

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2675

ALPHA PAINTING & CONSTRUCTION COMPANY, INC.

v.

DELAWARE RIVER PORT AUTHORITY OF THE COMMONWEALTH OF
PENNSYLVANIA AND THE STATE OF NEW JERSEY,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-16-cv-05141)
District Court Judge: Honorable Noel L. Hillman

Argued: February 6, 2020

Before: CHAGARES, RESTREPO, and BIBAS, *Circuit Judges*.

(Filed: July 30, 2020)

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OPINION*

RESTREPO, *Circuit Judge*.

A federal court’s constitutional subject matter jurisdiction is never a trivial matter, even when it hinges on seemingly technical issues such as word choice, litigation strategy, and procedural chronology. By waiving any entitlement to damages before the District Court, Alpha Painting & Construction Co., Inc. rendered its case against the Delaware River Port Authority (DRPA) moot. Accordingly, we will vacate the District Court’s order and remand this case for dismissal based on mootness.

I

We will recount only the relevant factual and procedural history here; our prior opinion in this case provides a more comprehensive summary. *Alpha Painting & Constr. Co. v. Del. River Port Auth.*, 853 F.3d 671 (3d Cir. 2017). The parties’ dispute stems from DRPA’s competitive bidding process for a contract to repaint the Commodore Barry Bridge (the “Bridge Project”). DRPA is a public entity created by an agreement between the Commonwealth of Pennsylvania and the State of New Jersey for the purpose of developing and maintaining bridges between the two states.

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

In May 2016, DRPA began soliciting bids for Phase 2 of the three-phase Bridge Project. Alpha is an industrial painting contractor that had previously worked with DRPA and submitted the lowest of seven bids for the project. The second-lowest bidder was Corcon, a contractor that had also worked with DRPA, including on the first phase of the Bridge Project. DRPA concluded its bidding process by rejecting Alpha's bid and accepting Corcon's.

DRPA's procurement manual, which sets forth its bidding procedures, states that its contracts must be awarded "to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids"—in other words, "the lowest responsible and responsive bidder." App. 335. In rejecting Alpha's bid in favor of Corcon's (despite Alpha's being the lowest), DRPA noted that Alpha was not a responsible bidder because it failed to submit certain records. Alpha's claims are based on DRPA's allegedly wrongfully conducted internal deliberations that resulted in the rejection of its bid.

In August 2016, Alpha filed its original Complaint requesting that the District Court void DRPA's resolution granting the contract to Corcon and order DRPA to award Phase 2 of the Bridge Project to Alpha. It asserted four claims: a state and federal common law claim alleging that DRPA's actions as a public agency were arbitrary and capricious, a procedural due process claim, and two state law claims. In a September 23, 2016 opinion and order, the District Court granted a permanent injunction in favor of Alpha on the arbitrary and capricious claim.

As a remedy, the District Court enjoined DRPA from proceeding on the project with Corcon and directed it to award the contract to Alpha. *Alpha Painting & Constr.*

Co. v. Del. River Port Auth., 208 F. Supp. 3d 607, 627 (D.N.J. Sept. 23, 2016) (stating that Alpha was “the lowest responsive and responsible bidder in accordance with DRPA’s procurement rules”). Having granted injunctive relief based on the arbitrary and capricious claim, the District Court opted not to “opine as to whether DRPA violated Alpha’s due process rights” or rule on its two state law claims, and it dismissed those three claims as moot. *Id.* at 627 n.34.

DRPA appealed the District Court’s ruling and challenged its injunctive remedy on the arbitrary and capricious claim. On appeal, this Court agreed with the District Court’s conclusion that DRPA’s conduct was arbitrary and capricious. Regarding the District Court’s remedy, however, this Court concluded that the District Court went too far when it “deem[ed] Alpha ‘responsible’ under DRPA’s guidelines” and awarded it the contract. *Alpha*, 853 F.3d at 688. We thus vacated the District Court’s remedy and remanded for the District Court “to fashion a more limited injunction.” *Id.* at 690 (instructing that “Alpha should be restored to competition and DRPA should evaluate Alpha’s bid and affirmatively determine, per its guidelines, whether Alpha, the lowest bidder, is a ‘responsible’ contractor”).

After considering the parties’ submissions on remand, the District Court modified its injunction, requiring DRPA to cancel the contract it awarded Corcon and to “issue a new Invitation for Bids for a revised Phase 2 contract . . . in compliance with DRPA’s procurement rules and the law.” *Alpha Painting & Constr. Co. v. Del. River Port Auth.*, No. 1:16-cv-05141-NLH-AMD, 2017 WL 3437781, at *6 (D.N.J. Aug. 10, 2017). Alpha opted not to participate in the rebidding process.

The District Court then addressed the claims it had previously dismissed as moot, including Alpha’s procedural due process claim. The Court noted that the claims had been mooted “because of the [original] remedy” on the arbitrary and capricious claim, *i.e.*, awarding the contract to Alpha. *Id.* In light of the modified injunction, however, it permitted Alpha leave to file an amended complaint “if it wishes to proceed with any viable claims it may have against DRPA.” *Id.*

Alpha accepted the Court’s offer and filed an Amended Complaint re-asserting its procedural due process claim and its two state law claims and lodging a new equal protection claim. Alpha sought the following relief on its two constitutional claims:

- a) Declare DRPA’s actions to be unconstitutional;
- b) Award attorney fees and costs of suit to Plaintiff pursuant to 42 U.S.C. § 1988, or such other applicable laws; and
- c) Awarding such further relief as the Court deems just and proper pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

App. 316, ¶ 149 (prayer for relief on procedural due process claim); App. 320–21, ¶ 184 (prayer for relief on equal protection claim).

DRPA filed a motion to dismiss Alpha’s Amended Complaint, arguing, among other things, that the District Court lacked subject matter jurisdiction because Alpha had “received all of the relief it sought and all of the relief to which it was entitled.” App. 551. In the course of Alpha’s response, it clarified the remedies it sought in its Amended Complaint, waiving certain forms of relief while doubling down on others:

- “At this juncture, Alpha only seeks declaratory relief, attorneys’ fees, and costs of suit. Any paragraphs in Alpha’s Amended Complaint suggesting otherwise were an inadvertent error. (ECF 70). Alpha *does not* seek monetary damages.” App. 611 n.1.
- “Alpha, however, now merely seeks declaratory relief and the award of attorneys’ fees and costs of suit on Counts II, III, and IV of the Amended Complaint, which were not yet adjudicated on the merits.” App. 612.

- “From the facts already found by this Court, Alpha seeks a declaration that DRPA’s arbitrary conduct violated its rights. Such an outcome leaves the parties, and their respective rights, in precisely the position they remain now, but for the issue of fees and costs.” App. 613.
- “This Court has not yet rendered a decision as to whether DRPA’s arbitrary and capricious rejection of Alpha’s bid amounts to a deprivation of due process for which Alpha is entitled to attorneys’ fees and costs.” App. 615.
- “To be clear: *Alpha does not seek monetary damages*. Alpha seeks declaratory relief, attorneys’ fees and costs of suit, which are distinct from monetary damages.” App. 617 (emphasis in original) (citation omitted).
- “The only remaining portion of the case is to litigate purely legal determinations—specifically: (a) whether DRPA’s arbitrary and capricious conduct amounts to the due process and statutory violations alleged in Counts II–V; and (b) if so, whether these violations entitle Alpha to an award of attorneys’ fees and costs.” App. 620–21.

On June 22, 2018, the District Court concluded that it had subject matter jurisdiction, and it granted in part and denied in part DRPA’s motion to dismiss Alpha’s Amended Complaint. It dismissed Alpha’s state law claims but permitted its procedural due process and equal protection claims to proceed.

On July 6, 2018, DRPA filed a petition for a writ of mandamus, claiming, in relevant part, that the District Court exceeded this Court’s mandate on remand by reviving claims that were previously dismissed and permitting the addition of a new claim after final judgment. This Court denied the petition.

Alpha subsequently filed a motion for summary judgment on its equal protection and due process claims. In a June 26, 2019 opinion, the District Court granted Alpha’s motion. Addressing remedies, the District Court stated:

[T]he Court has already provided the remedy of injunctive relief for Alpha’s common law arbitrary and capricious claim against DRPA, which is the same relief sought for Alpha’s due process and equal protection claims. Alpha also seeks attorney’s fees and costs pursuant to 42 U.S.C. § 1988 because it has brought its claims under 42 U.S.C. § 1983.

Alpha Painting & Constr. Co. v. Del. River Port Auth., No. 1:16-cv-05141-NLH-AMD, 2019 WL 2611113, at *5 (D.N.J. June 26, 2019).¹ The District Court ruled that Alpha was the prevailing party “on all of its viable claims against DRPA” and awarded it attorneys’ fees and costs pursuant to § 1988. *Id.* at *6. DRPA timely appeals that decision.

II²

The issue of mootness³ surfaces here in an unusual posture, upon Alpha’s constitutional claims in its post-judgment Amended Complaint, after the District Court already had awarded injunctive relief on its arbitrary and capricious claim. Complicating matters, Alpha has waived entitlement to any relief except a declaration that DRPA’s actions were unconstitutional, along with attorneys’ fees and costs. As

¹ To clarify, Alpha did not seek injunctive relief for its constitutional claims in its Amended Complaint. *See* App. 316, ¶ 149 (prayer for relief on procedural due process claim); App. 320–21, ¶ 184 (prayer for relief on equal protection claim).

² This court exercises plenary review over all jurisdictional questions. *Biener v. Calio*, 361 F.3d 206, 210 (3d Cir. 2004).

³ As both parties confirmed at oral argument, mootness, not standing, is the relevant analysis here. Like mootness, standing limits federal courts’ jurisdiction “to cases and controversies in which a plaintiff has a concrete stake.” *Freedom from Relig. Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 475–76 (3d Cir. 2016). “Standing ensures that each plaintiff has ‘[t]he requisite personal interest ... at the commencement of the litigation,’ while mootness ensures that this interest ‘continue[s] throughout’ the duration of the case.” *Id.* at 476 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)).

we will discuss below, Alpha’s waiver of all other forms of relief—in particular, nominal damages—is fatal to its claims.⁴

Mootness is rooted in the “case-or-controversy limitation on federal judicial authority” found in Article III, section 2 of the Constitution. *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). “Mootness ensures that the litigant’s interest in the outcome continues to exist throughout the life of the lawsuit.” *Freedom from Relig. Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) (internal quotations omitted). A court will not dismiss a case as moot, so long as “secondary or collateral injuries survive after resolution of the primary injury.” *Id.* (quoting *Chong*, 264 F.3d at 384) (internal quotations omitted). The “relevant question” is whether a plaintiff “has a *viable* claim for damages that would save its case from mootness.” *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 623 (3d Cir. 2013) (emphasis in original). A plaintiff must “ha[ve] suffered, or [must remain] threatened with, an actual injury traceable to the [defendant] that is likely to be redressed by a favorable decision.” *Chong*, 264 F.3d at

⁴ It bears noting at the outset that a party “may not waive the defense of subject matter jurisdiction.” 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3522 (3d ed. 2019) (stating that subject matter jurisdiction is “too fundamental a concern to be left to the whims and tactical concerns of the litigants”); *see also Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 383 (3d Cir. 2001) (“[I]t is within our discretion to consider a mootness question not raised by the parties.”); Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”). With that in mind, this case concerns Alpha’s waiver of nominal damages as a form of relief—and that waiver’s impact on the District Court’s subject matter jurisdiction. In other words, the operative question is *whether Alpha waived entitlement to nominal damages*, rendering the case moot because the District Court could not grant a viable form of relief; the issue is *not whether Alpha’s disclaimer of nominal damages waived its ability to now raise nominal damages* as a defense to mootness on appeal.

384. “[T]he form of relief sought is often critical in determining” whether a live case or controversy exists. *Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987). A case is moot where there is no effective relief for the district court to grant. *See Freedom*, 832 F.3d at 476.

Alpha, in its response to DRPA’s motion to dismiss its Amended Complaint, made clear to the District Court the remedies it sought:

At this juncture, Alpha only seeks declaratory relief, attorneys’ fees, and costs of suit. Any paragraphs in Alpha’s Amended Complaint suggesting otherwise were an inadvertent error. Alpha *does not* seek monetary damages.

App. 611 n.1 (emphasis in original) (citation omitted).

Alpha went on to state that

[t]he only remaining portion of the case is to litigate purely legal determinations—specifically: (a) whether DRPA’s arbitrary and capricious conduct amounts to the due process and statutory violations alleged in Counts II–V; and (b) if so, whether those violations entitle Alpha to an award of attorneys’ fees and costs.

App. 620–21. Alpha repeatedly made similar statements to the District Court.

When there is no ongoing or threatened injury that the court can remedy, neither a request for attorneys’ fees and costs nor a request for declaratory relief can stave off mootness. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (“An ‘interest in attorney’s fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.”) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)); *Ivy Club v. Edwards*, 943 F.2d 270, 276 (3d Cir. 1991) (“[A]n interest in attorneys’ fees does not save a matter from mootness.”); *CMR D.N. Corp.*, 703 F.3d at 628 (stating that declaratory

relief is “prospective in nature” and cannot sustain a claim of past injury); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 699 (3d Cir. 1996) (finding a claim for declaratory and injunctive relief moot where there was “no hint in the record of any present or imminent future harm from the [defendant’s] alleged conduct”). Thus, the forms of relief that Alpha requested before the District Court cannot sustain the District Court’s subject matter jurisdiction. A request for declaratory relief cannot sustain the District Court’s subject matter jurisdiction because Alpha not only withdrew from the bidding process for Phase 2 of the Bridge Project but also stated before the District Court that it *only* sought relief for past injury.⁵ Further, there is no evidence in the record that the injury described in the Amended Complaint is ongoing. And there is no indication that it could resume in the future, given the District Court’s enforceable injunction.⁶ Additionally, as noted above, a request for attorney’s fees and costs alone cannot sustain a claim.

⁵ In its response to DRPA’s motion to dismiss before the District Court, Alpha made clear that it was not seeking prospective relief in its Amended Complaint when it stated that the declaratory relief it sought would “leave[] the parties, and their respective rights, *in precisely the position they remain now*, but for the issue of fees and costs.” App. 613 (emphasis added). This is also clear from Alpha’s Amended Complaint, which does not allege wrongful conduct by DRPA beyond its dealings during the bidding process for Phase 2 of the Bridge Project. *See, e.g.*, App. 290 ¶ 1 (“This Amended Complaint seeks relief due to the low bidder from the violations of its rights to procedural due process and equal protection.”); App. 316 ¶ 149 (“Alpha, as the lowest responsive bidder, had an interest in being awarded the Contract that is sufficient to give rise to the protections of the procedural due process clause.”); App. 320 ¶ 184 (“DRPA afforded Alpha and Corcon, on their respective bids, disparate treatment without a rational basis.”).

⁶ We are “reluctant to declare a case moot” when the defendant voluntarily ceases the challenged conduct after the litigation has commenced or ceases the conduct in response to a court order (that may not permanently restrain the allegedly wrongful actions) while maintaining that the conduct was lawful. *Hartnett v. Pa. State Educ. Assoc.*, --- F.3d ---, 2020 WL 3456680, at *2–3 (3d Cir. 2020). The “key

Here, the District Court awarded Alpha attorneys' fees and costs on the constitutional claims in its post-judgment Amended Complaint, noting that it had "already provided the remedy of injunctive relief for Alpha's common law arbitrary and capricious claim." *Alpha*, 2019 WL 2611113, at *5. Precisely because the District Court had already granted injunctive relief (and Alpha consequently did not request it in its Amended Complaint) and because Alpha withdrew from the bidding process, the key question in this case is whether there was any "effective relief" remaining for the District Court to grant when it issued its June 26, 2019 order granting Alpha's motion for summary judgment on its constitutional claims. As

question" regarding this barrier to mootness is whether the defendant "could reasonably be expected to engage in the challenged behavior again," such that prospective relief would be warranted. *Id.* at *3. The defendant faces a "heavy" burden to demonstrate that it will not do so. *Id.*

Here, the District Court previously issued an order enjoining DRPA from engaging in the exact conduct that Alpha now claims is unconstitutional. *Alpha Painting & Constr. Co.*, 2017 WL 3437781, at *6. Neither party appealed that order, and the opportunity to do so has long passed, meaning the District Court's injunction will permanently prohibit DRPA's allegedly unconstitutional conduct. This is *not* a case where a district court's order might be vacated, such that a defendant potentially could resume its activity. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1117 & n.5 (10th Cir. 2012).

While DRPA maintains that its Phase 2 bid evaluation procedures were lawful, notwithstanding the District Court's injunction, this belief is irrelevant here, where a final court order prohibits it from engaging in the disputed conduct ever again. *See Hartnett*, 2020 WL 3456680, at *3 ("[T]he focus is on whether the defendant . . . may 'return to [its] old ways' later on." (quoting *Friends of the Earth*, 528 U.S. at 189)). Further, DRPA and Alpha both stated at oral argument that the evidentiary record is silent as to whether DRPA's "allegedly wrongful behavior could [] reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 170. What is more, Alpha withdrew from DRPA's Phase 2 bidding process, further preventing recurrence. Given all of this, DRPA cannot "reasonably be expected to engage in the challenged behavior again." *Hartnett*, 2020 WL 3456680, at *3. DRPA thus has satisfied its "heavy" burden of "show[ing] that there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct." *Id.* at *2-3.

explained above, Alpha's *requested* forms of relief—declaratory relief and attorneys' fees and costs of suit—fall short of saving its claims from mootness.

Alpha argues on appeal that the District Court nonetheless maintained subject matter jurisdiction because it *could* have awarded nominal damages to remedy the constitutional injury Alpha allegedly suffered. Alpha stated at oral argument that when it waived entitlement to *monetary damages* before the District Court, it meant *compensatory* damages, not *nominal* damages—and, thus, it did not disclaim entitlement to nominal damages.

It is true that, at least in certain circumstances, “it is not necessary to allege nominal damages” for a court to grant such relief. *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (quoting *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965)). In an action under § 1983, nominal damages serve to vindicate past violations of a plaintiff's rights where the “deprivation has not caused actual, provable injury.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (citing *Carey v. Phipus*, 435 U.S. 247, 266 (1978)). “By making the deprivation of such [due process] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.” *Carey*, 435 U.S. at 266; *see, e.g., Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) (“A live claim for nominal damages will prevent dismissal for mootness . . .”); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 & n.32 (5th Cir. 2009) (“This court and others have consistently held that a claim for nominal damages avoids mootness.”). Thus, if Alpha maintained viable entitlement to nominal damages, its constitutional claims may have survived.

Unfortunately, it did not. A party can waive a form of relief, including nominal damages. *See Alexander v. Riga*, 208 F.3d 419, 429 (3d Cir. 2000) (finding that plaintiffs waived the ability to challenge a jury instruction that allegedly deprived them of nominal damages). And Alpha’s waiver of all damages except “declaratory relief, attorneys’ fees, and costs of suit” was unequivocal, notwithstanding its argument that it only meant *compensatory* damages when it disclaimed *monetary* damages. *See App.* 611 n.1. Thus, though Alpha may not have realized the consequences at the time, it intentionally relinquished its entitlement to nominal damages.

Alpha additionally argues that procedural due process claims are considered “‘complete’ at the moment plaintiff is deprived of a protected interest without due process.” Appellee’s Br. 22 (citing *Carey*, 435 U.S. at 266). By this reasoning, Alpha asserts that it had an “‘absolute’ right to obtain nominal damages and declaratory relief on its procedural due process claim.” Appellee’s Br. 22 (quoting *Carey*, 435 U.S. at 266). In *Carey*, however, the plaintiff had not waived entitlement to nominal damages—and nothing in *Carey* prevents a party from doing so.

We thus conclude that Alpha’s constitutional claims in its post-judgment Amended Complaint are moot. We state this with some discomfort, as courts are in the business of vindicating constitutional rights. However, it is no small or technical matter that federal courts’ “exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy” throughout the litigation. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). And here, the District Court simply did not have a viable form of relief at its disposal sufficient to sustain the case.

Accordingly, we will vacate the District Court’s order and remand this case for dismissal.⁷

⁷ Rather than find this case moot based on voluntary cessation, Judge Bibas would reach the merits. When the cessation is due to a court order, the key question is not just whether that order “might be vacated, such that a defendant potentially could resume its activity,” Maj. Op. 11 n.6, but whether it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” *Hartnett*, 2020 WL 3456680, at *2 (internal quotation marks omitted). Even if the particular wrong challenged is over and done, the claim for declaratory relief is not moot if there is a “reasonable likelihood that a declaratory judgment would affect the *parties’ future conduct.*” *Id.* (emphasis added).

In Judge Bibas’s view, DRPA has not borne its “heavy burden” of making that showing. *Id.* Even though DRPA cannot resume the challenged behavior in this particular round of bidding, it still insists that it has done nothing wrong. Appellant’s Br. 42–51. And while Alpha is no longer bidding for this particular project, it is still in the business of painting bridges and there is no evidence that it will not bid on future projects. Because DRPA bears the burden of proving mootness, Alpha should get the benefit of any evidentiary silence.