of Fourth Amendment rights is sufficient." *Id.* In *Dearmore v. City of Garland*, 400 F. Supp. 2d 894 (N.D. Tex. 2005), a property owner challenged a rental-inspection ordinance similar to Zion's. The ordinance made it "an offense if an owner rents his property without a permit. It is also an offense if an owner refuses to allow an inspection by the City. An owner, therefore, can be fined up to $2000 per day for renting his property without a permit." *Id.* at 900–01. As with Zion's amended ordinance, the city was "authorized"—but not required—to obtain a search warrant. *Id.* at 897. The court rejected the

city's motion to dismiss on standing grounds, holding that "[a]lthough the City has not cited Dearmore for an offense, *it could do so at any time*, which makes the injury imminent rather than conjectural or hypothetical. Dearmore must consent in advance to the annual inspection, even if the property is unoccupied." *Id.* at 901 (emphasis added).

Dearmore's logic commands the same outcome here. Both the amended and unamended ordinance condition legal occupancy on a certificate of compliance. *Compare* Unamended Ordinance § 10-180(2)(a), (c), (d) (Exhibit A) *with* Amended Ordinance § 10-180(2)(a), (c), (d) (Exhibit A(i)). Then, that certificate is conditioned on a rental inspection. *Compare* Unamended Ordinance § 10-180(5)(c) *with* Amended Ordinance § 10-180(5)(c). If a tenant asserts the Fourth Amendment right to be free of a warrantless inspection, the ordinance empowers Zion either to seek a warrant *if it chooses* or else to impose fines. *Compare* Unamended Ordinance § 10-180(5)(g), 180-9 *with* Amended Ordinance § 180(5)(g); § 10-180(9). And until Zion chooses to seek a warrant, the ordinance makes Plaintiffs' occupancy illegal, subject to eviction, for merely asserting their Fourth Amendment rights. *See* Amended Ordinance § 10-180(2)(a), (c), (d) (Exhibit A(i)). That is an unconstitutional condition on Plaintiffs' Fourth Amendment rights. *See Thompson v. City of Oakwood*, 307 F. Supp. 3d 761, 778 (S.D. Ohio 2018) (holding a "violation of the unconstitutional conditions doctrine occurred . . . when Oakwood presented Plaintiffs the choice between agreeing to an inspection and being denied a certificate of occupancy").

The cases Zion cites to contest Plaintiffs' standing are inapposite. Zion cites *Hometown Co-op. Apartments v. City of Hometown*, 515 F. Supp. 502, 504 (N.D. Ill. 1981), which found that the plaintiff's assumption "that there will be situations in which the City of Hometown either will refuse to seek a warrant, presumably in bad faith and contrary to the letter and spirit of the ordinance, or will be unable to procure one," was too speculative to confer standing. What Zion leaves out is that unlike Zion's optional warrant requirement, Hometown's was mandatory: "[W]here no consent has been

given to enter or inspect any property, *no entry or inspection shall be made without the procurement of a warrant* from the Circuit Court of Cook County." *Id.* at 503 (emphasis added). The ordinance even went on to state grounds for probable cause to support such a warrant based on actual suspicion that something was wrong inside the home. *Id.* It stands to reason that the court was unwilling to presume the city would violate the text of its own mandatory warrant procedures. Here, on the other hand, Zion's warrant provision under both the old and new ordinances is completely optional, *compare* Unamended Ordinance § 10-180(5)(g) *with* Amended Ordinance § 10-180(5)(g), and it has a demonstrated history of disregarding that provision in favor of punitive measures. 2d Am. Compl. ¶¶ 42–50, 54–60, 77.

The other two inspection cases that Zion cites—*Tobin* and *Makula*—are similarly unavailing.

Tobin v. City of Peoria dismissed a rental-inspection lawsuit as not ripe where the city had not sought a warrant and said it would act in good faith. 939 F. Supp. 628, 635 (C.D. Ill. 1996). But the *Tobin* ordinance affirmatively required the city "*shall advise* the owner or authorized agent *and occupant* of the inspection[and] *their right to refuse inspection of the dwelling unit*." *Id.* at 630 (emphasis added). Here of course, there is no requirement that Zion tell tenants about their right to refuse—and that is not what Zion does. On the contrary, Zion has history of bad faith, advancing the perception that tenants have no choice in the matter at all. 2d Am. Compl. ¶¶ 42–50, 54–60, 77. This lawsuit is about Zion's strong-arm tactics forcing tenant consent, which, unlike *Tobin*, the ordinance permits.

Makula v. Village of Schiller Park was resolved on summary judgment—where "[t]he essential facts [we]re not in dispute"—not on a motion to dismiss. No. 95 C 2400, 1998 WL 246043, at *1 (N.D. Ill. Apr. 30, 1998). The court struck down two portions of the inspection ordinance conditioning rental licenses on mandatory searches. *Id.* at *7 (requiring "[a]n irrevocable consent by the owner as a condition of obtaining a license, does not pass constitutional muster. For the same reasons, the court will also strike § 93.82, which requires an owner to agree to the administrative

search in order have a license issued or renewed." (quotation marks omitted)). The court would not presume on the record before it that the village would "attempt [to] punish" those who refuse. *Id.* Here, however, that is precisely what Plaintiffs have alleged. Zion has stated—in writing in its administrative adjudication—that it can, and will, skip the warrant requirement and go straight for the punishment. 2d Am. Compl. ¶ 57; Exhibit E. Zion is now asking this Court not to take it at its word. That is the very definition of a disputed fact inappropriate for dismissal on the pleadings, and it must be subjected to adversarial testing and resolution at summary judgment—like *Makula*.

Finally, Zion quotes *Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017), for the proposition that "[f]or purposes of standing to seek injunctive relief against future harm, courts generally assume that litigants 'will conduct their activities within the law. . . .'" (Mem. 8). Cherry picking that language from *Simic* ignores the facts of the case. Zion is implying that *Simic* assumed the defendants there would act according to the law in a constitutional challenge, but the quoted passage was talking about the plaintiff. The plaintiff in *Simic* challenged a municipal ordinance barring texting and driving, but she was also prohibited from doing so by a state statute. The very next sentence reads: "That assumption surely holds with respect to obeying laws that are not themselves the target of a party's constitutional challenge, as was the case . . . here." 851 F.3d at 738. *Simic* did not assume that a defendant with a stated policy of unconstitutional conduct would ignore that policy in the future. And when it did address the plaintiff's conduct, it affirmed that "[a] person is not necessarily required to risk prosecution in order to challenge a law's validity." *Id.* at 739.

Zion points to no authority that warrants dismissal of Plaintiffs' claim based on standing because Plaintiffs' claim is moored in real harm. Zion's warrant provision was—and is—optional. And Zion refusing to seek a warrant when a tenant does not consent to an inspection is not speculation, it has happened. 2d Am. Compl. ¶¶ 49. And Zion threatening legal action and exacting punishing fines when tenants assert their Fourth Amendment rights is also not speculation, it has

happened. 2d Am. Compl. ¶¶ 53–60. Now Zion has amended its ordinance but removed none of the features of the ordinance that created these harms. Therefore, Zion cannot be given a presumption it will act in good faith unless it disputes the operative allegations in the complaint—something it cannot do at this juncture. A city cannot inflict constitutional wounds and then amend its ordinance insignificantly to assert a good faith defense that it would never violate the Constitution to avoid already-incurred liability.[2] Countenancing such conduct would set dangerous precedent for Fourth Amendment abuse.

III. Plaintiffs have standing to seek a monetary damages and declaratory judgment.

Zion writes separately regarding Plaintiffs' claims for monetary damages and declaratory judgment, though its reasoning is the same as its challenge to injunctive relief. (Mem. 10–12). As to damages based on past harm, Zion argues that "the past harm Plaintiffs allege are (1) fear of business losses and eviction and attendant emotional distress and (2) loss of time expended on compiling documents and talking with lawyers about their situation." (Mem. 10–11). Zion asserts that such damages are "manufacture[d]" and do not confer standing. (Mem. 11).

Zion does not cite the law governing damages for constitutional harm. Section 1983 creates "a species of tort liability" for constitutional violations. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–06 (1986) (citations omitted). Under this theory of liability, "compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment

[2] Zion does not argue that its amendment to the ordinance moots this case, nor could it. "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 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). Zion does not, because it cannot, argue that they met this formidable burden.

of reputation . . . *personal humiliation, and mental anguish and suffering*." *Id.* at 307 (citations omitted; emphasis added). Zion does not refute this basis for liability; it disputes instead whether the facts here are severe enough to cause those injuries. This simply underscores the need to have Plaintiffs' damages claim resolved at summary judgment or trial.

Zion cites *Schmidling v. City of Chicago* in its damages section. (Mem. 11). But *Schmidling* is inapplicable. *Schmidling*, which involved an attempt to enjoin a weed control ordinance, did not mention damages. It simply says that when the threat of prosecution occurred years in the past without a renewal of threat, there is no standing. 1 F.3d 494, 499 (7th Cir. 1993) (denying standing when a past ticket was "too attenuated in time to show a sufficiently immediate threat."). The threat here, on the other hand, was so immediate that Plaintiffs sought a temporary restraining order.

Finally, Zion argues that Plaintiffs lack standing to seek declaratory relief. (Mem. 11–12). Plaintiffs seek a judgment under 28 U.S.C. § 2201 and Fed. R. Civ. P. 65 declaring unconstitutional all relevant portions of Zion's code that empower it to enforce inspections by means other than consent or warrant. "The phrase 'case or actual controversy' in the Declaratory Judgment Act 'refers to the type of "Cases" and "Controversies" that are justiciable under Article III." *Amling v. Harrow Indus. LLC*, 943 F.3d 373, 377 (7th Cir. 2019). "The requirements of the Act and those of Article III are therefore coextensive." *Id.* Having established standing to seek injunctive relief and damages, Plaintiffs have standing to seek a declaratory judgment.

CONCLUSION

Zion denied Josefina and her tenants' certificates of compliance—and thus their right to lawfully rent and occupy their homes—because they asserted their Fourth Amendment rights. The amended ordinance is simply a continuation of this harm because it does not require a warrant or consent before the City imposes penalties for illegal occupancy. These factual allegations state a Fourth Amendment claim, and the motion to dismiss should be denied.

Dated: February 4, 2020

Respectfully submitted,

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Certificate of Service

I hereby certify that on February 4, 2020, I electronically filed the foregoing **Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss** with the Clerk of the Court using the ECF system, which will send notification of such filing to registered counsel of record.

/s/ James W. Joseph