IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION
CASE NO. 5:14-cv-00651-TJC-PRL

ART ROJAS, FRANCES JEAN PORGAL, LUCINDA HALE, AND DANIEL HALE, Plaintiffs, v. CITY OF OCALA, FLORIDA, KENT GUINN, individually, and GREG GRAHAM, individually, Defendants.	**PLAINTIFFS' OPPOSITION TO DEFENDANTS' RULE 60 MOTION FOR RELIEF**

I. The City is not entitled to Rule 60(b) relief.

The City's Rule 60(b) motion must be denied. Rule 60(b) states that "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons . . ." Fed. R. Civ. P. 60(b). Plaintiffs assume the City relies upon 60(b)(4) (void judgment) or else 60(b)(6) (extraordinary circumstances),[1] as those are the only potentially applicable provisions. Relief under Rule 60(b) is "extraordinary and may only be granted in exceptional circumstances." *Zurich N. Am. v. Matrix Serv., Inc*., 426 F.3d 1281, 1289 (10th Cir. 2005) (internal quotation marks omitted). *See also Waddell v. Hemerson*, 329 F.3d 1300, 1309 n. 11 (11th Cir. 2003) ("It is for the public good that there be an end of litigation."). Factors that inform a district court's exercise of discretion[2] in ruling on a Rule 60(b) motion are as follows:

> (1) That final judgments *should not lightly be disturbed*; (2) that the Rule 60(b) motion is not to be used as a *substitute for appeal*; (3) that the rule should be liberally construed in order to achieve *substantial justice*; (4) whether the motion was made *within a reasonable time*; (5) whether . . . there is *merit in the movant's* claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a *fair opportunity to present his claim or defense*; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack. These factors are to be considered in the light of the great desirability of preserving the principle of the finality of judgments.

United States v. Gould, 301 F.2d 353, 355-56 (5th Cir. 1962) (emphasis added). Rule 60 relief is unwarranted here because: (1) there is no merit to the City's mootness argument; (2) even if the City's arguments had merit, it had a nearly a year since *Flanigan's* was decided to present this argument; (3) the City is using Rule 60(b) as a substitute for appeal; and (4) the balance of equities weigh strongly against the City's demand for relief from nominal damages, *infra.*

At the outset, the City is contravening the "well-recognized rule" that "precludes the use of a Rule 60(b) motion as a substitute for a proper and timely appeal." *Burnside v. Eastern*

[1] Relief under Rule 60(b)(6) "is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances, and that, absent such relief, an extreme and unexpected hardship will result." *SEC v. N. Am. Clearing, Inc*., 656 F. App'x 947, 949 (11th Cir. 2016) (citation omitted).

[2] *Toole v. Baxter Healthcare Corp*., 235 F.3d 1307, 1316-17 (11th Cir. 2000) (explaining the "sound discretion" of the district court in reviewing Rule 60(b) motions).

Airlines, Inc., 519 F.2d 1127, 1128 (5th Cir.1975). A Rule 60(b)(4) or (6) motion must be made within a "reasonable time" 60(c)(1), and cannot be used as a substitute for an appeal. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). On May 24, 2018, this Court granted Plaintiffs' Motion for Summary Judgment against the City and Chief Graham (collectively "City" unless otherwise noted), and awarded each plaintiff nominal damages. (Doc.88). On June 25, 2018, the City filed a notice of appeal (Doc.91), pending 18-12679. On July 9, 2018, the City filed its Rule 60(b) Motion (Doc.94), arguing that *Flanigan's Enters. v. City of Sandy Springs*, 868 F.3d 1248, 1253 (11th Cir. 2017) (en banc), decided on August 23, 2017, requires this Court to vacate its May 24, 2018 (Doc.88) order on mootness and standing grounds. (Doc.94 at 1). On the same day, the City filed its "Civil Appeal Statement" asserting the very same mootness and standing issues raised in the Rule 60(b) Motion. (Ex.1). The City offers no explanation for using Rule 60(b) as the vehicle for presenting its arguments in lieu of appeal.

A district court lacks jurisdiction "to *grant* relief under Rule 60(b)" while an appeal is pending. *Madura v. BAC Home Loans Servicing, LP*, 2015 U.S. Dist. LEXIS 32667, at *9 n.8 (M.D. Fla. Feb. 5, 2015) (emphasis added). "A district court, however, retains jurisdiction to entertain and *deny* a Rule 60(b) motion after the filing of an appeal." *Id.* (emphasis added).[3]

Furthermore, "Rule 60(b)(4) does not provide a license for litigants to sleep on their rights." *Espinosa*, 559 U.S. at 275 (denying Rule 60(b) relief because the defendant "forfeited its arguments . . . by failing to raise a timely objection"). The City waited until July 18, 2018—nearly a year after *Flanigan's* was decided—to raise its *Flanigan's* mootness argument without any "reason . . . for failing to take action sooner.'" *Fails v. Byrd*, 2018 U.S. Dist. LEXIS 96013, at *2-3 (N.D. Fla. May 21, 2018) (quoting *BUC Int'l Corp. v. Int'l Yacht Council Ltd.,* 517 F.3d

[3] *See also Madura v. BAC Home Loans Servicing, LP,* 2018 U.S. App. LEXIS 12290, at *10 (11th Cir. May 8, 2018); Fed. R. App. P. 12.1 advisory committee's notes ("After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without remand. But it can entertain the motion and deny it.").

1271, 1275-76 (11th Cir. 2008)).[4] A district court should "deny a Rule 60(b)(4) motion" where the moving party "'does not give an acceptable reason for this delay.'" *Gill v. Wells*, 610 Fed. App'x 809, 812 (11th Cir. 2015) (citation omitted). *See Stansell v. Revolutionary Armed Forces of Columbia*, 771 F.3d 713, 737 (11th Cir. 2014) ("Because Herrera knowingly sat on his rights for *nine months* before filing anything at all with the district court, he waived his right to object" under Rule 60(b)(4)) (citing *Espinosa*, 559 U.S. at 275) (emphasis added); *Pierce v. Kyle*, 535 Fed. Appx. 783, 785 (11th Cir. 2013) (party not entitled to relief under 60(b)(4) where it waited more than one year before raising arguments in 60(b) motion); *Maradiaga v. United States*, 679 F.3d 1286, 1294 (11th Cir. 2012) ("It is not an abuse of discretion for the district court to deny a motion under Rule 60(b) when that motion is premised upon an argument that the movant could have, but did not, advance before the district court entered judgment.").[5]

II. The City failed to demonstrate that this Court's exercise of jurisdiction constituted an "egregious" "usurpation of power" necessary for relief under Rule 60(b)(4).

Even assuming, *arguendo*, that this Court improperly exercised its jurisdiction in granting Plaintiffs' nominal damages—which is manifestly not the case, *infra*— "it is well-settled that a mere error in the exercise of jurisdiction does not support relief under Rule 60(b)(4)." *Oakes v. Horizon Fin., S.A.*, 259 F.3d 1315, 1319 (11th Cir. 2001). *See In re Evans*, 506 F. App'x 741, 744 (10th Cir. 2012) ("[l]ack of subject-matter jurisdiction does not, however, necessarily render a judgment 'void.'"). "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Espinosa*, 559 U.S. at 270. "The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality

[4] The Supreme Court denied *certiorari* in March 2018 (86 U.S.L.W. 3484), yet the City fails to explain why it didn't notify this Court of the Eleventh Circuit's *Flanigan's* ruling before then, nor does it explain why it waited four months after the denial of *certiorari* to make this argument now.

[5] Although 60(b)(4) claims are not ordinarily dismissed as untimely, there are "'situations where the reasonable time limitation would require diligence on the part of the movant.'" *Hertz Corp. v. Alamo Rent-A-Car*, 16 F.3d 1126, 1130 n.8 (11th Cir. 1994) (citation omitted). *See Stansell*, 771 F.3d at 737 ("Herrera does not give an acceptable reason for this delay. Therefore, the district court did not err in denying the Rule 60(b)(4) motion."); *see also Saldana v. United States*, 2018 U.S. Dist. LEXIS 79199, at *5-6 (S.D. Fla. May 9, 2018); *Fails v. Sheriff's Dep't*, 2017 U.S. Dist. LEXIS 62813, at *1-2 (N.D. Fla. Mar. 14, 2017) (Rule 60(b)(4) "motion is untimely" because "Plaintiff provides no reason justifying his extensive delay."); *SEC v. Lauer*, 2015 U.S. Dist. LEXIS 178877, at *9 (S.D. Fla. Nov. 25, 2015).

would swallow the rule." *Id*. "Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect" are granted "only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id.* at 271.

"'[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a judgment void.'" *Id.* (citation omitted). *See also United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) ("Only when the jurisdictional error is 'egregious' will courts treat the judgment as void."). A "judgment is not void and is therefore not within the ambit of 60(b)(4) simply because it is erroneous, or is based upon precedent which is later deemed incorrect or unconstitutional." *Marshall v. Bd. of Educ*., 575 F.2d 417, 422 (3d Cir. 1978) (citations omitted, emphasis added).[6] The City utterly failed to show that this Court's exercise of jurisdiction constituted an "egregious" "usurpation of power." *See United States v. Zimmerman*, 491 F. App'x 341, 346 (3d Cir. 2012) ("we would not conclude that the District Court's exercise of jurisdiction—even if erroneous—rose to the level of a 'total want of jurisdiction' or a 'clear usurpation of power' so as to render the judgment void from its inception.") (citation omitted). In fact, the City failed to demonstrate that this Court's exercise of jurisdiction was erroneous at all, *infra.*

III. This Court's exercise of jurisdiction in awarding nominal damages was not only proper but mandatory under Supreme Court and Eleventh circuit precedent.

A. Supreme Court and Eleventh Circuit precedent *obligate* a court to award nominal damages upon a finding of a past constitutional violation, regardless of whether it is the sole remaining claim, and *Flanigan's* does not hold otherwise.

The Supreme Court "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). The Supreme Court has also made clear that a nominal damages claim, standing alone, survives mootness. *Id.* at 113 (affirming award of only nominal damages). So too has the Eleventh

[6] *See also Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374-78 (1940); *Pierce v. Kyle*, 535 F. App'x 783, 785 (11th Cir. 2013) ("Rule 60(b)(4) applies only where: (1) the court that rendered judgment lacked even an 'arguable basis' for exercising jurisdiction; or (2) the judgment was premised on a due process violation that deprived a party of notice or the opportunity to be heard.").

Circuit. *See Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty., Fla*., 842 F.3d 1324, 1330-31 (11th Cir. 2016) ("[Plaintiffs'] demands for nominal damages are not moot. . . . even [if] injunctive or declaratory relief is unavailable."); *Gray v. Bostic*, 720 F.3d 887, 893 (11th Cir. 2013) (citing *Farrar*) (a "plaintiff who wins nominal damages" *only* "is a prevailing party under 42 U.S.C. § 1988."); *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1244, 1246 (11th Cir. 2011); *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007); *see also L.M.P. v. Sch. Bd*., 879 F.3d 1274, 1280 (11th Cir. 2018) (not disturbing district court's finding that plaintiffs were entitled to nominal damages only); *Hoever v. Belleis*, 703 F. App'x 908, 912 (11th Cir. August 10, 2017) (nominal damages claim was not moot even though the plaintiff's "recovery was necessarily limited to nominal damages"). As this Court summarized in 2017:

> In *Carey v. Piphus*, 435 U.S. 247 (1978), the Supreme Court held that proof of a violation of a fundamental Constitutional right *mandated* an award of nominal damages . . . This rule has been *consistently applied* in the Eleventh Circuit where a Constitutional violation has been found.[7]

The Eleventh Circuit has indeed "held *unambiguously* that a plaintiff whose constitutional rights are violated is *entitled* to nominal damages even if he suffered no compensable injury." *Slicker v. Jackson*, 215 F.3d 1225, 1231-32 (11th Cir. 2000) (emphasis added). In *Slicker*, the court ruled that even though the plaintiff could not prevail on any other claim, "under *controlling case law* the district court erred in not allowing Slicker to seek nominal damages." *Id.* (emphasis added).

Nominal damages are therefore mandatory "if a plaintiff establishes a violation of a fundamental constitutional right." *Hughes*, 350 F.3d at 1162.[8] "It has long been recognized by the Supreme Court and the Eleventh Circuit that nominal damages serve to 'vindicate[] deprivations of certain 'absolute' rights.'" *Whitfield v. Thompson*, 165 F. Supp. 3d 1227, 1236-37 (S.D. Fla. 2016) (citing *Carey*, 435 U.S. 247; *Brooks v. Warden*, 800 F.3d 1295, 1308 (11th

[7] *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty*., 249 F. Supp. 3d 1286, 1291 (M.D. Fla. 2017) (emphasis added) (citing *Hughes v. Lott*, 350 F.3d 1157 (11th Cir. 2003); *KH Outdoor LLC v. City of Trussville*, 465 F.3d 1256 (11th Cir. 2006); *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008)).
[8] *Accord Williams v. Brown*, 347 F. App'x 429, 436-37 (11th Cir. 2009); *KH Outdoor*, 465 F.3d at 1262; *Caban-Wheeler v. Elsea*, 71 F.3d 837, 841-42 (11th Cir. 1996) (nominal damages required).

Cir. 2015); *Hughes*, 350 F.3d 1157). The Eleventh Circuit has applied this rule to Establishment Clause violations specifically. *See Pelphrey*, 547 F.3d at 1282 ("Because the taxpayers proved a constitutional violation, they are *entitled* to nominal damages.") (emphasis added); *Pelphrey v. Cobb Cty.,* 495 F. Supp. 2d 1311, 1319 (N.D. Ga. 2007) ("a plaintiff who vindicates a right under the Establishment Clause . . . is entitled to an award of nominal damages").[9]

A district court has *no discretion* to deny nominal damages if a past constitutional violation is demonstrated, and will be reversed if it dismisses a case without considering a remaining nominal damages claim. *See Jackson v. Hill*, 569 Fed. Appx. 697, 699 (11th Cir. 2014) ("The district court erroneously failed to consider whether Jackson was entitled to nominal damages"); *see also Brooks*, 800 F.3d at 1307-08; *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1185 (11th Cir. 2009 ("We hold that Amnesty's complaint properly alleges a claim for nominal damages for the violation of its constitutional rights, and reverse the district court's dismissal of that portion of the complaint."); *Virdi v. Dekalb Cty. Sch. Dist*., 216 F. App'x 867, 873 (11th Cir. 2007) ("The fact that Virdi suffered a constitutional violation means that he is *entitled* to an award of nominal damages.") (emphasis added). Even when a plaintiff has not requested nominal damages in his complaint, the Eleventh Circuit has held that a district court must still consider whether such damages are recoverable before dismissing a complaint.[10]

By "making the deprivation of such rights actionable for nominal damages . . . the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). "Perhaps even more important to society, however, is the ability to hold a municipality accountable." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317-18 (2d Cir. 1999). Nominal damages also "encourage the municipality to reform the

[9] *See also Al-Amin v. Smith*, 511 F.3d 1317, 1335 (11th Cir. 2008) ("Our precedent . . . recognizes the award of nominal damages for violations of the . . . right to free speech"); *Trussville*, 465 F.3d at 1261 ("First Amendment violation"); *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980).

[10] *See Magwood v. Sec'y, Florida Dep't of Corr.,* 652 Fed. App'x 841, 845 (11th Cir. 2016); *Hale v. Sec'y for Dep't of Corr*., 345 F. App'x 489, 492 (11th Cir. 2009) (unpublished) (pro se prisoner not precluded from seeking nominal damages claim for violation of his First Amendment rights, and district court erred by failing to consider whether nominal damages were recoverable before dismissing case); *Williams v. Brown*, 347 F. App'x 429, 436 (11th Cir. 2009) (same).

patterns and practices." *Id.* Nominal damages often serve their most important function in "one-time" situations. The "rationale for the award of nominal damages being that federal courts should provide some marginal vindication for a constitutional violation." *Price v. City of Charlotte*, 93 F.3d 1241, 1246 (4th Cir. 1996).

B. The Eleventh Circuit's narrow ruling in *Flanigan's*—limited solely to challenges to repealed ordinances—has no bearing on this case.

1. *Flanigan's reaffirmed* the general rule that a plaintiff who proves a deprivation of *a past constitutional right* is entitled to nominal damages even if that is the plaintiff's sole remaining remedy.

Contrary to the City's argument, *Flanigan's* did not change the settled rule that nominal damages are *mandatory* upon a finding of a past constitutional violation, even if other remedies have been mooted and it is the sole remaining claim. *See generally Alberto v. Jones*, 2018 U.S. Dist. LEXIS 36168, at *11 (N.D. Fla. Feb. 5, 2018) ("A plaintiff *is entitled* to receive nominal damages for the violation of a fundamental constitutional right") (emphasis added, citation omitted); *Oliver v. Gafford*, 2018 U.S. Dist. LEXIS 69599, at *35 & n.19 (N.D. Fla. Jan. 18, 2018) (plaintiff "of course, may proceed on his claim for nominal damages" even though he would "be limited to recovery of nominal damages if he succeeds on any of his remaining claims that his constitutional rights were violated"). *See also infra* at III-B-3. Nor could it in light of *controlling* Supreme Court precedent. *See Farrar*, 506 U.S. at 115. Indeed, a year after *Flanigan's* was decided, the Eleventh Circuit reaffirmed the well-settled rule that a claim for damages, standing alone, survives mootness, even if an amendment to a challenged ordinance moots all remaining claims. *Checker Cab Operators, Inc. v. Miami-Dade Cty.*, 2018 U.S. App. LEXIS 21729, at *11-13 (11th Cir. Aug. 6, 2018).

Flanigan's applies only to a narrow category of cases involving challenges to repealed legislation where *no past* constitutional violation is established. 868 F.3d. at 1263-64. The Eleventh Circuit stressed that its decision had no bearing on the standard nominal damages awards that rectify a *past* constitutional harm (as here): "To be sure, there are cases in which a judgment in favor of a plaintiff requesting only nominal damages would have a practical effect

on the parties' rights or obligations." *Id*. "Likewise, there are situations in which nominal damages will be the *only appropriate remedy*." *Id.* (emphasis added). The court held: "In such circumstances, the exercise of jurisdiction *is plainly proper*." *Id.* (emphasis added).

The court simply noted one caveat to the general rule: "situations in which the same award would serve no purpose other than to affix a judicial seal of approval to an outcome that *has already been realized*." *Id.* at 1263-64 (emphasis added). It found that "[t]his case is squarely of that last variety." *Id.* The court explained that because plaintiffs sought to enjoin an ordinance, and that ordinance had been repealed: "*Appellants have already won*. Their victory, while perhaps not expedient, is comprehensive. They have received all the relief they requested and there is nothing of any practical effect left for us to grant them." *Id.* (emphasis added). The court cautioned that its ruling was confined to challenges to *repealed legislation*: "we hold 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." *Id.* at 1263-64 (emphasis added).

The court explicitly clarified, again, "our holding here does not foreclose the exercise of jurisdiction *in all cases* where a plaintiff claims only nominal damages." *Id.* at 1263 n.12. And yet again: "Our holding today that a prayer for nominal damages cannot save *this case* from mootness *does not imply* that a case in which nominal damages are the only available remedy *is always or necessarily moot*." *Id.* 1270 n.23 (emphasis added). On the contrary, the court validated its prior holdings, preserving the general rule that a sole nominal damages claim alone survives mootness so long as a *past violation* is found:

> This Court has long recognized that "[n]ominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages." [Citing *Trussville*, 465 F.3d at 1260; *Hughes*, 350 F.3d at 1162]. Thus, where . . . [a] court determines that a *constitutional violation occurred*, but that no actual damages were proven, it is within its Article III powers to award nominal damages.

Id. (emphasis added). The court was beyond clear: "Today's holding does not, of course, alter this long-standing view." *Id.*

2. Unlike in *Flanigan's*, the Plaintiffs here proved a past deprivation of a fundamental right, entitling them to nominal damages.

This case fits squarely within the general category of nominal damages claims—those involving a *past constitutional violation*—not the "last variety" involving a challenge to a repealed ordinance as was presented in *Flanigan's*. 868 F.3d at 1264. Unlike in *Flanigan*'s, the Plaintiffs here suffered a constitutional violation through their direct unwelcome contact with the City's Prayer Vigil and actions promoting it. (Doc.88 at 37). "Quite simply, when constitutional rights are violated, a plaintiff may recover nominal damages." *Trussville*, 465 F.3d at 1261 (internal quotation marks omitted). This constitutional injury could not be repealed. A violation of the First Amendment itself "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also S.D. v. St. Johns Cty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1096 (M.D. Fla. 2009) ("Plaintiffs' loss of rights guaranteed to them by the Establishment Clause of the First Amendment constitutes irreparable injury"); *Gibson v. Lee Cty. Sch. Bd.*, 1 F. Supp. 2d 1426, 1434 (M.D. Fla. 1998) ("An infringement of Plaintiffs' First Amendment rights guaranteed by the Establishment Clause, even for minimal periods of time, constitute[s] irreparable injury").[11] The "injury that gives standing to plaintiffs" in Establishment Clause cases is the "unwelcome direct contact" with the state-sponsored religion. *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1086 (4th Cir. 1997). The Eleventh Circuit has recognized that an actual constitutional injury occurs when a plaintiff is "subjected to unwelcome religious statements.'" *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (citation omitted). *See also Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003) ("the worst of the wound is inflicted by the [religious] monument itself."). Thus, the Plaintiffs here suffered a clearly defined, past constitutional violation—an irreparable injury—and because it was a one-time event, this is precisely the type of case "in which nominal damages [is] the *only appropriate remedy* to be awarded to a victorious plaintiff." *Flanigan's*, 868 F.3d at 1264 (emphasis added).

The plaintiffs in *Flanigan's* failed to demonstrate a past constitutional violation. The

[11] *See Herdahl v. Pontotoc Cnty. Sch. Dist.*, 887 F. Supp. 902, 904 n.1 (N.D. Miss. 1995) (Establishment Clause violations "are, as a matter of law, injurious.").

ordinance banned sexual devices and the plaintiffs alleged that they intended to purchase or sell such devices *in the future*, but there was no proof the ordinance had been unconstitutionally applied to them in the past. *Id.* at 1253-54, 1265. The plaintiffs therefore did not demonstrate a past constitutional violation.[12] The court underscored the fact that "the only injury of which Appellants complained, and thus the only one we have the power to remedy, was the existence of a constitutionally impermissible prohibition." *Id.* at 1264-65. Their complaints "pray predominantly—and, in Inserection's case, exclusively—for declaratory and injunctive relief" to repeal the ordinance. *Id.* "Having already achieved that," they had "already won." *Id.*

The Plaintiffs here, by stark contrast, "won" nothing when the Prayer Vigil ended at its scheduled time. Nothing could be repealed. The damage was irreparably done.[13] The Court's award of nominal damages was therefore not a "judicial seal of approval to an *outcome that has already been realized*." *Flanigan's*, 868 F.3d at 1264 (emphasis added). Instead, nominal damages were the "*only appropriate remedy*," making this Court's "exercise of jurisdiction [] *plainly proper*." *Id.* (emphasis added). In *Gray v. Bostic*, 720 F.3d 887, 896 (11th Cir. 2013), the Eleventh Circuit emphasized the importance of nominal damages in cases like this:

> Justice O'Connor's concurring opinion in *Farrar* reminds us that not all nominal damages awards are *de minimis*. *Id*. at 121 ("Nominal relief does not necessarily a nominal victory make."). This is because "an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved." *Id*. Thus, *Farrar* allows us to also consider the significance of the legal issue on which the plaintiff claims to have prevailed.

"The right to be free from a state establishment of religion is a fundamental right." *Pelphrey*, 495 F. Supp. 2d at 1319; *see also Milwaukee Deputy Sheriffs Ass'n v. Clarke*, 2008 U.S. Dist.

[12] Even the dissent suggested only that the city "*potentially* violated Plaintiffs' constitutional rights *by enacting this ordinance*." 868 F.3d at 1274-75 (Wilson, J., dissenting) (emphasis added).

[13] To reiterate, this Court found the Plaintiffs suffered a concrete constitutional injury when they "attended the Prayer Vigil but were unable to participate in any of the activity because the speakers only invited the audience to pray and sing." (Doc.88 at 19). They also suffered a concrete constitutional injury when they encountered the City's communications promoting prayer and the Prayer Vigil. (Doc.88 at 18). And, as this Court noted, they were unconstitutionally "forced to choose between avoiding the religious message and being involved members of their community," which was "exactly the Hobson's choice creating plaintiffs' injury." (Doc.88 at 28).

LEXIS 12662, at *5 (E.D. Wis. Feb. 5, 2008) ("by vindicating a fundamental right and clarifying that public employees could avail themselves of it, plaintiffs' action served an important public purpose.") (Establishment Clause case).

"[V]indicating a constitutional right against a municipal defendant heightens the public benefit created by a lawsuit." *Villano v. City of Boynton Beach*, 2001 U.S. App. LEXIS 15419, at *12 (11th Cir. June 27, 2001) (citations omitted). "Public benefit is a distinct measure of success in civil rights actions and was a central aim of [Plaintiffs'] litigation." *Id.* "When courts affirm the constitutional rights of citizens, public officials are deterred from violating other citizens' rights in the future." *Popham v. Kennesaw*, 820 F.2d 1570, 1580 (11th Cir. 1987). "This is especially true in the area of police misconduct where injunctive relief is generally unavailable to safeguard individual rights." *Id*. Thus, this Court's nominal damages award serves to promote the Ocala Police Department's "'scrupulous observance' of the Constitution." *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1242 (10th Cir. 2010) (citing *Carey*, 435 U.S. 247).

Vacating the nominal damage award would produce the opposite effect, serving only to *vindicate the City* and its officers for trampling on vital constitutional rights. This would be manifestly unjust, particularly because the City flagrantly violated the Constitution: "No factually particularized, pre-existing case law was necessary for it to be obvious to local government officials that organizing and promoting a Prayer Vigil would violate the Establishment Clause," the magistrate judge declared. (Doc.14 at 24). This Court agreed: "By these authorities, all of which well-predate the actions here, a reasonable fact-finder could find that it was *clearly established* that a government-sponsored prayer vigil would violate the Establishment Clause." (Doc.88 at 51-52) (emphasis added). "Even without more," this Court noted, "an invitation by a city police department encouraging the community's attendance at a Prayer Vigil entangles the government with religion." (*Id.* at 38). "Given the additional involvement of the Ocala Police Department Chaplains in organizing and participating in the event while wearing their Ocala Police Department uniforms, the entanglement *was excessive*." (*Id.*) (emphasis added). The Court further observed: "Given that the facebook page posting by

the Ocala Police Department asked Ocala's citizens to join in 'fervent prayer'– an undisputedly religious action, and that the Prayer Vigil consisted of chaplains offering Christian prayers and singing from the stage with responsive audience participation, a reasonable observer would find that the Prayer Vigil had a religious purpose." (Doc.88 at 33-34). The Court added (at 34):

> The content of the facebook letter (inviting the community to come join in fervent prayer), the name of the event ('Community Prayer Vigil'), the nature of the speakers' remarks (Christian prayers and songs), the participation from the crowd (responding in religious colloquy with speakers, holding hands in circles, bowing heads), all bespeak the religious effect of the activity, which was to promote prayer.

Flanigan's would even be inapposite if the City had cancelled the Prayer Vigil, because, as this Court correctly found, the Plaintiffs *already* suffered a deprivation of their Establishment Clause rights by the City's actions leading up to the event. (Doc.88 at 33-34). *See also Doe v. Crestwood,* 917 F.2d 1476, 1479 (7th Cir. 1990); *Newman v. City of E. Point*, 181 F. Supp. 2d 1374, 1377-78 (N.D. Ga. 2002). This Court admonished: "While the City paints this as a fleeting incident that could not possibly be deemed official policy so as to subject it to liability, in fact, the events here took place over the course of eight days, beginning with Chief Graham's calling the meeting and culminating with the Prayer Vigil." (Doc.88 at 56-57). During that time "both Chief Graham and Mayor Guinn took many actions in their official roles in very public ways to initiate, organize, facilitate, promote, encourage, endorse, and otherwise sponsor the Prayer Vigil (all in the face of vocal opposition which pointed out the violation), *easily* subjecting the City of Ocala to liability for violating the Establishment Clause." (*Id.*) (emphasis added).

And yet, despite being presented with *repeated* opportunities to cancel the event, the City's officials not only refused, they *doubled down*. "Soon after the Vigil was advertised, several citizens, including some of the plaintiffs, contacted Chief Graham and Mayor Guinn, expressing concern that a prayer vigil organized by a police department would violate the U.S. Constitution." (Doc.88 at 10). Chief Graham proclaimed: "I have no intention of canceling the event." (Doc. 54-40). The Chief responded to a supporter (subject line: "Stand tall on prayer!"):

> Thanks for the encouraging words. I have been getting quite a few responses from

> people, mostly from out of our area, who oppose this. I have no intention on calling this gathering off nor changing my personal belief on the power of prayer. Take care and I hope to see you on Wednesday.

(Doc. 54-55). Mayor Guinn also responded to a citizen's complaint about what the citizen perceived to be the Police Chief's endorsement of religion: "I think this is great. I'll be sure to praise him [Chief Graham] for it." (Doc. 54-49 at 3). The Mayor wrote to Chief Graham about the Prayer Vigil two days later, stating: "As I told you I think this is a great idea and have been responding to the atheist groups that are writing me about it. I put it on my calendar to be there." (Doc. 54-25 at 2). The next day, Mayor Guinn wrote to a protesting citizen who had urged the Mayor to show leadership in addressing the Chief's violation of the First Amendment, saying: "I'm proud to stand by my Chief and support him. Times like this do test *leadership* and that's why *we're* leading the community in this prayer vigil. Yes *we* have heard from folks like you who don't understand the constitution. *We are* doing absolutely nothing wrong." (Doc. 54-51). In responding to another citizen's concern, Mayor Guinn proclaimed:

> Thanks for your interest in our community. There is nothing in the constitution to prohibit us from having this vigil. *Not only are we not canceling* it we are trying to promote it and have as many people as possible to [sic] join us. We open every council meeting with a prayer. And we end the prayer in Jesus name we pray. Our city seal says "God be with us" and we pray that he is and us with him.

(Doc. 54-44 at 2). The City was presented with another opportunity to cancel the event when the AHA "urged Chief Graham to remove the Prayer Vigil letter from the Ocala Police Department facebook page on the grounds that it was an unconstitutional government endorsement of religion." (Doc.88 at 14) (Doc. 54-46 at 2). But not even the threat of a lawsuit could deter the City from holding its Prayer Vigil. "Chief Graham responded that his efforts were upholding the rights of others to assemble and that taxpayer funds were used only to the minimal extent that Graham wrote the letter and printed it on Department letterhead." (Doc.88 at 14) (Doc. 54-46).

3. *Flanigan's* did not abrogate or depart from settled law.

Flanigan's did not change settled law. 868 F.3d at 1270 n.23. It remains firmly established in this Circuit that the "'repeal of a challenged law does not necessarily moot a claim for damages by a plaintiff alleging *a past violation of his rights*.'" *Rodriguez v. Jones*, 2018 U.S.

Dist. LEXIS 128958, at *3 n.1 (N.D. Fla. May 25, 2018) (citation omitted, emphasis added). *See also McKenzie v. Riley*, 2013 U.S. Dist. LEXIS 60367, 2013 WL 1800554, at *5 (M.D. Ala. Apr. 29, 2013) (noting that "repeal of a challenged law does not necessarily moot a claim for damages by a plaintiff alleging a past violation of his rights.").

The Eleventh Circuit has always treated challenges to repealed legislation differently from typical nominal damages claims, holding that while nominal damages are required if a plaintiff proves a *past constitutional violation* and that claim can never be mooted, *e.g.*, *Carver*, 842 F.3d at 1330-31; *Pelphrey*, 547 F.3d at 1282, the "repeal of the challenged ordinance *may not necessarily moot* the plaintiff's constitutional challenge to that ordinance." *Crown Media, LLC v. Gwinnett Cty.*, 380 F.3d 1317, 1324-25 (11th Cir. 2004) (emphasis added).[14] Whether a plaintiff is entitled to nominal damages arising from challenged legislation turns on whether that legislation was unconstitutionally applied to the plaintiffs before it was repealed.

In *Tokyo Gwinnett, LLC v. Gwinnett County*, the Eleventh Circuit made clear that "when a plaintiff challenges the constitutionality of local ordinances, replacement of the ordinances usually moots the plaintiff's claims for prospective relief, *but not his claims for damages*." 669 F. App'x 531, 532 (11th Cir. 2016) (internal citations omitted, emphasis added). The court thus held that the district court "erred in dismissing as moot Tokyo Valentino's claims for damages." *Id.* The new ordinances could not "have mooted those damages claims" *if* the plaintiffs demonstrated that harm "was *already caused* by the old ordinances." *Id.* (emphasis added).[15]

In *Granite State Outdoor Advert., Inc. v. City of Clearwater*, the Eleventh Circuit again held: "Because Granite State has requested damages, however, the changes made to the

[14] *Accord Tanner Advert. Grp., L.L.C. v. Fayette Cty.*, 451 F.3d 777, 785 (11th Cir. 2006).

[15] *Accord DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1259 (11th Cir. 2007) ("If a litigant asserts damages from the application of a constitutionally defective statute, he may be able to pursue his constitutional challenge notwithstanding later legislative changes that would appear to address his complaint."); *id.* at n.5 ("such a request may save an otherwise moot constitutional claim."); *KH Outdoor, L.L.C. v. Clay Cty.*, 482 F.3d 1299, 1303 (11th Cir. 2007) ("because KH Outdoor requested damages, the changes made to the ordinance do not moot KH Outdoor's challenge to the Old Sign Ordinance."); *Action Outdoor Advert. JV, LLC v. City of Destin*, 19 Fla. L. Weekly Fed. D 91 n.20 (U.S. N.D. Fla. 2005) ("The repeal of a statute may not, however, moot a constitutional challenge in a case in which the plaintiff seeks damages").

ordinance do not make this case moot." 351 F.3d 1112, 1119 (11th Cir. 2003) (citations omitted). Thus, it found, "we must rule on the constitutionality of the provision." *Id.* But it simply found that "this section was not unconstitutionally applied to Granite State." *Id.*

Conversely, in *Trussville*, the Eleventh Circuit held that the plaintiffs were entitled to nominal damages because the legislation *was* unconstitutionally applied to them before it was repealed. 465 F.3d at 1261-62. The court reiterated that plaintiffs are entitled to nominal damages when they prove "a violation of a fundamental constitutional right." *Id.* The court distinguished *Granite State*, nothing that "[h]ere, that constitutional violation existed because the ordinance impermissibly discriminated based on the content of speech, and, unlike the situation in *Granite State*, the violation inheres in the very section of the ordinance used to deny KH Outdoor's permits." *Id.* The court found nominal damages critical in such a case, declaring: "an award of nominal damages is particularly appropriate in a First Amendment overbreadth case" because it vindicates the rights of "'other members of society.'" *Id.* (citation omitted).

Flanigan's expressly persevered the foregoing authorities. The court relied directly on *Trussville*, 465 F.3d at 1260, to support its ruling that "'[n]ominal damages'" remain warranted "'*if a plaintiff establishes a violation of a fundamental constitutional right*.'" 868 F.3d at 1270 n.23 (emphasis added).

That *Flanigan's* did not overturn settled precedent is underscored by the fact that, since it was decided, this Court and other Courts within the Eleventh Circuit have continued to hold that nominal damages are mandatory upon a finding of a past constitutional violation, and that a nominal damages claim survives mootness even when it is the only remaining claim:

- *Spears v. Martin Corr. Inst.*, 2018 U.S. Dist. LEXIS 110244, at *9 (S.D. Fla. June 29, 2018) ("even if the plaintiff might only be entitled to nominal damages, the complaint is nevertheless sufficient to survive the motion for judgment on the pleadings.")
- *Alberto v. Jones*, 2018 U.S. Dist. LEXIS 36168, at *11 (N.D. Fla. Feb. 5, 2018) ("A plaintiff is entitled to receive nominal damages for the violation of a fundamental constitutional right, even if he cannot prove actual injury.")
- *Hunter v. Corr. Corp. of Am.,* 2017 U.S. Dist. LEXIS 199955, at *16 (S.D. Ga. Dec. 5, 2017) ("the Court finds Defendants . . . violated Plaintiff's rights under the Establishment

Clause and awards Plaintiff $1.00 in nominal damages . . . Plaintiff's claims for injunctive relief are moot.")

- *Velasquez v. Graham*, 2018 U.S. Dist. LEXIS 127503, at *1-2 (N.D. Fla. July 28, 2018) (allowing sole remaining nominal damages claim to proceed)
- *Oliver*, 2018 U.S. Dist. LEXIS 69599, at *35 (although plaintiff could not prevail on prospectively relief claims, "Plaintiff, of course, may proceed on his claim for nominal damages if he is able to establish that his constitutional rights were violated")
- *Fisher v. Jones*, 2018 U.S. Dist. LEXIS 67544, at *6 (N.D. Fla. Apr. 23, 2018) ("Therefore, plaintiff's recovery in this action is limited to nominal damages.")
- *Knott v. McLaughlin*, 2018 U.S. Dist. LEXIS 2587, at *1 (M.D. Ga. Jan. 8, 2018) ("the Plaintiff's claims may proceed, but his monetary relief is limited to nominal damages.")
- *Walker v. Herron*, 2018 U.S. Dist. LEXIS 69257, at *1 (N.D. Fla. Apr. 25, 2018) ("Plaintiff is permitted to proceed on his claims for nominal damages only."); *Walker v. Herron*, 2018 U.S. Dist. LEXIS 69596, at *7 (N.D. Fla. Mar. 19, 2018) ("Accordingly, Plaintiff is only entitled to pursue a claim for nominal damages.")
- *Walker v. Akridge*, 2018 U.S. Dist. LEXIS 111025, at *32 n.12 (N.D. Fla. Feb. 26, 2018) ("Plaintiff, of course, would be permitted to proceed on a claim for nominal damages if he could establish that Dr. Akridge violated his constitutional rights")
- *Teggerdine v. Speedway*, LLC, 2018 U.S. Dist. LEXIS 91043, at *4 (M.D. Fla. May 31, 2018) (sole nominal damages claim not dismissed on grounds of mootness)
- *Hall v. Palmer*, 2017 U.S. Dist. LEXIS 174013, at *47 (M.D. Fla. Oct. 20, 2017) ("Thus, any claim for nominal damages remains.")
- *Brazill v. Miners*, 2017 U.S. Dist. LEXIS 213329, at *2 (M.D. Fla. Dec. 28, 2017) ("Plaintiff's request for declaratory relief and compensatory and punitive damages were dismissed (see Dkts. 49, 69). His request for nominal damages for violation of his right to bodily privacy claim and retaliation claim was allowed to proceed")
- *Moody v. Shoultes*, 2018 U.S. Dist. LEXIS 25382, at *1-2 (M.D. Ga. Feb. 16, 2018) ("Plaintiff is permitted to pursue his Eighth Amendment claims for nominal damages")
- *Sears v. Thomas*, 2018 U.S. Dist. LEXIS 114466, at *32 (S.D. Fla. July 9, 2018) ("where a plaintiff suffers only a de minimis physical injury, nominal damages are still available."); *Sears v. Thomas*, 2017 U.S. Dist. LEXIS 186498, at *6 (S.D. Fla. Nov. 8, 2017) ("Plaintiff's free exercise claim for nominal damages may proceed" alone)
- *Clark v. Price*, 2018 U.S. Dist. LEXIS 1479, at *16 (N.D. Ala. Jan. 4, 2018) ("a plaintiff claiming violation of his constitutional rights is entitled to nominal damages even if he suffered no compensable injury")
- *Hammonds v. Jones*, 2018 U.S. Dist. LEXIS 36438, at *8-9 (M.D. Ala. Mar. 5, 2018) (plaintiff entitled to proceed on his nominal damages claim even though claims for injunctive and declaratory relief were moot)

- *Young v. Smith*, 2018 U.S. Dist. LEXIS 119068, at *40 (S.D. Ga. July 17, 2018) ("successful constitutional claimants . . . may still recover nominal damages.")
- *Rodriguez v. Jones*, 2018 U.S. Dist. LEXIS 128958, at *3 n.1 (N.D. Fla. May 25, 2018) (noting that voluntary repeal of challenged law would "not necessarily moot this case if there were a basis for nominal damages")
- *Wilson v. Danforth*, 2018 U.S. Dist. LEXIS 9846, at *4 (S.D. Ga. Jan. 22, 2018) ("Plaintiff's recovery was properly limited to nominal damages.")
- *Washam v. Bush*, 2018 U.S. Dist. LEXIS 49629, at *2 (S.D. Ga. Mar. 26, 2018) ("Plaintiff should be allowed to proceed on his deliberate indifference and equal protection claims and seek nominal damages" on those claims)
- *Johnson v. New Destiny Christian Ctr. Church, Inc.*, 2018 U.S. Dist. LEXIS 130126, at *19 (M.D. Fla. July 30, 2018) ("Nominal damages are appropriate")
- *Maciejka v. Williams*, 2017 U.S. Dist. LEXIS 182842, at *45 (S.D. Fla. Nov. 2, 2017) ("Under these circumstances, Plaintiff is limited to nominal damages.")

C. Contrary to the City's argument, plaintiffs need not demonstrate a likelihood of recurrence to save a nominal damages claim from mootness, although recurrence would be likely here if the Court vacates the nominal damage award.

The City's analysis of *Flanigan's* exhibits a fundamental misunderstanding of mootness, for it discusses at length the "voluntary cessation" exception, suggesting that Plaintiffs must prove a likelihood of recurrence to prevent their nominal damages claim from being moot. (Doc.94 at 3-8). But it is apodictic that "[a] claim for damages does not expire upon the termination of the wrongful conduct. Unlike declaratory and injunctive relief, which are prospective remedies, awards for monetary damages compensate the claimant for alleged past wrongs." *McKinnon v. Talladega Cnty., Ala.,* 745 F.2d 1360, 1362 (11th Cir. 1984) (citation omitted).[16] In 2016, the Eleventh Circuit reiterated that "demands for nominal damages are not

[16] *Accord Philippeaux v. Apartment Inv. & Mgmt. Co*., 598 F. App'x 640, 643 (11th Cir. 2015) (finding claim for damages for past violation of FHA not moot where plaintiff vacated apartment where alleged violation occurred); *Clay*, 482 F.3d at 1303 ("Here, because KH Outdoor requested damages, the changes made to the ordinance do not moot KH Outdoor's challenge to the Old Sign Ordinance."); *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1277 (11th Cir. 2006) (same); *Granite State*, 351 F.3d at 1119 ("Because Granite State has requested damages, however, the changes made to the ordinance do not make this case moot."); *Saleem v. Evans*, 866 F.2d 1313, 1316 (11th Cir. 1989) ("[T]he district court correctly concluded that Diaab's claim for injunctive relief against the warden of WCI is moot because Diaab is no longer incarcerated at WCI. Nonetheless, because his claim for damages remains alive, we are presented with a justiciable case or controversy."); *Lucky Dick Promotions, LLC v. Polk Cty*., 2016 U.S. Dist. LEXIS 152804, at *11 (M.D. Fla. Nov. 3, 2016) (same); *Cross v. City of Sarasota*, 2016 U.S. Dist. LEXIS 152615, at *3 (M.D. Fla. Nov. 2, 2016) (damage claim not moot by amendment).

moot" and remain "'the appropriate means of 'vindicating' rights" even "when injunctive or declaratory relief is unavailable." *Carver Middle Sch,*, 842 F.3d at 1330-31 (citations omitted).

The likelihood of recurrence has no bearing on nominal damages, as the only question is whether a *past constitutional violation occurred* (which again, was not the case in *Flanigan's*). *See Tokyo*, 669 F. App'x at 532 ("The new ordinances cannot have mooted those damages claims because those claims concern harm that, allegedly, was already caused by the old ordinances."); *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1519 (11th Cir. 1992) ("the claim for damages saves from mootness the Society's contention that the 'old' park regulations were unconstitutional as applied to it . . . because that claim [] seeks compensation for a past injury."); *FFRF v. New Kensington Arnold Sch. Dist*., 832 F.3d 469, 478 n.7 (3d Cir. 2016) ("The risk of future contact . . . does not factor into our analysis of whether there is standing to pursue nominal damages.") (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). The Eleventh Circuit has frequently made clear: "when the plaintiff has requested damages, those claims are not moot." *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1244 (11th Cir. 2011)."Relief if the form of damages for a past violation of constitutional rights is not adversely affected by the mootness doctrine." *Myrick v. United States Dep't of Veterans Affairs*, 2017 U.S. Dist. LEXIS 29669, at *20 n.11 (M.D. Ala. Mar. 1, 2017) (citation omitted).[17]

Flanigan's did not abrogate or change this settled rule, and indeed, preserved it, *supra*. Instructively, a year after *Flanigan's* was decided, the Eleventh Circuit once again declared:

> "Although a case will normally become moot when a subsequent [law] brings the existing controversy to an end, when the plaintiff has requested damages, *those claims are not moot*." [*Marietta*, 654 F.3d at 1244]. Unlike claims for declaratory and injunctive relief, which are inherently prospective in nature, "a claim for money damages *looks back in time and is intended to redress a past injury*." *Adler*, 112 F.3d at 1477. Because an "appellant['s] claim for money damages *does not depend on any threat of future harm,* [the] claim remains a live controversy." *Id.* at 1478.

Checker Cab, 2018 U.S. App. LEXIS 21729, at *11-13. In *Checker Cab*, the plaintiffs sought

[17] *See also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 393-94 (1981); *Lee v. Estes*, 2017 U.S. Dist. LEXIS 17480, at *10 (N.D. Ala. Feb. 8, 2017) ("The plaintiff's claim for monetary, albeit nominal damages, is not moot."); *Floyd v. Williams*, 2016 U.S. Dist. LEXIS 179903, at *7-8 (S.D. Ga. Dec. 29, 2016).

declaratory and injunctive relief, as well as damages, in their equal protection challenge to a county's ordinance. *Id.* The ordinance was repealed. Relying on *Flanigan's*, the court ruled that the repealed ordinance "is incapable of sowing future harm, mooting the Medallion Holders' claims for declaratory and injunctive relief." *Id.* "However, because the Medallion Holders also sought damages," the court held that "those claims are not moot." *Id.* Thus, the Plaintiffs here were not required to demonstrate recurrence to maintain their nominal damages.

Nonetheless, Plaintiffs feel obligated to respond to the City's comment that its officials have gone even further than *Flanigan's* repeal of legislation, "unequivocally demonstrating their commitment not to engage in the type of conduct about which Plaintiffs complained." (Doc.94 at 5). This argument is meritless to the point of being frivolous. As this Court found: "*Even after the Vigil*, the Mayor continued to applaud the effort, appearing in media outlets to discuss this lawsuit and the recent Vigil." (Doc.88 at 13 n.8) (emphasis added). "The day after the Prayer Vigil, congratulatory emails circulated within the Ocala Police Department, thanking the Chief, Captains, Officers, Chaplains, and Ms. Haynes for their efforts regarding the Prayer Vigil." (Doc.88 at 20) (Doc. 54-32). And at his deposition, the Mayor maintained his position:

> Q: Can the police chief state, on [Ocala Police Department] letterhead, that people should believe in God? A: Yes.
> Q: [A]s far as you're concerned, if the police chief wants to put out something on letterhead saying that you should believe in God or that you should believe in Jesus, that's fine? A: He can do that.
> Q: So as far as you're concerned, they [the Ocala Police Department] could have another vigil such as that one next week if they wanted to? A: Sure.
> Q: And the chief could post another letter saying that there is something that requires fervent prayer in the city? A: Yes.

(Doc.88 at 13-14 n.8). Additionally, Mayor Guinn acknowledged "that he had the authority to instruct that Ocala Police Department Chaplains not lead prayers at the Prayer Vigil or attend in Ocala Police Department Chaplain uniforms, but he did not consider doing any of that because he believed those actions were permitted under the Establishment Clause." (Doc.88 at 15).

In *Flanigan's*, by contrast, the "City Council itself passed a resolution expressly 'disavow[ing] any intent to reenact [the Ordinance] or any similar regulation.'" 868 F.3d at 1262.

There was "very substantial evidence" that there was "no reasonable expectation that the same or a similar provision will be reenacted." *Id.* at 1260. The "repeal itself was passed unanimously with all members present." *Id.* "Additionally, the City has offered persuasive explanations, not dependent upon this litigation, to explain its course of conduct in repealing the Ordinance." *Id.* Further, the city in *Flanigan's* "*conceded* that [the past legislation] is unnecessary to accomplish one of the key goals of passing it: elimination of the harmful secondary effects of shops that sell the banned devices." *Id*. at 1261 (emphasis added). The City here has done nothing of the sort.

D. The City's standing arguments are meritless.

The City's attempt to rehash its standing arguments is unavailing. (Doc.94 12-13). This Court thoroughly and soundly rejected the City's standing arguments (Doc.88 at 23-28), and the City presents nothing new. Moreover, Rule 60(b) is an improper vehicle for rehashing these arguments, which instead must be raised on its appeal. And again, even assuming, *arguendo*, that this Court's exercise of jurisdiction was erroneous, and even assuming that Rule 60(b) could be used as a substitute for an appeal, for the City to prevail under 60(b)(4), it would have to prove that this Court's exercise of jurisdiction was an egregious usurpation of power. *Espinosa*, 559 U.S. at 270-71. This, the City has failed to do.

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the City's Rule 60(b) motion and grant Plaintiffs' attorneys fees incurred by responding to the same.[18]

Respectfully submitted,

August 15, 2018

[18] Plaintiffs request that the Court add the fees incurred in responding to this Motion to the Plaintiffs' pending fee motion (Doc.90). Ms. Miller spent 57.75 hours researching and analyzing cases, drafting, and revising Plaintiffs' response to the City's Rule 60 Motion. Mr. Niose spent 3 hours reviewing and editing Ms. Miller's draft, as well as discussing initial strategy with Ms. Miller. Based on the reasonable hourly rates claimed in Plaintiffs' Motions for attorneys' fees ($350 for Ms. Miller and $450 for Mr. Niose), Plaintiffs seek $21,562.5 in addition to the amount sought in the Motion for Fees. Plaintiffs remind the Court that such fees go directly to the American Humanist Association's legal center to support future *pro bono* civil lawsuits that seek to vindicate fundamental constitutional rights.

/s/ Monica L. Miller

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CERTIFICATE OF SERVICE

I certify that I electronically filed the PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RELIEF with the Clerk of the Court using the CM/ECF system, which will provide notice to the following CM/ECF participant(s):

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This 15th day of August, 2018.

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