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 FOR THE PETITIONERS


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## 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.

## PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE

Petitioners are Chike Uzuegbunam* and Joseph Bradford. Both were students at Georgia Gwinnett College when this case began. Both are individual persons.

Respondents are Stanley C. Preczewski, 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. All are or were officials at Georgia Gwinnett College involved in enforcing the challenged policies, and Chike and Joseph sued them in their official and individual capacities. During this lawsuit, Respondent Preczewski left the employ of Georgia Gwinnett College, and Respondent Jann L. Joseph took his place as president. Under FED. R. CIV. P. 25(d), Respondent Joseph is automatically substituted for the official capacity claims against Respondent Preczweski. The individual capacity claims against Respondent Preczewski remain.

## LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Eleventh Circuit, No. 18-12676, *Uzuegbunam* v. *Preczewski*, petition for initial hearing en banc denied February 21, 2019, judgment entered July 1, 2019, en banc review denied September 4, 2019, mandate issued September 12, 2019.

U.S. District Court for the Northern District of Georgia, No. 1:16-cv-04658-ELR, *Uzuegbunam* v. *Preczewski*, final judgment entered May 25, 2018.

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* Pronounced CHEE'-kay Oo-zah-BUN'-um.

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## INTRODUCTION

It is almost universally recognized that a nominal-damages claim is justiciable when a plaintiff seeks vindication for a completed constitutional injury, including after government officials have changed their unconstitutional policies or conduct. *E.g.*, 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Fed. Practice & Procedure* § 3533.3 n.47 (4th ed. 2020) [hereinafter *Wright & Miller*] (collecting many cases). "By making the deprivation of rights actionable for nominal damages," courts recognize the societal importance "that those rights be scrupulously observed." *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). But not so in the Eleventh Circuit, which says that a court can never vindicate a constitutional right if the plaintiff's only claim is for nominal damages.

Petitioner Chike Uzuegbunam was a student at Georgia Gwinnett College when officials stopped him from sharing his faith on campus. The problem? He was not standing in, and had not reserved, a "speech zone," part of the 0.0015% of campus where the College confined "free speech expression." After securing a reservation and stationing himself in the minuscule speech zone, Chike began distributing religious literature and sharing his faith. Yet campus police stopped Chike from speaking again, purportedly because someone complained. As the police explained, the College's speech code defined as "disorderly conduct" anything that makes another person feel uncomfortable. So the police threatened to punish Chike if he did not stop speaking. Another student, Petitioner Joseph Bradford, self-censored when he learned what had happened. Chike then filed this lawsuit.

When confronted with these unconstitutional acts and policies, Gwinnett officials doubled down and moved to dismiss, arguing that Chike's speech amounted to "fighting words" that the First Amendment does not protect. When Chike amended the complaint and added Joseph, the College affirmed its position and moved to dismiss again.

Months later, College officials eliminated their Speech Code Policy and revised their Speech Zone Policy, then moved to dismiss Chike's and Joseph's requests for injunctive and declaratory relief as moot. The Eleventh Circuit then held, in a different case, that a repeal of an unenforced law moots a nominal-damages claim. So Gwinnett officials argued in supplemental briefing that Chike's and Joseph's claims for nominal damages were moot as well, even though the College had already applied those policies. The lower court agreed, depriving Chike and Joseph of any opportunity to vindicate their constitutional injuries.

But as this Court has recognized, constitutional rights are worth protecting even when the injury cannot be quantified into dollars and cents. Nominal damages ensure this principle applies in practice—that courts treat the rights of those who cannot measure their loss monetarily as no less important than the rights of those who can. Nominal damages also hold government officials accountable for such violations and make certain that courts scrupulously enforce constitutional rights. Because nominal-damages claims relate to past injuries, and not merely declarations of future rights, this Court should reaffirm that such claims present justiciable controversies.

## STATEMENT OF THE CASE

### I. Censorship through speech policies

#### A. Chike and Joseph desire to share their faith.

Petitioners Chike Uzuegbunam and Joseph Bradford were students at Georgia Gwinnett College. Pet.App.61a. Both are Christians who daily strive to live out their faith and believe they must share their Christian faith with others. Pet.App.61a–62a.

Through public speaking, personal conversations, and distributing pamphlets, Chike sought to share with students on campus that salvation and eternal life are available through Jesus Christ. Pet.App.62a. Joseph's message was similar, and he also sought to persuade students of the Bible's truth and to approach life from a biblical worldview. *Ibid.*

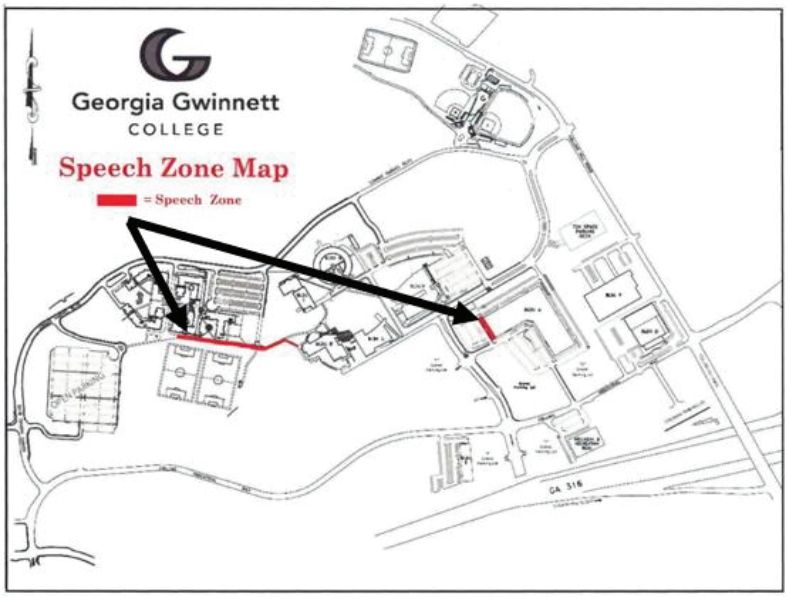
Chike and Joseph do not engage in their expression for money. Pet.App.62a. They do not sell, seek donations, or solicit signatures. They merely share the Gospel out of love for others. *Ibid.* They express their religious beliefs peacefully, without confrontation or amplification, to anyone who wants to listen. *Ibid.*

#### B. Georgia Gwinnett College's Speech Zones and Speech Code severely restrict expression.

Respondents are officials of Georgia Gwinnett College, a public institution. Pet.App.62a–72a. The College's 260-acre campus in Lawrenceville, Georgia consists of publicly accessible buildings and outdoor areas, open-air quadrangles, and park-like lawns. Pet.App.72a. It is chock full of places where expressive activity can flourish without inhibiting other activities, including these places:

*Ibid.*; First Am. V. Compl. Exs. 7A–7F.

Respondents regulated student expression through a Speech Zone Policy that purportedly provided "a forum for free and open expression of divergent points of view by students [and] student organizations." Pet.App.73a. But the Policy did the exact opposite. Students could engage in expressive activities only by "reserving" one of two speech zones that comprised one patio and one sidewalk—about 0.0015% of campus (highlighted in red):




Pet.App.75a–80a, 138a, 146a–47a; First Am. V. Compl. Ex. 6 (arrows added). These minuscule speech zones were available only about 10% of the time: two to four hours each weekday and closed on the weekend. Pet.App.74a. To engage in expression at other times or places, students needed a permit. Pet.App.74a, 78a–79a.

Students seeking this permit faced yet more barriers. They had to submit a request at least three days in advance, and the Policy gave Respondents unbridled discretion to decide who could speak in the zones, when they could speak, and what materials they could give to passersby. Pet.App.74a–83a.

There's more. If the College allowed a student to secure a reservation, the Policy prohibited that student from using the tiny speech zones again for at least 30 days—even if no one else reserved the zones during that period. Pet.App.83a. And when that student spoke, Respondents enforced a separate Speech Code that defined as "disorderly conduct" any "behavior which disturbs the peace and/or *comfort* of person(s)" on campus. Pet.App.84a (emphasis added). The Speech Code included no guidelines or standards. Pet.App.85a. So if even a single student complained that another student's speech made him feel uncomfortable, the speaker ran the risk of disciplinary action from reprimand to expulsion. Pet.App.85a–86a.

**C. Respondents censor Chike.**

In late July 2016, Chike decided to share his faith by engaging in one-on-one conversation and literature distribution on campus. Pet.App.90a. He chose an expansive concrete plaza just outside the campus library, a hub of student pedestrian activity and conversations. Pet.App.90a–91a. To communicate, Chike distributed handouts to passing students and others willing to accept them, and he talked to anyone interested. Pet.App.91a. Chike did not force his pamphlets on anyone, harass those who were uninterested, force anyone to engage in dialogue, or speak louder than a conversational tone of voice. *Ibid.*

Not long after Chike began, Respondent Perry, a campus security officer, stopped him and warned that Chike could not distribute written materials outside the two speech zones. Pet.App.71a, 92a. Officer Perry explained the Speech Zone Policy, ordered Chike to stop, and ultimately directed him to the Office of Student Integrity for more information. Pet.App.92a.

Chike and a friend visited the Office and spoke with Respondent Dowell, the Office director. Pet.App.67a, 92a. Director Dowell agreed with Officer Perry that Chike could not distribute literature outside the speech zones or without a reservation. Pet.App.93a. The friend asked if Chike could engage interested individuals in one-on-one conversation outside the zones, but Director Dowell affirmed that the College prohibits those conversations too. *Ibid.* Fearing discipline, Chike stopped distributing literature and engaging in public expression about his faith outside the speech zones. Pet.App.94a.

**D. Respondents censor Chike again.**

Chike instead reserved one of the two, minuscule speech zones to share his religious beliefs. Pet.App. 95a. As required, he submitted to the Office of Student Integrity for approval two religious pamphlets he intended to distribute. *Ibid.* On August 25, 2016, Chike and a friend went to the zone and stood in an area that would not block any building entrances or create any congestion. Pet.App.96a. Chike's friend prayed and distributed the pamphlets while Chike shared his religious beliefs. *Ibid.* Chike did not carry signs or amplify his voice; he did not use inflammatory rhetoric or attack any individual. He simply spoke about how Jesus Christ died on the cross

and rose from the dead to provide salvation and eternal life to all. Pet.App.97a.

After about 20 minutes, Respondent Hughes, a campus police lieutenant, drove up and asked Chike to stop speaking so the two of them could talk. Pet.App.70a, 97a. Lieutenant Hughes declared, "we just got some calls on you" and asked what Chike was doing. Pet.App.97a. Chike explained that he had reserved the speech zone and was "preaching the love of Christ." *Ibid.*

Lieutenant Hughes demanded, and Chike gave him, Chike's student ID, which Hughes took to his patrol car. Pet.App.98a. The Lieutenant came back with Respondent Lawler, a campus police sergeant, and claimed that Chike had only reserved the zone for one-on-one conversations and literature distribution, not open-air speaking. Pet.App.71a, 98a–99a. Lieutenant Hughes warned that Chike had engaged in "disorderly conduct" because his speech was disturbing the peace and comfort of those in the speech zone. Pet.App.99a.

Lieutenant Hughes told Chike to go back to the Office of Student Integrity and clarify whether he could use the speech zone for open-air speaking. Pet.App.100a. Lieutenant Hughes also cautioned that if Chike or his friend started speaking publicly again, officials could prosecute Chike for disorderly conduct. *Ibid.* Chike explained that Georgia Gwinnett has allowed other events and speakers to use even amplified sound—both inside and outside the speech zones—without interference, including the broadcast of vulgar, lewd, and obscene music. *Ibid.* But Lieutenant Hughes admonished Chike that he had to comply with the College's policies. *Ibid.*

At this point, Sergeant Lawler chimed in to say that Chike's speech was disorderly conduct because it was disturbing others' comfort, as shown by the complaints the officials had received. Pet.App.101a. Lawler explained that any complaint converts expression into disorderly conduct. *Ibid.*

Lieutenant Hughes then suggested that Chike should stop speaking publicly in the speech zone because it was not effective. Pet.App.101a. He counseled Chike to communicate his message more like members of the Church of Jesus Christ of Latter-Day Saints. Pet.App.101a–02a. Hughes reiterated that if Chike ignored the officers' instructions, the College could discipline him under its policies. Pet.App.102a.

Lieutenant Hughes concluded by ordering Chike to stop speaking publicly and to return to the Office of Student Integrity to get permission. Pet.App.102a. Chike questioned what good permission would do if people could still stop his speech by complaining. *Ibid.* Hughes opined that he did not think the Office would approve open-air speaking in the speech zone anyway "because it disturbs people." *Ibid.*

Chike and his friend followed Lieutenant Hughes' orders and spoke with Director Dowell in the Office of Student Integrity. Pet.App.103a. Director Dowell stated that it violated College policy for anyone to express a "fire and brimstone message" on campus—even in a speech zone. *Ibid.* Of course, Chike was *not* expressing such a message (although such a message would be protected from viewpoint discrimination). Pet.App.97a. And as the College's officials interpreted it, the school's policy also banned private, one-on-one conversations in any event. Pet.App.93a, 103a.

In sum, Chike could not speak about his faith anywhere on campus. Without a permit, the College banned Chike from speaking in the over 99.99% of campus outside the speech zones. Even *with* a reservation in the zones, open only about 10% of the week, he faced discipline if he said anything that made anyone uncomfortable, even in one-on-one conversations.

After the run-ins with Georgia Gwinnett officials, Chike and Joseph stopped any efforts to share religious literature publicly or engage in open-air speaking about their faith, though they desired to do so. Pet.App.104a–12a. But for Respondents' unconstitutional policies and enforcement, Chike and Joseph would have immediately resumed their expressive activities on campus. Pet.App.112a–13a. Since then, Chike graduated, and Joseph no longer attends the College.

## II. Lower court proceedings

In December 2016, Chike sued to challenge the Speech Zone and Speech Code policies, seeking various remedies including prospective equitable relief and nominal damages. Pet.App.132a–33a, 157a–58a. Respondents moved to dismiss, defending their speech policies and claiming that Chike's speech—the basic tenets of the Christian faith—"arguably rose to the level of 'fighting words'" and were thus not worthy of First Amendment protection. Pet.App.155a. Petitioners then filed an amended complaint that added Joseph as a plaintiff, since he also desired to share his faith but could not without immediate threat of punishment, including possible expulsion and prosecution for disorderly conduct. Pet.App.158a–59a; Pet.App.100a, 106a–113a.

Respondents again moved to dismiss, raising nearly identical arguments to defend their policies. Pet.App.159a–60a. Later, they eliminated their Speech Code, revised their Speech Zone Policy, and moved to dismiss *only* Petitioners' requests for injunctive and declaratory relief as moot. Pet.App.160a.

Three months later, the en banc Eleventh Circuit decided *Flanigan's Enterprises, Inc.* v. *City of Sandy Springs*, holding that the government's repeal of an ordinance it never enforced mooted the plaintiffs' nominal-damages claims. 868 F.3d 1248, 1263–70 (11th Cir. 2017) (en banc). Meanwhile, the U.S. Department of Justice filed a statement of interest here, concluding that Chike and Joseph "have stated claims for violations of the First and Fourteenth Amendments." U.S. Statement of Interest at 9, J.A.24.

Eight months after *Flanigan's* issued, Respondents cited it to argue that Chike's and Joseph's nominal-damages claims were also moot. Pet.App. 163a. The district court waited to rule until May 2018, a full year after briefing was complete and after Chike graduated. *Ibid.* The court held that Chike's graduation mooted his claims, and that the policy changes mooted Joseph's, who was still enrolled when the court ruled. Pet.App.25a–40a. The court held that the amended complaint did not request compensatory damages, and the nominal-damages claims were moot under *Flanigan's*—even though College officials had enforced their unconstitutional policies to stop Chike from speaking, and their enforcement prevented Joseph from doing so. Pet.App.40a–45a. The court dismissed the case.

The Eleventh Circuit affirmed, relying on *Flanigan's* to declare the case moot.[1] Pet.App.12a–16a. Chike's and Joseph's nominal-damages claims, the panel reasoned, were not justiciable because nominal damages would not "have a practical effect on the parties' rights or obligations." Pet.App.13a, 15a–16a. Chike and Joseph argued that nominal-damages awards would vindicate the constitutional injuries they had suffered. Pet.App.14a–15a. But per the panel, *Flanigan's* established that nominal damages have no practical effect unless the plaintiff has paired a nominal-damages claim with "a well-pled request for compensatory damages," Pet.App.15a, as though nominal damages are a mere tag-along that depend on compensatory damages for their vitality.

*Flanigan's* held that courts have "Article III powers to award nominal damages" when they "determine[ ] that a constitutional violation occurred, but that no actual damages were proven." Pet.App.13a. But the panel construed this power as "limited" "to cases in which both compensatory and nominal damages were pled." *Ibid.*

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[1] The district court purported to grant both Respondents' Motion to Dismiss for Mootness and their Motion to Dismiss under Rule 12(b)(6). Pet.App.46a. But as the Eleventh Circuit explained, the district court "based its decision entirely on mootness and did not address whether the First Amended Complaint otherwise stated a claim on which relief could be granted." Pet.App.6a. Thus, when the Eleventh Circuit affirmed the district court's ruling, it affirmed *only* the "the district court's dismissal of the First Amended Complaint as moot." Pet.App.19a.

The Eleventh Circuit also eliminated any distinction between nominal-damages claims based on unconstitutional policies that have been enforced and those that have not. (As noted above, *Flanigan's* involved an unenforced policy. 868 F.3d at 1262–65.) Chike's and Joseph's "right to receive nominal damages as the result of any unconstitutional conduct . . . would [still] have to flow from a well-pled request for compensatory damages," said the panel. Pet.App.15a.

In sum, the Eleventh Circuit's decision below makes standalone nominal-damages claims—those unaccompanied by requests for compensatory damages—worthless if prospective injunctive relief is unavailable. According to the Eleventh Circuit, requests for nominal damages are not justiciable even when the government has already enforced a challenged policy and caused the plaintiff's injury. Yet somehow a nominal-damages claim becomes justiciable when paired with a compensatory-damages claim, even one that ultimately fails on the merits.

## SUMMARY OF THE ARGUMENT

Courts widely recognize that a nominal-damages claim is an appropriate remedy for constitutional violations under Article III. As with other damages claims, courts have an obligation to decide the merits of requests for nominal damages, because such claims provide effectual relief. And all but the Eleventh Circuit recognize that a nominal-damages claim remains justiciable even after government officials change their unconstitutional policy or conduct. *E.g.*, 13C *Wright & Miller* § 3533.3 n.47 (collecting many cases).[2]

The majority rule makes sense. A case is moot only when it is impossible for a court to grant any effectual relief. Damages claims—including claims for nominal damages—offer effectual relief: they remedy past injuries and permanently alter the parties' relationship. And no prospective change to a defendant's policies or conduct can remedy or undo past, completed injuries.

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[2] Accord, *e.g.*, *Amato* v. *Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999); *Cent. Radio Co.* v. *Norfolk*, 811 F.3d 625, 631–32 (4th Cir. 2016); *Morgan* v. *Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 & n.32 (5th Cir. 2009); *Miller* v. *City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010); *Crue* v. *Aiken*, 370 F.3d 668, 677 (7th Cir. 2004); *Advantage Media, L.L.C.* v. *City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006); *Bernhardt* v. *Cnty. of L.A.*, 279 F.3d 862, 872 (9th Cir. 2002); *Comm. for First Amendment* v. *Campbell*, 962 F.2d 1517, 1526–27 (10th Cir. 1992); *Griffith* v. *Butte Sch. Dist. No. 1*, 244 P.3d 321, 328 (Mont. 2010); *Carter* v. *City of Las Cruces*, 915 P.2d 336, 337 (N.M. Ct. App. 1996); *Coleman ex rel. Coleman* v. *Daines*, 979 N.E.2d 1158, 1160 (N.Y. 2012); *Barcik* v. *Kubiaczyk*, 895 P.2d 765, 779 (Or. 1995); *Kuehn* v. *Renton Sch. Dist. No. 403*, 694 P.2d 1078, 1080 (Wash. 1985).

Creating an Article III exception that carves out nominal-damages awards would upend decades of precedent and the overwhelming majority rule. It would create doctrinal inconsistencies and deprive many victims of constitutional violations of any remedy. It would also stifle the development of law necessary to overcome qualified immunity and thwart the purpose of § 1983 to provide relief to those harmed by the government's past, unconstitutional conduct.

The Eleventh Circuit's rationale is deeply flawed. Article III does not require that a nominal-damages claim be accompanied by a compensatory-damages claim to be justiciable. And for a past constitutional violation involving a concrete and particularized injury, the constitutional-avoidance doctrine is inapplicable; courts have an unflagging duty to decide such a controversy. Nominal damages are also a well-recognized remedy that do not impact a mootness analysis. And maintaining decades of precedent on this issue will not open the floodgates to attorney-fee awards.

Chike and Joseph had the courage to stand up to Georgia Gwinnett College officials when the students were silenced on their own campus. But the lower courts responded by holding that the constitutional violations they experienced didn't matter, and that no official would be held accountable. This Court should reverse.

## ARGUMENT

### I. Chike's and Joseph's nominal-damages claims are justiciable.

To establish Article III standing, a plaintiff must show he has suffered an "injury in fact" traceable to the defendant's conduct that is likely to be redressed by a favorable court ruling. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, both Chike and Joseph suffered injuries caused by Respondents' actions. A damages award is a proper form of redress for these past injuries. *City of L.A.* v. *Lyons*, 461 U.S. 95, 113 (1983). Chike's and Joseph's injuries are justiciable as demonstrated by history, tradition, and this Court's precedents, all of which teach that nominal damages remedy constitutional injuries that do not result in easily quantifiable or provable damages. *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978).

#### A. Nominal damages provide a remedy for injuries that do not cause quantifiable or compensable harm.

Respondents' position is that they can violate constitutional rights without consequence if the harm is not quantifiable or compensable. But it is "a general and indisputable rule, that where there is a legal right, there is also a legal remedy." *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23). Over 200 years ago, this Court recognized that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

It is this protection that allows our government to be "emphatically termed a government of laws." *Marbury*, 5 U.S. at 163. Yet it will "cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Ibid.*

Nominal damages serve this important purpose. Courts have long awarded them when there has been an "infraction of a legal right" but "the extent of loss is not shown" or the right itself is "not dependent upon loss or damage." Charles T. McCormick, *Handbook on the Law of Damages* § 20 at 85 (1935). From the English common law through today, courts have turned to nominal damages to vindicate deprivations of rights that did not cause compensable harm. *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11 (1986) (quoting *Carey*, 435 U.S. at 266). Accord, *e.g.*, *Robinson* v. *Lord Byron*, 2 Cox 4, 30 Eng. Rep. 3, 3 (1788) (awarding nominal damages when plaintiff showed a riparian-rights invasion but offered no proof of damages); *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322) (when a right is violated, "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") (emphasis added); *Whipple* v. *Cumberland Mfg. Co.*, 29 F. Cas. 934, 936 (Story, Circuit Justice, C.C.D. Me. 1843) (No. 17,516) ("[I]n the absence of any other proof of substantial damage, nominal damages will be given in support of the right."); 1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 9–10 (John R. Berryman ed., 4th ed. 1916) (collecting hundreds of cases awarding nominal damages in response to a violation of rights).

Nominal damages play a critical role in keeping federal courts open to litigants, especially in civil-rights cases. Otherwise, constitutional victims who lack readily provable compensatory damages could be barred from accessing the justice system altogether. This Court recognized as much in *Carey* v. *Piphus,* holding that plaintiff students pursuing a § 1983 action after a school suspension could recover nominal damages for the deprivation of their constitutional rights "even if [plaintiffs] did not suffer" additional injury beyond the invasion of constitutional rights. 435 U.S. at 266–67.

"By making the deprivation of [constitutional] rights actionable for nominal damages" without requiring compensable harm, the law "recognizes the importance to organized society that those rights be scrupulously observed." *Id.* at 266. Accord, *e.g.*, *City of Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion) ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."); *Amato* v. *Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999) ("[W]hile 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.").

The Court reaffirmed this principle in *Memphis Community School District* v. *Stachura*, a case in which a tenured elementary teacher brought First and Fourteenth Amendment claims against a school district as a result of his suspension. 477 U.S. 299 (1986). In explaining that "the abstract value of a constitutional right may not form the basis for § 1983 [compensatory] damages," the Court made clear that "nominal damages" "are the appropriate means of

'vindicating' rights whose deprivation has not caused actual, provable injury" beyond the actual harm caused by the constitutional violation. *Id.* at 308 & n.11 (quoting *Carey*, 435 U.S. at 266). See also *Farrar* v. *Hobby*, 506 U.S. 103, 112 (1992) ("*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his right[s].").

Even before *Carey* and *Stachura*, circuit courts awarded nominal damages when the government injured a plaintiff by violating her constitutional rights. *E.g.*, *U.S. ex rel. Tyrrell* v. *Speaker*, 535 F.2d 823, 829–30 (3d Cir. 1976) (due process); *Magnett* v. *Pelletier*, 488 F.2d 33, 35 (1st Cir. 1973) (per curiam) (unreasonable search). Since then, every federal circuit has upheld or granted standalone nominal-damages awards in a variety of constitutional cases.[3]

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[3] *E.g.*, *O'Connor* v. *Huard*, 117 F.3d 12, 18 (1st Cir. 1997) (due process); *Fassett* v. *Haeckel*, 936 F.2d 118, 121 (2d Cir. 1991) (Fourth Amendment); *Allah* v. *Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (free exercise); *Price* v. *City of Charlotte*, 93 F.3d 1241, 1257 (4th Cir. 1996) (equal protection); *Archie* v. *Christian*, 812 F.2d 250, 252 (5th Cir. 1987) (due process); *Wolfel* v. *Bates*, 707 F.2d 932, 934 (6th Cir. 1983) (First Amendment right to petition for redress of grievances); *Reed* v. *Kemper*, 673 F. App'x 533, 537 (7th Cir. 2016) (right to marry); *Corpus* v. *Bennett*, 430 F.3d 912, 916 (8th Cir. 2005) (excessive force); *Klein* v. *Laguna Beach*, 810 F.3d 693, 697 (9th Cir. 2016) (free speech); *Stoedter* v. *Gates*, 704 F. App'x 748, 762 (10th Cir. 2017) (unreasonable seizure); *Pelphry* v. *Cobb Cnty.,* 547 F.3d 1263, 1282 (11th Cir. 2008) (Establishment Clause); *Carter* v. *Williams*, 897 F.2d 1168 (D.C. 1990) (table) (prisoner's right to access law library materials).

They are right to do so. Besides following this Court's precedents, courts redress a past injury in a tangible way when they award nominal damages. "As distinguished from punitive and compensatory damages, nominal damages are awarded to vindicate rights." *Cummings* v. *Connell*, 402 F.3d 936, 942 (9th Cir. 2005). That is why courts provide a nominal-damages award for a constitutional injury even when a plaintiff has "also sought, and received, declaratory relief." *Franklin* v. *Aycock*, 795 F.2d 1253, 1264–65 (6th Cir. 1986) (citing *Bilbrey* v. *Brown*, 738 F.2d 1462 (9th Cir. 1984), and *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980)).

Nominal damages do far more than ensure a plaintiff's happiness. "[W]hile 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." *Amato*, 170 F.3d at 317. Such a judgment holds a government "entity responsible for its actions and inactions, but can also encourage the [government] to reform the patterns and practices that led to constitutional violations, as well as alert the [government] and its citizenry to the issue." *Id.* at 318. In sum, a nominal-damages award is "meant to guarantee that unconstitutional acts remain actionable rather than to 'measure' the constitutional injury in any meaningful sense (or to serve as a replacement for speculative damages)." *Id.* at 319.

### B. A prospective change in policy or conduct cannot moot a damages claim, including one for nominal damages.

#### 1. A case is moot only when it is impossible to grant any effectual relief.

Federal courts have Article III power to decide "Cases" and "Controversies." A litigant may invoke that jurisdiction if she has suffered, or even been threatened with, an injury that is "traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin* v. *Chafin*, 568 U.S. 165, 171–72 (2013) (quoting *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). This case-or-controversy requirement ensures that federal courts exercise authority to decide adversarial questions affecting the rights of litigants before them. *GTE Sylvania, Inc.* v. *Consumers Union of U.S., Inc.*, 445 U.S. 375, 382 (1980). When that requirement is met, a federal court's "'obligation' to hear and decide" the case "is 'virtually unflagging.'" *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint Commc'ns, Inc.* v. *Jacobs*, 134 S. Ct. 584, 591 (2013)).

A case becomes moot, then, "only when it is *impossible* for a court to grant any effectual relief whatever." *Chafin*, 568 U.S. at 172 (emphasis added) (quoting *Knox* v. *Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012)). Provided "the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ibid.* (quoting *Knox*, 567 U.S. at 307–08). "[A]n identifiable trifle," such as a $1.50 tax or $5 fine, "is enough for standing." *United States* v. *Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669, 689 n.14 (1973).

### 2. Nominal damages offer effectual relief for past constitutional injuries.

A defendant seeking to show mootness must satisfy a "demanding standard." *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). That standard is insurmountable when a plaintiff pleads damages. *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608–09 (2001) (when a "plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case"). "If there is any chance of money changing hands, [the] suit remains live." *Mission Prod. Holdings*, 139 S. Ct. at 1660. That is because damages always offer effectual relief: "[W]hether compensatory or nominal, [damages] modif[y] 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.

In *Farrar*, the Court recognized that nominal-damages awards are effectual for altering the legal relationship of the parties. A jury in that case found that a government official violated a citizen's rights but awarded him no relief. 506 U.S. at 106–07. The Fifth Circuit remanded for entry of a nominal-damages award. *Id.* at 107. After the district court did so and granted plaintiffs' attorney fees, the Fifth Circuit held that the plaintiffs had not prevailed because "the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief." *Ibid.* In its view, the "nominal award of one dollar . . . did not in any meaningful sense change the legal relationship" between the parties. *Ibid.* It was too "technical" and "insignificant" a victory "to support prevailing party status." *Id.* at 108.

This Court reversed, holding that "a plaintiff who wins nominal damages is a prevailing party." *Farrar*, 506 U.S. at 112. Such a plaintiff obtains "actual relief on the merits of his claim materially alter[ing] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111–12; accord *id*. at 111 (quoting *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989) ("[T]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.")). 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." *Id.* at 113.

In this respect, nominal damages play a similar role to compensatory damages; both modify the defendant's behavior for the plaintiff's benefit by granting "actual relief" and are awarded for a past violation of the plaintiff's rights. And there is no requirement that a nominal-damages claim be paired with a compensatory-damages claim to be justiciable, because an award of nominal damages alone is effectual relief. Cf. *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 13 (1992) (even the availability of a "partial remedy" is "sufficient to prevent [a] case from being moot").

### 3. A change in policy or conduct does not erase a completed constitutional injury.

When a plaintiff suffers a constitutional injury, that plaintiff's right to a remedy does not disappear simply because the defendant later changed its unconstitutional policies or conduct. Repealing a policy or altering a course of conduct does not "erase[ ] the slate concerning the alleged [constitutional] violations." *Comm. for First Amendment* v. *Campbell*, 962 F.2d 1517, 1526 (10th Cir. 1992). "[By] definition claims for past damages cannot be deemed moot." *Taxpayers for the Animas-La Plata Referendum* v. *Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1479 (10th Cir. 1984). Accord, *e.g.*, *Cent. Radio Co.* v. *Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016) (city's decision to amend challenged sign code did not moot "the plaintiffs' request for retrospective relief in the form of nominal damages"); *Brinsdon* v. *McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345 (5th Cir. 2017) ("The mootness doctrine applies to [prospective] equitable relief but will not bar any claim for damages, including nominal damages."); cf. *Lyons*, 461 U.S. at 109 (even though plaintiff lacked standing to pursue prospective injunctive relief, his assault claim remained for damages).

No one disagrees that a compensatory-damages claim remains justiciable despite a defendant's change in policy. And all circuits addressing the issue except the Eleventh Circuit have held the same for nominal damages. The Eleventh Circuit even concedes the justiciability of a nominal-damages claim—provided it is paired with a compensatory-damages claim, even if "no actual [compensatory] damages

[a]re ultimately *proven*." Pet.App.15a. Curiously, its mootness rule applies only when a plaintiff brings a standalone nominal-damages claim.

It doesn't matter whether a claim for money damages is compensatory or nominal. Damages claims are not moot because they are a form of redress for a completed injury. That is why courts routinely grant nominal damages without compensatory damages despite a defendant's post-violation change in policy. *E.g.*, *Six Star Holdings, LLC* v. *City of Milwaukee*, 821 F.3d 795, 805 (7th Cir. 2016) (awarding nominal damages despite defendant's repeal of its ordinances that violated plaintiff's speech rights); *Mellen* v. *Bunting*, 327 F.3d 355, 363–65 (4th Cir. 2003) (standalone nominal-damages claim "continue[d] to present a live controversy" after university changed unconstitutional policies and student plaintiffs had graduated). Accord 13C *Wright & Miller* § 3533.3 ("Untold numbers of cases illustrate the rule that a claim for money damages is not moot, no matter how clear it is that the claim arises from events that have completely concluded without any prospect of recurrence. The Supreme Court has made the point several times." (collecting cases)).

Just as in a case of trespass, battery, or libel, a defendant's prospective change in conduct does not negate the Article III injury that a plaintiff has already suffered. *Amato*, 170 F.3d at 317–18. Nor does the change impact this Court's recognition that "a claim for damages cannot evade review; it remains live until it is settled [or] judicially resolved." *Genesis HealthCare Corp.* v. *Symczyk*, 569 U.S. 66, 77 (2013). Indeed, "nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents." *Mission Prod. Holdings*, 139 S. Ct. at 1660.

"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.

**4. Because nominal-damages awards remedy past injuries, they are always retrospective and serve a distinct purpose from declaratory judgments.**

In cases where no compensable harm exists, nominal damages offer litigants an important remedy not offered by declaratory judgments alone. Declaratory-judgment actions were created to obtain prospective declarations of rights; nominal-damages claims vindicate past violations. That is why courts have discretion whether to issue a declaratory judgment but have an obligation to award nominal damages once a plaintiff establishes a violated right.

From their beginning, the attraction of declaratory judgments was the creation of a procedure to determine legal rights "*before breach*." Edwin M. Borchard, *The Uniform Act on Declaratory Judgments*, 34 HARV. L. REV. 697, 707 (1921). Thus, modern scholars characterize declaratory judgments as a way to decide "an actual controversy that has not reached the stage at which either party may seek a coercive remedy," i.e., one that allows "actual controversies to be settled before they ripen into violations of law." 10B *Wright & Miller* § 2751. Accord *MedImmune, Inc.* v. *Gentech, Inc.*, 549 U.S. 118, 129 (2007) (the "very purpose" of the Declaratory Judgment Act is to "ameliorate" the "dilemma" posed by "putting" one "to the choice between abandoning his rights or risking" suit). Accordingly, a declaratory judgment was intended to be, and usually is, a

prospective remedy. *E.g.*, *L.A. Cnty.* v. *Humphries*, 562 U.S. 29, 31 (2010) (contrasting "monetary damages" with "prospective relief, such as an injunction or a declaratory judgment"); *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 676 n.6 (2010) (lawsuit "seeks only declaratory and injunctive—that is, prospective—relief").

Nominal damages serve a different purpose; they vindicate legal violations. McCormick, *supra*, at 85 ("Nominal damages are awarded for the infraction of a legal right."). And this distinction makes a difference.

For example, in *O'Connor* v. *City & County of Denver*, 894 F.2d 1210 (10th Cir. 1990), a movie theater and cashier brought a civil-rights action alleging the City violated their constitutional rights by enforcing a former amusement licensing scheme. After the City amended its Code, the plaintiffs admitted their claims for injunctive and declaratory relief were moot. And because they failed to prove compensable harm at trial, the City argued the whole case should be dismissed as moot. The Tenth Circuit disagreed: "by definition claims for past damages cannot be deemed moot." *Id.* at 1216 (quotation omitted). Because "the nominal damages sought in this case were *past* damages *not affected* by any changes in the Code," "repeal and amendment of the Code did not moot plaintiffs' claim for nominal damages." *Ibid.* (emphasis added). Accord, *e.g.*, *Jacobs* v. *Clark Cnty. Sch. Dist.*, 526 F.3d 419, 426 (9th Cir. 2008) (plaintiff "has standing to bring a non-moot claim for nominal damages because she alleges an 'injury in fact'—namely, deprivation of her First Amendment right" caused by her school "and would be redressed if [the] court were to find the policy unconstitutional").

To be sure, not every request for declaratory relief is prospective. Courts will entertain retrospective declaratory judgments when they are paired with damages claims. *E.g.*, *PeTA* v. *Rasmussen*, 298 F.3d 1198, 1202–03 n.2 (10th Cir. 2002) (Tenth Circuit will "consider declaratory relief retrospective to the extent that it is intertwined with a claim for monetary damages that requires [it] to declare whether a past constitutional violation occurred"); *Crue* v. *Aiken*, 370 F.3d 668, 677 (7th Cir. 2004) ("When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive."). And retrospective declaratory judgments may be available if the declaration will affect the parties' future rights and obligations, making the remedy effectively prospective. *E.g.*, *Soc'y of Separationists, Inc.* v. *Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992) ("To obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future.").

But it remains generally true that a declaratory judgment's primary purpose is to guide future conduct while a nominal-damages award remedies a past injury and changes the parties' status based on the constitutional violation. *E.g.*, *Burns* v. *Pa. Dep't of Corr.*, 544 F.3d 279, 283–84 (3d Cir. 2008) (defendant's change in policy did not moot nominal-damages claim for a "completed violation"); *Am. Humanist Ass'n* v. *Greenville Cnty. Sch. Dist.*, 652 F. App'x 224, 231–32 (4th Cir. 2016) (plaintiffs' Establishment Clause claim was not moot despite their move to another state because their "injury was complete at the time the violation occurred."); *Miller* v. *City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010)

("[P]laintiffs' claims remain viable to the extent that they seek nominal damages as a remedy for past wrongs."). Such an award is independent of a court order's declaratory effect. *E.g.*, *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (courts have the broad power to adjudicate suits over private rights "even when plaintiffs alleged only the violation of those rights and nothing more"). It vindicates rights in the absence of compensable harm. *Carey*, 435 U.S. at 266; *Stachura*, 477 U.S. at 308.

That a nominal-damages award may also have some declaratory effect makes no difference. After all, compensatory-damages awards require a court to "declare" that a defendant acted unlawfully. *E.g.*, *Mglej* v. *Gardner*, __ F.3d __, 2020 WL 5384938, at *8 (10th Cir. 2020) (to be entitled to damages, a plaintiff must prove defendants acted unlawfully or wrongfully); *Grossman* v. *City of Portland*, 33 F.3d 1200, 1208 (9th Cir. 1994) (same); Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 4 (1918) ("In a sense all judgments of courts declare jural relations."). If this is the feature of nominal-damages awards that renders them too close to declaratory-judgment actions to be justiciable, then a defendant's change in conduct would moot *all* damages claims. And this Court has, properly, rejected that proposition. *Genesis HealthCare*, 569 U.S. at 77 (a "claim for damages" "remains live until it is settled [or] judicially resolved").

The fundamental difference between declaratory-judgment actions and nominal-damages claims also explains why courts have discretion to issue declaratory judgments but are obligated to award nominal damages upon proof of violation.

This Court has described the Declaratory Judgment Act as "an enabling Act, which confers a *discretion* on the courts rather than an absolute right upon the litigant." *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 287 (1995) (emphasis added) (quoting *Pub. Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952), and citing *Green* v. *Mansour*, 474 U.S. 64, 72 (1985), and *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 95 n.17 (1993)). Accord, *e.g.*, *Brillhart* v. *Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942) ("Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, 28 U.S.C.A. § 400, it was under no compulsion to exercise that jurisdiction.").

The opposite is true of nominal damages. As this Court emphasized in *Farrar*, "*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his right" but cannot establish compensable damage. 506 U.S. at 112. Accordingly, "the rationale of *Farrar* requires an award of nominal damages upon proof of an infringement" of a constitutional right. *Risdal* v. *Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000) (quotation omitted).[4]

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[4] Accord, *e.g.*, *Robinson* v. *Cattaraugus Cnty.*, 147 F.3d 153, 162 (2d Cir. 1998) (citing *Carey*, 435 U.S. at 266–67) ("If a jury finds that a constitutional violation has been proven but that the plaintiff has not shown injury sufficient to warrant an award of compensatory damages, the plaintiff is entitled to an award of at

One final, practical observation: If nominal-damages awards were essentially equivalent to declaratory judgments, it would be strange that courts, including this one, have continued making and affirming nominal-damages awards in the 80-plus years since Congress enacted the Declaratory Judgment Act. Pub. L. No. 73-343, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. 2201–02 (2012)). The explanation is that although the Declaratory Judgment Act did not extend federal jurisdiction, it did "enlarge[ ] the range of remedies available in the federal courts." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Declaratory judgments and nominal-damages awards are not the same remedy.

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least nominal damages *as a matter of law*.") (emphasis added). *Price* v. *City of Charlotte*, 93 F.3d 1241, 1246 (4th Cir. 1996) ("A plaintiff's failure to prove compensatory damages [for a constitutional violation] results in nominal damages."); *Schneider* v. *Cnty. of San Diego*, 285 F.3d 784, 794 (9th Cir. 2002) ("[N]ominal damages must be awarded if a plaintiff proves a violation of his [or her] constitutional rights." (citation omitted) (collecting cases)); *Searles* v. *Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) ("[A]n award of nominal damages is mandatory upon a finding of a constitutional violation"); *Caban-Wheeler* v. *Elsea*, 71 F.3d 837, 841–42 (11th Cir. 1996) (plaintiff's proof of a constitutional violation warrants a nominal-damages award, even if the plaintiff has not requested a nominal-damages jury instruction); *People for Ethical Treatment of Animals, Inc.* v. *Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005) ("[W]hen a court finds a constitutional violation in an action seeking monetary relief under 42 U.S.C. § 1983, the court (or jury) must at least award nominal damages.") (collecting cases).

### C. Chike's and Joseph's nominal-damages claims remain a "live" controversy because they seek vindication for past constitutional injuries.

These principles apply in a straightforward way here. Chike alleges that Respondents violated his constitutional rights when they stopped him from speaking and forced him to limit his expression on campus to a minuscule space, at limited times. They violated his rights a second time when they shut down his speech—in the designated space and at an approved time—because someone objected (a classic heckler's veto) and because College officials thought Chike should express his message in a different way. Joseph alleges that Respondents' policies and treatment of Chike stopped him from speaking at all, another classic First Amendment violation.

Both students sufficiently alleged constitutional injuries, traceable to Respondents' conduct. *Lujan*, 504 U.S. at 561–562 (when a plaintiff is the "object of the government action" "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it"). And this Court has held that a nominal-damages award is a proper remedy for redressing those injuries. Their claim for nominal damages, if successful, will permanently modify the legal relationship between Chike and Joseph on one hand, and Respondents on the other. Respondents' change in policy does not eliminate or diminish the past violation of Chike's and Joseph's constitutional rights. And without nominal damages, Chike and Joseph have no remedy at all. Contra *Marbury*, 5 U.S. at 163. Their claims are not moot.

Vindicating Chike's and Joseph's free-speech rights is particularly crucial here because Respondents' misconduct occurred on a public-college campus. The "vigilant protection of constitutional freedoms is nowhere more vital" than at public colleges. *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). Yet nearly 90% of public colleges and universities have adopted policies that are either clearly unlawful or constitutionally suspect under the First Amendment. Found. for Individual Rights in Educ., *Spotlight on Speech Codes 2019*, available at https://perma.cc/DLH4-AG7R. And claims for prospective relief are highly susceptible to mootness because students graduate, and colleges change offending policies—at least temporarily—when sued.

Students also frequently suffer no compensable harm from a college's speech-suppressing policies. Unless a nominal-damages claim remains justiciable, many students will be deprived of their only remedy. That leads to even more constitutional violations rather than "scrupulous[ ]" observance, *Carey*, 435 U.S. at 266, of students' free-speech rights on campus.

## II. The overwhelming majority of circuit courts uphold the justiciability of nominal-damages claims for good reason.

The overwhelming majority of federal circuits recognize "that a claim for nominal damages precludes mootness" based on a change in policy or conduct. *N.Y. State Rifle & Pistol Ass'n* v. *City of N.Y.*, 140 S. Ct. 1525, 1536 (2020) (per curiam) (Alito, J., dissenting from order vacating and remanding for further proceedings) (citing *Amato*, 170 F.3d at 317); *Cent. Radio*, 811 F.3d at 631–32; *Morgan* v. *Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 n.32 (5th Cir. 2009); *Klein* v. *Laguna Beach*, 810 F.3d 693, 697 (9th Cir. 2016); *Stoedter* v. *Gates*, 704 F. App'x. 748, 762 (10th Cir. 2017); and *Bernhardt* v. *Cnty. of L.A.*, 279 F.3d 862, 872 (9th Cir. 2002)); accord, *e.g.*, *Miller*, 622 F.3d at 533; *Crue*, 370 F.3d at 677; *Advantage Media, L.L.C.* v. *City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006); *Comm. for First Amendment*, 962 F.2d at 1526–27 ("majority rule"). Any exception to Article III jurisdiction based on nominal damages would undermine § 1983's purposes and insulate governmental abuses from judicial review.

### A. The majority rule is doctrinally consistent with Article III justiciability.

The majority rule follows this Court's justiciability jurisprudence: nominal damages offer actual, effectual relief for constitutional violations because they modify a defendant's behavior toward a plaintiff. Thus, a nominal-damages claim cannot be mooted by a defendant's prospective policy change.

Any other rule would be idiosyncratic and internally inconsistent. For example, no one contests that a plaintiff can bring a nominal-damages claim paired with a claim for prospective relief. But because "a plaintiff must demonstrate standing separately for each form of relief sought," *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000), that means plaintiffs must have standing to seek nominal damages at the outset.

It makes no sense then that nominal damages, sufficient to support standing at the outset, become insufficient to support a case-or-controversy at the moment a defendant is able to moot prospective relief. Either nominal damages based on past injuries are insufficiently concrete to support standing and should never be awarded, contra *Carey*, 435 U.S. at 266, or they are sufficient for standing and to prevent mootness. *Friends of the Earth*, 528 U.S. at 190–94 (though this Court has sometimes described mootness as "standing set in a time frame," mootness is a more flexible and forgiving inquiry than standing); *Flanigan's*, 868 F.3d at 1267 n.20 (making the same point about "the flexible character of the Article III mootness doctrine") (cleaned up) (quoting *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 400 (1980)).

To avoid such an inconsistent result, the Court should reaffirm that a claim for nominal damages based on a past violation of constitutional rights is justiciable.

### B. The majority rule upholds § 1983's purpose and better protects constitutional rights.

Congress enacted § 1983 because vindicating constitutional violations is of "the highest importance." H.R. Rep. No. 94-1558, at 2 (1976). "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. To put an exclamation point on it, in 1980, Congress eliminated the amount-in-controversy requirement for federal-question jurisdiction. Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369 (1980). In so doing, Congress explained that "it is virtually impossible to put a monetary value on many important constitutional and Federal statutory rights." S. Rep. No. 96-827, at 3–4 (1980). Accord *Stachura*, 477 U.S. at 310 ("History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections.").

Holding that standalone nominal-damages claims are not justiciable vitiates § 1983 in three ways. First, it requires § 1983 plaintiffs to claim compensatory damages despite Congress having removed the amount-in-controversy requirement. That removal was intentional, correcting the misimpression for "certain citizens . . . that although their federal rights have been violated, their injury is too insignificant" to confer jurisdiction. H.R. Rep. No. 96-1461, at 2 (1980).

Second, holding that a nominal-damages claim is insufficient to continue a case or controversy eliminates any possibility for an attorney-fee award, contradicting this Court's holding in *Farrar*. This would deter litigants and attorneys from pursuing constitutional claims that lack a compensatory-damages component, expanding opportunities for government officials to violate constitutional rights.

Constitutional violations often do not cause easily quantifiable or compensable harm, meaning that nominal damages are the only means of vindication. A new carve-out for such claims will leave victims of unconstitutional government conduct without a remedy in far too many cases. *E.g.*, *Hudson* v. *Michigan*, 547 U.S. 586, 610 (2006) (Breyer, J., dissenting) (review of reported decisions failed to show "a single reported case in which a plaintiff has collected more than nominal damages solely as a result of the knock-and-announce violation"); *Stoedter*, 704 F. App'x at 762 (nominal damages were suspect's only remedy for an unreasonable seizure); *Amato*, 170 F.3d at 317–20 (nominal damages were arrestee's only remedy after police officers violated the Fourth Amendment by using excessive force); *Ass'n of Cmty. Orgs. for Reform Now* v. *Dickerson*, No. AMD 07-92, 2008 WL 4056183, at *1–3 (D. Md. Aug. 28, 2008) (nominal damages were organization's only remedy after officials violated the First Amendment by repeatedly stopping the organization from registering voters on public sidewalks).

Third, the nominal-damages rule alleviates another barrier to § 1983 plaintiffs obtaining appropriate relief: the failure of courts to develop precedent that is critical for plaintiffs to overcome qualified immunity. That doctrine insulates government

officials from civil-damage liability in their individual capacities unless a plaintiff can prove the officials violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). If a right was not "clearly established at the time" the officials acted, the officials are immune from suit. *Pearson* v. *Callahan*, 555 U.S. 223, 243–44 (2009) (quoting *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999)). For a right to be "clearly established," a plaintiff needs "settled law," and "a robust consensus of cases of persuasive authority." *Dist. of Columbia* v. *Wesby*, 138 S. Ct. 577, 589–90 (2018) (cleaned up). That typically requires caselaw with an analogous factual context. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

Creating a special justiciability rule for nominal damages means that those deprived of their constitutional rights cannot move forward and obtain a judgment unless they have compensatory damages. This, in turn, will decrease the number of judgments that create the robust consensus of cases necessary to put government officials on notice that their conduct is wrongful. That decrease will mean fewer litigants with damages claims will be able to overcome qualified immunity defenses. In other words, mooting claims for nominal damages will diminish the number of plaintiffs who obtain vindication for the violation of their rights—including plaintiffs with compensable losses.

The present context is illustrative. As noted above, unconstitutional speech codes and speech zones are rampant at public colleges and universities. But rather than provide guidance to colleges, universities, and students that the policies applied here are

blatantly unconstitutional, there is no judgment informing anyone about the validity of those policies and Respondents' applications of them. The result is more unredressed constitutional violations in the future, both because students will be stymied by qualified immunity and officials will not have the benefit of judicial rulings to guide their conduct.

### C. The majority rule recognizes that nominal damages are crucial to redress one-time violations in many contexts.

There are a number of instances in which nominal damages are the only effective remedy, not only for constitutional violations, but for other one-time violations, such as trespass and libel. And there is nothing unique about one-time trespass or libel violations that makes them analytically distinct from one-time violations of constitutional rights for purposes of a mootness analysis.

For example, a court in 1466 held a man liable for a one-time trespass, despite no damage claim and an undisputed boundary line. *Hulle* v. *Orynge*, Y.B. 6 Edw. 4, fol. 7, Mich, pl. 18 (1466). The decision resulted from the common-law understanding that the law would "not authorize the least violation of" a property right. 1 WILLIAM BLACKSTONE, COMMENTARIES *138–39.

Likewise, many libel claims involve parties with no ongoing relationship. *E.g.*, *Calder* v. *Jones*, 465 U.S. 783, 786 (1984) (a single, allegedly defamatory article). In a case that lacks compensatory damages, a libel judgment may clear a plaintiff's name with third parties but does nothing to affect the parties' rights and obligations.

The reasoning that undergirds such cases applies equally to nominal-damages awards for constitutional violations. James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1606 (2011) (nominal damages are well suited where 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").

In sum, courts have long treated nominal-damages claims as justiciable, and not just for constitutional rights. Nominal damages are not some special exception to justiciability; they share the same justiciability pedigree as any other remedy for a concrete, particularized injury. There is no good reason to jettison decades of precedent and to deprive constitutional victims of their remedy.

## III. The Eleventh Circuit's rule misunderstands the nature and purpose of nominal-damages awards.

The Eleventh Circuit carved out standalone nominal-damages claims from ordinary rules of Article III justiciability. It held that such claims are moot after officials change their unconstitutional policies, even when officials have enforced those policies and caused plaintiffs a concrete injury. Pet.App.15a. This outlier view is flawed and results in government officials avoiding judicial review and accountability through well-timed policy shifts.

### A. Nominal-damages claims do not need to be paired with compensatory-damages claims to be justiciable.

In the Eleventh Circuit's unique view, a plaintiff seeking nominal damages can avoid mootness if those damages "flow from a well-pled request for compensatory damages." Pet.App.15a. But the Eleventh Circuit's novel theory does not even require a successful compensatory-damages claim, only a "well-pled complaint for compensatory damages, [even if] no actual damages were ultimately *proven*." *Ibid.* (citing *Flannigan's*, 868 F.3d at 1270 n.23). The Eleventh Circuit points to no other court's precedent for this approach, and there is little to recommend it.

To start, adopting the Eleventh Circuit's rule would encourage plaintiffs to do exactly what the Eleventh Circuit worried would happen if it allowed nominal-damages claims to avoid mootness: allege a category of damages even when such damages are not obvious or desired. This deprives plaintiffs of the freedom to make litigation choices, forces plaintiffs to prove compensatory-damages claims in situations where such proof may involve sensitive, private matters, and needlessly prolongs and complicates litigation.

For example, to avoid the possibility of the government mooting their lawsuit without acknowledging its past constitutional violations, the Eleventh Circuit's rule would have required the students in *Brown* v. *Board of Education* to claim and prove compensatory damages for the "feeling of inferiority" resulting from facing segregated public schools. 347 U.S. 483, 484 (1954). It would have obligated the students in *Safford Unified School District No. 1* v.

*Redding*, 557 U.S. 364, 374–75 (2009), to plead and show the monetary cost for the "embarrassing, frightening, and humiliating" effects of a middle-school-student strip search. Even in *Flanigan's* itself, the plaintiff would have had to testify and undergo cross-examination on activities involving intimate conduct. As these cases illustrate, plaintiffs of all kinds have incentive to "waive[ ] all right to more than nominal damages," a choice that was "self-evident" at common law. *Daniels* v. *Bates*, 2 Greene 151, 152 (Iowa 1849).

What's more, an obligatory result of the Eleventh Circuit's rule would be unnecessary, collateral litigation, advanced solely to game the mootness analysis. For example, § 1983 allows compensatory damages for "mental and emotional distress" besides physical harm and financial loss. *Carey*, 435 U.S. at 262. While the Eleventh Circuit's rule would bar claims by candid plaintiffs, less honorable plaintiffs could plead their way around mootness by alleging frivolous or minimal allegations of emotional harm. Article III does not require such an approach, nor should this Court incentivize it.

The Eleventh Circuit's approach would also mean that mere labels make the jurisdictional difference. A $1 nominal-damages claim alone would be moot. But a $1 compensatory-damages claim (*e.g.*, a fraction of a tank of gas needed to drive to campus to share one's faith, a confiscated piece of sidewalk chalk) would remain justiciable. So the result would be litigants creatively repackaging their nominal-damages claim as a compensatory one—until the Eleventh Circuit tries to extend its rule to "trivial" compensatory-damages claims, which also would conflict with this Court's rulings. See *Sprint Commc'ns Co., L.P.* v.

*APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (even "a dollar or two" can confer Article III standing); *SCRAP*, 412 U.S. at 689 n.14 ("an identifiable trifle," like a $1.50 tax, "is enough for standing").

If courts can decide the constitutionality of a changed policy based solely on a compensatory-damages claim, it does not serve judicial restraint, or modesty, or any other policy to prohibit the same decision in the context of a nominal-damages claim. Quite the opposite, requiring citizens to vindicate their constitutional rights by presenting courts with undesired or illusory compensatory-damages claims will require courts to resolve additional questions in which no party has a real and vital interest. Because nominal damages redress the injury from past violations of constitutional rights, there is no (and should be no) requirement that a plaintiff plead compensatory damages.

### B. The constitutional-avoidance doctrine does not justify a refusal to remedy completed constitutional violations.

The Eleventh Circuit in *Flanigan's* also invoked the constitutional-avoidance doctrine, concluding that federal courts "must generally decline to pass on the constitutionality of legislation unless 'as a necessity in the determination of real, earnest, and vital controversy between individuals.'" 868 F.3d at 1269 (quoting *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring)). Because the city repealed the ordinance at issue in *Flanigan's*, the court viewed the situation as "no more real than any other hypothetical statute on which the federal courts should routinely decline to pass judgment." *Ibid.* But in the context presented here,

the Eleventh Circuit panel's action is not constitutional avoidance; it's constitutional abdication—the refusal to adjudicate past violations of constitutional rights.

Again, this case presents an actual Article III "case or controversy": whether Respondents violated Chike's and Joseph's constitutional rights by adopting, maintaining, and enforcing their policies to silence Chike and Joseph. If a nominal-damages claim is insufficient for courts to hear this controversy, then courts cannot ensure that the government will "scrupulously" enforce constitutional rights. *Carey*, 435 U.S. at 266. Instead, it will routinely ignore them. Once a lawsuit satisfies Article III, as here, there is no good reason for a court to avoid the merits. Courts have a duty to proceed. *Lexmark*, 572 U.S. at 126 (court has "unflagging" obligation to decide cases within its jurisdiction).

And it is no objection to say that such a decision will have little effect on the parties. As noted above, nominal damages provide "actual relief" for plaintiffs and alter their legal relationship with defendants. Further, federal courts regularly make Fourth Amendment pronouncements even in disputes where the criminal defendant lacks a remedy because of the good-faith exception or other defenses. *E.g.*, *Davis* v. *United States*, 564 U.S. 229, 246 n.7 (2011) (rejecting the argument that such a ruling results in "advisory opinion[s]"). The same is true when a court issues a merits ruling in a § 1983 dispute with state officials who successfully invoke qualified immunity. *E.g.*, *Camreta* v. *Greene*, 563 U.S. 692, 708 (2011) ("[A] constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior."). Federal courts decide equal-protection

challenges to benefit regimes alleged to be discriminatory even if curing the unequal treatment does not lead to awarding the benefit the plaintiff sought. *E.g.*, *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1698 (2017). Provided "the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin*, 568 U.S. at 172.

### C. Nominal-damages awards do not destroy the mootness doctrine.

The Eleventh Circuit also frets that allowing nominal-damages claims to go forward will "drastically reduce, if not outright eliminate, the viability of the mootness doctrine." *Flanigan's*, 868 F.3d at 1270. Accord, *e.g.*, *Utah Animal Rights Coal.* v. *Salt Lake City Corp.*, 371 F.3d 1248, 1266 (10th Cir. 2004) (McConnell, J., concurring) ("[N]o constitutional case would ever become moot."). Not so. Only a "valid" nominal-damages claim "should avoid mootness." 13C *Wright & Miller* § 3533.3 n.47. And there are many scenarios when merely alleging nominal damages will not preserve an otherwise-moot case.

For example, Plaintiffs cannot pursue nominal-damages claims against state defendants in their official capacity under § 1983. In *Arizonans for Official English* v. *Arizona*, 520 U.S. 43 (1997), this Court held that the plaintiff's free-speech claim was moot despite a claim for nominal damages because the only remaining defendant was the State of Arizona, which was not a proper § 1983 defendant. *Id.* at 69 (citing *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)).

In addition, a statute or cause of action sometimes restricts nominal damages. As this Court made clear in *Arizonans for Official English*, "[a] request for damages that is barred as a matter of law cannot save a case from mootness." *Tanner Advert. Grp., LLC* v. *Fayette Cnty.*, 451 F.3d 777, 786 (11th Cir. 2006) (citing *Arizonans*, 520 U.S. at 69).

This proposition is equally true outside the § 1983 context, both under statutes, *e.g.*, *Walker* v. *United Parcel Serv., Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001) (nominal damages unavailable under the Family and Medical Leave Act, which limits recovery to actual monetary losses), and the common law, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 907(a) (1979). State courts often recognize this reality. *E.g.*, *Kerns* v. *Wells Fargo Bank, N.A.*, 818 S.E.2d 779, 786 n.12 (Va. 2018) ("Though available in contract actions, nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred.") (cleaned up); *Connaughton* v. *Chipotle Mexican Grill, Inc.*, 75 N.E.3d 1159, 1164 (N.Y. 2017) ("Nominal damages are not available when actual harm is an element of the tort.").

Finally, nominal-damages claims are unavailable when a plaintiff has suffered no injury and, as a practical matter, seeks only prospective relief. For example, the Sixth Circuit held that a plaintiff challenging a repealed curfew on door-to-door solicitations could not "state a valid claim for damages" when it "received a curfew waiver," was "the only entity known to have requested and benefitted from such a waiver," and "never asked for another extension thereafter." *Ohio Citizen Action* v. *City of Englewood*, 671 F.3d 564, 581 (6th Cir. 2012). And the Third Circuit held that a plaintiff could not

recover nominal damages "simply based on the *existence* of a zoning law" when it had "never sought and was not denied a building permit." *CMR D.N. Corp.* v. *City of Phila.*, 703 F.3d 612, 628 (3d Cir. 2013) (emphasis added).

Such invalid claims should be dismissed for lack of standing at the outset. But whether analyzed as a standing or mootness problem, the inquiry either way will come down to whether a plaintiff can show that her injury is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Lujan*, 504 U.S. at 560).[5] A plaintiff cannot create standing by merely adding nominal damages as another remedy once a defendant changes policy or conduct. Rather, plaintiffs would have to allege a past violation of their constitutional rights sufficient to overcome a 12(b)(6) motion to dismiss. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007). If the plaintiff makes such a plausible allegation, a court has no discretion to dismiss it. See *Mission Prod. Holdings*, 139 S. Ct. at 1660 ("[Damages] claims, if at all plausible, ensure a live controversy.").

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[5] In pre-enforcement actions, that inquiry will turn on whether the plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 159 (quoting *Babbitt* v. *Farm Workers*, 442 U.S. 289, 298 (1979)). Chike's claim is not a pre-enforcement action but a claim for a past constitutional violation. And Joseph, too, asserted an injury because he intended to engage in similar conduct as Chike but could not because of Respondents' policies and the way Respondents applied those policies to Chike. Both Petitioners had standing from the get-go, and their claims are not moot.

### D. The rule that nominal-damages claims are justiciable has not opened the floodgates to attorney-fee awards.

Some critics of the rule that nominal-damages claims avoid mootness argue that it will "perverse[ly]" "create an incentive for plaintiffs in cases covered by fee-shifting statutes to continue to run up legal bills even after the underlying dispute no longer presents any justiciable legal controversy." *Utah Animal Rights*, 371 F.3d at 1270 (McConnell, J., concurring). But that criticism is misplaced.

To start, attorney-fee critics ignore that one purpose of awarding § 1983 attorney fees "is to encourage litigants to assume the role of a private Attorney General." *McCann* v. *Coughlin*, 698 F.2d 112, 128 (2d Cir. 1983). "This policy may be served by granting a fee request even where a plaintiff is unable to prove actual damages resulting from his constitutional deprivation." *Ibid.* It may be that a local government quickly capitulates after a lawsuit challenges a constitutional violation based on an unlawful policy. But attorney fees incentivize a party and counsel to pursue a meritorious suit and ensure the unlawful policy does not return. Absent that incentive, unconstitutional policies that do not result in compensatory damages can arise, phoenix-like, from the ashes of quick-fix amendments, leading to more violations in the future.

As for the fees themselves, this Court has already rejected the "catalyst theory" for conferring prevailing-party status under 42 U.S.C. 1988(b)'s fee-shifting regime because the catalyst theory involves "no judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at

604–05. Section 1988 requires a party to have "prevailed on the merits of at least some of his claims," the Court explained. *Id.* at 603 (quoting *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980) (per curiam)). And while a change in policy that never affected anyone's rights is insufficient to trigger the right to fees, the opposite is true for a plaintiff who alleges that her rights have already been violated: "an award of nominal damages suffices under this test." *Id.* at 604 (citing *Farrar*).

And yet, a nominal-damages award does not guarantee an attorney-fee award. Though a plaintiff who wins nominal damages "is a prevailing party under § 1988," *Farrar*, 506 U.S. at 111–12, that finding only makes the plaintiff eligible for fees and "bear[s] on the propriety of fees awarded under § 1988." *Id.* at 114. Relevant factors might include "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served[.]" *Id.* at 122 (O'Connor, J., concurring).

For many decades, lower courts have had no difficulty applying these factors to fashion appropriate attorney-fee awards. *E.g.*, *Boston's Children First* v. *City of Boston*, 395 F.3d 10, 16 (1st Cir. 2005); *Jama* v. *Esmor Corr. Servs., Inc.,* 577 F.3d 169, 175–76 (3d Cir. 2009); *Mercer* v. *Duke Univ.*, 401 F.3d 199, 203–04 (4th Cir. 2005); *Cartwright* v. *Stamper*, 7 F.3d 106, 109 (7th Cir. 1993); *Murray* v. *City of Onawa*, 323 F.3d 616, 619–20 (8th Cir. 2003); *Benton* v. *Or. Student Assistance Comm'n*, 421 F.3d 901, 905–06 (9th Cir. 2005); *Brandau* v. *Kansas*, 168 F.3d 1179, 1181–82 (10th Cir. 1999). There is no reason to think that bringing the Eleventh Circuit back in line with the rest of the country will cause a glut of unwarranted attorney-fee awards.

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To ensure the protection of free speech, due process, and other constitutional rights, federal courts must be able to award nominal damages when a plaintiff does not allege or cannot prove compensable harm. If courts decline to adjudicate live controversies simply because they consider nominal damages insignificant or trifling, they will allow constitutional violations to go unremedied and will substantially undermine the likelihood that government officials will honor constitutional rights.

The Eleventh Circuit's approach allows constitutional violations to go unremedied, incentivizes government officials to game federal-court jurisdiction and avoid consequences, and creates a special exception to Article III jurisdiction that has no basis in law or policy.

This case is a perfect example. College officials silenced Chike on his campus not once, but twice. It took courage for Chike and Joseph to challenge this censorship by College officials, who initially defended it by characterizing Chike's peaceful message as "fighting words," unprotected by the First Amendment.

Yet the lower courts told the students that the violation of their constitutional rights did not matter. As a result, no Georgia Gwinnett officials have been held accountable for Chike's and Joseph's constitutional injuries. And because the lower courts have not explained why the officials' policies and practices were constitutionally infirm, neither those officials nor those at other campuses will think twice about engaging in the same conduct in the future. Only this Court can right that wrong.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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