

No. 10-1121

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IN THE  
**Supreme Court of the United States**

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DIANNE KNOX; WILLIAM L. BLAYLOCK;  
ROBERT A. CONOVER; EDWARD L. DOBROWOLSKI, JR.;  
KARYN GIL; THOMAS JACOB HASS; PATRICK JOHNSON;  
AND JON JUMPER, ON BEHALF OF THEMSELVES  
AND THE CLASSES THEY REPRESENT,  
*Petitioners,*

v.

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 1000,  
*Respondent.*

---

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

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**PETITIONERS' OPPOSITION TO  
RESPONDENT'S MOTION TO  
DISMISS AS MOOT**

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**OPPOSITION TO MOTION TO DISMISS**

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**INTRODUCTION**

Respondent's eleventh-hour Motion to Dismiss is a classic "attempt to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 279 (2001) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000)). For the past half-decade, this case has marched apace through the district court and court of appeals. All the while,

Respondent made no effort to remedy the constitutional violations that prompted Plaintiffs to file suit. But now, only after this Court has granted certiorari and the opening brief has been filed, Respondent has had a sudden change of heart: Six years after the case began, and three years after the district court ordered it to provide the adequate notice compelled by the First Amendment, Respondent has hastily cobbled together a homemade remedy that it asserts satisfies Petitioners' demands and the judgment below, implemented it unilaterally, and announced that the case is suddenly moot.

This last-ditch effort to avoid adjudication of an issue on which this Court has already granted certiorari should be seen for what it is: a litigant attempting to play ducks and drakes with the judiciary. It is desperate. It is a half-measure. And most importantly, it is futile. The case is not moot, for several reasons.

*First*, the case retains vitality under this Court's several decisions expounding upon voluntary-cessation doctrine. Petitioners Dianne Knox *et al.* and the classes they represent ("the Nonmembers") remain subject to Respondent's authority to collect forced dues. Respondent could at any time impose another supplemental assessment without a *Hudson* notice, capturing the Nonmembers' wages to subsidize unwanted political speech. "[C]ollateral effects of [the] dispute" therefore "continue to affect the relationship of litigants," *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 585 (1984) (O'Connor, J., concurring), and a binding declaration that Respondent violated the Nonmembers' First Amendment rights would be of true, tangible benefit. Nor can Respondent show, as it must, "that it is *absolutely* clear that

the allegedly wrongful behavior could not reasonably be expected to recur.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (quotation marks & citation omitted; original emphasis). The exception to the voluntary-cessation doctrine therefore does not apply.

*Second*, the Nonmembers seek nominal damages, and a live claim for nominal damages “suffice[s] to deflect mootness.” 13C C. Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 3533.3 (3d ed.) (“*Wright & Miller*”). Respondent seeks to skirt this problem by gluing a dollar to the document sent to the Nonmembers. But that crude substitute will not do. Nominal damages, after all, are awarded not to make a plaintiff whole for financial injury but as an equitable means of vindicating a right. A defendant cannot stymie a plaintiff’s effort to vindicate his rights by simply handing him a dollar bill; that fundamentally misunderstands the nature of the nominal-damages remedy.

*Finally*, this case is not moot because, even setting aside the Nonmembers’ request for a declaratory ruling and nominal damages, Respondent has not given the Nonmembers everything they seek through litigation. Respondent has not yet issued all the payments required under the district court’s order. And its notice to class members contains a number of strings and caveats that reduce the likelihood of a given class member ever seeing a refund. This accordingly is not a case where a plaintiff “already has ‘obtained everything that [he] could recover ... by a judgment of this court in [his] favor.’” *Hall v. C.I.A.*, 437 F.3d 94, 99 (D.C. Cir. 2006) (citation omitted).

Respondent’s eleventh-hour motion should be denied, and the case—six years in the making, and weeks

from oral argument—should be decided on the merits. At a minimum, Respondent’s motion should not foreclose oral argument in this case, and the Court may then have an opportunity to further examine the substance of Respondent’s contentions.

## **BACKGROUND AND PROCEDURAL POSTURE**

### **I. Facts of the Case<sup>1</sup>**

**Background:** Petitioners Dianne Knox *et al.*, and the approximately 36,000 class members they represent, are employees of the State of California who are not members of their monopoly bargaining representative, Respondent Service Employees International Union, Local 1000 (“SEIU”). California law and SEIU’s contracts with the State require that the Nonmembers pay compulsory agency fees to the SEIU as a condition of their employment. Cal. Gov’t Code § 3513(k); Pet. App. E at 77a.

Because union fees typically include more than collective bargaining costs, this Court in *Teachers Local No. 1 v. Hudson* determined that transparency is required to enable nonmembers to object and avoid subsidizing union political and other nonbargaining activities. It held that, as a constitutional precondition to collecting agency fees, “[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee.” 475 U.S. 292, 306 (1986). In June 2005, SEIU sent its annual *Hudson* notice to the Nonmembers. Joint Appendix (“JA”) 96-151.

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<sup>1</sup> A more complete statement of the facts of the case and its procedural posture appears in Petitioners’ Brief on the Merits, pp. 2-8.

Shortly after the expiration of the thirty-day period for nonmembers to object under the June 2005 *Hudson* notice, SEIU's legislative bodies began discussing an "Emergency Temporary Assessment" to fund opposition to four ballot initiatives proposed by then-Governor Arnold Schwarzenegger during the summer of 2005. Pet. App. A at 27a, 628 F.3d at 1128 (Wallace, J., dissenting); *accord id.* at 5a-6a, 628 F.3d at 1118-19. SEIU intended to use the assessment "for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." Pet. App. B at 53a. SEIU also warranted that "the fund 'will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.'" Pet. App. A at 6a, 628 F.3d at 1118-19. SEIU's goal was to raise \$12 million for its political campaign. *Id.* at 5a, 628 F.3d at 1118.

SEIU approved the assessment for its new "Political Fight-Back Fund" on August 27, 2005. It became effective on September 1, 2005. About August 31, 2005, SEIU informed its members and the Nonmembers about the imposition of the "temporary dues increase ... 'to defeat Propositions 76 and 75,' other future attacks on the Union pension plan, and [for] other activities," including "to elect a governor and legislature who support public employees and the services [they] provide." *Id.* at 6a, 28a, 628 F.3d at 1119, 1129. This letter "did not provide an explanation for the basis of the additional fees being imposed, and it did not provide nonmembers with an opportunity to object to the additional fees." *Id.* at 28a, 628 F.3d at 1129 (Wallace, J., dissenting).

Deduction of the assessment began with the State employees' September 2005 paychecks, and continued through December 2006.

## **II. The Proceedings Below**

On November 1, 2005, the Nonmembers filed this lawsuit alleging that the collection and use of the \$12 million special assessment was unconstitutional. JA at 16-17. The Complaint sought declaratory and injunctive relief and equitable restitution for violations of the Nonmembers' rights under the First and Fourteenth Amendments and 42 U.S.C. § 1983, as well as attorneys' fees and costs pursuant to 42 U.S.C. § 1988. JA at 20-23.

The district court entered summary judgment for the Nonmembers "in accordance with the Court's Order[s] of 3/28/08" and "6/17/08." R. 140: Judgment; R. 159: Amended Judgment. It declared that SEIU's June "2005 *Hudson* Notice could not possibly have supplied the requisite information with which nonmembers could make an informed choice of whether or not to object to the Assessment," and that "the 2005 *Hudson* Notice was inadequate to provide a basis for the Union's Assessment." Pet. App. B at 70a. The court emphasized that "[i]t is hard to imagine any circumstances in which it could be more clear that an Assessment was passed for political and ideological purposes." *Id.* at 64a. Therefore, the district court directed SEIU to "issue a proper *Hudson* notice as to the Assessment, with a renewed opportunity for nonmembers to object to paying the non-chargeable portion of the fee. The Union is ordered to issue nonmembers who, pursuant to this proper notice, object to the Assessment a refund, with

interest, of that amount,” *Id.* at 72a, as well as an award of nominal damages. R. 150 at 2.<sup>2</sup>

SEIU appealed. R. 155, 161. On December 10, 2010, a divided panel of the Ninth Circuit reversed. Pet. App. A at 1a-16a, 628 F.3d at 1115-23.

The Nonmembers filed their Petition for Writ of Certiorari on March 10, 2011. This Court granted the Petition on June 27. The Nonmembers filed their Brief on the Merits on September 12. SEIU filed its Motion to Dismiss as Moot on October 3.

### **III. Facts Related to the Motion to Dismiss**

On September 29, 2011, more than two weeks after the Nonmembers filed their Brief on the Merits with this Court, more than three months after the Court granted the Petition, more than three years after the district court entered judgment (R. 140; R. 159), and nearly six years after the elections in which the Nonmembers’ forced dues were expended against their will, Respondent caused to be mailed to most of the Nonmembers a ten-page document that is attached as Exhibit A to the Appendix (“App.”) to the Motion to Dismiss (“Mot.”).<sup>3</sup>

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<sup>2</sup> Respondent asserts that “Petitioners did not request, nor did the District Court grant, any relief – including any forward-looking injunctive relief – relating to future fee increases.” Motion at 4 (citations omitted). Of course, by the time the district court entered judgment in late March 2008, collections of the Emergency Temporary Assessment had ceased more than a year before.

<sup>3</sup> Nearly two weeks later, upon discovery that the notice had not been sent to all of the Nonmembers, SEIU caused to be delivered to 755 additional Nonmembers copies of the same notice. Supplemental (“Supp.”) App. at 14a.

Respondent contends that its actions constitute voluntary compliance with the district court's judgment, and therefore moot the case, because its notice "provide[s] Petitioners and the class they represent with all of the relief that the District Court ordered in this case, and indeed more." Mot. at 1. The district court ordered Respondent to "issue a *proper Hudson* notice as to the Assessment, with a renewed opportunity for nonmembers to object to paying the nonchargeable portion of the fee" and "to issue nonmembers who, pursuant to this *proper* notice, object to the Assessment a refund, with interest, of that amount." Pet. App. B at 72a (emphasis added).

Moreover, the district court specifically *rejected* the proposition that SEIU's *post hoc* fee calculation was appropriate: "the adequacy of *Hudson* notices should not be viewed through a lens skewed by the benefit of hindsight." *Id.* at 65a.

The Nonmembers will not quibble over the contents of SEIU's belated "notice" document, but highlight a few salient points:

1. The mailing offers SEIU's views of this litigation, and an inaccurate rendering of the case as filed, Mot. App. at 7a-9a.

2. The mailing repeats SEIU's litigation contention that some expenditures "funded chargeable ... activities," *Id.* at 10a.

3. While enclosing one dollar (\$1.00) in each mailing, SEIU only notes that it "correspond[s] to the district court's order with regard to nominal damages," *id.* at 11a, not that it is in *compliance with* the district court's judgment.

4. The mailing refers “any questions about the rights and/or procedures” to itself exclusively, rather than to class counsel. *Id.*

Upon these facts, Respondent presents to this Court its Motion to Dismiss as Moot.

## ARGUMENT

### RESPONDENT’S ELEVENTH-HOUR ATTEMPT TO MOOT THIS CASE FAILS.

“[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome,” *City of Erie*, 529 U.S. at 287 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)), such that it becomes impossible for the court to grant “any effectual relief whatever’ to [the] prevailing party,” *id.* (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). While the phrasing varies, “[t]he central question” in a mootness inquiry “is constant—whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties.” *Wright & Miller* § 3533.

A decision on the merits here will have such an impact, for several reasons.

#### **I. Respondent’s Voluntary Cessation Does Not Moot the Case Because It Remains Free to Resume Its Challenged Activity.**

1. The motion should be denied, first and foremost, because this is a “voluntary cessation” case. The primary remedy the Nonmembers obtained below and seek here—namely, a finding that a special assessment without a new *Hudson* notice is unlawful—has a continuing impact on both parties precisely because Respondent stopped its special assessment volunta-

rily and could begin another one at any time. And “[i]t is well settled 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.’” *Friends of the Earth, Inc. v. Laidlaw Evtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)). “[I]f it did, the courts would be compelled to leave ‘[t]he defendant ... free to return to his old ways.’” 528 U.S. at 189.

Informed by that danger, the standard this Court applies “for determining whether a case has been mooted by the defendant’s voluntary conduct is stringent: ‘A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.’” *Id.* (quoting *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968)) (emphasis added). The burden lies with the movant to demonstrate with absolute clarity that the behavior will not recur. *Id.* 528 U.S. at 189.

That burden “is a heavy one.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). It is met where, for example, a student who sues to challenge a high school policy in a particular state moves to another state, never to return, and is graduating; in that circumstance, the student “faces not the slightest possibility” of being affected by the policy again. *Camreta v. Greene*, — U.S. —, 131 S. Ct. 2020, 2034 (2011). It is not met, however, where a city responds to litigation by repealing an objectionable ordinance, because “the city’s repeal ... would not preclude it from reenacting precisely the same provision if the District Court’s judgment were vacated.” *City of Mesquite*, 455 U.S. at 289 n.11. Nor is it met where

the defendant “t[ells] the court that the [objectionable practices] no longer exist[ ] and disclaim[s] any intention to revive them.” *W.T. Grant*, 345 U.S. at 633. That turn of events may well foreclose the Court from issuing an *injunction* to stop the discontinued practice, but it “does not suffice to make a case moot.” *Id.*

As *Hudson* demonstrates, this burden is not met where a union alters its behavior after being hailed into court: “The same concerns—the fear that a defendant would be ‘free to return to his old ways,’ ... and that he would have ‘a powerful weapon against public law enforcement,’ ... dictate that we review the legality of the practice defended before the District Court.” For this reason, this Court there rejected a suggestion of mootness. 475 U.S. at 305 n.14 (citation omitted).

2. Respondent fails to meet its “heavy” burden here. Indeed, Respondent’s arguments are reminiscent of those rejected in *City of Mesquite* and *W.T. Grant*. Respondent argues that “there is no reasonable probability” that its conduct will recur because it “recently amended its internal policies to require that, before collecting any future special assessments ..., it will provide non-members with notice of the assessment and an opportunity to object” to contributing more than “fair-share” fees. Mot. at 13. But that sort of internal policy change does not make “absolutely clear” that the challenged conduct is a thing of the past. *Friends of the Earth*, 528 U.S. at 189. Far from it: for all that appears, Respondent’s policy could change with the tides; it could vote to revert to its old policy at a moment’s notice.

Respondent’s soothing assurances thus are even less compelling than the city’s repeal of its ordinance in *City of Mesquite*; there, at least, the city could take

shelter in the presumption that government bodies act in good faith. See *Alden v. Maine*, 527 U.S. 706, 755 (1999). Respondent is entitled to no such presumption of governmental regularity. Like in *W.T. Grant*, its policy change amounts to merely telling the court “that the [objectionable practices] no longer exist[ ] and disclaim[ing] any intention to revive them.” 345 U.S. at 633.

That does not suffice in *any* circumstance. Much less does it suffice where the defendant continues to insist that its challenged policy is lawful and changes it at the last minute only to avoid a potential adverse ruling. As Wright & Miller observe: “A defendant’s mootness argument is particularly suspect in face of ... abandonment of its conduct mid-trial,” and “[t]he effect of discontinuance may be affected by the defendant’s continued assertion that the discontinued acts are lawful.” *Wright & Miller* § 3533.5; accord *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (no mootness where university “did not change its [challenged] policy for more than a year after the commencement of litigation” and “defended and continues to defend” the policy; court was “left with no assurance” that university “will not reimplement” the policy).

Moreover, Respondent’s “predictable protestations of repentance and reform,” *Gwaltney*, 484 U.S. at 66 (quotation marks & citation omitted), are particularly suspect here given the rights at stake. This Court explained in *Hudson* that non-union employees’ money cannot be “used, *even temporarily*, to finance ideological activities unrelated to collective bargaining.” 475 U.S. at 305 (quotation marks & citation omitted; emphasis added). That is so because “whatever the amount [at stake], the quality of respondents’ inter-

est in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear”; an individual cannot be forced “to contribute even three pence for the propagation of opinions which he disbelieves.” *Id.* (quotation marks & citation omitted). If Respondent were to reverse course and again capture the Nonmembers’ wages for political use, even temporarily, the constitutional deprivation would be severe.<sup>4</sup>

For all of these reasons, Respondent cannot demonstrate that it is “*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.” *Gwaltney*, 484 U.S. at 66. The case is not moot.

3. Respondent argues that the voluntary-cessation doctrine is inapplicable here because “a plaintiff must have a claim for prospective relief on appeal if the ‘voluntary cessation’ exception is to apply,” and “[p]etitioners do not seek prospective relief of any kind.” Mot. at 11. Even assuming Respondent’s premise is correct,<sup>5</sup> its argument fails because the

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<sup>4</sup> Indeed, this is the second time within a decade that a class of nonmembers has had to sue this union to vindicate, after a multi-year battle, their First Amendment rights under *Hudson*. See *Cummings v. Connell*, 402 F.3d 936 (9th Cir. 2005).

<sup>5</sup> Respondent offers no support for the proposition that “prospective relief” is the gatekeeper for voluntary-cessation analysis. *Greenlaw v. United States*, 554 U.S. 237 (2008), is totally inapposite, as Respondent’s own parenthetical makes clear. See Mot. at 11. And while Stern & Gressman state that “[m]ere voluntary cessation ... does not render moot a suit for an injunction...” E. Gressman *et al.*, SUPREME COURT PRACTICE 931 (9th ed. 2007), it is a logical fallacy to conclude from that statement that *only* suits for injunction are amenable to voluntary-cessation analysis. Indeed, this Court has observed that “there is ‘little practical difference’ between an injunction and anticipa-

relief the Nonmembers seek in this case *does* have prospective effect. The Nonmembers seek, and the district court provided, a directive that SEIU perform affirmative acts—namely, issue a proper *Hudson* notice and process and issue subsequent refunds. That is injunctive relief, because when a court “direct[s]” a defendant “to perform certain acts,” the order is “plainly cast in injunctive terms” and is “within the meaning of the word ‘injunction.’” *Aberdeen & Rockfish R.R. v. S.C.R.A.P.*, 422 U.S. 289, 307-08 (1975). And injunctive relief is prospective, as this Court emphasized twice in the last Term alone. *See Los Angeles Cnty. v. Humphries*, — U.S. —, —, 131 S. Ct. 447, 449 (2010) (“The question presented is whether the ... requirement also applies when plaintiffs seek prospective relief, such as an injunction or a declaratory judgment.”); *Christian Legal Soc’y v. Martinez*, — U.S. —, — n.6, 130 S. Ct. 2971, 2982 n.6 (2010) (“CLS’s suit, after all, seeks only declaratory and injunctive—that is, prospective—relief”).

Moreover, plaintiffs also obtained below, and seek on appeal, nominal damages. An award of nominal damages likewise is prospective because it “signifies that there was indeed a breach,” and that determination “may be significant in future dealings between the parties.” *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 461 (7th Cir. 2010) (Posner, J.); *accord Utah Animal Rights Coal. v. Salt Lake City Co.*, 371 F.3d 1248, 1268 (10th Cir. 2004) (McConnell, J., concurring). Respondent’s attempt to avoid voluntary-cessation analysis fails.

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tory relief in the form of a declaratory judgment.” *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432 (1999); *see also California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

**II. This Case Is Not Moot Because the Nonmembers Seek Nominal Damages and Respondent's Voluntary Actions Are No Substitute.**

This case also is not moot for a second, independent reason: the Nonmembers seek nominal damages for the past violation of their constitutional rights.

1. This Court explained in *Carey v. Phipus*, 435 U.S. 247, 266 (1978), that “[b]y making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed[.]” “*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation” of a constitutional right. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). And, of course, “even an award of nominal damages suffices” to constitute “relief on the merits” and create a “material alteration of the legal relationship of the parties.” *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep’t of Health & Human Res.*, 532 U.S. 598, 603-04 (2001) (quotation marks & citation omitted).

As courts consistently have recognized, *Carey* and its progeny stand for the proposition that “a claim for nominal damages avoids mootness” in cases alleging a constitutional deprivation. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (citing *Carey*); accord, e.g., *Utah Animal Rights Coal.*, 371 F.3d at 1257-58 (10th Cir.) (same); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) (same); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) (same); *Doe v. Delie*, 257 F.3d 309, 314 (3d Cir. 2001) (same); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983) (same); *Murray v. Bd. of Trs.*, 659 F.2d 77, 79 (6th

Cir. 1981) (same). That is so because “[t]he very determination that nominal damages are an appropriate remedy for a particular wrong implies a ruling that the wrong is worthy of vindication by an essentially declaratory judgment.” *Wright & Miller* § 3533.3. Thus “[a] valid claim for nominal damages should avoid mootness.” *Id.* So it does here.

2. Respondent does not take issue with (or even address) these authorities. Instead, it argues that the nominal-damages claim is moot because it sent a pamphlet to class members and attached a one-dollar bill to each copy “with a dot of clear, removable glue.” Mot. at 6, 9. But that will not do, for two reasons. First, Respondent did not purport to pay the dollar in satisfaction of each Nonmember’s claim. Instead, it told the class members that the dollar “*correspond[s]* to the district court’s order with regard to nominal damages,” *id.* at 11a (emphasis added), all the while denying that the Nonmembers have been “fully successful in the lawsuit.” *Id.* at 9a. That looks more like a cynical payout than satisfaction of a judgment. It does not moot the case. *Cf. Grand River Dam Auth. v. Eaton*, 803 P.2d 705, 710 (Okla. 1990) (mootness follows from payment only if made with “intent to compromise or settle the matter”). Defendants cannot avoid legal complaints by stapling a dollar to a piece of paper, mailing it to a plaintiff, and saying the dollar “*correspond[s]*” to the plaintiff’s nominal-damages request.

Second, and in any event, Respondent’s gambit entirely ignores the import of nominal damages. “Nominal damages are given, not as an equivalent for the wrong,” 25 C.J.S. Damages § 12, but instead as an “appropriate means of ‘vindicating’ rights.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308

n.11 (1986). *Accord Farrar*, 506 U.S. at 115 (“[A] nominal damages award ... render[s] a plaintiff a prevailing party by allowing him to vindicate his ‘absolute’ right to procedural due process through enforcement of a judgment against the defendant”). This, then, is not a case where “[p]etitioners and the class they represent have received all of the relief that would be available to them following any decision in their favor by this Court.” Mot. at 8 (citing *Brownlow v. Schwartz*, 261 U.S. 216, 217 (1923)). Mailing plaintiffs a dollar, and divorcing that payment from any “vindication” of the plaintiffs’ rights, *Memphis Cmty.*, 477 U.S. at 308 n.11, hardly replaces the damage award the plaintiffs seek. The nominal-damages claim remains justiciable.

### **III. This Case Is Not Moot Because Respondent Did Not Give the Nonmembers All They Seek.**

Respondent’s Motion can and should be denied on a third ground, as well: Even if this were not a voluntary-cessation case, and even if the Nonmembers’ request for nominal damages had been satisfied, they still would not have received all they seek through this lawsuit.

1. To be sure, cases often are deemed moot where the plaintiff “already has ‘obtained everything that [he] could recover’ ... by a judgment of this court in [his] favor.” *Hall*, 437 F.3d at 99 (citation omitted). That proposition, however, has two necessary corollaries. First, a defendant’s promise to give the plaintiff everything he seeks *at some future time* does not moot the case. As Judge Posner has explained, even where a promised payment is “highly likely,” it is “not certain until made, and a case does not become moot merely because it is highly likely to become

moot shortly.” *Selcke v. New England Ins. Co.*, 2 F.3d 790, 792 (7th Cir. 1993); accord *Erie Ins. Prop. & Cas. Co. v. Johnson*, 2011 WL 3607950, at \*3 (S.D. W.Va. 2011) (“Erie cannot ‘moot’ a Counterclaim merely by ... announcing plans of making ... payments in the future.”).

Second, a case is not rendered moot where the relief the plaintiff seeks is “different from what the [defendant] is prepared to allow.” *Marin-Rodriguez v. Holder*, 612 F.3d 591, 596 (7th Cir. 2010) (Easterbrook, J.). That is true even where the differences between what is sought and what is offered are comparatively small. *E.g.*, *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 767 (4th Cir. 2011).

2. The district court’s judgment ordered Respondent to issue objecting Nonmembers “a refund, with interest,” of the non-chargeable portion of the special assessment. Pet. App. at 72a. That order has not yet been fulfilled. Respondent apparently has issued refunds to those class members who objected in response to the May 2005 *Hudson* notice. *See Supp. App.* at 4a-5a, ¶ 7. And it apparently has sent letters to other class members, giving them an opportunity to object and *offering* to refund their money if certain conditions are met. *See Mot.* at 9a. But that is a mere (unenforceable) promise of future payment. Even if that promise were “highly likely” to make this case moot shortly, it is not moot yet. *Selcke*, 2 F.3d at 792.

Moreover, Respondent’s refund notice features all manner of conditions, caveats, and confusions to which the Nonmembers would object if they had a binding judgment to use as a benchmark. It provides that a refund request must: (1) contain an original signature; and (2) include the requester’s social secu-

rity number. Mot. at 9a. It forbids requests by facsimile or email. *Id.* And it offers a lengthy, complex description of this litigation’s procedural history before finally getting around to informing class members of the refund offer. *Id.* at 7a-9a. There is no suggestion that these are rules a court would impose. See, e.g., *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987) (barring “unrealistic and excessively complex procedural requirements”).

More to the point, the Nonmembers object to Respondent’s conditions, caveats, and confusions as unnecessary complications aimed at reducing the number of class members who claim a refund. The district court ordered Respondent to “issue a *proper Hudson* notice.” Pet. App. at 72a (emphasis added). It is not at all clear that Respondent’s homespun notice is “proper”—but as things now stand, there is no court that can adjudicate that question. A reversal on the merits would change that and permit continuing judicial supervision over the matter. The remedy the Nonmembers seek accordingly is “different from what the [defendant] is prepared to allow.” *Marin-Rodriguez*, 612 F.3d at 596. For this reason, too, the case is not moot.

\* \* \*

It is no coincidence that after six years of intransigence, Respondent has suddenly reversed course and made a show of trying to satisfy the Nonmembers’ demands and the district court’s judgment. But Respondent’s efforts have nothing to do with actually fulfilling the district court’s judgment and everything to do with a cynical “attempt to manipulate the Court’s jurisdiction to insulate a favorable decision from review.” *City News*, 531 U.S. at 279 (quoting *City of Erie*, 529 U.S. at 288).

To be sure, Respondent’s manipulative conduct is not enough, by itself, to avoid mootness. But it is relevant. Mootness, after all, is distinct from standing; while the latter doctrine is wholly inflexible, the former allows consideration of a case’s equities. See *Friends of the Earth*, 528 U.S. at 189-91. That is why “there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.” *Id.* at 190. The Court may properly consider the fact that “by the time mootness is an issue, the case has been brought and litigated, often (as here) for years,” and that “[t]o abandon the case at an advanced stage may prove more wasteful than frugal.” *Id.* at 191-92. And the Court can—and does—consider whether a finding of mootness would “reward an arguable manipulation of [the Court’s] jurisdiction.” *City News*, 531 U.S. at 284. Such manipulation is disfavored in general, see *id.*, but it also can bear upon the credibility of a movant’s assertions that challenged activity will not resume in the future. See *City of Erie*, 529 U.S. at 303 (Scalia, J., concurring).

**CONCLUSION**

The Motion to Dismiss should be denied. If, however, this Court grants the Motion, it should at a minimum issue an order directing vacatur of the Ninth Circuit's decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

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