

No. 19-968

IN THE
Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,
Petitioners,

v.

STANLEY C. PRECZEWSKI, JANN L. JOSEPH, LOIS C.
RICHARDSON, JIM B. FATZINGER, TOMAS JIMINEZ,
AILEEN C. DOWELL, GENE RUFFIN, CATHERINE
JANNICK DOWNEY, TERRANCE SCHNEIDER, COREY
HUGHES, REBECCA A. LAWLER, AND SHENNA PERRY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF OF *AMICI CURIAE* GENERAL
CONFERENCE OF SEVENTH-DAY
ADVENTISTS AND PACIFIC PRESS
PUBLISHING ASSOCIATION
IN SUPPORT OF PETITIONERS**

TODD MCFARLAND
Counsel of Record
Associate General Counsel
*General Conference of
Seventh-day Adventists*
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 681-6321
mcfarlandt@gc.adventist.org

ANDREW G. SCHULTZ
*Rodey, Dickason, Sloan,
Akin & Robb, P.A.*
201 Third Street, NW
Albuquerque, NM 87102

Counsel for Amici Curiae

QUESTION PRESENTED

Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICI CURIAE</i>	1
STATEMENT.....	3
A. Missionary proselytization through door-to-door literature distribution and solicitation has a long tradition	4
B. <i>Amici's</i> missionaries regularly are engaged in this traditional religious speech	8
C. Religious speech by door-to-door missionaries lies at the core of First Amendment protection	10
D. Door-to-door missionaries frequently encounter local laws that suppress this protected religious speech.....	12

E. Amici often are forced to challenge unconstitutional ordinances when localities seek to enforce them as a means of restricting protected religious speech.....	16
SUMMARY OF THE ARGUMENT	19
ARGUMENT	20
A. A locality’s effort to avoid accountability and evade an adverse ruling does not resolve a lawsuit challenging an ordinance that has been enforced to restrict religious speech.....	20
B. Nominal damages are essential in litigation asserting the religious speech rights of door-to-door missionaries in localities with oppressive ordinances.....	23
CONCLUSION.....	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arkansas-Louisiana Conference of Seventh-Day Adventists v. City of White Hall</i> , Cause no. 5:16-CV-13-JM (E.D. Ark. Jan. 19, 2016)	21
<i>Ben-Levi v. Brown</i> , 136 S. Ct. 930 (2016)	25
<i>Buckley v. American Constitutional Law Foundation, Inc.</i> , 525 U.S. 182 (1999)	15
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)	26
<i>Capitol Square Review & Advisory Board v. Pinette</i> , 480 U.S. 136 (1987)	26
<i>City of Lakewood v. Plain Dealer Public Co.</i> , 486 U.S. 750 (1988).....	14
<i>City of Riverside v. Rivera</i> , 477 U.S. 561 (1986).....	25
<i>Committee for First Amendment v. Campbell</i> , 962 F.2d 1517 (10th Cir. 1992).....	24

<i>Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 477 U.S. 530 (1980)</i>	14
<i>FW/PBS v. City of Dallas, 493 U.S. 215 (1990)</i>	15
<i>Farrar v. Hobby, 506 U.S. 103 (1992)</i>	24, 25
<i>Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)</i>	14
<i>Freedman v. Maryland, 380 U.S. 51 (1965)</i>	14, 15
<i>Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980)</i>	16
<i>Gulf States Conference of Seventh-Day Adventists v. City of Gulfport, Cause no. 1:19-CV-541-HSO-JCG (S.D. Miss. Aug. 23, 2019)</i>	21
<i>Hughes v. Rowe, 499 U.S. 5 (1980)</i>	24
<i>Hynes v. Mayor of Oradell, 425 U.S. 601 (1976)</i>	16
<i>Knox v. Service Employees International Union, Local 1000, 567 U.S. 298 (2012)</i>	26

<i>Larson v. Valente</i> , 456 U.S. 228 (1982).....	14
<i>Marks v. United States</i> , 4430 U.S. 188 (1977).....	16
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1992).....	13
<i>Memphis Community School District v. Stachura</i> , 477 U.S. 299 (1986).....	24
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988).....	12
<i>Murdock v. Pennsylvania</i> , 319 U.S. 105 (1943).....	<i>passim</i>
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015).....	14
<i>Riley v. National Federation of the Blind</i> , 487 U.S. 781 (1999).....	12, 15
<i>Schultz v. City of Cumberland</i> , 228 F.3d 831 (7th Cir. 2000).....	15
<i>Secretary of State v. Joseph H. Munson Co.</i> , 497 U.S. 947 (1984).....	15
<i>Southwest Promotions v. Conrad</i> , 420 U.S. 546 (1975).....	14, 15

*Village of Schaumburg v. Citizens for
a Better Environment*,
444 U.S. 620 (1980)..... 12, 15

*Watchtower Bible & Tract Society of
New York v. Village of Stratton*,
536 U.S. 150 (2002)..... 11, 12, 15, 26

Statutes

Act of Uniformity,
14 Car. 2 c. 4 (1662) 3

Federal Civil Rights Act,
42 U.S.C. § 1983..... 21, 23

Licensing of the Press Act,
14 Car. 2 c. 33 (1662) 3

Privacy Act,
Pub. L. 93-579, § 7 (5 U.S.C. § 552a) 15

Other Authorities

American Bible Society,
<http://www.americanbible.org/about>
(last viewed on Sept. 18, 2020).....5

Distribution of Religious Literature,
[http://library.truman.edu/microforms/pamphlets_
in_american_history.asp](http://library.truman.edu/microforms/pamphlets_in_american_history.asp)
(last visited Sept. 18, 2020)5

History of Mormonism, http://historyofmormonism.com/mormon-history/ (last visited on Sept. 18, 2020)	5
John William Jones, <i>Christ in the Camp, or Religion in Lee's Army</i> (1887) (available at http://www.perseus.tufts.edu/ hoppertext?doc=Perseus%3Atext%3A2001.05.0163 (last visited Sept, 18, 2020)	5
Mark 16:15	1, 4
Matthew 28:19	1, 4
Matthew 28:20	1, 4
Frank S. Mead & Samuel S. Hill, <i>Handbook of Denominations in the United States</i> (Abingdon Press 14th ed. 2018)	4, 5, 6, 7
Moody Publishers, https://www.moodypublishers.com/About/ (last viewed on Sept. 18, 2020).....	7
Elizabeth Twaddell, <i>The American Tract Society, 1814-1860</i> , Church History, Vol. 15, No. 2 (Cambridge UP Jun. 1946), available at http://www.jstor.org/stable/3160400 (last viewed on Sept. 18, 2020).....	4
Watchtower magazine (collection of back issues, https://avoidjw.org/magazines (last viewed Sept. 18, 2020).....	7

Ellen G. White,
The Publishing Ministry (1983)6

INTERESTS OF *AMICI CURIAE*¹

Amici curiae are religious organizations that follow the “Great Commission,” given by Jesus Christ to his followers, to go into all the world and “preach the Gospel.” See, Matthew 28:19-20; Mark 16:15. A principal method by which these organizations follow this evangelical mandate is through door-to-door visits with potential converts during which church members share their testimonies, discuss religious issues, pray, distribute religious literature and solicit charitable contributions to sustain these missionary activities. These evangelistic efforts, traditionally known as “colporteur” ministries, have a long history in this country. *Amici* sponsor and support some the nation’s oldest and largest colporteur ministries. The Eleventh Circuit decision under review here seriously threatens the viability of those ministries.

Amicus General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents over 91,000 congregations with more than 22 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,600 congregations with more than 1.3 million members. The General Conference sponsors several missionary programs in which church members travel to areas to evangelize local residents through door-to-door solicitation.

¹ Rule 37 statements: All parties consented or filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

One of these programs is a student missionary effort known as the “Literature Evangelist” program. These student missionaries regularly encounter local speech-suppressive laws which must be addressed through negotiation or litigation before these missionary activities may occur. A justiciability rule that would limit the recovery of damages arising from legal challenges to these speech-suppressive laws would significantly undermine the Church’s ability to protect the religious speech of its student evangelists in communities that try to use their local laws to suppress such expression.

Amicus Pacific Press Publishing Association is one of two publishing houses for the Seventh-day Adventist Church located within the United States. This publishing house was established in 1875 for the purpose of printing and distributing Adventist literature for use in evangelism and proselytizing. Since its founding, Pacific Press Publishing Association has supported and participated in the Adventist Church’s Literature Evangelism ministry as an important channel for its publications.

STATEMENT

Rather than summarizing the procedural history of this case, *amici* present here a description of the type of religious speech that will be impacted by the Eleventh Circuit’s decision.

Amici participate in door-to-door missionary activity in many locations around the country. They also are forced to bring civil rights actions challenging local licensing and solicitation ordinances that some localities impermissibly use to restrict this kind of protected First Amendment

activity. *Amici* rely on claims for nominal damages to secure redress for the violation of their missionaries' religious speech rights and to develop the law when local governments alter their laws as a means to avoid accountability.

Religious proselytizing through face-to-face meetings with potential converts, accompanied by distribution of religious literature, has a history at least as old as that of this nation. As this Court has recognized, such missionaries have been a "potent force in various religious movements down through the years." *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). The same religious dissenters and non-conformists who fled England and the Act of Uniformity, 14 Car. 2 c. 4 (1662), and the Licensing of the Press Act, 14 Car. 2 c. 33 (1662), later proposed, debated, and eventually approved the Bill of Rights, with its protections of religion and religious speech. The result has been a uniquely vibrant development and dissemination of religious views in this country. See, Frank S. Mead & Samuel S. Hill, *Handbook of Denominations in the United States* (Abingdon Press 14th ed. 2018) (cataloging more than 225 American denominations).

A. Missionary proselytization through door-to-door literature distribution and solicitation has a long tradition.

The missionary tradition predates the founding of this nation by millennia, dating at least to the "Great Commission" given by Jesus Christ to his followers to go into all the world and "preach the Gospel." See, Matthew 28:19-20; Mark 16:15. The specific form of evangelism involving the distribution of printed

literature followed closely after Johannes Gutenberg's introduction of movable type for printing in the mid-fifteenth century. Cf. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 n. 6 (1943) (collecting examples of this method of evangelism).

In early nineteenth century America, “the organization of individual evangelical activity was [seen as] the universally recognized panacea for the ills and sins of the world.” Elizabeth Twaddell, *The American Tract Society, 1814-1860*, Church History, Vol. 15, No. 2 (Cambridge UP Jun. 1946) pp. 116-132, at p. 116) (available at <http://www.jstor.org/stable/3160400>) (last viewed on Sept. 18, 2020). As a result, numerous evangelistic associations began missionary activity through the distribution of religious literature. The American Tract Society was founded in Boston for this purpose in 1814. Two years later, the American Bible Society was established in New York to distribute Bibles and study aids. See <http://www.americanbible.org/about> (last viewed on Sept. 18, 2020). Both organizations remain active in the distribution of religious literature.

The Church of Jesus Christ of Latter-day Saints began missionary activities almost immediately after it was organized in 1830. Mead & Hill, *Handbook of Denominations*, at 134-141; see <http://historyofmormonism.com/mormon-history/> (last visited on Sept. 18, 2020). These missionary activities have long included the distribution of religious literature. Cf. http://library.truman.edu/microforms/pamphlets_in_american_history.asp (last visited Sept. 18, 2020) (catalogue of pamphlets).

During the Civil War era, chaplains and others distributed Bible and tracts as colporteurs (peddlers of religious books). John William Jones, *Christ in the Camp, or Religion in Lee's Army* (1887) (available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0163> (last visited Sept, 18, 2020)).

At roughly this same time, the Seventh-day Adventist church was recognized and began sponsoring colporteur ministries. See Mead & Hill *Handbook of Denominations*, at 19-25. Early Adventist Church founder Ellen G. White called for “message-filled books, magazines, and tracts to be scattered everywhere like the leaves of autumn.” Ellen G. White, *The Publishing Ministry* (1983), at 5. Taking this counsel to heart, the Adventist Church continues to use several methods of missionary activity that involve the distribution of religious literature through face-to-face meetings and door-to-door canvassing. Pacific Press Publishing Association began publishing religious outreach materials for the Seventh-day Adventist Church in 1875, and this ministry has been active and continues to this date. Cf. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 n. 7 (1943) (noting these missionary efforts).

These missionary activities are now known as “Literature Evangelism,” and those who participate in them are referred to as “Literature Evangelists.” This form of evangelism has been and remains a critical part of the ministry of the Adventist Church.

These ministries were joined in the 1870s by the denomination now known as Jehovah's Witnesses. See Mead & Hill, *Handbook of Denominations*, at

124-127. Jehovah's Witnesses have long focused upon distribution of the written word as part of their evangelistic mission, and almost immediately began distributing Watchtower magazine. See, <https://avoidjw.org/magazines/> (collection of back issues (last viewed Sept. 18, 2020). Jehovah's Witnesses also sponsor active missionary efforts, and these missionaries are now known as "pioneers."

A similar organization arose in 1894, when American evangelist Dwight L. Moody founded the Bible Institute Colportage Association in Chicago to distribute evangelical Protestant religious tracts and books. Now known as Moody Publishers, it continues to publish and distribute religious materials. See, <https://www.moodypublishers.com/About/> (last viewed on Sept. 18, 2020).

As these examples show, American religious groups have a long history of seeking converts through personal appeals coupled with distribution of religious literature. This practice, which is at the heart of the speech protected by the First Amendment, has long been integral to the vitality of American religious life.

B. *Amici's* missionaries regularly are engaged in this traditional religious speech.

Amici long have been involved in this accepted form of missionary activity. And the Adventist Church's experience with its student missionary programs is particularly relevant, not only to the

Adventist Church, but to any religious organization engaged in door-to-door proselytization.

The Adventist Church's program is designed not only to place literature in the home, but also to offer a range of religious services, all designed to promote the Adventist Church's evangelistic message. Students also routinely pray with willing homeowners, offer personal religious testimonies and perform religious counseling.

Another integral feature of these missionary programs is the solicitation of donations to support the program and the Christian education of the student missionaries. Student missionaries are trained to explain that the literature is offered on a purely voluntary basis. They suggest a donation range for any books in which the homeowner might be interested, and describe the manner in which donations are use. This description includes a statement that a portion of any donation will be used for the student missionary's Christian education.

Although money may be involved (if a donation is received), missionaries do not sell literature. Missionaries routinely give literature to interested homeowners who do want or who are unable to make a donation. Missionaries are trained to attempt to leave some material, even if only a pamphlet, at every house where someone is willing to accept it. Missionaries also receive donations from persons who do not want any literature but just want to help. A typical donation ranges from \$10 to \$20, although donations above and below that suggested range frequently occur.

Donations are solicited for reasons beyond the obvious need to support the program and increase its outreach. For example, the Church has learned over the years that people are more likely to read what they value. A book that is simply “forced upon” a person is less likely to be valued than one accompanied by a voluntary financial gift. A contemporaneous donation often creates an allegiance or an affinity between the donor and the cause that the donation supports. As a result, the simple act of making a donation is frequently the first step in the conversion of the donor.

In short, *amici’s* missionary programs are paradigmatic examples of religious speech in the long tradition of “colporteur” ministries in which evangelists go door-to-door distributing literature and soliciting potential converts.

C. Religious speech by door-to-door missionaries lies at the core of First Amendment protection.

This Court recognized the significance of these ministries over three quarters of a century ago in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943):

The hand distribution of religious tracts is an age-old form of missionary evangelism . . . [and] has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose coleporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of

religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting.

Id. at 108-09. While the name of this ministry may have changed – “coleporteurs” are now identified by terms such as missionaries or evangelists – the nature of the speech, and the need to protect that speech, remain the same.

This Court revisited the issue of door-to-door religious ministries in *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002), and made clear that door-to-door witnessing could not be subjected to municipal licensing restrictions. In reaching this decision, the Court noted that some of its “early cases” which invalidated such speech-restrictive laws “also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved. *Id.* at 162. However, after a more thorough analysis, the Court made the following definitive statement:

The rhetoric used in the World War II-era opinions that repeatedly saved [missionaries] from petty prosecutions reflected the Court’s evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.

Id. at 169. *Village of Stratton* thus reaffirmed the principle recognized in *Murdock*, namely that door-to-door canvassing and distribution of religious

literature is protected First Amendment activity, even if money is involved.² Indeed, it is difficult to imagine a more ringing endorsement of the “value judgment” embodied in *Murdock* than this statement in *Village of Stratton*.

D. Door-to-door missionaries frequently encounter local laws that suppress this protected religious speech.

Not all localities in this country have heeded the “value judgment” embodied in *Murdock* and *Village of Stratton*. Indeed, many municipalities have interpreted the Court’s observation in *Village of Stratton* that “a town may have [interests] in some form of regulation, particularly when the solicitation of some form of money is involved,” 536 U.S. at 162, as *carte blanche* authority to apply their local licensing and solicitation ordinances to all door-to-door missionary activities. These cities also require permits, and frequently impose an onerous application process and permit fees – sometimes running into thousands of dollars – before student missionaries may engage in this kind of protected speech. These municipalities also enforce their

² This latter aspect of *Murdock* was not at issue in *Village of Stratton*, as it had been previously reaffirmed by the Court. See, *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) (“charitable appeals for funds, on the street or door to door, involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes” and is fully protected speech) (quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)); see also *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 788-89 (1988) (charitable solicitation protected speech).

ordinances against *amici's* missionaries through criminal prosecutions. Such ordinances thus impose significant burdens upon *amici's* ability to exercise their core First Amendment right of religious speech.

These laws tend to fall into three general categories. Some entirely ban all door-to-door activity – which has long been recognized as unconstitutional. See, *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943). Many more municipalities attempt to regulate door-to-door activity any time money is involved, both when sales are made and when donations are solicited. And finally other localities seek to regulate only sales, but exclude charitable solicitations. Under these latter ordinances, the Church's missionary work should be exempt from regulation. Some cities, however, take the position that because of the contemporaneous nature of the two transactions (distribution of literature and solicitation of a donation), the missionary activities are subject to the ordinance.

These ordinances are often blatantly unconstitutional prior restraints on protected speech under this Court's existing precedents. They also suffer from numerous other constitutional infirmities. For example, such ordinances often:

- exempt certain speakers, viewpoints and/or messages, creating content and viewpoints discrimination. See, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Larson v Valente*, 456 U.S. 228, 246-47 (1982); *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n of New York*, 447 U.S. 530, 537 (1980);

- vest the issuing authority with unfettered discretion to grant or deny the permit based on undefined standards. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 133 n. 10 (1992); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757-58 (1988);
- sweep too broadly, are not narrowly drawn, and are not the only reasonable alternative which has the least impact on First Amendment freedoms. *Southwestern Promotions v. Conrad*, 420 U.S. 546, 559-60 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965);
- fail to include required procedural safeguards to reduce the danger of prohibiting constitutionally protected speech, *Southwestern Promotions v. Conrad*, 420 U.S. 546, 559-60 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965);
- omit any time frame in which the permit must be granted or denied. *FW/PBS v. City of Dallas*, 493 U.S. 215, 227-29 (1990);
- impose significant, non-nominal license fees. *Murdock*, 319 U.S. at 113-15;
- require applicants to provide a litany of personal information (including social security numbers in violation of the Privacy Act, Pub. L. 93-579, § 7, set out as note to 5 U.S.C. § 552a). *Village of Stratton*, 536 U.S. at 166-67; *Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 198-99 (1999).;

- seek disclosure of detailed information regarding the intended use of any donated funds. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Sec. of State v. Joseph H. Munson Co.*, 497 U.S. 947 (1984); *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988);
- inquire regarding the applicant's criminal history and prevent persons with prior convictions from securing a license. *Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000); *Genusa v. City of Peoria*, 619 F.2d 1203, 1218, 1219 n. 40 (7th Cir. 1980); and
- are impermissibly vague. *Marks v. United States*, 430 U.S. 188, 196 (1977); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976).

In short, although these ordinances are as diverse as the communities that pass them, such laws are arguably the ones that most frequently are in violation of the First Amendment.

E. *Amici* often are forced to challenge unconstitutional ordinances when localities seek to enforce them as a means of restricting protected religious speech.

Under *amici's* missionary programs, each year hundreds of college age students and other church members visit scores of locales around the country. The fact that these missionaries work in a variety of different localities creates the potential for numerous conflicts with local governments regarding the enforcement of laws that restrict their rights to religious speech.

Amici are aware, through long experience, of the potential for conflicts, and actively work to avoid them. For example, before *amici's* missionaries visit a particular community, they seek to inform local authorities of the nature of the program and the missionaries' upcoming activities. These efforts largely are successful. Often there is no further communication with authorities and these missionary visits are both productive and uneventful. Unfortunately, however, each year a significant number of localities attempt to enforce various speech-suppressive ordinances, such as business or solicitation licensing ordinances, against *amici* and their missionaries.

The attempted enforcement of these speech-suppressive ordinances consistently follows one of two patterns. Sometimes local authorities will respond to the program leader's overtures by asserting that the missionaries' activities are subject to regulation under a local ordinance before the missionaries arrive. In those instances, a city official – such as a city clerk or police administrator – will provide the city's interpretation of the ordinance and insist that it will be enforced against the student missionaries, who will be subject to prosecution if they engage in missionary work in that locale.

Other times, *amici's* overtures are ignored, the missionaries commence their efforts, and the locality's intent become evident only when one or more missionaries are stopped, threatened or arrested by local police. Such encounters often result in criminal prosecutions under speech-suppressive ordinances that are plainly unconstitutional. Over

the past several annual cycles, *amici's* missionaries have faced criminal prosecution in at least 11 states, including Alabama, Arkansas, California, Georgia, Louisiana, New Jersey, Michigan, Mississippi, Oklahoma, Tennessee, and Texas.

Once the Church becomes aware that the locality is threatening to or is enforcing a speech-suppressive ordinance against its missionaries, all of the missionary teams are forced to move to a different community until the issue can be resolved; otherwise, all of the missionaries could risk criminal prosecutions for violating the ordinance. Because a significant number of the missionaries are minors or young adults, the Church simply cannot risk their arrests. The Church is acutely aware of the collateral consequences of an arrest or criminal prosecution for these missionaries, even if the charge is eventually dropped or the missionary is acquitted. In addition to being traumatizing to the students and disruptive to the program, such arrests commonly must be disclosed in college, graduate and law school applications. They also are routinely the subject of inquiry on job applications, background checks, professional licensing reviews and immigration and citizenship applications.

The collateral consequences for missionaries who are criminally prosecuted is one of the reasons the Adventist Church has implemented a vigorous program of notice to localities, followed by negotiation and, where necessary, litigation.

SUMMARY OF ARGUMENT

The present case arises from a challenge to a policy restricting free speech on a public college campus.

But the Court's decision will have unavoidable and far-ranging implications in other settings. *Amici* participate in door-to-door missionary activity – including personal witnessing, distributing religious literature, and soliciting support – in many localities across the county. This Court's First Amendment case law has long recognized that this form of religious speech is at the core of protected First Amendment activity.

Because some municipalities attempt to use their licensing and solicitation ordinances to heavily regulate, if not ban, these door-to-door missionary activities, *amici* often are forced to bring civil rights actions in federal court challenging these laws after the municipalities have enforced them against missionaries. These cases seek both injunctive relief and damages. In many instances, the cities seek to avoid adverse rulings by revising their laws to remove the constitutionally suspect provisions. These kinds of legislative revisions serve the short-term purpose of resolving the instant litigation by doing away with offending ordinance. This solution, however, does not remedy the retrospective harm caused by the denial of the missionaries' First Amendment rights. And simply erasing the offending provisions does not allow the courts to develop the law in this area by analyzing these ordinances and further articulating the boundaries of constitutionally permissible regulation of protected First Amendment speech.

If this Court endorses the Eleventh Circuit's position, then *amici* and the many religious minorities who depend on the federal courts to

protect their fundamental rights will be deprived of an important remedy to secure redress on meritorious constitutional claims, regardless of a locality's calculated efforts to avoid accountability. Nominal damages ensure that violation of the essential religious speech rights at the heart of the First Amendment can be remedied.

ARGUMENT

- A. A locality's effort to avoid accountability and evade an adverse ruling does not resolve a lawsuit challenging an ordinance that has been enforced to restrict religious speech.**

When *amici* plan their annual missionary calendar and determine the localities in which their Literature Evangelists will proselytize, they do not do so with the intention of running afoul of any local laws. Indeed, they do all that they can to cooperate with local authorities in order to comply with the reasonable demands of local requirements. But despite *amici's* best efforts, some localities remain steadfast in impermissibly applying their local ordinances to curtail constitutionally protected door-to-door missionary activities. In those instances – which normally arise after the locality has enforced its law – the Adventist Church must resort to litigation to protect the First Amendment rights of its student missionaries.

When the Adventist Church does litigate, it files suit in federal court asserting claims under the

Federal Civil Rights Act, 42 U.S.C. § 1983.³ Because the Church seeks to continue its program in the local area, it asserts claims for declaratory and injunctive relief to curtail the municipality's future enforcement of the challenged ordinance against the Literature Evangelists. In many instances, because local authorities already have prevented Literature Evangelists from engaging in door-to-door missionary work (either through prior restraint of their speech through draconian permitting applications or overzealous enforcement following interactions with citizens) the Church also seeks an award of nominal damages for this lost opportunity.

Once faced with the prospect of defending the constitutionality of their ordinances in federal court, many cities seek to avoid an adverse ruling rather than secure a decision on the merits. This outcome frequently takes the form of the locality revising its laws to remove the constitutionally suspect provisions. Thus, for example, a city will amend a solicitation ordinance to exempt charitable and religious solicitations. Or it will replace a required solicitation permit and fee with a simple no-cost registration requirement for charitable or religious organizations.

These kinds of legislative revisions serve the short-term purpose of resolving the instant litigation by doing away with offending ordinance. The city is

³ See, e.g., *Gulf States Conference of Seventh-day Adventists, et al. v. City of Gulfport, Mississippi*, Case No. 1:19-cv-541 HSO-JCG (S.D. Miss. Aug. 23, 2019); *Arkansas-Louisiana Conference of Seventh-day Adventists, et al. v. City of White Hall, Arkansas*, Case No. 5:16-CV-13-JM (E.D. Ark. Jan 19, 2016).

able to avoid an adverse ruling related to the constitutionality of its earlier statute. And with the law no longer on the books, this result removes the need for prospective declaratory or injunctive relief.

This stop-gap solution, however, is far from ideal. First, erasing the need for prospective relief does not address the retrospective harm caused by the denial of the Literature Evangelists' First Amendment rights. A nominal-damages award is needed in order to vindicate the constitutional injury that has already occurred.

Second, the local government's improvised amendment of its laws carried out solely in response to a pending civil rights lawsuit prevents any judicial examination of the challenged ordinance. By simply erasing the offending enactments, courts are precluded from analyzing their provisions and delineating the boundaries of constitutionally permissible regulation of protected First Amendment speech. The absence of any judicial scrutiny prevents the development of law in this area and frustrates the purpose of § 1983 to provide relief to those harmed by the government's past, unconstitutional conduct.

B. Nominal damages are essential in litigation asserting the religious speech rights of door-to-door missionaries in localities with oppressive ordinances.

The present litigation involves a challenge to a policy restricting free speech on a public college campus. As shown in the above summary, however, similar First Amendment challenges arise in other settings. And in the context of *amici's* missionary

programs, a claim for nominal damages is crucial even after localities amend their unconstitutional ordinances.

A municipality's prospective change in its laws does nothing to remedy a past constitutional violation. See, *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1526 (10th Cir. 1992) (neither a change in conduct nor a subsequent change in policy "erases the slate concerning the alleged First Amendment violations.") Thus, when a locality alters its solicitation or licensing laws after enforcement against amici's Literature Evangelists, a remedy is still required to rectify the earlier deprivation of their protected First Amendment rights.

In most cases, the locality's enforcement of its unconstitutional ordinance against a Literature Evangelist results in no clearly quantifiable injury. Nominal damages serve that precise function of providing a remedy where a plaintiff has suffered a constitutional deprivation but cannot prove the precise amount or extent of that recognizable injury. See, *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (nominal damages available where a plaintiff "cannot prove actual injury"); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) ("nominal damages, * * * are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury"); *Hughes v. Rowe*, 449 U.S. 5, 13 n.12 (1980) (nominal damages available even where plaintiff "cannot prove actual injury").

The fact that damages are "nominal" in no way connotes that they are not important. As Justice O'Connor observed, "[n]ominal relief does not

necessarily a nominal victory make.” *Farrar*, 506 U.S. at 121 (O’Connor, J., concurring). To the contrary, “[a] judgment 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 have to pay.” *Farrar*, 506 U.S. at 113. An award of nominal damages thus alters the legal relationship between the parties.

Beyond merely shifting the dynamic between the parties to the underlying litigation, an award of nominal damages significantly impacts the manner in which government can approach the regulation of protected speech. See, *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (“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.”). Cf. *Ben-Levi v. Brown*, 136 S. Ct. 930, 93 n. 70 (2016) (Alito, J., dissenting from denial of certiorari) (noting that “a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.”) (quoting *Knox, v. Service Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012)).

Religious speech in the form of door-to-door missionary activity – including personal witnessing, distributing religious literature, and soliciting support – has long been sheltered with protection by the First Amendment. See *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296

(1940). Unfortunately, as this Court has noted, “[i]n Anglo-American history, * * * government suppression of speech has * * * commonly been directed precisely at religious speech.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

Recognizing the justiciability of nominal damages claims after a change in the law ensure that plaintiffs like Petitioners, *amici* – and the many religious minorities who depend on the federal courts to protect their fundamental rights – are able to secure redress on meritorious constitutional claims, regardless of a locality’s calculated efforts to avoid an adverse court ruling. Nominal damages ensure that violation of the essential religious speech rights at the heart of the First Amendment can be remedied.

CONCLUSION

This Court should reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

TODD MCFARLAND
Counsel of Record
Associate General Counsel
General Conference of
Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321
mcfarlandt@gc.adventist.org

ANDREW G. SCHULTZ
*Rodey, Dickason, Sloan,
Akin & Robb, P.A.*
201 Third Street, NW – Suite 2200
Albuquerque, NM 87102
Counsel for Amici Curiae

SEPTEMBER 2020