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

AMICI CURIAE BRIEF OF JUSTICE AND FREEDOM FUND, STUDENTS FOR LIFE OF AMERICA, RATIO CHRISTI, YOUNG AMERICA'S FOUNDATION, AND TURNING POINT USA SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amici curiae respectfully submit that the decision of the Eleventh Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010). JFF has made numerous appearances in this Court as *amicus curiae*.

Justice and Freedom Fund is joined by several organizations that maintain student groups ("Student Amici") in colleges and universities across the nation. All of these groups disseminate information about urgent contemporary issues, implicating First Amendment rights to freedom of speech. Student Amici write to inform the Court about the free speech challenges they have faced and successfully litigated.

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[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

Students for Life of America is the nation's largest pro-life student organization with groups on over 1,240 high schools and college campuses across the country. Student groups may offer information about abortion, local pregnancy centers, and other resources for pregnant students. See https://studentsforlife.org.

Ratio Christi is a Christian apologetics campus ministry that seeks to intellectually defend the Christian faith and provide biblical perspective on current cultural, ethical, and political issues. See https://ratiochristi.org.

Young America's Foundation is a 501(c)(3) non-profit, educational organization whose mission is to educate and inspire increasing numbers of young Americans concerning the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. The Foundation accomplishes its mission by providing essential conferences, seminars, educational materials, internships, and speakers to young people across the country. YAF also maintains and operates the Reagan Ranch, the National Journalism Center, the Center for Entrepreneurship & Free Enterprise, and operates hundreds of chapters at high schools and universities all across the nation. Consistent with its tax status, YAF stands resolute as a strictly non-partisan organization dedicated to the ideas and principles of the American founding, providing an abiding, faithful guide for young Americans here in the 21st century and beyond. See www.yaf.org.

Turning Point USA is a 501(c)(3) non-profit organization whose mission is to identify, educate, train, and organize students to promote freedom. See www.tpusa.com.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Student Amici seek to exercise their rights to free expression through signs, flyers, pamphlets, images, peaceful demonstrations, information tables, and hosting events on campus with invited guest speakers. They write to draw the Court's attention to their experiences with a variety of unconstitutional restraints on their fundamental rights to free speech and association. The roadblocks to free student speech on campus have spawned legal challenges from coast to coast, including California, Oregon, Michigan, Ohio, Arkansas, Colorado, Georgia, Florida, and New York. These states represent all the circuits in the three-way split identified by Petitioners—the Second, Sixth, Eighth, Ninth, Tenth, and Eleventh. Many of Student Amici's cases have been successfully settled, generating policy changes that will preserve free expression for future students and even triggering new legislation.

This Court has expressed a high regard for constitutional liberties. Even the smallest loss is worthy of a judicial remedy. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). The high value this Court assigned to First Amendment liberties in *Elrod* supports Petitioners' argument that the government's post-filing change of an unconstitutional

policy does not moot a nominal-damages claim to vindicate the government's past, completed constitutional violation.

Unconstitutional campus policies follow several common patterns. Some, like Georgia Gwinett College, quarantine speech to a tiny "speech zone" on campus. Many impose unreasonable permit requirements, including advance permission to speak and even the obligation to disclose the content of the students' expression. Although some permit requirements include the payment of a "security fee," these policies do not necessarily impose a financial cost that can be alleged as compensatory damages.

A decision in favor of Petitioners will enhance the ongoing ability of groups like Student Amici to settle lawsuits quickly, protecting free expression on campus and limiting the opportunity for government school officials to manipulate the system.

ARGUMENT

I. STUDENT AMICI HAVE CHALLENGED A VARIETY OF UNCONSTITUTIONAL CAMPUS POLICIES ACROSS THE NATION.

The cumulative experiences of Student Amici demonstrate that many American colleges and universities have become a "marketplace of restraints" riddled with constitutional flaws rather than the quintessential "marketplace of ideas" they were intended to be. Speech is restricted to ridiculously tiny "speech zones" representing a miniscule percentage of the campus. Advance "permission slips" impose

unconstitutional prior restraints on student speech. Viewpoint discrimination proliferates as officials exercise unfettered discretion to censor "offensive" speech or discriminate in the recognition of student groups and/or funding for their events. This all needs to stop, whether damages are counted in dollars or the loss of precious First Amendment freedoms. A high percentage of college campus free speech cases hinge on nominal damages claims. Many or perhaps even most student speakers would be left without a legal remedy if nominal damages are insufficient to support their claims.[2]

Today's college students are tomorrow's voters, community leaders, lawyers, judges, and legislators. Free speech is essential to a free society that preserves the liberties enshrined in the U.S. Constitution—especially the First Amendment. Student Amici have made a valuable contribution to protecting these freedoms through their litigation efforts.

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[2] "Out of 60 cases that ADF has filed challenging speech zones, speech codes, or student group recognition policies, only 7 of those cases—or 11.7 percent—resulted in payment of compensatory damages." https://www.adflegal.org/blog/these-3-stats-show-why-colleges-must-be-held-responsible-violating-students-rights (last visited 09/25/20). This means that nearly 90 percent of those cases rest on nominal damages.

A. Unconstitutional speech zones and permitting policies may only generate nominal damages rather than out-of-pocket costs that can be alleged or recovered as damages.

Free speech is not a virus that must be quarantined. The real "virus" is the rampant viewpoint discrimination seen in cases brought against unconstitutional university campus policies, as Student Amici's challenges demonstrate. These policies are far outside the "reasonable time, place, or manner restrictions" that may lawfully be imposed under specified circumstances. *Ward v. Rock Against Racism,* 491 U.S. 781, 792 (1989). A permit scheme imposing such restrictions "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. See *United States v. Grace*, 461 U.S. 171, 177 (1983)." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Some colleges establish "speech zones" that represent a tiny percentage of the total campus and severely restrict communication. These "quarantines," often coupled with unfettered discretion and blatant viewpoint discrimination, are horribly unconstitutional but typically do not generate financial damages that can be alleged in a lawsuit.

Ratio Christi encountered a tiny "speech zone," much like the one at issue in this Petition, that exiled a pro-life display to an area comprising less than 0.08 percent of a 405-acre Georgia campus. *Ratio Christi of Kennesaw State University v. Olens*, Case 1:18-cv-

00956-TWT, filed March 15, 2018 (N.D. Ga.). This lawsuit was settled and included the university's payment of $20,100 to cover the costs of litigation. But if the case had continued without that settlement—and only nominal damages—it could have gone up on appeal to the Eleventh Circuit and been subject to the same mootness analysis at issue in this Petition.

Extreme speech quarantines are similarly evident in other challenges litigated by Student Amici. This past May 2020, Students for Life filed suit in the District of Oregon to challenge Chemeketa Community College's policy limiting free speech to two small areas that occupy about 1.5% of the 100-acre campus. *Chemeketa Students for Life v. Members of the Chemeketa Board of Education*, Case No. 6:20-cv-00742-MC, filed May 5, 2020 (D. Ore.). In addition to this draconian restriction on the space where speech may occur, the policy requires permission two weeks in advance for all outdoor expressive activities. This burdensome system prevented students from handing out fliers between classes for an indoor event about the morality of physician-assisted suicide that had already been approved and scheduled. Students for Life encountered similar obstacles at the Miami University of Ohio, where a complex permit system required them to post "trigger warnings" about their pro-life displays that might cause "emotional trauma" to viewers. The students sued after university officials shut down their annual Cemetery of the Innocents display. *Students for Life at Miami University of Ohio*, *Hamilton v. Trustees of Miami University of Ohio,* Case No. 1:17-cv-00804-TSB, filed November 29, 2017 (S.D. Ohio).

Turning Point USA students have wrestled with speech zones and permits in Michigan. Grand Valley State University had a policy limiting speech to two small zones that comprise less than 0.03 percent of the campus. University officials told Turning Point USA chapter members they could not speak to other students about the First Amendment and have them write messages on a large beach ball dubbed a "free speech ball" because the members were not standing in one of the two tiny zones. Campus police and administrators threatened that students would be arrested for trespassing if they continued their expressive activities. Turning Point USA sued the university. *Turning Point USA at Grand Valley State University v. The Trustees of Grand Valley State University,* Case 1:16-cv-01407, filed December 7, 2016 (W.D. Mich.). Officials promptly implemented policy revisions and a stipulated dismissal was filed on March 1, 2017. Meanwhile, Turning Point USA students at another Michigan institution, Macomb Community College, challenged a policy that banned all public expression without a permit and even then assigned speakers to a tiny speech zone that made up approximately .001 percent of campus, limiting students' ability to communicate effectively. *Turning Point USA at Macomb Community College v. Macomb Community College,* Case 2:17-cv-12179-BAF-DRG, filed August 24, 2017 (E.D. Mich.). This lawsuit was also settled quickly, with the college agreeing to suspend the challenged policies and adopt permanent revisions by the end of the semester, in addition to paying damages and attorney fees.

B. Some permit requirements also necessitate payment of a "security fee" by the student group hosting an event.

Young Americans for Freedom have fought unconstitutional "security fees" in both Georgia and California. In *Young Americans for Freedom of Kennesaw State University v. Harmon*, Case 1:18-cv-00956-TWT, Filed March 5, 2018 (N.D. Ga.), university officials had complete discretion to impose unconstitutional "security fees" for any event they considered "controversial." They imposed a fee on YAF students for an event they hosted featuring conservative speaker Katie Pavlich. The students' case was filed and settled in 2018, with the school agreeing to adopt a new policy that clearly outlines when and how security fees can be charged. This is the *same* university Ratio Christi sued—the *same* year—over a "speech zone" that severely restricted their ability to exhibit a pro-life display.

In February 2016, conservative Ben Shapiro was scheduled to give a presentation at California State University–Los Angeles as part of a free speech event that Young America's Foundation and the Cal State–L.A. chapter of Young Americans for Freedom had organized. University officials attempted to shut down the event—but when those efforts failed, professors helped incite a mob of protestors to block entry to the venue where Shapiro was speaking—ironically—about free speech and diversity. It took a lawsuit to bring about needed changes to the unconstitutional policies that enabled this censorship.

Young America's Foundation v. Covino, Case 2:16-cv-03474, filed May 19, 2016 (C.D. Calif.). One of those policies was a "security fee" charged for events school officials considered "controversial."

In its Oregon case (filed in May 2020) against Chemeketa Community College, Students for Life is battling a requirement to estimate and pay a security fee to control disruptive protests intended to drown out their message, in addition to the extreme space restrictions and permit requirements described above. Such a policy, essentially forcing peaceful speakers to finance a "heckler's veto," would "confer broad powers of censorship" on both officials and protesters. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 880 (1997).

C. Unfettered discretion, leading to constitutionally prohibited viewpoint discrimination, is a common theme in Student Amici challenges.

One of the hallmarks of unconstitutional speech suppression is a law or policy that grants "unfettered discretion" to government officials to determine how, when, or where a speaker may speak—or worse yet, what that speaker may say. All Student Amici have experienced this sort of censorship on campuses across the nation, including policies related to registration of student organizations, mandatory student fees, and distribution of funding for these groups.

Students for Life has experienced the impact of viewpoint discrimination in Ohio, California, and New York. Miami University of Ohio required them to post

"trigger warnings," i.e., signs warning others about their pro-life displays. But as this Court recently held, "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2018). California State University–San Marcos officials denied SFL $500 in funding to host a visiting speaker on "Abortion and Human Equality" yet granted nearly $300,000, using mandatory student fees, to fund the Gender Equity and the LGBTQA Pride Center. *Apodaca, Students for Life at California State University San Marcos v. White*, Case 3:17-cv-01014-L-NLS, filed May 17, 2017 (S.D. California). It is blatant viewpoint discrimination for the university to force students to pay for advocacy of views the university decides are orthodox while excluding funding for competing views. At Queens College in New York, SFL was denied "registered" status, which would have allowed the group to join more than 100 student organizations—including pro-abortion clubs—allowed to reserve meeting space, invite speakers, and receive funding from mandatory student activity fees. *Queens College Students for Life v. Members of the City University of New York Board of Trustees*, Case 1:17-cv-00402, filed January 25, 2017 (E.D. New York). Turning Point USA students successfully fought a similar policy at Macomb Community College in Michigan. The college's policy banned all public expression without a permit from an administrator—who had unrestricted authority to grant or deny requests.

Young Americans for Freedom have faced viewpoint discrimination in Florida and Georgia, both states within the Eleventh Circuit. The University of Florida

failed to distribute money collected from mandatory student fees to student organizations in a fair, viewpoint-neutral manner, prompting a lawsuit from the Young Americans for Freedom chapter on campus. *Young Americans for Freedom v. University of Florida*, Case 1:18-cv-00250-MW-GRJ, filed December 21, 2018 (N.D. Fla.). Funding was denied when YAF requested it to host conservative speakers but granted to groups inviting more progressive speakers. After being sued, the school revised its policies and settled the litigation in 2019. In Georgia, where YAF battled Kennesaw State University over its burdensome "security fees," the school established a four-tiered system that classified registered student organizations and assigned privileges according to viewpoints officials favored (or disfavored). The higher the classification, the greater the access to the best areas of the campus and student funding. No conservative groups achieved a status higher than the "recognized" tier—the lowest level.

Ratio Christi, a Christian apologetics organization, has faced viewpoint discrimination in both Colorado and Georgia. The University of Colorado, Colorado Springs refused to grant the group registered status because of its requirement that student leaders share its religious beliefs. The university's denial limited its access to funding, meeting and event space, and administrative support. *Ratio Christi at the University of Colorado, Colorado Springs v. Sharkey*, Case 1:18-cv-02928, filed November 14, 2018 (D. Colo.). The lawsuit prompted the school to update its policies to ensure that a student club may require its leadership to promote the purposes of the club and hold beliefs

consistent with the group's mission. In Georgia, where Kennesaw State University relegated Ratio Christi's pro-life display to a tiny "speech zone" on campus (see Sect. IA), officials had unrestricted discretion to grant, deny, or modify a student organization's reservation request even for unconstitutional reasons. The lack of guidelines allowed them to "quarantine" speech they deemed "controversial" to a small, less-accessible speech zone. Georgia is in the Eleventh Circuit where, under existing precedent, it could be difficult to vindicate this type of constitutional violation if it results in only nominal damages.

II. REMEDIES FOR NOMINAL DAMAGES ARE IMPORTANT TO FACILITATE REVISION OF UNCONSTITUTIONAL POLICIES ON CAMPUS AND DETER FUTURE VIOLATIONS.

The Eleventh Circuit's treatment of nominal damages enables colleges and universities to perpetrate unconstitutional speech policies without facing serious consequences. Without nominal damages, schools can cleverly craft their policies to impose restraints on free speech while avoiding monetary costs to students. They can also prolong litigation to moot a case in progress, thereby avoiding consequences and continuing their unconstitutional policies.

A. Nominal damages confer prevailing party status entitling the plaintiff to attorney fees—a powerful remedy to deter future violations.

Reasonable attorney fees may be awarded to vindicate constitutional rights violations. 42 U.S.C. §§ 1983, 1988(b). This is true regardless of whether damages are financial or nominal. "[A] plaintiff who wins nominal damages is a prevailing party under § 1988." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Attorney fee awards may be substantial and often dwarf the student plaintiffs' out-of-pocket costs.

Many cases in this context are litigated without charge to the student plaintiffs, through the efforts of nonprofit legal defense organizations that rely on donations. Attorney fee recovery enables the ongoing defense of constitutional rights and gives schools an incentive to maintain constitutional policies that do not chill free speech or violate other First Amendment rights.

Each of the Student Amici has had at least one case that generated attorney fees as part of its settlement with a college or university. For example:

Student Amici	Award	Date Settled
Students for Life	$240,000	January 31, 2020
Apodaca v. White		
Young America Fdn.	$66,000	July 31, 2019
Young Americans for Freedom v. University of Florida		
Turning Point USA	$10,000	November 8, 2017
Turning Point USA at Macomb Community College v. Macomb Community College		
Ratio Christi	$20,100	October 19, 2018
Ratio Christi of Kennesaw State University v. Olens		

Attorney fee awards put "teeth" into settlement agreements, encouraging schools to maintain constitutionally acceptable policies on campus.

B. Remedies for completed constitutional violations expedite lasting policy changes that ensure free expression in the future, regardless of the type or amount of damages.

Students for Life has an ongoing case against the Chemeketa Board of Education (filed in May 2020) that demonstrates the devious strategies employed by schools. In 2011, Chemeketa College revised its "Free Speech Guidelines" to correct policies that violated the

First Amendment. But in 2019—eight years later—the school reverted to its previous unconstitutional policy that granted discretion to administrators to decide who may speak on campus. *Chemeketa Students for Life*, Case No. 6:20-cv-00742-MC, filed May 5, 2020 (D. Ore.), Verified Complaint, ¶¶ 139–154. This type of government discretion inevitably leads to unconstitutional viewpoint discrimination. Students should be able to concentrate on their studies and exchange ideas freely on campus without having to sue their college over unconstitutional speech policies. Yet many institutions refuse to revise their policies until a lawsuit is filed.[3] As *Chemeketa Students for Life* illustrates, some universities must be sued more than once over the same unconstitutional policy.[4]

The Eleventh Circuit's approach creates the danger that a school may revise its policy in response to a student challenge, as Chemeketa College did in 2011, but later revert to its old unconstitutional ways. If courts must recognize nominal damages for completed constitutional violations, prevailing party status can be

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[3] "In 81 percent of the lawsuits that ADF has filed against public colleges or universities, the institution agreed to modify the unconstitutional policy only after the lawsuit was filed." https://www.adflegal.org/blog/these-3-stats-show-why-colleges-must-be-held-responsible-violating-students-rights (last visited 09/25/20).

[4] "ADF has sued 8 universities or university systems more than once—and 4 of those lawsuits involved the exact same policy." https://www.adflegal.org/blog/these-3-stats-show-why-colleges-must-be-held-responsible-violating-students-rights (last visited 09/25/20).

established, attorney fees may be recovered—and the school will have a strong incentive to maintain constitutional policies.

C. Successful litigation may trigger legislative changes that facilitate free expression in the future, regardless of the type or amount of damages.

Courts cannot legislate, but litigation may raise awareness of important issues that should be addressed through legislation. That happened in a case Turning Point USA students filed in Arkansas after university officials kicked a student off the patio in front of the Student Union for setting up a table to promote a new student chapter on campus. *Turning Point USA at Ark. State Univ. v. Rhodes*, 2020 U.S. App. LEXIS 27635 (8th Cir. 2020). The lawsuit prompted Arkansas legislators to enact the Forming Open and Robust University Minds (FORUM) Act. *See* Ark. Code Ann. §§ 6-60-1001 to 1010. The Act protects free expression on campus and prohibits the restrictive policies Turning Point students experienced. It expressly protects student organizations from discrimination based on the organization's expression, including requirements that group leaders support the organizational mission, affirm the organization's beliefs, and/or comply with a code of conduct. Ark. Code Ann. § 6-60-1006. Although the Eighth Circuit held that officials had qualified immunity because the unconstitutionality of the school's unwritten "Tabling Policy" was not clearly established, the FORUM Act now provides remedies, including injunctive relief,

attorney fees, and expenses. Ark. Code Ann. § 6-60-1009.

CONCLUSION

Amici urge this Court to reverse the decision of the Eleventh Circuit Court of Appeals and confirm that the government's post-filing revision of an unconstitutional policy does not moot a nominal damages claim that vindicates the government's past, completed constitutional violations of a plaintiff's constitutional rights.

Respectfully submitted,

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