No. 14-17283

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL LEVIN; MARIA LEVIN;
PARKLANE ASSOCIATES, L.P.; SAN FRANCISCO
APARTMENT ASSOCIATION; COALITION FOR BETTER HOUSING,

Plaintiffs - Appellees,

DAVID GREENE,

Intervenor (as to as-applied claims),

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant - Appellant.

On Appeal from the United States District Court
for the Northern District of California
Honorable Charles R. Breyer, District Judge

MOTION TO DISMISS THE APPEAL FOR LACK OF JURISDICTION (MOOTNESS)

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INTRODUCTION

The City of San Francisco (City) initiated this appeal after the District Court for the Northern District of California struck down as unconstitutional the 2014 version of S.F. Admin. Code § 37.9A(e)(3)(E) (2014 Ordinance), Appendix (App.) 30. That law required people applying to withdraw property from the rental market to first pay their tenants large amounts of unrestricted cash so the tenants could rent new housing at the City's high, open market rates for two years. Under the 2014 Ordinance, the required tenant payments were calculated as (1) the difference between the tenant's current, monthly (rent controlled) rate and the monthly rate to rent a comparable unit on the open market (2) multiplied by 24 (months). This tenant payment, which amounted to more than $117,000 in the case of the lead plaintiffs/appellees, was called the "Rental Payment Differential" (Rental Payment Differential or "Payment"). The 2014 Ordinance required property owners to give the Payment to all tenants displaced by an owner's decision to stop renting property, with no accountability as to how tenants spent the money. In his order of October 21, 2014, District Judge Charles Breyer struck down this scheme on its face as an unconstitutional taking of private property. *See* App. at 100-01.

Soon after the City appealed, the City government began considering new legislation that would replace the unconstitutional Rental Payment Differential scheme and conform its code to the district court ruling. Based on this development, the City

sought and received a stay of this appeal. The City has now enacted the proposed new legislation and it is effective. *See* App. at 103-19. The law challenged by Plaintiffs no longer exists. As a result, the City has mooted its appeal and this Court lacks jurisdiction over this case.[1] The Court should accordingly lift the stay and dismiss this appeal.

BACKGROUND

On July 24, 2014, Daniel and Marie Levin (Levins), Park Lane Associates, L.P. (Park Lane), the San Francisco Apartment Association, and the Coalition for Better Housing filed the complaint in this case. That complaint challenged the June 1, 2014, enactment of S.F. Admin. Code Section 37.9A(e)(3)(E), and the Rental Payment Differential obligation it imposed on landlords as a violation of the federal constitution and state law. To understand why recent amendments to the City code moot this case, it is necessary to review the legal and factual context giving rise to this appeal.

A. The Background Legal Framework

1. The Ellis Act and City Process for Withdrawing Rental Units

In 1985, the California legislature enacted Cal. Gov't Code Sections 7060-7060.7, known as the "Ellis Act." This law was intended to protect the right of

[1] The City's position is that it's at least ambiguous whether District Judge Breyer's order enjoins it from implementing its modified relocation payments ordinance. In the absence of clarification on that issue, the City opposes this motion.

rental property owners to stop using their property for rental purposes. It specifically states that: "[n]o public entity . . . shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease . . . ." Cal. Gov't Code § 7060(a). The Act permitted local governments to "mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations." *Id.* § 7060.1(c).

S.F. Admin. Code Section 37.9A establishes a multi-faceted procedure for property owners wishing to exercise Ellis Act rights to withdraw units from the rental market. Central to this process is the filing of a Notice of Intent to Withdraw Rental Units (Notice of Intent to Withdraw) with the City Rent Board. A rental unit is deemed to be withdrawn from the market 120 days after the filing of the Notice of Intent to Withdraw. S.F. Admin. Code § 37.9A(f)(4), App. 32. However, a tenant can extend the effective date of rental unit withdrawal to a *year* from the filing of such a notice if the tenant is "at least 62 years of age or disabled as defined in Government Code § 12955.3, and has lived in his or her unit for at least one year prior to the date of delivery to the Rent Board of the [Notice of Withdrawal]." S.F. Admin. Code § 37.9A(f)(4), App. 32. Once a property owner files a Notice of Intent to Withdraw, his ability to re-rent the property is restricted. S.F. Admin. Code § 37.9A(c), (d), App.

27-28; S.F. Admin. Code § 37.9A(a)(1), App. 27.

2. The 2005 Relocation Payment Law

In 2005, the City enacted S.F. Admin. Code Section 37.9A(e), entitled "Relocation Payments to Tenants" (2005 Ordinance). This law required people withdrawing their property from the rental market after February 20, 2005, to make a $4,500 "relocation payment" to any displaced tenants. S.F. Admin. Code § 37.9A(e)(3)(A), App. 29-30. The 2005 Ordinance requires withdrawing landlords to pay an additional $3,000 to "any tenant who, at the time the [Notice of Withdrawal] is filed with the Board, is 62 years of age or older, or who is disabled within the meaning of Section 12955.3 of the California Government Code." *Id.* § 37.9A(e)(2)(D). This amount is adjusted annually according to the Consumer Price Index (CPI). *Id.* § 37.9A(e)(3)(D), App. 29.

3. The 2014 Ordinance and Challenged Rental Payment Differential Mandate

On June 1, 2014, the City enacted San Francisco Ordinance No. 54-14, codified as S.F. Admin. Code Section 37.9A(e)(3)(E)—the challenged law—to increase the liability of landlords to tenants effected by withdrawal of a unit from the rental market. The 2014 Ordinance states that each tenant displaced by an owner's decision to stop renting "shall be entitled to *the greater* of:

> (i) the payment specified in Subsections 37.9A(e)(3)(A)–(D) [i.e., the 2005 Ordinance]; or

> (ii) an amount equal to the difference between the unit's rental rate at the time the landlord files the notice of intent to withdraw rental units with the Board, and the market rental rate for a comparable unit in San Francisco as determined by the Controller's Office, multiplied to cover a two-year period, and divided equally by the number of tenants in the unit (the "Rental Payment Differential").

Id. § 37.9A(e)(3)(E), *see* App. 30.

This requirement was intended to fund a tenant's acquisition of new housing accommodations in San Francisco at open market rates for two years. *See* Stipulated Facts, Dist Ct. DE 50-1 ¶ 48, App. 11; DE 60-22 at 1-14 (Transcript of Board of Supervisors Land Use Meeting, Mar. 17, 2014); DE 60-24, at 1-2 (Transcript of Board of Supervisors Meeting, Apr. 1, 2014). The 2014 Ordinance was retroactive, requiring even those property owners that had completed the Ellis Act process to make the new Payment if the tenant was still in the unit as of the effective date of the Ordinance. S.F. Admin. Code § 37.9A(e)(3)(F), App. 30. Any displaced tenant entitled to a Payment under the 2014 Ordinance, and who is disabled within the meaning of Section 12955.3 of the California Government Code or over 62 years of age, was also entitled to the additional $3,000 bonus payment authorized by the 2005 Ordinance.

The precise amount of money that landlords had to pay tenants under the Rental Payment Differential mandate was calculated according to a "Rental Payment Differential Schedule" (Schedule) created by the City Controller's Office. S.F.

Admin. Code § 37.9A(e)(3)(E)(ii), App. 30. Pursuant to a Schedule issued soon after the effective date of the 2014 Ordinance, the Rental Payment Differential scheme imposed landlord Payment liabilities from tens of thousands to several hundred thousand dollars. DE 50-1 at 8-10, App. 69-71. Nothing in the 2014 Ordinance required tenants to use a Payment under the Rental Payment Differential scheme for relocation or housing purposes. Indeed, nothing in the 2014 Ordinance constrained or conditioned a tenant's use of a Payment received from a property owner. *Id.* at 10 ¶ 42, App. 71. Nothing in the law required tenants to account for their actual use of the Payment. *Id.*

B. The Individual Plaintiffs: Levins and Park Lane

1. The Levins

The lead plaintiffs in this case are the Levins. They own a two-story house located at 471-473 Lombard Street, in the North Beach area near their business. *See* DE 46 at 7 ¶ 39 (admission in Answer), App. 42.[2] In 2013, the Levins moved into the top floor of the house, a small, one-bedroom unit. The bottom unit remained occupied by a tenant who had moved into the unit in 1988. DE 50-1 at 12 ¶¶ 51-54, App. 73.

In late 2013, the Levins decided to withdraw their property from the rental market under the Ellis Act so they could use the entirety of their house for their own

[2] Citations to DE 46 are designed to refer the Court to factual admissions in the City's Answer. Thus, all factual propositions supported by a reference to DE 46 are admitted facts.

purposes, including for family and friends. Accordingly, on December 16, 2013, they filed a Notice of Intent to Withdraw Units and a Notice of Termination of Tenancy. DE 46 at 7 ¶ 43, App. 42. The tenant paid a rent of $2,479.67 at that time. *Id.* at 7 ¶ 41, App. 42.

The 2005 Ordinance in effect when the Levins filed their Notice of Intent to Withdraw required them to give the tenant a $5,210.91 "relocation payment" to complete the withdrawal of the Property, half of which was due when the Levins served a Notice of Termination of Tenancy. Therefore, when the Levins served such notice on December 16, 2013, they gave the tenant a $2,605.46 payment. DE 50-1 at 12 ¶ 55, App. 73. The tenant subsequently claimed to be disabled "within the meaning of Section 12955.3 of the California Government Code," entitling the tenant to an additional payment in the amount of $3,473,93 and extending the date of withdrawal of the unit to December 16, 2014. DE 46 at 8 ¶ 44, App. 43. The Levins decided not to contest the tenant's claims or the one-year extension on withdrawal. *Id.* Therefore, within 15 days of the tenant's claim, they paid the tenant one-half of the disability bonus of $3,473,93. At that time, the Levins had paid the tenant a total of $6,079.39. DE 50-1 at 13 ¶¶ 56-57, App. 74.

As of June 1, 2014, the Levins' tenant had not vacated their property. Therefore, under the 2014 Ordinance, the Levins became retroactively subject to the Rental Payment Differential. DE 46 at 2 ¶ 6, App. 37. Based on the tenant's monthly

rent of $2,479.67, *id.* at 7 ¶ 41, App. 42, and move in date of 1988, the Rental Payment Differential Scheme required the Levins to pay their tenant $117,958.89 to re-possess their property for non-rental use. DE 50-1 at 13 ¶¶ 61-62, App. 74. If the Levins did not make the required Payment, the withdrawal of their property from the market would be void, they would have to accede to continued occupation of the property by a tenant against their will, and they would be bound to rent the unit at a rent controlled rate (rather than increasing the rent to market value) if it became vacant within the next five years. DE 46 at 8-9 ¶ 50, App. 43-44.

2. Park Lane

Park Lane owns and manages a 33-unit building located at 1100 Sacramento Street, San Francisco, in the Nob Hill District (the Property). DE 50-1 at 14 ¶ 65, App. 75. In 2013, Park Lane decided to convert the building into a Tenancy-In-Common (TIC) ownership system under which the units could be sold rather than rented. DE 46 at 9 ¶ 55, App. 9. Park Lane accordingly moved to withdraw the units in the Property from the rental market. On October 22, 2013, Park Lane served a Notice of Termination on its tenants. On October 24, 2013, Park Lane filed its Notice of Intent to Withdraw. *Id.* at 9-10 ¶¶ 58-59, App. 44-45; DE 50-1 at 14 ¶¶ 67-69, App. 75. At this time, 15 of Park Lane's units were vacant and 18 were tenant-occupied. DE 46 at 9-10 ¶ 58, App. 44-45. Many tenants in the occupied units claimed to be over 62 or "disabled" within the meaning of Government Code Section

12955.3 and on this basis, extended the date of withdrawal for their units to a year from the October 24, 2013 filing of the Notice of Intent to Withdraw. *Id.* at 10 ¶ 61, App. 45; DE 50-1 at 14 ¶ 70, App. 75.

The 2005 Ordinance in effect when Park Lane filed its Notice of Intent to Withdraw required it to give each tenant displaced by its Ellis Act withdrawal a $5,210.91 payment, except for two units that had more than three tenants (in that case, the total payment was $13,500.00, divided equally by the tenants in the unit). As required, Park Lane paid its tenants half of the relocation payments—a total of $88,585.55—upon serving Notices of Termination of Tenancy. DE 46 at 10 ¶ 60, App. 45; DE 50-1 at 14 ¶ 69, App. 75. Under the 2005 Ordinance, Park Lane was required to give an additional $3,473.93 payment to tenants claiming to be "disabled" or over 62. Park Lane also timely made these payments, paying out an additional $43,424.65. DE 46 at 10 ¶ 61, App. 45; DE 50-1 at 15 ¶ 71, App. 76.

As of June 1, 2014, tenants in 13 units had not vacated Park Lane's Property. DE 50-1 at 15 ¶ 74, App. 76. Under the 2014 Ordinance, Park Lane became subject to the Rental Payment Differential scheme with respect to these tenants. *Id.*; DE 46 at 2-3 ¶ 7, App. 37-38. As a result, it was suddenly obligated to pay more than a million dollars to its remaining tenants to complete withdrawal of its property from

the rental market. DE 46 at 10 ¶ 66, App. 45; DE 50-1 at 15 ¶¶ 75-76, App. 76.[3]

C. Trial Court Procedure

On July 24, 2014, Park Lane, the Levins and the other plaintiffs filed a complaint challenging the Rental Payment Differential scheme in the 2014 Ordinance. DE 1, App. 1-26. The complaint raises facial and as-applied constitutional claims under 42 U.S.C. § 1983, including a claim that the Ordinance imposes unconstitutional conditions and effects an uncompensated taking of property. After denying a motion for temporary restraining order, the district court stayed Plaintiffs' as-applied claims and set their facial claims for trial. DE 40. Subsequently, a tenant in the Park Lane property moved to intervene. The district court denied intervention in the live, facial phase of litigation, but allowed it in the stayed as-applied phase. DE 42.[4]

The court held a bench trial on the facial claims on October 6, 2014. On October 21, 2014, the court issued an order striking down the 2014 Rental Payment Differential on its face as an unconstitutional taking. *See* DE 92, App. 78-101. The

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[3] Park Lane was required to pay $223,782.25 to a tenant who began renting a unit in San Francisco in 1997 and who paid a monthly rent of $8,470.44. Park Lane had to pay $156,313.73 to a tenant who began renting a unit in 1970. Park Lane was also bound to pay $154,874.38 to tenants that paid a monthly rent of $8,076.40. DE 50-1 at 15 ¶¶ 75-76, App. 76.

[4] This ruling was not appealed, and the Intervenors have accordingly never been parties to Plaintiffs' facial claims, including those on appeal here.

court specifically held that the Rental Payment Differential scheme violated *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The court ruled that there was not a sufficient "nexus" between the Payment mandate and a property owner's decision to stop renting, as required by *Nollan*, because the withdrawing property owners did not cause the high rent burden faced by tenants, for which the law tried to mitigate. It further held that the Payment violated Dolan's "rough proportionality" standard because the Payment mandate was disproportionate to any harm withdrawing landlords caused tenants and the 2014 Ordinance included no restrictions on how displaced tenants used the Payment. DE 50-1 at 10 ¶ 42, App. 71.

The Court therefore granted declaratory relief to Plaintiffs and a permanent injunction against the 2014 Rental Payment Differential requirement. DE 93, App. 102. The district court stayed the injunction until October 24, 2014, at which time it became effective.[5] *Id.* On November 18, 2014, the City appealed.[6] DE 96.[7]

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[5] Though it has no bearing on mootness arising from the City's legislative action, Plaintiffs note that no tenants remain in the properties at issue in this suit. Following the district court judgment, the Levin's only tenant vacated the Levin's property by December 16, 2014 (the effective date of withdrawal of the unit). At that time, the Levins paid the tenant all remaining relocation monies due under the 2005 Ordinance, and finalized the withdrawal of their unit from the rental market. All tenants have also vacated the Park Lane property, and Park Lane has paid them all money due under the 2005 Ordinance. Park Lane's property has also been fully withdrawn from the rental market.

(continued...)

D. The Stay and Passage of the Amended, 2015 Ordinance

1. The Stay

On February 3, 2015, several City Supervisors introduced legislation to amend the 2014 Ordinance and its Rental Payment Differential scheme. The changes were designed (in the City's words) to "impact features of the Ordinance that were significant to the district court's opinion, including the total amount of the relocation payment and the lack of restrictions on a tenant's use of the payment amounts." Cir. Dkt. No. 5 (Stay Motion) at 5. Subsequently, on February 12, 2015, the City moved this Court to stay its appeal because of the pending legislation. Cir. Dkt. No. 5. This Court granted a stay on February 27, 2015, which is due to expire on August 26, 2015. Cir. Dkt. No. 7.

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[5] (...continued)

It is highly doubtful that any of the former tenants could claim a right to additional payments under the amended, 2015 payment scheme since such tenants have not complied with the payment process mandated by that law. In any event, any potential monetary claim that Plaintiffs' former tenants may have against Plaintiffs based on new legislation is not at issue here and must be pursued, if at all, through a different vehicle.

[6] The appeal concerns only Plaintiffs' facial claims; the as-applied claims are stayed below.

[7] The Intervenors did not appeal. Indeed, they could not because they were not a party to the facial litigation.

2. The Enactment of New Provisions and Repeal of the Challenged Rental Differential Payment Mandate

On April 21, 2015, the City Board of Supervisors passed the proposed amendments to its tenant payment code, and on May 15, 2015, the City Mayor signed it, thereby making the new law effective. *See* App. 103-19. The Legislative Digest accompanying the amendments notes they "attempt to address the [District] Court's concerns." *Id.* at 119. And indeed, the new legislation changes numerous aspects of the 2014 Ordinance. It (1) caps ~~landlord-to-~~tenant relocation payments at $50,000 per unit (not including the $3,000 disability or "over 62" bonus); (2) requires tenants to use the money only for direct relocation costs; (3) requires tenants to prove how they spend landlord payments; (4) expands the objectives of the law to include mitigating for moving expenses; (5) adds new factual findings and (6) changes the process and timing by which landlords must make tenant payments. App. 103-19.

The following chart highlights some of the differences between the 2014 Ordinance challenged by Plaintiffs and the new, amended 2015 Ordinance:

2014 Rental Differential Payment Law	Amended 2015 Ordinance
No cap on amount of tenant payment; some payments over $100,000 per tenant	$50,000 cap per unit

No limit on tenant's use of payment	Tenants must use payment for "relocation costs," defined as "rent payment for a replacement dwelling, the purchase price of a replacement dwelling, any costs incurred in moving to a replacement dwelling, or any costs that the tenant can demonstrate were incurred to mitigate the adverse impacts on the tenant of the eviction"
No accountability on actual use of money	Tenants must retain documentation of use and landlords can request documentation
No mechanism to reimburse landlords	Tenants must reimburse landlords within three years for money not spent on relocation costs
Landlords must pay tenants half of money to tenant upon filing Notice of Intent to Withdraw Units	Landlords pay half upon receipt of declaration stating tenant will use money for relocation costs
Purpose is to subsidize a displaced tenant's open market rents	Purpose includes mitigating for moving expenses
Few factual findings	Adds new and different factual findings

ARGUMENT

I

THE CITY'S NEW LEGISLATION EFFECTIVELY REPEALS THE RENTAL DIFFERENTIAL PAYMENT SCHEME CHALLENGED BY PLAINTIFFS AND MOOTS THE CITY'S APPEAL

By enacting amendments to the 2014 Ordinance which substantially change the law and effectively repeal the Rental Differential Payment mandate challenged by

Plaintiffs, the City has rendered its appeal moot.

A. Mootness Standards

An appeal "is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The basic question is whether there exists a present controversy as to which effective relief can be granted." *Vill. of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993) (internal quotation marks and citations omitted). The issue of mootness goes to the court's subject matter jurisdiction. *Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). Consequently, federal courts must resolve mootness issues as a threshold matter if they "are to function within their constitutional sphere of authority." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

A substantial amendment to challenged legislation "is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (case mooted by substantial amendment).[8]

An exception to mootness based on legislative change exists "where it is

[8] *See also Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977) (enactment of new statute during pendency of appeal "clearly" mooted the claims); *Diffenderfer v. Cent. Baptist Church of Miami, Inc.*, 404 U.S. 412, 415 (1972) (repeal of statute and enactment of new statute mooted case).

virtually certain that the repealed law will be reenacted." *Noatak*, 38 F.3d at 1510; *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). Yet, such a situation is "rare," *Noatak*, 38 F.3d at 1510, and thus, "constitutional challenges to statutes are routinely found moot when a statute is amended." *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61 (2d Cir. 1992) (citing *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989). Circuit decisions finding a case to be moot after the government made significant changes to a challenged law are legion. *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007); *Soranno v. Clark County*, 345 F.3d 1117, 1119 (9th Cir. 2003); *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 377-78 (2d Cir. 2004); *National Advertising Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005).

National Advertising illustrates the typical mooting effect of amendments to a challenged ordinance. There, an advertising business sought to maintain billboards in Miami which conflicted with the City's sign code. *National Advertising*, 402 F.3d at 1330. The company sued the City, seeking to enjoin the sign code on constitutional grounds. *Id.* at 1331. While its suit was pending, "the City began the process of amending its zoning regulations pertaining to signs." *Id.* Although the district court eventually granted judgment to the City on the merits, on appeal, the Eleventh Circuit considered whether the case was moot due to the amendments to the sign code. *Id.* at 1332.

The Circuit Court first noted that there was no real evidence that the City would re-enact the code provisions originally challenged by the suit. *Id.* at 1334. It then concluded that because the amendments had substantially altered the challenged code, they had obviated the legal case itself. The court explained that the City "completely revised and amended its zoning ordinances, changing entirely the provisions of their code that were the gravamen of this suit." *Id.* Since "these amendments changed the zoning code so that the allegedly unconstitutional portions of the City's zoning ordinance no longer exist," the controversy giving rise to the suit had disappeared. *Id.* at 1335. The case was moot. As the following shows, the same rationale applies in this case.

B. By Substantially Amending Its Tenant Payment Laws and Effectively Repealing Certain Challenged Provisions, the City Mooted This Case

Because of the City's recent amendments to its 2014 Ordinance, the legislation which Plaintiffs challenged and which the district court struck down "no longer exists." *National Advertising*, 402 F.3d at 1335. Plaintiffs raised their claims against a Rental Payment Differential scheme which (1) required landlords to pay their tenants the difference between the tenant's monthly rent controlled rate and market rents for a similar unit—multiplied by twenty-four (24)—*with no upward limit* on total amount; (2) was not intended to provide moving assistance, but to fund "two years of a theoretical rental market differential to which the tenant might now be

exposed;" App. 95; (3) set no conditions on how tenants could use the funds (they could just as lawfully use the payment to buy a new car or travel as for housing); (4) included no mechanism to account for the tenant's use of the money; (5) provided no way for a landlord to seek reimbursement if he believed the payment was illegitimate; and (6) included few factual findings. App. 30.

The City's recent amendments to its code have rescinded this scheme. The amendments substantially reduce a withdrawing landlord's potential liability to displaced tenants by imposing a $50,000 per unit cap on any relocation payment. App. 111. They clarify that the law is intended to mitigate for a tenant's actual "relocation costs," not just for the high open market rents a tenant might face upon loss of a rent controlled unit. App. 105, 133. They require a tenant to spend any landlord payment only for specified relocation costs, and demand that the tenant keep records of the money's use. App. 113. The legislation is supported with new factual findings which were not present in the 2014 Ordinance and not before the district court. App. 103-05.

These changes effect concerns central to Plaintiffs' complaint and the district court ruling. The potential for astronomical payment obligations, the lack of restraints on a tenant use of money, the law's intent to transfer money from landlord to tenants for the purpose of subsidizing a tenant's high rents (rather than for help with more typical relocation costs, like moving) were central to the filing of the complaint and

litigation below. The City has now responded to these concerns by "completely revis[ing[] and amend[ing] its [] ordinances, changing entirely the provisions of their code that were the gravamen of this suit." *National Advertising*, 402 F.3d at 1334. The injunction issued by the district court accordingly applies to a 2014 Rental Payment Differential scheme that is gone. It does not cover the new law.

It makes no difference that the amended, 2015 Ordinance uses some of the same terminology and has some overlap in packaging with the old, challenged 2014 Ordinance. For mootness, it is enough that the City's laws have been "'sufficiently altered so as to present a substantially different controversy from the one' that was filed." *Lamar Advertising*, 356 F.3d at 377-78 (quoting *Northeastern Fla. Chap. of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 671 (1993) (O'Connor, J., dissenting)). Accordingly, this appeal has "'lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law.'" *Princeton*, 455 U.S. at 103 (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)).

Notably, there is no reason to believe the City intends to reenact the old Rental Differential Payment scheme struck down by the lower court. To the contrary, the City promptly initiated and completed a process to abandon that scheme out of respect for the district court's ruling, and it has not claimed (nor do Plaintiffs claim) that the amendments are a sham. *See Noatak*, 38 F.3d at 1510 (recognizing an exception to

mootness arising from legislative modifications only when it is "virtually certain that the repealed law will be reenacted"). The City believes its new law accomplishes its goals, and as a result, it "has no motive to re-enact a constitutionally suspect ordinance to accomplish the same objective." *Outdoor Media Group*, 506 F.3d at 901.

While the City was fully within its rights to delete, change, and re-write its tenant payment laws during the pendency of its appeal, it cannot have it both ways. It cannot continue to appeal an adverse ruling against its old, Rental Payment Differential scheme after it has enacted new laws altering and rescinding that scheme. By choosing to significantly amend its laws rather than defending them as written (and struck down), the City has mooted this appeal.[9] *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977) (enactment of a new statute during appeal "clearly" mooted the case).

CONCLUSION

The Court should hold this controversy moot, dismiss the appeal for lack of jurisdiction, and remand the case to the district court for any further proceedings.

DATED: June 8, 2015.

Respectfully submitted,
/s/ J. David Breemer
J. DAVID BREEMER
Counsel for Plaintiffs - Appellees

[9] The City's legislative amendments have mooted Plaintiffs' as-applied claims, as well as their facial ones. But since only the facial claims are on appeal, it will be up to the district court to moot the as-applied claims.

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ J. David Breemer
J. DAVID BREEMER