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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 DANIEL LEVIN, ET AL.,

No. 3:14-cv-03352-CRB

9 Plaintiffs,

**ORDER DENYING MOTION FOR
RELIEF FROM JUDGMENT**

10 v.

11 CITY AND COUNTY OF SAN
12 FRANCISCO,

13 Defendant.
_____ /

14 More than two years ago, the Court held that an ordinance enacted by the City and
15 County of San Francisco (“the City”) was unconstitutional. See generally Mem. & Order
16 (dkt. 92). While appealing that decision, the City amended its ordinance, mooting the appeal.
17 See USCA Mem. Dispo. (dkt. 127) at 2. The Ninth Circuit then remanded the case for this
18 Court to decide, in the first instance, whether its judgment against the City should be vacated
19 as a result.¹ Id. at 3.

20 To make that decision, the Court must first determine whether the City’s own
21 voluntary action mooted this case. See Chemical Prod. & Distrib. Ass’n v. Helliker, 463
22 F.3d 871, 879 (9th Cir. 2006). If the answer is yes, the Court may decide, in its discretion,
23 whether the equities counsel in favor of vacatur. See id. at 878; see also Am. Games, Inc. v.
24 Trade Products, Inc., 142 F.3d 1164, 1168 (9th Cir. 1998); Blair v. Shanahan, 38 F.3d 1514,
25 1521 (9th Cir. 1994). If the answer is no, the Court has little choice but to vacate the
26 judgment. Helliker, 463 F.3d at 878; see also United States v. Munsingwear, Inc., 340 U.S.
27 36, 39–40 (1950).

28 _____
¹ The Court has authority to consider the City’s request for vacatur under Federal Rule of Civil Procedure 60(b). U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship, 513 U.S. 18, 29 (1994).

I.

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2 The “principal condition” on which vacatur turns is whether mootness was caused by
3 happenstance or by voluntary action of the losing party. U.S. Bancorp Mortg. Co. v. Bonner
4 Mall Partnership, 513 U.S. 18, 24–25 (1994); accord Dilley v. Gunn, 64 F.3d 1365, 1370 (9th
5 Cir. 1995). This is because a party “who seeks review of the merits of an adverse ruling, but
6 is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in
7 the judgment.” Bancorp, 513 U.S. at 25 (citation omitted). “The same is true when
8 mootness results from unilateral action of the” prevailing party. Id. (citing Walling v. James
9 V. Reuter, Co., Inc., 321 U.S. 671, 675 (1944)). Either way, the “established practice” is to
10 vacate the judgment. Id. at 22–23 (quoting Munsingwear, 340 U.S. at 39). But when
11 mootness results from voluntary action of the losing party, the adverse judgment “is not
12 unreviewable, but simply unreviewed” by choice. Id. Vacatur, as a result, becomes a matter
13 of discretion. See id. at 29.

14 The script flips again when one branch of government moves to vacate an adverse
15 judgment after voluntary action of another branch has mooted the case. See Helliker, 463
16 F.3d at 879. These cases tend to follow a pattern: the legislature causes mootness by
17 amending or repealing a law that the executive had been sued for enforcing—and then the
18 executive moves to vacate the adverse judgment. When that happens, courts treat the
19 executive as being “in a position akin to a party who finds its case mooted on appeal by
20 happenstance, rather than events within its control.” Nat’l Black Police Ass’n v. Dist. of
21 Columbia, 108 F.3d 346, 353 (D.C. Cir. 1997). The legislature, after all, “may act out of
22 reasons totally independent of ending the lawsuit” or “because the lawsuit has convinced it
23 that the existing law is flawed.” Id. at 352. So, without more, courts do not assume that the
24 legislature acted simply to bail out the executive. Id.; accord Am. Library Ass’n v. Barr, 956
25 F.2d 1178, 1187 (D.C. Cir. 1992) (noting that Congress might have sought to “repair what
26 may have been a constitutionally defective statute, which “represents responsible lawmaking,
27 not manipulation of the judicial process”). Vacating the judgment thus becomes the
28 “established practice” once more. See, e.g., Helliker, 463 F.3d at 878–79 (vacating judgment

1 against state executive official after state legislature mooted case by passing statute
2 preempting challenged law and accompanying state administrative regulations); Log Cabin
3 Republicans v. United States, 658 F.3d 1162, 1165, 1168 (9th Cir. 2011) (per curiam)
4 (vacating judgment against the federal government and federal executive officials after
5 Congress mooted case by repealing “Don’t Ask, Don’t Tell”); Khodara Env’tl., Inc. ex rel
6 Eagle Env’tl., L.P. v. Beckman et al., 237 F.3d 186, 192, 195 (3d Cir. 2001) (Alito, J.)
7 (vacating judgment against state and federal executive officials after Congress mooted case
8 by amending statute governing construction of landfills); Valero Terrestrial Corp. v. Paige,
9 211 F.3d 112, 121 (4th Cir. 2000) (vacating judgment against state executive officials after
10 state legislature mooted case by amending statute governing disposal of toxic waste).

11 This “principle that legislation is attributed to the legislature alone is inherent in our
12 separation of powers.”² Helliker, 463 F.3d at 789. Separation of powers, in turn, is inherent
13 in our structure of federal and state governments. To state the obvious: the Constitution
14 divides the federal government into three separate and independent branches. See U.S.
15 Const. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the
16 United States”); id. art. II, § 1 (“The executive power shall be vested in a President of
17 the United States of America”); id. art. III, § 1 (“The judicial power of the United
18 States, shall be vested in one Supreme Court,”). To state the less obvious: although the
19 Constitution does not require the same of state governments, see Dreyer v. Illinois, 187 U.S.
20 71, 84 (1902), it presumes that they will at least have separate legislative and executive
21 branches. The Domestic Violence Clause requires the federal government to protect states

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23 ² The City maintains that separation-of-powers principles and the presumptive legitimacy of
24 legislative actions are two separate and independent reasons for ordering vacatur here. See Mot. at 11;
25 Reply at 1. Not necessarily. Although legislative actions are presumptively legitimate, Black Police
26 Ass’n, 108 F.3d at 353, so are executive actions, United States v. Armstrong, 517 U.S. 456, 464 (1996).
27 Nevertheless, the Ninth Circuit has refused to vacate judgments against executive officials whose own
28 voluntary action caused mootness. See Cammermeyer v. Perry, 97 F.3d 1235, 1239 (9th Cir. 1996).
And it has done the same for at least one lesser public body, albeit in an unpublished opinion. See
99 Cents Only Stores v. Lancaster Redevelopment Agency, 60 F. App’x 123, 125 (9th Cir. 2003).
Indeed, if the presumptive legitimacy of government action alone warranted vacatur whenever
government action caused mootness, there would be no reason to discuss separation of powers. But
courts consistently do just that, so here that presumption is best understood as merely a supporting
rationale for treating distinct branches of government as distinct actors.

1 against internal unrest “on the Application of the [State] Legislature or of the [State]
2 Executive (when the Legislature cannot be convened).” U.S. Const. art. IV, § 4; see also
3 Luther v. Borden, 48 U.S. 1, 43 (1849) (noting that, to act on such an application, the
4 President must first determine what “body of men” is the state’s rightful legislature and what
5 person is the state’s rightful governor). No wonder, then, that this union of fifty states has
6 fifty state legislatures and fifty state governors.

7 The City maintains that separation-of-powers principles apply here in a “practical
8 sense” because San Francisco’s governmental structure places different powers in different
9 hands. See Mot. at 11. The City elects a Board of Supervisors that may act only by
10 ordinance and is expressly forbidden from interfering in administrative affairs.³ See
11 S.F. Charter §§ 2.101, 2.105, 2.114. Its mayor serves as a “chief executive officer” tasked
12 with enforcing the law. Id. § 3.100.

13 The City’s system, however, is only one of countless ways in which lesser public
14 bodies arrange their affairs. San Jose vests “[a]ll powers of the City” in a city council that,
15 like San Francisco’s Board of Supervisors, may only act “by ordinance.” S.J. Charter §§
16 400, 600. But, rather than holding elections to select an executive officer, the city council
17 appoints a city manager to handle day-to-day operations. Id. §§ 700–01. Portland, for its
18 part, allows its city council to exercise its array of powers by whatever means, save
19 delegating legislative functions. See Portland (Oregon) Charter § 2–104. Both San Jose and
20 Portland also elect a mayor who, unlike in San Francisco, serves on the city council. See S.J.
21 Charter §§ 500–01; Portland Charter §§ 2–102, 3–101. And these are just two contrasting
22 examples—from major cities to boot.

23 The City’s position would thus force courts to examine town charters on a
24 case-by-case basis to determine whether any particular lesser public body has sufficiently
25 separated powers to warrant vacatur as a matter of course. That would be exceedingly
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28 ³ San Francisco’s charter also stresses that “[a]ll legislative acts shall be made by ordinance,”
S.F. Charter § 2.105, suggesting that the Board performs at least some non-legislative acts.

1 difficult.⁴ But even if wading into those murky waters had more practical appeal, there
2 remains ample reason to doubt whether any lesser public body seeking vacatur stands in the
3 same shoes as the federal government and the states, however it structures its affairs.

4 The Supreme Court’s cases on sovereign immunity and 42 U.S.C. section 1983
5 (“Section 1983”) provide something approaching The Standard Model of the governmental
6 universe. And those cases suggest that, unlike the federal government and the states, the City
7 is an ordinary litigant. The federal government enjoys sovereign immunity “save as it
8 consents to be sued.” United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United
9 States v. Sherwood, 312 U.S. 584, 584 (1941)). States presumptively enjoy the same, Alden
10 v. Maine, 527 U.S. 706, 713 (1999), and are not “persons” under Section 1983 because that
11 term does not normally extend to sovereigns, Will v. Michigan Dep’t of State Police, 491
12 U.S. 58, 64 (1989).⁵ But for lesser public bodies like the City, the opposite is true. They do
13 not enjoy sovereign immunity, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429
14 U.S. 274, 280 (1977), and are indeed “persons” under Section 1983, Monell v. Dep’t of
15 Social Services of New York, 436 U.S. 658, 690 (1978).⁶

16 Bottom line: the privilege that the City seeks seems reserved for sovereigns. At least
17 two circuits, for that matter, have held that a judgment against a city need not be vacated
18 when the city repeals a challenged law—and so held without regard to its governmental
19 structure. See Houston Chronicle Pub. Co. v. City of League City, Tex., 488 F.3d 613, 619
20 (5th Cir. 2007) (solicitation ordinance); 19 Solid Waste Dep’t Mech. v. City of Albuquerque,

21 _____
22 ⁴ Administrative agencies with mixed legislative and executive functions might create similar
23 difficulties. See Bancorp, 513 U.S. at 25 n.3; accord Helliker, 463 F.3d at 880. Mercifully, there is no
24 need to grapple with those difficulties here.

25 ⁵ Section 1983 provides a private right of action against any person who, under color of state
26 law, deprives another of a federal right. See 42 U.S.C. § 1983. So, by its terms, the statute does not
27 apply to the federal government or federal officials. See Bivens v. Six Unknown Named Agents, 403
28 U.S. 388, 406 (1971).

29 ⁶ Tribal governments, for their part, are sovereigns. Santa Clara Pueblo v. Martinez, 436 U.S.
30 49, 58 (1978) (noting that tribal governments presumptively enjoy sovereign immunity). Unlike the
31 federal government and the states, tribal governments are under no expectation to adhere to
32 separation-of-powers principles, though many tribes have done just that. See, e.g., Yavapai-Apache
33 Nation Const. art. III (“The Yavapai-Apache government shall be divided into three (3) separate and
34 independent branches of government . . .”).

1 76 F.3d 1142, 1144–45 (10th Cir. 1996) (drug testing policy). The Court likewise concludes
2 that the City’s voluntary action mooted this case. It will therefore proceed to the equities.⁷

3 **II**

4 When weighing the equities, the Court must balance “the competing values of finality
5 of judgments and right to relitigation of unreviewed disputes,” as well as any “consequences
6 and attendant hardships” that might result. Am. Games, 142 F.3d at 1168 (quoting Ringsby
7 Truck Lines, Inc. v. Western Conf. of Teamsters, 686 F.2d 720, 722 (9th Cir. 1992)).

8 The City stresses that it is not trying “to have its cake and eat it too” because it has
9 scrupulously abided by the terms of injunctions issued here and in state court, and because it
10 urged the Ninth Circuit to reach the merits on appeal. Mot. at 13; see also Dilley, 64 F.3d at
11 1372 n.6 (noting that it may weigh equitably in favor of vacatur if the party seeking it did not
12 seek to avoid appellate review). The City also observes that both the original and amended
13 ordinance “are now a dead letter on independent state law grounds,” making this Court’s
14 constitutional holding unnecessary.⁸ Id. at 13–14; see also Coyne et al. v. City and County of
15 San Francisco (dkt. 133–11) at 1 (holding that California’s Ellis Act preempts both
16 ordinances); Black Police Ass’n, 108 F.3d at 354 (noting that, at least in the D.C. Circuit,
17 avoidance of constitutional questions counsels in favor of vacatur).

21 ⁷ The City cites both In re City of El Paso, 887 F.2d 1103 (D.C. Cir. 1989), and Nat’l Black
22 Police Ass’n v. Dist. of Columbia, 108 F.3d 346 (D.C. Cir. 1997), as examples of courts vacating
23 “adverse decisions against a local government where the local government has amended a challenged
24 law or otherwise created mootness.” Mot. at 10. But those cases are not persuasive here—and not just
25 because neither decision is binding. Though it ordered vacatur, the former case expressly acknowledged
26 that the City of El Paso “contributed to the occurrence of mootness on appeal” after losing in district
27 court. In re El Paso, 887 F.2d at 1106. The latter case, meanwhile, concerned the District of Columbia,
28 which is far from the average local government (to the extent that term applies at all). Although the
nation’s capital has its own legislative body, Congress retains ultimate authority over its affairs. See
U.S. Const. art I, § 8, cl. 17. The District presumptively enjoys sovereign immunity, see Blue v. District
of Columbia Public Schools, 764 F.3d 11, 14 (D.C. Cir. 2014), but is also considered a “person” under
Section 1983, see Baker v. District of Columbia, 326 F.3d 1302, 1306 (D.C. Cir. 2003) (noting that
Monell claims lie against the District). And if that were not sui generis enough, the District sends
delegates to the Electoral College like each of the fifty states. See U.S. Const. amend. XXIII.

⁸ This reality also suggests that the City’s fears of collateral consequences are overstated. See
Ford v. Wilder, 469 F.3d 500, 506 (6th Cir. 2006).

1 Fair enough, but not enough. Let’s have no illusions about what happened here. The
2 City tried to repair some (but not all) of the original ordinance’s constitutional
3 infirmities—and successfully requested a stay of the appeal to make those repairs. The City
4 then sought review of the amended ordinance, which by its very design would have presented
5 a closer question on the merits. Now, after being denied review, the City seeks vacatur based
6 on mootness that it itself caused. The Court sees no equitable reason to reward litigants for
7 attempting to hedge their bets.

8 What is more, judicial precedents are “presumptively correct and valuable to the legal
9 community as a whole.” Bancorp, 513 U.S. at 26–27. They require “the investment of
10 judicial resources,” Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Seafirst Corp., 891 F.2d
11 762, 765 (9th Cir. 1989), while parties incur the “considerable expense” of litigation in the
12 process of obtaining them, *see, e.g., Visto Corp. v. Sproqit Tech., Inc.*, case no. 04-cv-0651-
13 EMC, 2006 WL 3741946, at *7 (N.D. Cal. 2006). Judgments, in short, are not to be set aside
14 lightly. This case is no different.⁹

15 Finally, there might be an unspoken undercurrent flowing through the instant dispute:
16 attorney’s fees. *See* Compl. (dkt. 1) at 25 (seeking fees under 42 U.S.C. section 1988).
17 Because the Court entered judgment in their favor, Plaintiffs are likely “prevailing parties”
18 entitled to fees even though the case became moot on appeal—at least as things stand now.¹⁰
19 *See Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717 (9th Cir. 2013); UFO Chuting
20 of Hawaii, Inc. v. Smith, 508 F.3d 1189, 1197 & n.8 (9th Cir. 2007). But vacating the
21 judgment might invite the argument that doing so doomed any forthcoming effort to recover
22 attorney’s fees. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) (“An order
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24 ⁹ The City argues that the “same or greater” investment of time and resources in Log Cabin
25 Republicans v. United States, 658 F.3d 1162 (9th Cir. 2011), blunts the force of these considerations
26 here. *See* Reply at 6. Not so. The Ninth Circuit ordered vacatur in that case because Congress repealed
27 the challenged statute, mooting a case against the executive branch. *See Log Cabin Republicans*, 658
28 F.3d at 1167–68. The district court, therefore, had no occasion to weigh the equities in the manner
prescribed here.

¹⁰ The Court stayed its injunction for three days, but three days only. *See* Mem. & Order at 24.
So this is not a case where Plaintiffs fall short of being prevailing parties for having failed to obtain a
“direct benefit” from the judgment. *See UFO Chuting*, 508 F.3d at 1198.

1 vacating the judgment on grounds of mootness would deprive [the plaintiff] of its claim for
2 attorney’s fees”). But see Williams v. Alioto, 625 F.2d 845, 847–48 (9th Cir. 1980) (per
3 curiam) (holding that plaintiffs were “prevailing parties” under 42 U.S.C. section 1988
4 despite “dismissal of the appeal as moot and vacation of the district court judgment”); UFO
5 Chuting, 508 F.3d at 1198 (citing Williams favorably). Those fees are a crucial incentive for
6 civil-rights plaintiffs, who are “the chosen instrument of Congress to vindicate ‘a policy that
7 Congress considered of the highest priority.’” Christiansburg Garment Co. v. Equal
8 Employment Opportunity Comm’n, 434 U.S. 412, 418 (1978) (quoting Newman v. Piggie
9 Park Enterprises, Inc., 390 U.S. 400, 402 (1968)). So while resolving whether Plaintiffs are
10 entitled to fees is a question for another day, the Court is loathe to risk burying an inadvertent
11 dagger in their chances.

12 * * *

13 For the foregoing reasons, the Court DENIES the City’s motion for relief from
14 judgment and, pursuant to Civil Local Rule 7–1(b), does so without oral argument.
15 Accordingly, the Court VACATES the hearing set for June 9, 2017.

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IT IS SO ORDERED.

Dated: May 30, 2017



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE