No. 19-968

In The Supreme Court of the United States

CHIKE UZUEGBUNAM, ET AL.,
Petitioners,

v.

STANLEY C. PRECZEWSKI, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF AMICUS[1]

CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to promoting religious freedom for people of all faiths. Given its educational mission, CatholicVote is concerned about the threat to religious expression on college campuses and in the public sphere generally if a standalone nominal damages claim does not forestall mootness. Under the Eleventh Circuit's novel rule, religious speakers, like the students in *Uzuegbunam v. Preczewski*, 781 F. App'x 824 (11th Cir. 2019), lack any effective way to vindicate their speech (or other constitutional) rights. Public officials are free to enact broad speech codes that chill religious or other disfavored speech activity. If challenged, the officials simply can amend their policies prior to final judgment, mooting any claims for injunctive relief, declaratory judgment, and nominal damages. Given that many constitutional violations do not cause monetary harm, the Eleventh Circuit's rule precludes speakers from vindicating their First Amendment rights and disregards "the importance to organized society that [comes from] these rights be[ing] scrupulously enforced." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

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[1] Each party filed a blanket consent to the filing of amicus curiae briefs in this matter. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

CatholicVote comes forward to urge this Court to confirm what *Carey* and this Court's other nominal damages cases intimate: that a claim for nominal damages for the violation of First Amendment or other constitutional rights remains justiciable because it (1) "alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), and (2) "secures important social benefits that are not reflected in nominal or relatively small damages awards." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). This rule, which a majority of circuits has adopted, not only follows directly from this Court's precedents, but also ensures the uniform and "vigilant protection of constitutional freedoms [which] is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

SUMMARY OF ARGUMENT

There are at least three reasons why this Court should hold that a claim of nominal damages for the violation of a fundamental right staves off mootness. First, as *Carey* and *Farrar* demonstrate, an award of nominal damages changes the legal relationship between the parties "for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Farrar*, 506 U.S. at 113. Thus, the Eleventh Circuit's central contention—that an award of nominal damages has no "practical effect on the legal rights or responsibilities of the parties"—is inconsistent with *Carey* and *Farrar*. *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs*, 868 F.3d 1248, 1268 (11th Cir. 2017) ("*Flanigan's*"). Preserving a nominal damages claim

in the wake of the government's amending an unconstitutional policy "holds [the government] entity responsible for its actions and inactions, but also can encourage the [government] to reform the patterns and practices that led to constitutional violations." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 318 (3d Cir. 1999). In this way, nominal damages protect constitutional rights, like free speech, that are critically important to the individual and our society but that frequently do not result in specific compensable injury when violated. *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (explaining that "nominal damages … are the appropriate means of 'vindicating' rights where deprivation has not caused actual, provable injury").

Second, the "nominal damages solution to mootness," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n.24 (1997), is particularly important at public colleges and universities where government officials (1) have broad control over most aspects of student life and (2) can "chill" expression by adopting broad speech codes that frequently go unchallenged. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."). If government officials are allowed to moot such constitutional challenges simply by revising their policy before final judgment, even fewer students will pursue legal actions, "putting the decision as to what views

shall be voiced largely into the hands of" the government instead of where it belongs—with "each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California*, 403 U.S. 15, 24 (1971).

Third, the government's ability to moot a plaintiff's nominal damages claim by amending an unconstitutional policy raises the same concerns as when the government changes its policy to avoid an overbreadth challenge. In both situations, a plaintiff's First Amendment speech claim seeks to vindicate her own constitutional rights while, at the same time, directly benefitting society: "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984). In *Massachusetts v. Oakes*, five Justices held that a subsequent amendment to an overbroad statute does not moot a plaintiff's overbreadth challenge so as to avoid chilling the speech of the speaker and others not before the Court. 491 U.S. 576, 586 (1989) (Scalia, J., concurring and dissenting in part). The same chill, however, occurs in the nominal damages context. Allowing government officials to moot a nominal damages claim through a later amendment makes the promulgation of unconstitutional regulations "cost free" to the government while restricting a wide range of speech if the unconstitutional policy is "never challenged" and "before the ones that are challenged are amended to come within constitutional bounds." *Id.*

ARGUMENT

I. *Carey* and *Farrar* establish that a standalone nominal damages claim avoids mootness because nominal damages alter the legal relationship between the parties and protect absolute rights, like freedom of speech, for the benefit of society.

In rejecting "the nominal damages solution to mootness," *Arizonans for Official English*, 520 U.S. at 69 n.24, the Eleventh Circuit became the first and only federal circuit to hold that a standalone nominal damages claim is moot even where, as here, government officials applied the contested regulation to restrict constitutionally protected speech activity. *See Uzuegbunam*, 781 F. App'x at 830-31. According to the Eleventh Circuit, a subsequent amendment of an unconstitutional regulation generally moots a nominal damages claim because an award of nominal damages has no "practical effect on the legal rights or responsibilities of the parties before us." *Flanigan's*, 868 F.3d at 1268. *See also Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2004) (McConnell, J., concurring) ("*UARC*") (contending that an "award of nominal damages would serve no practical purpose, would have no effect on the legal rights of the parties, and would have no effect on the future"). On this view, nominal damages do "'[]not affect the rights of litigants in the case before'" a federal court but instead provide at most "purely psychic satisfaction" to a plaintiff. *Flanigan's*, 868 F.3d at 1264, 1268 (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam)).

The central question in this case, then, is whether nominal damages have a practical or legal effect on the rights or obligations of the parties. *See UARC*, 371 F.3d at 1271 (Henry, J., concurring) ("Judge McConnell and I agree that the essential question is 'whether granting a present determination of the issues offered … will have some effect in the real world.'"). Contrary to the Eleventh Circuit's suggestion, *Carey* and *Farrar* addressed *this* question directly and answered it in the affirmative. *Farrar* considered this question in relation to whether a person who received a nominal damages award was a prevailing party under 42 U.S.C. § 1988. The Fifth Circuit, foreshadowing the Eleventh Circuit's and Judge McConnell's position, had held that an award of nominal damages at most "was a technical victory … so insignificant … as to be insufficient to support prevailing party status." *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5th Cir. 1991) (internal punctuation and citation omitted); *Flanigan's*, 868 F.3d at 1268 ("At this point in the litigation, the only redress we can offer Appellants is judicial validation, through, nominal damages, of an outcome that has already been determined."). This Court reversed, taking issue with the Fifth Circuit's characterization of the nature and effect of nominal damages.

According to *Farrar*, a plaintiff is a prevailing party "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-12; *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (describing how "[t]he touchstone of the prevailing

party inquiry must be the material alteration of the legal relationship of the parties"). The Court had no reservations about concluding that a plaintiff who receives nominal damages is a prevailing party under § 1988. Although "'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status," an award of nominal damages does much more: "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Farrar*, 506 U.S. at 112-13 (citation omitted). That is, a nominal damages award has a legal and practical effect on the rights and obligations of the parties. Specifically, it affects a "material alteration of the legal relationship between the parties" by entitling a plaintiff "to enforce a judgment … against the defendant." *Id*. at 113; *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) ("The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.") (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)) (emphasis in *Hewitt*).[2]

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[2] The *Farrar* Court was unanimous on this point. Justices Blackmun, Stevens, and Souter joined Justice White's separate opinion, which agreed with the majority that a successful nominal damages claim changes the legal relationship between the parties: "Because Farrar won an enforceable judgment against respondent, he has achieved a 'material alteration' of their legal relationship, and thus he is a 'prevailing party' under the statute."

Farrar, therefore, is inconsistent with the Eleventh Circuit's claim in *Uzuegbunam* and *Flanigan's* that a nominal damages claim avoids mootness only if there is "an ongoing controversy regarding compensatory damages throughout the entire litigation." *Uzuegbunam*, 781 F. App'x. at 831; *Flanigan's*, 868 F.3d at 1266 (claiming that *Carey* was not moot because "at no point was that nominal damages award the only remedy available to the plaintiffs"). If the Eleventh Circuit was correct, then a plaintiff who received only an award of nominal damages could never be a prevailing party. Such an award would have no practical effect on the legal rights of the parties and would provide at most psychic satisfaction. In fact, under the Eleventh Circuit's rule, a plaintiff could never even recover nominal damages without recovering some other form of relief. As soon as a court determined that all other forms of relief (injunctive, declaratory, and compensatory) were unavailable—leaving only a nominal damages claim—the court would lose jurisdiction over the case given that "[n]ominal damages … are not themselves an independent basis for [Article III] jurisdiction." *See Flanigan's*, 868 F.3d at 1268-69.

Farrar directly undermines the Eleventh Circuit's position. Justiciability requires "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Rice*, 404 U.S. at 246. As *Farrar* confirms, an award

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Farrar, 506 U.S. at 123 (White, J., concurring and dissenting in part).

of nominal damages does just that—it provides specific relief through an enforceable judgment. Accordingly, *Farrar* held that a plaintiff could receive only nominal damages (such that a standalone nominal damages claim must preserve a live case or controversy) and that an award of nominal damages made the plaintiff a prevailing party (such that nominal damages must have a practical and legal effect on the rights of the parties). *See Farrar*, 506 U.S. at 115; *Carey*, 435 U.S. at 266-67. And the resulting change in the legal relationship between the parties occurs regardless of "the magnitude of the relief obtained." *Farrar*, 506 U.S. at 114; *Garland*, 489 U.S. at 790 (explaining that "the *degree* of the plaintiff's success" does not affect "eligibility for a fee award"); *Farrar*, 506 U.S. at 116-17 (O'Connor, J., concurring) ("One dollar is not exactly a bonanza, but it constitutes relief on the merits. And it affects the defendant's behavior toward the plaintiff, if only by forcing him to pay one dollar—something he would not otherwise have done."). The amount of the claim—whether for nominal damages or a *de minimis* compensatory award—is not dispositive. Having a claim for a legal remedy is: "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."[3] *Ellis v. Railway*

[3] The lower courts have recognized that nominal damages "are inherently a legal remedy." *Hopkins v. Sounders*, 199 F.3d 968, 977 (8th Cir. 1999); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570-71 (1999) (noting that monetary damages generally are legal in nature unless the award is "restitutionary … such as in actions for disgorgement of improper profits" or is "incidental to or intertwined with injunctive relief"). The

Clerks, 466 U.S. 435, 442 (1984); *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) ("If there is any chance of money changing hands, Mission's suit remains live."); *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (explaining that even the loss of "a dollar or two" is sufficient to confer Article III standing); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (noting that "an identifiable trifle is enough for standing to fight out a question of principle" and that "[w]e have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than … a $5 fine and costs … and a $1.50 poll tax") (citations and internal punctuation omitted).

Consequently, claims for actual and nominal damages need not travel together in a case (even though they frequently do) because each type of award has legal effect (*i.e.*, materially alters the legal relationship between the parties). *Farrar*, 506 U.S. at 113; *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 604 (2001) (explaining that this Court's precedents "establish that enforceable

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fact that qualified immunity, which prevents the recovery of legal remedies only, bars the recovery of nominal damages reinforces the legal nature of nominal damages. *Hopkins*, 199 F.3d at 978 (explaining that "[s]everal other circuits have also implicitly recognized the legal nature of nominal damages by finding them to be barred by qualified immunity"); *Bamdad v. Drug Enf't Admin.*, 617 F. App'x 7, 9 (D.C. Cir. 2015) (concluding "that qualified immunity does not apply to nominal-damages claims").

judgments on the merits … create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees") (citation omitted).

The Eleventh Circuit and Judge McConnell express concern that, if a prayer for nominal damages is sufficient to defeat mootness, "the jurisdiction of the court could be manipulated, the mootness doctrine could be circumvented" simply by appending a prayer for nominal damages. *Flanigan's*, 868 F.3d at 1270; *UARC*, 371 F.3d at 1266. These concerns are unfounded for at least three reasons. First, given that a nominal damages award has a practical effect on the legal rights and obligations of the parties, federal courts have jurisdiction to hear standalone nominal damages claims. Consequently, a plaintiff does not "manipulate" the jurisdiction of the federal courts by bringing such a claim. *See*, *e.g.*, *Buckhannon*, 532 U.S. at 608-09 ("And petitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case."). Second, plaintiffs have little incentive to manufacture such claims given the difficulty in obtaining attorney's fees under *Farrar* if a plaintiff recovers only nominal damages. *Farrar*, 506 U.S. at 115 ("When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."). Third, there is no evidence that the majority of circuits, which holds that nominal damages preclude

mootness, has been besieged by frivolous nominal damages claims.[4]

Moreover, this Court has acknowledged that the "magnitude of the relief," whether nominal damages or a small compensatory damages award, does not change the action's ability to "vindicate[]" "important interests." *SCRAP*, 412 U.S. at 689 n.14. "Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. *Rivera*, 477 U.S. at 574; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (discussing how a plaintiff who secures relief in a civil rights action "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority"). In such situations, nominal damages provide "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury," *Stachura*, 477 U.S. at 308 n.11,

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[4] The threat of jurisdictional manipulation would seem to run in the opposite direction under the Eleventh Circuit's rule: "But allowing claims to proceed based on nominal damages would lead to no worse jurisdictional manipulation than what happened here: a city repealed a challenged ordinance years into litigation and just days after we granted en banc review." *Flanigan's*, 868 F.3d at 1272 (Wilson, J., dissenting). In the present case, Georgia Gwinnett College waited to amend its "Freedom of Expression Policy" until more than seven months after applying that policy to stifle Mr. Uzuegbunam's speech and after filing its motion to dismiss. This Court should reject a rule that subjects constitutional rights to such a cat-and-mouse game.

given "the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266; *Rivera*, 477 U.S. at 574 ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."); *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring) ("Nominal relief does not necessarily a nominal victory make."); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999) ("Thus, while the monetary value of a nominal damage award must, by definition, be negligible, its value can be of great significance to the litigant and to society.").[5]

Far from being an aberration, *Farrar* built on the foundation set out in *Carey*, which held that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." 435 U.S. at 266. To be actionable is to "[f]urnish[] the legal ground for a lawsuit or other action." *Actionable*, Black's Law Dictionary (10th ed. 2019); *Actionable*, Merriam-Webster Dictionary (same) (available at https://www.merriam-webster.com/dictionary/actionable). Under *Carey*, a nominal damages claim provides the ground for a legal action, the basis for a federal court's Article III jurisdiction. This, in turn, means that a standalone nominal damages claim precludes mootness. *See Amato*, 170 F.3d at 317 ("[A] litigant is entitled to an

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[5] These cases show that the term "nominal" is something of a misnomer. Although small in amount, the purpose of nominal damages awards is to vindicate intangible interests (such as constitutional rights) that cannot be reduced to a matter of dollars and cents because their value—to the individual and society—is priceless.

award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury."); *UARC*, 371 F.3d at 1272 (Henry, J., concurring) ("That the Court held that 'the denial of procedural due process should be actionable for nominal damages without proof of actual injury,' only underscores the argument that the denial of a substantive constitutional right is indisputably actionable for nominal damages."). If not (*i.e.*, if the Eleventh Circuit is correct that nominal and compensatory damages always must travel together), then a court never could award only nominal damages. But this Court did just that in *Farrar*. 506 U.S. at 115.

II. Allowing government officials to moot nominal damages claims for constitutional violations through subsequent amendments impermissibly chills free expression at public universities and in the public sphere generally.

In *Carey*, this Court explained that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." 435 U.S. at 254. Certain "absolute" rights have such "importance to organized society that" they must "be scrupulously observed" even "without proof of actual injury." *Id.*; *Rivera*, 477 U.S. at 574 ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.").

First Amendment speech rights are fundamental in this way: "Freedom of speech and freedom of the press … are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-71 (1942) (internal punctuation and citation omitted). Affording broad protection to expression advances our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This is particularly important in the public school setting: "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487. Protecting the free flow of ideas on university campuses preserves the rights of student speakers while fostering the societal benefits championed in *Carey*:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us…. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritarian selection."

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (citation omitted); *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's

dedication to safeguarding academic freedom.") (citation omitted).

The problem is that individuals who are denied their First Amendment rights—*e.g.*, students subject to speech codes on public campuses—often do not suffer compensable harms; rather, the harm is the loss of the right to participate in the marketplace of ideas. And this loss results not only from the enforcement of unconstitutional speech policies, but also from the mere presence of such policies: "These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). By restricting who may speak and limiting what listeners may hear, government officials stifle the robust exchange of ideas that is so important to the educational process: "The essentiality of freedom [of speech] in the community of American universities is almost self-evident…. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Keyishian*, 385 U.S. at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

In the First Amendment context, a nominal damages award protects the interests of individuals and society in at least two ways. First, as discussed above, such an award "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111. Second, it

benefits society-at-large by stopping the government's violation of fundamental rights now and in the future. *See*, *e.g.*, *Rivera*, 477 U.S. at 574 ("Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards."). As the Second Circuit put the point, "[a] judgment [for nominal damages] against a municipality not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue." *Amato*, 170 F.3d at 317-18. *See also Flanigan's*, 868 F.3d at 1275 (Wilson, J., dissenting) ("If however we decide this case and determine that the City of Sandy Springs violated the Constitution in enacting the ordinance, then the City would be stopped from even reenacting the ordinance.").

The Eleventh Circuit's rule dramatically reduces the protection afforded speakers (and listeners) under the First Amendment. Government officials need not worry about the scope of a written or unwritten policy. If a restriction on speech (or other constitutional right) is ever challenged, the officials can avoid an adverse judgment by modifying the policy at any point before final judgment. *See id*. at 1275 (Wilson, J., dissenting) ("Under the majority opinion, as long as the government repeals the unconstitutional law, the violation will be left unaddressed; the government gets one free pass at violating your constitutional rights."). The chilling effect of this rule is manifest. Confronted with an overbroad speech restriction, "[m]any persons,

rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119 (citation omitted). As a result, "the censor's determination may in practice be final." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

This is particularly true at state-run colleges and universities where the government directly influences so many aspects of a student's life—from housing and meals to curriculum requirements, course offerings, and student conduct codes. Rather than challenge school officials (who control most facets of college life), a student may determine that the safer route is to remain silent. This phenomenon is apparent in the present case. A student at Georgia Gwinnett College who wants to engage in prohibited speech activity (such as "distributing religious literature in an open, outdoor plaza on GGC's campus," *Uzuegbunam*, 781 F. App'x at 826) now knows that, even if she could litigate an action to judgment before graduating, the school can moot her claims for both prospective relief and nominal damages simply by amending its unconstitutional speech policy. Many students, therefore, are apt to do two things—"abstain from protected speech," *Hicks*, 539 U.S. at 119, and forego challenging the policies that prohibit their speech. Accordingly, the Eleventh Circuit's mootness rule threatens to chill student speech, stifling the robust marketplace of ideas that is so important on college campuses. *See Healy*, 408 U.S. at 180-81.

III. The government should not be permitted to moot a standalone nominal damages claim by amending an unconstitutional policy for the same reasons that such a change does not moot an overbreadth challenge under *Massachusetts v. Oakes*.

Given the "importance to organized society" of absolute rights, like First Amendment speech and procedural due process, *Carey* recognizes that nominal damages help to ensure that such rights are "scrupulously enforced." 435 U.S. at 266. In the First Amendment speech context, nominal damages promote the same benefits as this Court's overbreadth doctrine by "reduc[ing] the[] social costs caused by the withholding of protected speech." *Hicks*, 539 U.S. at 119. Under the overbreadth doctrine, "[l]itigants … are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Oakes*, 491 U.S. at 581 (plurality opinion) ("The doctrine is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions."); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (same). In this way, the overbreadth doctrine fosters a vibrant marketplace of ideas by "preventing an invalid statute from inhibiting the speech of third parties who are not before the Court." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789,

800 (1984); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser.").

Given that nominal damages and overbreadth both protect the marketplace of ideas from the chill that overly restrictive speech policies engender, if the government cannot amend such a policy to moot an overbreadth claim, it also should be precluded from modifying the same policy to moot a nominal damages claim. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) (explaining how the Court's overbreadth calculus "reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted"). And while this Court has not considered the latter issue, five Justices in *Massachusetts v. Oakes* concluded that a later alteration of an overbroad statute does not moot a plaintiff's overbreadth claim. The statute at issue in *Oakes* prohibited adults from posing or exhibiting minors "in a state of nudity" for purposes of visual representation or reproduction in any book, magazine, pamphlet, motion picture, photograph, or picture. 491 U.S. at 579. The respondent, Douglas Oakes, was convicted under the statute for taking roughly ten color photographs of his partially nude minor stepdaughter. *Id*. at 580. On appeal, the Massachusetts Supreme Judicial Court reversed, striking down the Massachusetts statute as substantially overbroad. After this Court

granted certiorari, the state legislature amended the statute to cure the overbreadth problem and argued that the amendment mooted the case. *Id.* at 582-83.

Justice O'Connor, writing for a plurality of the Court, contended that "the special concern that animates the overbreadth doctrine is no longer present after the amendment or repeal of the challenged statute." 491 U.S. at 584. Drawing on *Bigelow v. Virginia*, the plurality determined that the statutory amendment "eliminated any possibility that the statute's former version would 'be applied again to [the defendant] or [would] chill the rights of others.'" *Oakes*, 491 U.S. at 582 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 817-18 (1975)). According to the plurality, "[b]ecause, '[a]s a practical matter,' the question of the statute's 'overbreadth ha[d] become moot for the future,' we declined to 'rest our decision on overbreadth,' choosing instead to consider whether the former version of the statute had been constitutionally applied to the defendant." *Id.* (quoting *Bigelow*, 421 U.S. at 818). Under the plurality's interpretation, *Bigelow* stands for "the proposition that overbreadth analysis is inappropriate if the statute being challenged has been amended or repealed" because the amendment removes the chilling effect going forward. *Id.*[6]

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[6] In *Oakes*, five Justices disagreed with the plurality's interpretation of *Bigelow*. Justice Scalia, writing for a majority of the Court on this point, distinguished between the Court's *reaching* the issue of overbreadth and its *invalidating* a statute based on overbreadth. *Oakes*, 491 U.S. at 587 n.1 (Scalia, J., concurring and dissenting in part). *Bigelow* involved only the former, turning to the as-applied challenge because the overbreadth question

A majority of the Court, however, rejected the plurality's position. Justice Scalia, joined by four other Justices, concluded that an overbreadth defense remains viable even if the offending statute is subsequently revised and even when that amendment "eliminate[s] any unconstitutional 'chilling' of First Amendment rights" from the statute as originally enacted. *Id.* at 586 (Scalia, J., concurring and dissenting in part). According to these Justices, the Court must consider the cumulative "chill" imposed on protected expression under the plurality's proposed rule:

> The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post*, that is, after the offending statute is enacted, but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free, as Justice O'Connor's new doctrine would make it—that is, if *no* conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal—then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place. When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a

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"was no longer of general interest." *Id.* Thus, because "the Court held Bigelow's conviction unconstitutional as-applied, it was unnecessary to decide the merits of the overbreadth issue in that case." *Id.*

> substantial amount of legitimate speech would be "chilled" as a consequence of the rule Justice O'Connor would adopt.

Id. *See also id.* at 591 n.1 (Brennan, J., dissenting) ("I join Part I of Justice Scalia's opinion holding that a defendant's overbreadth challenge cannot be rendered moot by narrowing the statute after the conduct for which he has been indicted occurred—the only proposition to which five Members of the Court have subscribed in this case.").

Under *Oakes*, "the special concern that animates the overbreadth doctrine" (*i.e.*, the "chill" on protected speech) remains present and precludes mootness even if the government modifies the challenged statute. In this way, *Oakes* viewed the chilling effect of an overbroad speech restriction more broadly than the plurality. Whereas the plurality focused only on the chill to speakers *ex post* (*i.e.*, after the government amended its policy), a majority of the *Oakes* Court held that the overbreadth doctrine also safeguards against *ex ante* threats to speech. As Justice Scalia noted, overbroad laws chill speech before they are challenged and while the litigation is ongoing. But if government officials can amend such policies without "cost,"[7] then there is no incentive (1) for those officials "to stay within constitutional bounds in the first place," *id.* at 586, or (2) for speakers to take the personal or

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[7] The dissent in *Flanigan's* echoed Justice Scalia's point. *See Flanigan's*, 868 F.3d at 1275 (Wilson, J., dissenting) ("Under the majority opinion, as long as the government repeals the unconstitutional law, the violation will be left unaddressed; the government gets one free pass at violating your constitutional rights.").

financial risk of bringing a constitutional challenge that can be mooted so easily. *See Hicks*, 539 U.S. at 119. And *Osborne v. Ohio* confirms this holding:

> [F]ive of the *Oakes* Justices feared that if we allowed a legislature to correct its mistakes without paying for them (beyond the inconvenience of passing a new law), we would decrease the legislature's incentive to draft a narrowly tailored law in the first place. Legislators who know they can cure their own mistakes by amendment without significant cost may not be as careful to avoid drafting overbroad statutes as the might otherwise be."

495 U.S. 103, 121 (1990). Accordingly, under *Oakes*, the government cannot moot an overbreadth challenge by subsequently amending an overbroad law.

The circuit split regarding whether a subsequent amendment moots a nominal damages claim reflects the fault lines that exist between Justices O'Connor and Scalia with respect to overbreadth.[8]

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[8] Extending *Oakes*'s holding (that a subsequent amendment does not moot an overbreadth claim) to the nominal damages context is warranted given that a later change to an unconstitutional policy poses "a similar danger" to First Amendment rights. *See Freedman*, 380 U.S. at 56-57 ("Although we have no occasion to decide whether the vice of overbroadness infects the Maryland statute, we think that appellant's assertion of a similar danger in the Maryland apparatus of censorship … gives him standing to make that challenge…. [B]ecause the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute … contains the same vice as a statute

Uzuegbunam effectively adopts Justice O'Connor's view in *Oakes*, permitting government officials to moot a claim for nominal damages simply by amending their policy before final judgment. The majority of circuits mirrors Justice Scalia's position, protecting First Amendment rights *ex post* (after the government enforces an unconstitutional restriction) as well as *ex ante* (while government officials are considering whether to adopt speech restrictive policies). Not surprisingly, the Eleventh Circuit's rule and the *Oakes* plurality's rule both suffer from the same problem—they make the promulgation of unconstitutional speech restrictions "cost free" to government officials, permitting them to pass broad speech restrictions that cover both "constitutionally proscribable" expression and fully protected speech "so long as the offending [policy] was narrowed before the final appeal." 491 U.S. at 586. As a result, government officials under the Eleventh Circuit's rule "have significantly reduced incentive to stay within constitutional bounds in the first place." *Id*.

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delegating excessive administrative discretion."). Whereas an overbroad "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression," *Broadrick*, 413 U.S. at 612, the Eleventh Circuit's rule not only chills the speech of others, but also teaches speakers who are before the Court that they should submit to and forego challenging speech restrictions unless they have suffered specific monetary harm. This lesson contravenes *Carey*'s instruction that constitutional rights need to be "scrupulously enforced." 435 U.S. at 266.

Consistent with *Oakes*, this Court should preserve a student's ability to pursue a nominal damages claim even after the government revises its unconstitutional policy. This "nominal damages solution to mootness" has at least two salutary effects. It "holds that entity responsible for its actions and inactions, [and] encourage[s] the municipality to reform the patterns and practices that led to constitutional violations." *Amato*, 170 F.3d at 318; *Flanigan's*, 868 F.3d at 1275 (Wilson, J., dissenting) ("Declaring that their rights were violated is of legal significance. Plaintiffs could feel secure in their knowledge that their rights were violated and have protection from future infringement."). By protecting against the chilling effect of unconstitutional speech restrictions, the majority rule also provides the broad protection of speech that the First Amendment requires: "First Amendment standards, however, 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 327 (2010) (citation omitted).

The overbreadth doctrine does this by "allow[ing] facial challenges to overbroad statutes irrespective of the plaintiff's particular injury" to "ensure an optimal level of constitutional enforcement." *Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 61, 65-66 (3d Cir. 1990); *Broadrick*, 413 U.S. at 612 (explaining that overbreadth is predicated on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). *Oakes* buttresses the broad protection afforded speech by ensuring that a subsequent amendment to an overbroad statute does not moot a

plaintiff's overbreadth claim, which would cause "a substantial amount of legitimate speech [to] be 'chilled.'" 491 U.S. at 586 (Scalia, J., concurring and dissenting in part).

The same rule should apply in the context of nominal damages and for the same reasons. *See Smith v. People of the State of California*, 361 U.S. 147, 150-51 (1959) ("Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.").[9] As with a speaker confronting an overbroad speech restriction, "there is a possibility that, rather than risk punishment for conduct in challenging the [speech restriction]," a speaker in the Eleventh

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[9] In *Smith*, the Court precluded the removal of a scienter requirement from a statute that banned the possession of obscene material even though obscenity is unprotected under the First Amendment: "For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." 361 U.S. at 153. The same is true when the mootness doctrine is applied to nominal damages. If a subsequent change to an unconstitutional speech restriction moots a plaintiff's claim, then the plaintiff and other speakers "will tend to restrict" their speech to expression that falls comfortably within the government's policy, and the government "will have imposed a restriction upon the [expression] of constitutionally protected as well as" unprotected speech.

Circuit "will refrain from engaging further in protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possibly may be outweighed by society's interest in having the statute challenged." *Joseph H. Munson Co.*, 467 U.S. at 956. Given that government officials have little to no incentive to adhere to constitutional norms under *Uzuegbunam* and *Flanigan's*, the same *ex ante* and *ex post* chill is present if the government can moot a speaker's claim for nominal damages by altering an unconstitutional policy during litigation. "[A] substantial amount of legitimate speech [is] 'chilled'" by those speech codes "that are never challenged" and during "the time that elapses before the ones that are challenged are amended to come within constitutional bounds." *Oakes*, 491 U.S. at 586 (Scalia, J., concurring and dissenting in part). Moreover, because many "who desire to engage in legally protected expression … may refrain from doing so rather than risk prosecution or undertake to have the [policy] declared partially invalid," *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985), even fewer will pursue legal challenges if the government can moot their claims easily and without cost. Thus, this Court should apply *Oakes* to standalone nominal damages claims to ensure that constitutional rights are "scrupulously observed" and that all forms of protected expression (on college campuses and elsewhere) "have the 'breathing space' that they 'need to survive.'" *New York Times*, 376 U.S. at 272 (quoting *Button*, 371 U.S. at 433).

CONCLUSION

As this Court explained in *Roth v. United States*:

> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

354 U.S. 476, 488 (1957). With respect to speech on college campuses and in the public sphere generally, the Eleventh Circuit's rule props the door wide open, enabling government officials to chill and "inhibit constitutionally protected expression" without cost or penalty. *Smith*, 361 U.S. at 155. Under this rule, a speaker who is intrepid enough to challenge an unconstitutional speech restriction quickly learns that government officials can moot her claims for injunctive relief, declaratory judgment, and nominal damages simply by amending their policy. This, in turn, instructs other speakers to forego such challenges, silencing a wide range of protected expression and teaching speakers that a path of acquiescence is safer (and cheaper) than one of legal resistance—a lesson that contravenes *Carey*, *Farrar*, and this Court's First Amendment speech cases.

This Court, therefore, should hold that a standalone nominal damages claim averts mootness,

allowing plaintiffs to vindicate their "absolute" rights through a judgment that both "modifies the defendant's behavior for the[ir] benefit," *Farrar*, 506 U.S. at 113, and safeguards the societal benefits about which *Carey* is so concerned.

Respectfully submitted,

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