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* YOUNG AMERICANS FOR LIBERTY, INC. IN SUPPORT OF PETITIONERS

David M. Howard
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, NY 10112

Scott A. Keller
Counsel of Record
BAKER BOTTS L.L.P.
700 K Street, N.W.
Washington, D.C. 20001
(202) 639-7837
scott.keller@bakerbotts.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Young Americans for Liberty, Inc., founded in 2009, is a national nonprofit youth organization that advocates for the protection of constitutional rights and the advancement of liberty on university campuses and in American politics. The majority of Young Americans for Liberty's members are students enrolled in universities throughout the United States, and its members frequently engage in activities protected by the First Amendment.

Amicus's direct interest here stems from its deep commitment to protecting the freedom of speech, a critical safeguard of political liberty. Free speech is essential in university environments, and individuals must be allowed to redress past violations of their constitutional rights. Additionally, Young Americans for Liberty reaches students through active recruitment. University speech restrictions hamper activists' ability to express their First Amendment right to share their beliefs with other students and make them aware of opportunities on and off-campus.

[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. The common law of 1871 allowed plaintiffs to vindicate their rights even if they sought only nominal damages. This Court's precedents interpret 42 U.S.C. § 1983 in light of background tort common law principles at the time of the statute's enactment in 1871. And the two primary 19th century treatises this Court has examined in assessing the common law of 1871—Cooley's *Law of Torts* and Bishop's *Commentaries on Non-Contract Law*—both recognized that plaintiffs could vindicate their rights even if they sought only nominal damages.

II. In addition to that historical analysis, nominal damages today still provide retrospective relief for a plaintiff whose constitutional rights have been infringed, even though the plaintiff did not or cannot prove the precise *extent* of their injury. Individuals suffer a concrete injury when constitutional rights, such as those under the First Amendment, are infringed. And this Court has repeatedly explained, in the context of Article III standing, that the size of a plaintiff's injury is irrelevant for determining whether a case remains justiciable. Similarly, nominal damages are available for a plaintiff who proves a constitutional infringement on the freedom of speech, even if the plaintiff does not or cannot prove the precise extent of that injury.

III. A nominal-damages claim therefore cannot become moot just because a law or policy is changed going forward. A prospective change in law or policy does not fully remedy a past constitutional violation. Mootness occurs only when a court cannot possibly grant any effectual relief. But an award of nominal damages changes the legal relationship between the parties, as it orders the defendant to pay the plaintiff money because the defendant violated the plaintiff's constitutional rights. Even if the award

is just a single dollar, that remedy still redresses the plaintiff's past concrete injury.

This Court should reverse the Eleventh Circuit's contrary ruling below to ensure that proper remedies are available to redress violations of constitutional rights.

ARGUMENT

I. THE COMMON LAW OF 1871, WHICH 42 U.S.C. § 1983 IMPLICITLY INCORPORATED, ALLOWED PLAINTIFFS TO VINDICATE THEIR RIGHTS EVEN IF THEY SOUGHT ONLY NOMINAL DAMAGES

To determine what damages remedies are available under 42 U.S.C. § 1983, "the inquiry begins with the common law as it existed when Congress passed § 1983 in 1871." *Filarsky* v. *Delia*, 566 U.S. 377, 384 (2012). The Court's precedents "recognize[] that Congress intended [42 U.S.C. § 1983] to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997); see generally *Bond* v. *United States*, 572 U.S. 844, 857 (2014) ("statute derived from the common law carries with it the [common law's] requirement[s] * * * unless it is clear that the Legislature intended to [depart from the common law]").

Tort common law, in particular, dictates this analysis. This Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability * * * and ha[s] interpreted the statute in light of the background of tort liability." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (collecting cases); see *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 916 (2017). So "the tort liability created by § 1983 cannot be understood in a historical vacuum." *Rehberg* v. *Paulk*, 566 U.S. 356, 362 (2012) (quoting *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983), in turn quoting *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)).

The tort common law of 1871 recognized that plaintiffs could vindicate their rights even if they sought only nominal damages. Cooley's 1879 *Law of Torts* and Bishop's 1889 *Commentaries on Non-Contract Law* both support this. And these are the two primary 19th century treatises that this Court's § 1983 cases consult in assessing the common law of 1871. See, *e.g.*, *Filarsky*, 566 U.S. at 387 (citing Cooley and Bishop); *Bogan* v. *Scott-Harris*, 523 U.S. 44, 51 (1998) (stating that Cooley is an "influential treatise on the law of torts" and citing Bishop); *Wyatt* v. *Cole*, 504 U.S. 158, 164 (1992) (citing Cooley and Bishop); *id.* at 176 n.1, 178 & n.2 (Rehnquist, J., dissenting) (citing Cooley and Bishop); *Burns* v. *Reed*, 500 U.S. 478, 499-500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (citing Cooley and Bishop).

As Cooley explained while quoting Justice Story:

> The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is *entitled to maintain his action for nominal damages, in vindication of his right*, if no other damages are fit and proper to remunerate him.

Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 67 n.1 (1st ed. 1879) (emphasis added) (first quoting *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322) (Story, J.); then citing *Blanchard* v. *Baker*, 8 Me. 253, 268 (1832); *Whittemore* v. *Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813) (No. 17,600); *Johns* v. *Stevens*, 3 Vt. 308 (1830); *Ripka* v. *Sergeant*, 7 Watts & Serg. 9 (Pa. 1844); *Gladfelter* v. *Walker*, 40 Md. 1 (1874)).

Bishop also confirmed this:

> A wrong done to any tangible right recognized by the law imports injury; and, where only such wrong with no actual injury is

> shown, *the party may have, at least, nominal damages in vindication of the right.*

Joel Prentiss Bishop, *Commentaries on the Non-Contract Law and Especially as to Common Affairs Not of Contract or the Every-Day Rights and Torts* § 31, at 12-13 (1889) (emphasis added) (citing *Embrey* v. *Owen*, 6 Exch. 353 (1851); *Whipple* v. *Cumberland Mfg. Co.*, 29 F. Cas. 934 (C.C.D. Me. 1843) (No. 17,516) (Story, J.); *Bagby* v. *Harris*, 9 Ala. 173 (1846); *Paul* v. *Slason*, 22 Vt. 231 (1850); *Cory* v. *Silcox*, 6 Ind. 39 (1854); *Wright* v. *Stowe*, 49 N.C. 516 (1857); *Little* v. *Stanback*, 63 N.C. 285 (1869); *Bassett* v. *Salisbury Mfg. Co.*, 28 N.H. 438 (1854); *Webb*, 29 F. Cas. 506 (Story, J.)).

A sampling of quotations from 19th century caselaw substantiates Cooley's and Bishop's observation that plaintiffs can vindicate their rights even if only nominal damages are available:

- "We are of opinion, that, in the absence of any proof of actual damage in this case, the defendants were liable to nominal damages and to costs, and no more." *Dow* v. *Humbert*, 91 U.S. 294, 302 (1875).
- "The plaintiff was entitled to a verdict for nominal damages upon proof of the infringement of his right, although no actual injury was shown." *Blodgett* v. *Stone*, 60 N.H. 167, 167 (1880) (collecting cases).
- "The action is merely for injuries to the plaintiff's possession; and where no actual injury is shown, the law presumes injury and gives nominal damages." *Hefley* v. *Baker*, 19 Kan. 9, 11 (1877).
- "[I]t is clear that the mere entry upon the land, although there be not so much perceptible injury as the treading down a single sprig of grass, is a trespass, and entitles the plaintiff to nominal damages." *Little*, 63 N.C. at 287.

- "That an injury to a right is actionable, though the damage be inappreciable, is settled by abundant authority." *Del. & Hudson Canal Co.* v. *Torrey*, 33 Pa. 143, 149 (1859).
- "In short, wherever a wrong is done to a right, the law imports, that there is some damage to the right, and, in the absence of any other proof of substantial damage, nominal damages will be given in support of the right. This is a well-known and well-settled doctrine in the law, and has been fully recognized in this court." *Whipple*, 29 F. Cas. at 936 (Story, J.) (citing *Webb*, 29 F. Cas. at 508 (Story, J.)).
- "Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage." *Whittemore*, 29 F. Cas. at 1121 (Story, J.).

This historical analysis confirms that 42 U.S.C. § 1983 should allow nominal damages to vindicate *any* past violation of constitutional rights. See *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) ("In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded."); accord *Thole* v. *U.S. Bank N.A*, 140 S. Ct. 1615, 1623 (2020) (Thomas, J., joined by Gorsuch, J., concurring); *id.* at 1630 (Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ., dissenting). And this Court has already recognized that nominal damages are available for First Amendment, equal protection, and due process violations. *E.g., Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville,* 508 U.S. 656, 666 (1993) (equal protection); *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 309 (1986) (First Amendment); *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978) (procedural due process).

II. Nominal Damages Are Retrospective Relief For A Plaintiff Whose Rights Have Been Violated But Did Not Or Cannot Prove The Extent Of The Injury

In addition to the historical analysis, nominal damages today are still one form of retrospective, monetary relief redressing past violations of plaintiffs' rights. See, *e.g.*, Restatement (Second) of Torts § 907 cmt. a (Am. Law Inst. 1979) ("When a cause of action for a tort exists but no harm has been caused by the tort or the amount of harm is not significant or is not so established that compensatory damages can be given, judgment will be given for nominal damages * * * .").

Individuals suffer a concrete injury when constitutional rights, such as those under the First Amendment, are infringed. See, *e.g.*, *Spokeo*, 136 S. Ct. at 1549 (2016) ("[W]e have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete" for Article III standing, including "free speech" and "free exercise."). And this Court has made clear multiple times, while discussing Article III standing, that the *extent* of a plaintiff's injury has no bearing on whether that lawsuit can proceed. Likewise, nominal damages are available to remedy past constitutional concrete injuries even if plaintiffs do not or cannot prove the precise extent of their injuries.

A. The deprivation of constitutional rights necessarily injures individuals. Freedom of speech is a prominent example. Individuals who were blocked from speaking at a certain time and place—or in a certain manner—could have engaged in further speech at a time in the past of their choosing. See, *e.g.*, *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Here, for example, petitioner Uzuegbunam undoubtedly alleged a concrete injury when he was blocked from speaking at the time and place, and in the manner, that he preferred. See, *e.g.*, *Spokeo*, 136 S. Ct. at 1549. Petitioner Uzuegbunam sought to speak publicly about his faith on a public university campus. Pet. App. 3a-4a. He was first prohibited from speaking outside a specific speech zone designated by the university. *Ibid.* When he moved to that highly-limited speech zone comprising about 0.0015% of the campus, university officials again prohibited petitioner Uzuegbunam from speaking based on the university's policy as it relates to content. Pet. 4. Because of this, petitioner Bradford ceased efforts to speak publicly. Pet. App. 24a.

Even if these injuries were not quantifiable, they are concrete injuries nonetheless. The existence of a concrete injury does not depend on the extent of the injury. As this Court has repeatedly explained, the extent of an injury does not affect the justiciability of a lawsuit seeking to redress that concrete interest. *E.g.*, *Campbell-Ewald Co.* v. *Gomez,* 136 S. Ct. 663, 669 (2016) (standing even if "concrete interest" is "small") (quoting *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013)); *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-308 (2012) (quoting *Ellis* v. *Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 442 (1984)) (same).

B. Relatedly, nominal damages are a remedy awarded when a plaintiff proves constitutional rights were deprived—but did not or cannot prove the precise *extent* of that concrete injury. See, *e.g.*, *Farrar* v. *Hobby*, 506 U.S. 103, 112 (1992) (nominal damages available even where plaintiff "cannot prove actual injury"); *Stachura*, 477 U.S. at 308 n.11 (making "clear that 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) (per curiam) (nominal

damages available even where plaintiff did not show "proof of actual injury"); *Carey*, 435 U.S. at 266 ("[W]e believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury").

Nominal damages are a form of retrospective, monetary relief. See, *e.g.*, Restatement (Second) of Torts § 907 (defining nominal damages, in the tort context, as "a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages"). Specifically, a court enters a remedial order requiring the defendant to pay the plaintiff a small amount of money because the defendant violated the plaintiff's constitutional rights.

With compensatory damages, in contrast, the plaintiff proves the extent of their injury in monetary terms, thus justifying a larger award from the defendant. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003) ("Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'") (quoting *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001)).

Unlike compensatory damages, nominal damages are available even if the extent of a compensable injury cannot be shown, as "the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266. In other words, "[a] plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages." *Farrar*, 506 U.S. at 113.

So where a plaintiff cannot show the precise extent of an injury stemming from a past infringement of constitutional rights, nominal damages still allow the plaintiff to vindicate and redress these rights through the courts. See

James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 Colum. L. Rev. 1601, 1606-1607 (2011) (nominal damages may "provide the only possible remedy" when there has been "a one-off event that affected [the plaintiff] in the past and will not (under modern standing and ripeness decisions) support a claim for injunctive or declaratory relief").

Nominal damages thus alter the legal relationship between the parties. The court below erred in stating that nominal damages are merely a "judicial seal of approval." Pet. App. 13a (citation omitted). As this Court has explained, "[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 113. Consequently, "a plaintiff receive[s] at least some relief on the merits of his claim" by obtaining "nominal damages." *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-604 (2001).

C. Respondents incorrectly assert the "law is clear" that a plaintiff cannot obtain nominal damages if the plaintiff fails to plead compensatory damages. Br. in Opp. 9-10. Respondents make the further unsupported assumption that a plaintiff can almost always make allegations for compensatory damages, and the instances in which a plaintiff cannot "should be rare." *Ibid.*

A plaintiff need not plead compensatory damages—or even attempt to prove the extent of injury—to obtain nominal damages. See *Farrar*, 506 U.S. at 112; *Stachura*, 477 U.S. at 308; *Hughes*, 449 U.S. at 13 n.12; *Carey*, 435 U.S. at 266. Whether a plaintiff pleads or seeks compensatory damages, the plaintiff's constitutional right was violated in the past and thus produced a cognizable injury. Just

because the government did not inflict severe enough injuries to prompt plaintiff to seek compensatory damages does not negate the past constitutional injury.

III. A Nominal-Damages Claim For Retrospective Relief Is Not Mooted By A Prospective Change In Law Or Policy

A prospective change in policy does not fully remedy a past constitutional violation. When a policy is changed prospectively, that cannot moot a claim for retrospective relief like nominal damages. See, *e.g.*, 13C Charles Alan Wright & Arthur R. Miller, *Remedial Capacity In Changed Circumstances: Monetary Relief*, Fed. Prac. & Proc. Juris. § 3533.3 (3d ed. 2019) ("A valid claim for nominal damages should avoid mootness.") (collecting cases).

When a defendant changes how they will enforce a policy in the future, that may not fully redress a plaintiff's constitutional injury for how that policy was enforced in the past. As this Court has stated, mootness in general is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-190 (2000) (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 68 n.22 (1997)). And a plaintiff can retain an unredressed injury when a policy—unconstitutionally enforced against it in the past—is just changed going forward.

Nothing about nominal damages changes this analysis. "A plaintiff who shows past injury sufficient to support standing but who cannot measure damages for the injury may be able to support standing by claiming nominal damages alone." 13A Charles Alan Wright & Arthur R. Miller, *Remedial Benefit and Implied Causes of Action*, Fed. Prac. & Proc. Juris. § 3531.6 (3d ed. 2019). Whether a plaintiff continues to have standing is not affected by the

amount of money sought as a remedy. A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin*, 568 U.S. at 172 (quoting *Knox*, 567 U.S. at 307). The requested relief need not be sizeable: "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald*, 136 S. Ct. at 669 (quoting *Chafin*, 568 U.S. at 172).

The court below erred in holding that a nominal-damages claim can be sustained only where there is a live "request for compensatory damages." Pet. App. 15a. That conclusion directly contradicts this Court's precedents. See, *e.g.*, *Farrar*, 506 U.S. at 112-113; *Stachura*, 477 U.S. at 308 n.11.

The court below fundamentally misunderstood the remedial attributes of nominal damages. It believed a judgment in this lawsuit would amount to merely an "impermissible advisory opinion" regarding the regulation of speech in universities. Pet. App. 14a. But Article III's prohibition on advisory opinions applies only when federal courts would "decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam). Here, an award of nominal damages would change the legal relationship between the parties, requiring the defendant to make a (small) monetary payment to the plaintiff—following a judgment that the defendant violated the plaintiff's constitutional rights. See *Farrar*, 506 U.S. at 113.

Nor would federal courts opine "upon a hypothetical state of facts" when presented with a live claim for nominal damages to redress a past constitutional violation. *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citation omitted). Here, for example, petitioners alleged specific facts about how their constitutional rights were violated by respondents in the past. Petitioner Uzuegbunam first

was prohibited from publicly speaking about his faith outside the small speech zones. Pet. App. 3a-4a. After reserving one of these speech zones, he was again prohibited from speaking pursuant to the university policy after someone complained. Pet. App. 4a. After these incidents, petitioner Bradford ceased efforts to speak publicly. Pet. App. 24a.

Similarly, the court below erroneously thought a remedy for a significant sum of money was the only thing that could have a "practical effect" of keeping these claims alive. Pet. App. 13a-14a; see *Flanigan's Enters., Inc. of Ga.* v. *City of Sandy Springs,* 868 F.3d 1248, 1270 (11th Cir. 2017) (en banc) ("There, as here, the parties' right to a single dollar in nominal damages is not the type of 'practical effect' that should, standing alone, support Article III jurisdiction."). This, too, contradicts this Court's precedents, which establish that the quantum of damages has no bearing on whether a plaintiff has standing or can assert a claim for nominal damages. *E.g.*, *Campbell-Ewald,* 136 S. Ct. at 669; *Farrar*, 506 U.S. at 113.

At base, the fact that petitioners did not or cannot prove the precise extent of their injuries does not mean their claims for past constitutional injuries have been redressed. Petitioners therefore continue to have Article III standing, and "the case is not moot." *Chafin*, 568 U.S. at 172 (quoting *Knox,* 567 U.S. at 308)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

Scott A. Keller
Counsel of Record
BAKER BOTTS L.L.P.
700 K Street, N.W.
Washington, D.C. 20001
(202) 639-7837
scott.keller@bakerbotts.com

David M. Howard
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, NY 10112

Counsel for Amicus Curiae

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