

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

SIMON B. AMAYA PRICE,

Plaintiff,

V.

CITY OF NASHUA; and LORI WILSHIRE, President, Board of Aldermen, City of Nashua, in her official and individual capacities,

Defendants.

Case No. 1:26-cv-216-SM-TSM

**PLAINTIFF’S RESPONSE IN OPPOSITION TO
DEFENDANTS’ PARTIAL MOTION TO DISMISS**

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

INTRODUCTION..... 1

STATEMENT OF FACTS 1

ARGUMENT..... 4

 I. DEFENDANTS’ MOTION IS INVALID BECAUSE FEDERAL COURTS
 EXERCISE JURISDICTION OVER CLAIMS, NOT OVER FORMS OF RELIEF..... 4

 II. THE CLAIMS ARE NOT MOOT BECAUSE REPEALING THE ORDINANCE DOES
 NOT AFFECT AMAYA PRICE’S REQUEST FOR RETROSPECTIVE RELIEF. 6

 A. The claims are not moot because the Court can grant
 nominal damages..... 6

 B. The claims are not moot because the Court can grant
 declaratory relief. 7

 III. DEFENDANTS CANNOT MEET THEIR HEAVY BURDEN TO SHOW THAT
 THEIR VOLUNTARY CESSATION MEANS AMAYA PRICE IS NOT
 ENTITLED TO INJUNCTIVE RELIEF. 9

 A. Defendants bear the heavy burden of proving that their voluntary
 behavior has mooted Plaintiff’s claims or any form of relief. 9

 B. The claims are not moot because the Court can enjoin Defendants
 from restoring a policy or practice similar to the one repealed..... 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

<i>ACLU of Mass. v. United States Conference of Catholic Bishops</i> , 705 F.3d 44 (1st Cir. 2013).....	11
<i>Annex Books, Inc. v. City of Indianapolis</i> , 581 F.3d 460 (7th Cir. 2009)	13
<i>Brumit v. City of Granite City</i> , 72 F.4th 735 (7th Cir. 2023).....	7
<i>Chafin v. Chafin</i> , 568 U.S. 165 (2013)	9
<i>Doe v. Newton Pub. Sch.</i> , 48 F.4th 42 (1st Cir. 2022)	5
<i>F.E.R. v. Valdez</i> , 58 F.3d 1530 (10th Cir. 1995)	8
<i>FBI v. Fikre</i> , 601 U.S. 234 (2024)	10, 14
<i>Fitzgerald v. City of Portland</i> , No. 2:14-cv-00053-NT, 2014 U.S. Dist. LEXIS 152492 (D. Me. Oct. 27, 2014).....	7
<i>Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.</i> , 528 U.S. 167 (2000)	9, 10
<i>G. v. Fay Sch.</i> , 931 F.3d 1 (1st Cir. 2019).....	7
<i>Gent v. Cuna Mut. Ins. Soc'y</i> , 611 F.3d 79 (1st Cir. 2010).....	4
<i>In re Fin. Oversight & Mgmt. Bd.</i> , 979 F.3d 10 (1st Cir. 2020).....	8
<i>In re Ruiz</i> , 83 F.4th 68 (1st Cir. 2023)	5

<i>KH Outdoor, LLC v. City of Trussville</i> , 465 F.3d 1256 (11th Cir. 2006)	6
<i>Kuperman v. Wrenn</i> , 645 F.3d 69 (1st Cir. 2011).....	5, 6, 7
<i>McBreairty v. Brewer Sch. Dep’t</i> , 783 F. Supp. 3d 394 (D. Me. 2025)	8
<i>People for the Ethical Treatment of Animals v. Rasmussen</i> , 298 F.3d 1198 (10th Cir. 2002)	8
<i>Ramos-Ramos v. Jordán-Conde</i> , 171 F.4th 438 (1st Cir. 2026)	11
<i>Rian Immigrant Ctr. v. Cuccinelli</i> , No. 1:19-cv-11880-IT, 2020 U.S. Dist. LEXIS 203911 (D. Mass. Nov. 2, 2020)	11
<i>Scaer v. City of Nashua</i> , 162 F.4th 256 (1st Cir. 2025)	1, 8, 13, 14
<i>Town of Portsmouth v. Lewis</i> , 813 F.3d 54 (1st Cir. 2016).....	11
<i>Uzuegbunam v. Preczewski</i> , 592 U.S. 279 (2021)	7
<i>Vondra v. City of Billings</i> , Nos. 24-4183, 24-4551, 2025 LX 528168 (9th Cir. Dec. 17, 2025)	6
STATUTES AND RULES	
Fed. R. Civ. P. 12(b)(1).....	4, 6
Fed. R. Civ. P. 12(h)(3)	5
Fed. R. Evid. 201(b)(2)	4
Nashua Ordinance § 5-14(C)(3).....	2, 4
Nashua Ordinance O-26-001	1, 2, 3
Nashua Ordinance O-26-006.....	4, 12
U.S. Const. art. III, § 2	5

OTHER AUTHORITIES

13C Charles Allen Wright & Arthur R. Miller,
FED. PRAC. & PROCED. § 3533.3 (3d ed. 2014) 7

Joseph C. Davis & Nicholas R. Reaves, *The Point Isn’t Moot: How Lower
Courts Have Blessed Government Abuse of the Voluntary Cessation Doctrine*,
129 Yale L.J. Forum 325 (2019) 10

INTRODUCTION

A case is not moot if the court can grant any form of relief. Plaintiff Simon Amaya Price has already induced the Nashua Board of Alderman to repeal the unconstitutional address requirement challenged in this lawsuit. But that has no bearing on Amaya Price’s request for retrospective relief—an award of nominal damages and declaratory judgment. And the mere fact that Nashua repealed the ordinance does not meet the heavy burden defendants must meet to show that Amaya Price’s additional request for a permanent injunction is moot.

Amaya Price’s claims are not moot, and the Court should deny the partial motion to dismiss.

STATEMENT OF FACTS

On December 22, 2025, the United States Court of Appeals for the First Circuit held that the flags flown between 2017 and October 2024 on the City of Nashua’s so-called “Citizen Flag Pole” in front of city hall were not government speech but rather the speech of the private citizens who had applied to fly those flags. *See Scaer v. City of Nashua*, 162 F.4th 256, 258, 265 (1st Cir. 2025). As a result, the Court of Appeals concluded that Nashua had engaged in impermissible viewpoint discrimination. *See id.* at 258, 263.

Two weeks later, Nashua’s Mayor, Jim Donchess, proposed Ordinance O-26-001, in response to the First Circuit’s decision. *See* Dkt. 4 at 4. This ordinance, among other things, sought to close all flag poles at city hall as a forum for private speech.

Id. at 3; *see also* Dkt. 5 at 12-13. The Board scheduled the vote on Ordinance O-26-001 for its next meeting on February 10, 2026. *Id.* at 13-14; Dkt. 15, ¶ 21.

Near the start of this meeting, prior to this board vote, four members of the public arose to comment on the proposed ordinance during a designated period for public comment. Dkt. 5 at 3-5; Dkt. 15, ¶¶ 6-7, 33. The Board of Aldermen does not limit public comments to Nashua residents or impose any other requirement that turns on where a speaker lives or works. *Id.*, ¶ 58. Nevertheless, Nashua had (at the time) a city ordinance mandating that people giving comments must “identify [themselves] by name and addresses (sic) when beginning to speak.” Nashua Ord. § 5-14(C)(3). The Board of Aldermen will accept a home address or a business address to satisfy this address requirement, and residents of Nashua may simply say in what Nashua ward they reside. Dkt. 15, ¶¶ 10, 34; *see also* Dkt. 5 at 3. If the City already knows the business or home address of a speaker, then the speaker does not need to state any address publicly. *See* Dkt. 15, ¶ 34; Dkt. 5 at 15. Because the Board of Aldermen uploads both its meeting minutes and video recordings of its meetings to the internet, if a speaker discloses an address, that information is available online to people who did not physically attend. Dkt. 15, ¶¶ 23-24, 38

Plaintiff Simon Amaya Price, a political activist and gender desister, was the fourth person to rise to comment that evening. Dkt. 1, ¶¶ 25-27; Dkt. 15, ¶¶ 28-30; *cf.* Dkt. 20 at 2. During his comments, Amaya Price intended to argue that Ordinance O-26-001 did not go far enough and that Nashua should pass a more restrictive ordinance limiting the city hall poles to government flags. Dkt. 1, ¶¶ 28,

30-31. At the podium, Amaya Price began by stating his name and that he had come “to speak in regards to ordinance 26-001.” Dkt. 5 at 4; Dkt. 15, ¶ 35.

Lori Wilshire, President of the Board of Aldermen, then asked Amaya Price to state his address. Dkt. 5 at 4; Dkt. 15, ¶ 35. Because Amaya Price is a recognized public figure who receives death threats for his political advocacy, he has been advised never to disclose his address publicly. Dkt. 1, ¶¶ 36-37, 41.

Amaya Price responded that he had been advised to keep his address private for security reasons and asked if that was “acceptable.” Dkt. 5 at 4; Dkt. 15, ¶ 39.

Wilshire initially said “yes.” But after Nashua’s corporation counsel interrupted to say that the city’s ordinance required a home or business address, Wilshire would not permit Amaya Price to continue without disclosing an address. Dkt. 5 at 4-5; Dkt. 15, ¶¶ 40, 43; *cf.* Dkt. 20 at 2 (“Due to [Amaya Price’s] refusal to provide his address, he was not permitted to speak”). Amaya Price forfeited his speaking time and sat down without commenting further. Dkt. 5 at 5; Dkt. 15, ¶ 43.

On March 23, 2026, Amaya Price brought this lawsuit challenging the Nashua Board of Aldermen’s address requirement as unconstitutional. *See* Dkt. 1. Amaya Price brought two claims—one facial and one as-applied—requesting retrospective and prospective relief for both claims. He asked for nominal damages and a declaratory judgment for the past harm already inflicted when the Board of Aldermen enforced the unconstitutional rule against him. Dkt. 1 ¶¶ 63, 70; *id.* at 17 (¶¶ 2 & 3). And he asked for a permanent injunction to prevent further enforcement going forward. *Id.* ¶¶ 63, 70; *id.* at 17 (¶ 1).

“In response” to Plaintiff’s lawsuit, the Nashua Board of Aldermen met on May 12, 2026, and passed City ordinance O-26-006, which amended Nashua Ordinance § 5-14(C)(3) by eliminating the address requirement. Dkt. 20 at 3; Dkt. 20-1 at 3-4. Nashua Ordinance § 5-14(C)(3) now mandates that each “[s]peaker shall identify him or herself by name and city or town when beginning to speak.”¹ See Dkt. 20 at 3. On May 26, 2026, Defendant filed a “Partial Motion to Dismiss,” arguing that “most of the Plaintiff’s Complaint is moot in light of the recent passage of City ordinance O-26-006.” Dkt. 19. According to Defendants, “with the exception of the requested relief of nominal damages” in Count Two (an as-applied challenge), the Complaint is now moot. Dkt. 20 at 2, 6.

ARGUMENT

I. DEFENDANTS’ MOTION IS INVALID BECAUSE FEDERAL COURTS EXERCISE JURISDICTION OVER CLAIMS, NOT OVER FORMS OF RELIEF.

Defendants’ motion fails to follow Rule 12(b)(1). This Court can and should deny this motion for this error.

A 12(b)(1) motion asks a court to dismiss a civil action for lack of “subject-matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). Article III of the Constitution restricts the

¹ Defendants did not provide the text of this revised ordinance, only stating the new ordinance contains “a requirement that the person wishing to speak identify their town or city of residence or business.” Dkt. 20 at 3; *see also* Dkt. 20-1. This Court may take judicial notice that the revised ordinance appears in the agenda packet for the Board’s May 12 meeting, available on Nashua’s website, at <https://nashuanh.portal.civicclerk.com/event/4588/files/agenda/12627> (last accessed June 4, 2026). *See* Fed. R. Evid. 201(b)(2); *Gent v. Cuna Mut. Ins. Soc’y*, 611 F.3d 79, 84 (1st Cir. 2010) (judicial notice of information from official government websites).

subject-matter jurisdiction of federal courts to “Cases” and “Controversies.” *In re Ruiz*, 83 F.4th 68, 73 (1st Cir. 2023) (quoting U.S. Const. art. III, § 2). As a result, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss *the action*.” Fed. R. Civ. P. 12(h)(3) (emphasis added). When “an action becomes moot,” that action “is no longer a Case or Controversy for purposes of Article III, and is outside the jurisdiction of the federal courts.” *In re Ruiz*, 83 F.4th at 73 (cleaned up).

Defendants, however, never argue that Plaintiff’s civil action as a whole is moot, instead arguing that part of the case is moot because (in their view) the request for injunctive relief is no longer viable. But “[a] claim is moot only if no relief is available.” *Kuperman v. Wrenn*, 645 F.3d 69, 73 (1st Cir. 2011). And Defendants concede that, at very least, the request for nominal damages is live. Dkt. 20 at 6. That alone resolves the motion because Amaya Price seeks nominal damages for both claims. *See* Dkt. 1 ¶¶ 63, 70. Thus, Defendants’ “argument that [plaintiff] is no longer entitled to [prospective] relief is beside the point.” *Kuperman*, 645 F.3d at 73. The “question is whether [plaintiff] can obtain some relief, and he can. Therefore, his claims are not moot.” *Id.*

Whether a court can grant a particular form of relief is a different question than whether that court lacks subject-matter jurisdiction over the claim. District courts have equitable discretion to craft relief appropriate to the particular case, *Doe v. Newton Pub. Sch.*, 48 F.4th 42, 59 (1st Cir. 2022), so as long the claim itself is live, the fact that one form of relief may no longer be appropriate does not destroy the

court’s jurisdiction. *See Kuperman*, 645 F.3d at 73. Unless Defendants contend that *all forms* of relief are unavailable for a particular claim, then their motion must be denied as a misuse of Rule 12(b)(1). But Defendants admit that Amaya Price has a live claim for nominal damages, Dkt. 20 at 6, and thus implicitly concede that this Court has subject-matter jurisdiction over both claims, *see* Dkt. 1 ¶¶63, 70.

If Defendants believe that their own voluntary behavior moots one form of relief that Plaintiff seeks, they can renew that contention at summary judgment, when opposing some specific form of requested relief. Defendants cannot, however, move right now on those grounds to dismiss Plaintiff’s action under Rule 12(b)(1).

II. THE CLAIMS ARE NOT MOOT BECAUSE REPEALING THE ORDINANCE DOES NOT AFFECT AMAYA PRICE’S REQUEST FOR RETROSPECTIVE RELIEF.

A. The claims are not moot because the Court can grant nominal damages.

In his complaint, Amaya Price requested that this Court award nominal damages in the amount of \$17.91 for his past constitutional injury. Dkt. 1 at 2, 17. Although Defendants appear to believe only Count Two—the as-applied claimed—featured nominal damages, *see* Dkt. 30 at 6, both the facial and the as-applied counts expressly sought nominal damages.² Dkt. 1, ¶¶ 63, 70.

² Nominal damages can remedy both facial constitutional violations and as-applied constitutional violations. *See Vondra v. City of Billings*, Nos. 24-4183, 24-4551, 2025 LX 528168, at *8-9 (9th Cir. Dec. 17, 2025) (rejecting the argument “that nominal damages should not be awarded for facial constitutional violations”); *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1261 (11th Cir. 2006) (awarding nominal damages in facial First Amendment challenge).

Even alone, this request assures that Plaintiff's case is active, because "[a] valid claim for nominal damages avoids mootness." *Fitzgerald v. City of Portland*, No. 2:14-cv-00053-NT, 2014 U.S. Dist. LEXIS 152492, at *13 (D. Me. Oct. 27, 2014) (citing *Kuperman*, 645 F.3d at 73 & n.5). Because damages provide retrospective relief for past wrongdoing, *G. v. Fay Sch.*, 931 F.3d 1, 11 (1st Cir. 2019), that Defendants may have repealed the challenged policy does not affect nominal damages. It is "well established" that the "nominal damages . . . prevents mootness." *Brumit v. City of Granite City*, 72 F.4th 735, 737 (7th Cir. 2023) (citing *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021)); see also 13C Charles Allen Wright & Arthur R. Miller, *FED. PRAC. & PROCED.* § 3533.3 (3d ed. 2014). "Because every violation of a right imports damage, nominal damages can redress [a plaintiff's] injury even if he cannot or chooses not to quantify that harm in economic terms." *Uzuegbunam*, 592 U.S. at 293 (cleaned up).

B. The claims are not moot because the Court can grant declaratory relief.

Plaintiff also sought retrospective and prospective declaratory relief in his complaint. Dkt. 1 at 17. He asked this Court to declare both that Nashua's address requirement is unconstitutional and that Defendants violated Amaya Price's rights in the past by enforcing the requirement against him. *Id.* Declaratory judgments can supply both retrospective and prospective relief, because they can both affect the parties' future relationship and serve as a binding determination resolving a live legal controversy about liability for a past injury. See, e.g., *In re Fin. Oversight*

& Mgmt. Bd., 979 F.3d 10, 15 (1st Cir. 2020); *People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 & n.2 (10th Cir. 2002).

A “claim for a declaration . . . is not moot” when parties dispute liability and the claim “ask[s] the court to determine whether a past constitutional violation occurred.” *F.E.R. v. Valdez*, 58 F.3d 1530, 1533 (10th Cir. 1995). Even if “the need for prospective injunctive relief may be moot, the need for retrospective declaratory relief is not.” *McBreairty v. Brewer Sch. Dep’t*, 783 F. Supp. 3d 394, 415 (D. Me. 2025). “When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive.” *In re Fin. Oversight & Mgmt. Bd.*, 979 F.3d at 16 (citation omitted).

Indeed, the First Circuit ordered retrospective declaratory relief for a facial First Amendment claim in a recent case. *See Scaer*, 162 F.4th at 267. The defendant there argued that it had already repealed the challenged policy so injunctive relief was inappropriate (though defendant conceded the case as a whole was not moot). *See id.* at 261-62. The Circuit recognized “that because injunctions and declaratory judgments are different remedies, the latter may be available in situations where an injunction is unavailable or inappropriate” and instructed the district court to enter an interim declaratory judgment. *Id.* at 267 (citation and internal quotation marks omitted). On remand, the district court entered an interim declaratory judgment that resolved facial constitutional questions about the past policy that the defendant had repealed. *See Order, Scaer v. Nashua*, No. 24-cv-277-LM-TSM (D.N.H. February 2, 2026), ECF No. 54, at 1 (“During the time period between the

creation of the Citizen Flag Pole program and October 7, 2024, the City of Nashua was not engaged in government speech”). Amaya Price seeks similar (although non-interim) retrospective declaratory relief in this case.

This case is not moot, because the Court still has the authority to grant retroactive declaratory relief on both the facial and as-applied counts.

III. DEFENDANTS CANNOT MEET THEIR HEAVY BURDEN TO SHOW THAT THEIR VOLUNTARY CESSATION MEANS AMAYA PRICE IS NOT ENTITLED TO INJUNCTIVE RELIEF.

A. Defendants bear the heavy burden of proving that their voluntary behavior has mooted Plaintiff’s claims or any form of relief.

Even if the Court ignored Amaya Price’s request for retrospective relief in both claims, that alone would not moot the case—and certainly not at this stage of the litigation. Defendants admit that they rewrote their ordinance and repealed the address requirement “[i]n response” to Amaya Price’s lawsuit, to attempt to moot this case. *See* Dkt. 20 at 3. This transparent attempt at avoiding judicial scrutiny cannot moot Amaya Price’s case.

A claim is moot only when it becomes impossible for a court to grant any effectual relief. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Id.* (citation and internal quotation marks omitted)

“It 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 Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation and internal quotation marks omitted). A defendant

seeking to escape judgment based on his voluntary cessation “bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.* at 190. This is a “heavy burden of persuading,” *id.* at 189, because “[w]ere the rule more forgiving, a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off.” *FBI v. Fikre*, 601 U.S. 234, 241 (2024).

Contrary to what Defendants assert, *see* Dkt. 20 at 5-6, governments do not have a lower burden of proving mootness and overcoming the voluntary cessation doctrine than other defendants have. The Supreme Court has stressed that the same burden of proof “holds for governmental defendants no less than for private ones,” so that “[i]n all cases,” defendants must satisfy this heavy burden, “whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment.” *Fikre*, 601 U.S. at 241, 243. Although a few out-of-circuit cases—almost all from the Sixth Circuit—speak of greater solicitude favoring governments, this “has no basis in the Supreme Court’s precedent, as the Court has consistently applied the same ‘absolutely clear’ standard to all defendants.” Joseph C. Davis & Nicholas R. Reaves, *The Point Isn’t Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary Cessation Doctrine*, 129 Yale L.J. Forum 325, 328, 342 (2019). Although “some courts have expressly treated governmental officials voluntary conduct with more solicitude . . . neither the First Circuit nor the Supreme Court has endorsed such additional solicitude.” *Rian Immigrant Ctr. v. Cuccinelli*, No. 1:19-cv-11880-IT, 2020

U.S. Dist. LEXIS 203911, at *9 (D. Mass. Nov. 2, 2020) (citations and internal quotation marks omitted). And in fact, as the First Circuit explained, “the Supreme Court has not hesitated to invoke the voluntary cessation exception when considering the conduct of . . . municipal . . . defendants.” *Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016).

Moreover, the First Circuit expressly refused to “join the line of [out-of-circuit] cases holding that when it is a government defendant which has altered the complained of regulatory scheme, the voluntary cessation doctrine has less application.” *ACLU of Mass. v. United States Conference of Catholic Bishops*, 705 F.3d 44, 56 n.10 (1st Cir. 2013). Instead, in the First Circuit, “[t]he voluntary cessation doctrine precludes mootness where a defendant [] decides, on its own volition, to stop the challenged practice *in order* to moot the plaintiff’s case.” *Ramos-Ramos v. Jordán-Conde*, 171 F.4th 438, 443 (1st Cir. 2026) (internal quotation marks omitted) (emphasis added). To overcome voluntarily cessation doctrine, a defendant must show that it altered its behavior “for reasons unrelated to the litigation,” such as because of the independent action of a different branch of government. *Town of Portsmouth*, 813 F.3d at 59 & n.1.

Here, the legislators who violated Amaya Price’s rights and were sued—the Nashua Board of Aldermen and its President—are the very legislators repealing the challenged law. *See* Dkt. 20-1. No separate government branch acted. And both the timing of the ordinance change and Defendants’ own motion, *see* Dkt. 30 at 3, demonstrates that the goal was to the moot the case and avoid a costly adverse

judgment. Nothing prevents these same legislators from restoring the address requirement as soon as this case is over.

Defendants bear the formidable burden of showing that this Court cannot grant any effectual relief and that it is absolutely clear that the unconstitutional practices will not recur—a burden Defendants have not met and cannot meet on the pleadings alone.

B. The claims are not moot because the Court can enjoin Defendants from restoring a policy or practice similar to the one repealed.

Even after the passage of Ordinance O-26-006, this Court can grant effectual relief by enjoining Defendants from returning to using an address requirement or some similar policy or practice in the future.

The context of the litigation and Defendants' own brief, *see* Dkt. 20 at 3, makes clear that the passage of Ordinance O-26-006 is tactical. Nashua's Office of Corporation Counsel approved the form of the revised ordinance on April 7, 2026—two weeks after Amaya Price filed suit and the very day that the Complaint was served on the City of Nashua. *Compare* Dkt. 20-1 at 3 *with* Dkt. 1 at 17 and Dkt. 11. The Aldermen performed a first reading on April 14 and passed the ordinance on May 12. Dkt. 20-1 at 4. Defendants moved as quickly as they reasonably could under their own board procedures to try to moot this case. Unless this Court permanently enjoins Defendants, they can easily pass a new ordinance, restoring the address requirement, just as quickly as soon as this case ends.

Defendants, after all, still insist that the address requirement is constitutional. *See* Dkt. 15, ¶¶ 63, 70; *see also id.* at 21. And the Board of Alderment is still concerned about learning where public commenters come from, for even the revised policy still requires speakers to disclose their city or town of residence. *See* Dkt. 20 at 3. Defendants offer no sworn testimony—let alone testimony tested through cross-examination during discovery—proving that they will never restore the address requirement. Instead, they want this Court to declare the case moot based on a self-serving representation in a brief and pleadings. *See* Dkt. 20 at 6. “But there must be evidence; lawyers’ talk is insufficient.” *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009).

In a prior case, this Court has already rejected a motion to dismiss from the City of Nashua almost identical with the present motion. In that case, Nashua argued that either the case as a whole or, at least, the request for injunctive relief in that case was moot because Nashua’s Aldermen had repealed the challenged policy, because Nashua represented in its brief they would not restore it, and because governments are entitled to a presumption of mootness. *See* The Defendant, City of Nashua’s Memorandum of Law in Support of its Motion to Dismiss, *Scaer v. Nashua*, No. 24-cv-277-LM-TSM (D.N.H. February 25, 2026), ECF No. 56-1.

This Court, however, rejected Nashua’s arguments, holding that “the City fails to demonstrate that the court is powerless to grant any form of relief” and that “[t]o the extent the City seeks dismissal of [the plaintiffs’] claims only insofar as they seek injunctive relief, the City’s showing is conclusory and fails to satisfy its

‘formidable burden’ of persuading the court that its voluntary closure . . . demonstrates that there is ‘no reasonable expectation’ it will” restore the old policy “at some point in the future.” Endorsed Order, *Scaer v. Nashua*, No. 24-cv-277-LM-TSM (D.N.H. April 10, 2026) (citing *Fikre*, 601 U.S. at 241 and other cases). The Court did not recognize any special solicitude for governments about mootness.

This Court should come to the same conclusion here. Defendants have not met their formidable burden of demonstrating that their unconstitutional practice of mandating that speakers publicly state an exact home or business address cannot reasonably be expected to recur. *See Fikre*, 601 U.S. at 241.

CONCLUSION

This Court should deny Defendants’ partial motion to dismiss, because the claims are not moot and this Court can still grant relief that Plaintiff requested in his complaint.

Dated: June 5, 2026

Respectfully submitted,

/s/ Roy S. McCandless

/s/ Nathan J. Ristuccia

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