

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CHIKE UZUEGBUNAM, ET AL.,)
) Petitioners,)
) v.) No. 19-968
STANLEY C. PRECZEWSKI, ET AL.,)
) Respondents.)

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10 Washington, D.C.

11 Tuesday, January 12, 2021

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

16

17 APPEARANCES:

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19 on behalf of the Petitioners.

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21 Department of Justice, Washington, D.C.;
22 for the United States, as amicus curiae,
23 supporting the Petitioners.

24 ANDREW A. PINSON, ESQUIRE, Atlanta, Georgia;
25 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-968, Uzuegbunam
5 versus Preczewski.

6 Ms. Waggoner.

7 ORAL ARGUMENT OF KRISTEN K. WAGGONER

8 ON BEHALF OF THE PETITIONERS

9 MS. WAGGONER: Thank you, Mr. Chief
10 Justice. May it please the Court:

11 When Georgia Gwinnett officials
12 stopped Chike Uzuegbunam and Joseph Bradford
13 from sharing their faith, the officials caused
14 concrete injuries. Chike and Joseph lost
15 forever the chance to get those days back and
16 speak their message to their peers.

17 No policy change can ever restore that
18 lost opportunity. And as this Court said in
19 Carey, Stachura, and Farrar, the appropriate
20 remedy to redress those past harms is nominal
21 damages. Nominal damages awards satisfy Article
22 III. Farrar explains that nominal damages
23 provide relief on the merits, vindicate the
24 plaintiff through an enforceable judgment, and
25 modify the defendant's behavior for the

1 plaintiff's benefit by forcing the defendant to
2 pay the plaintiff money, the classic Article III
3 remedy for past injury. A one, 10, or 100
4 dollar award satisfies Article III because it
5 puts money in a plaintiff's pocket, no matter
6 how it is labeled: compensatory, statutory,
7 liquidated, or nominal.

8 The Eleventh Circuit's outlier rule is
9 a radical departure. For centuries, English and
10 American courts have awarded nominal damages
11 when no future threat exists, even after a
12 plaintiff waives compensatory damages. Every
13 circuit to address the issue does the same, even
14 the Eleventh, until this recent decision.

15 This Court should retain the
16 long-standing rule. It has not resulted in a
17 glut of cases, and the alternative makes a mess
18 of this Court's clear Article III jurisprudence.

19 Nominal damages provide a remedy in
20 many contexts, redressing injuries that
21 transcend price tags, from unconstitutional
22 searches and seizures to free exercise and due
23 process violations, to censorship and compulsion
24 of speech.

25 These constitutional rights are

1 invaluable, even when they don't result in
2 quantifiable harm. Yet, the officials urge you
3 to treat them as worthless. This Court should
4 decline that invitation and reverse.

5 I look forward to your questions.

6 CHIEF JUSTICE ROBERTS: Counsel, I
7 want to understand the scope of your argument
8 first. Say you go into court and say your
9 rights have been violated. The judge asks: How
10 have you been damaged by that? Do you have any
11 compensable injury? You say no. And he asks:
12 Is there any -- is that violation going to have
13 any effect on you in the future? And you say:
14 No, it's not going to be repeated. And he says:
15 Well, then you don't have standing, I've got to
16 throw the case out. And you say: Oh, well,
17 throw -- throw in a buck.

18 And then the judge is supposed to say:
19 Yeah, well, everything's fine now? Doesn't that
20 -- doesn't that make a mockery of our Article
21 III requirements?

22 MS. WAGGONER: No. Your Article III
23 requirements require redress, and this Court has
24 defined that as a personal tangible benefit.
25 The amount of a label is not necessarily

1 significant.

2 What is significant is that the past
3 injury is afforded some sort of redress, whether
4 that --

5 CHIEF JUSTICE ROBERTS: Well, but --

6 MS. WAGGONER: -- results --

7 CHIEF JUSTICE ROBERTS: -- the only
8 redress -- the only redress you're asking for is
9 a declaration that you're right. You want the
10 court to say, you know, you're right. And the
11 dollar is simply -- is a symbol to represent
12 that determination.

13 MS. WAGGONER: There is a declaration
14 that every judgment award would provide,
15 regardless of whether it's compensatory or
16 statutory or liquidated. But, in addition to
17 the declaration, there does need to be redress
18 for the past injury.

19 Declare -- declaratory judgments do
20 nothing for past injuries. They only redress
21 future --

22 CHIEF JUSTICE ROBERTS: Well, but I
23 would -- at page 18 and 19 of the Respondents'
24 brief, they go through all the authorities and
25 say that it's not that that dollar is a small

1 amount of compensatory damages; it is in name
2 only. It is not damages at all.

3 MS. WAGGONER: That's not what this
4 Court's cases have said or the common law. And
5 the significance of redressing the right, the
6 fact that a past injury has occurred, money
7 changes hands, as this Court said in *Farrar*, it
8 modifies the defendant's behavior in a way that
9 benefits the plaintiff. And providing money
10 damages of any amount is significant in that it
11 provides redress for the parties and an
12 enforceable judgment on the merits.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas.

16 JUSTICE THOMAS: Thank you, Mr. Chief
17 Justice.

18 I'd like to turn to something slightly
19 different, counsel. In -- in *Flanigan*, the
20 Eleventh Circuit precedent that -- that -- that
21 the court followed, the court of appeals, the --
22 there was no enforcement of the -- of -- of the
23 -- the ordinance involved.

24 Does that make a difference here?

25 MS. WAGGONER: I think it makes this

1 case even stronger than the Flanigan's ruling.
2 And I think that is a basis of distinction,
3 although even Flanigan's departs sharply from
4 the majority of circuits.

5 In terms of this case, this case,
6 there is a past chill with Joseph Bradford's
7 injury, and, certainly, silencing Chike twice in
8 a public place where he had a right to speak is
9 an injury all by itself.

10 JUSTICE THOMAS: So we have said --
11 and this is somewhat a different version or
12 similar to the Chief Justice's concern -- we've
13 said that -- that an injury has to be real and
14 substantial.

15 But, if you're only asking for a -- a
16 dollar or nominal damages, doesn't that seem to
17 undermine the real and substantial requirement?

18 MS. WAGGONER: I don't think so.
19 Congress has held that under Section 1983 the
20 vindication of civil rights is so significant
21 that it did away with the amount in controversy.

22 And this Court has held that
23 vindicating constitutional rights is of the
24 highest importance and that it is an injury in
25 and of itself to have the government engage in

1 misconduct and not redress that injury, no
2 matter how insignificant the damage award might
3 be.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: Good morning. Well,
8 as -- as you are aware, Congress passes lots of
9 statutes and they have tens of thousands of
10 words, and people frequently think that one new
11 set of words is -- is unconstitutional at least
12 as enforced. We're not supposed to give
13 advisory opinions.

14 But, if somebody comes in in the con
15 -- course of conduct under the statute or what
16 they're going to follow, why -- why -- is not
17 going to be done anymore.

18 It's the same question as the Chief's:
19 Why -- why isn't that just an advisory opinion?

20 And you can say, well, he's hurt. All
21 right. Is Bradford hurt? I see the first part,
22 the first plaintiff. What about Bradford?

23 MS. WAGGONER: Bradford is hurt. And
24 in terms of the Court filtering out cases that
25 are frivolous or where there is an advisory

1 opinion --

2 JUSTICE BREYER: No, no, not -- not
3 frivolous. How -- if Bradford is hurt, who
4 wouldn't be?

5 That is, give me an example of a case
6 where he says this is unconstitutional. They
7 think it could be applied to me. I think it's
8 -- I think it is unconstitutional. And I'm hurt
9 because I -- I -- I -- I'm a school teacher and
10 this sets up situations in the school which are
11 unconstitutional, and they're not going to be
12 done anymore.

13 How does he have a concrete injury?
14 Where is his concrete injury?

15 MS. WAGGONER: The concrete injury
16 comes when there's a past chill and there's a
17 specific intent that is demonstrated in the
18 pleadings that meets the standard in this
19 Court's holding in SBA List.

20 For a 12(b) motion, which this case is
21 on, the general allegations are sufficient to
22 establish the facts in the case, although, at a
23 later stage, summary judgment could be -- could
24 be considered by the Court. But Joseph had a
25 specific intent here, and Chike certainly does.

1 JUSTICE BREYER: Bradford, why, why?

2 MS. WAGGONER: He had a specific
3 intent to engage in the speech and to share his
4 faith on the campus. He was made aware of how
5 the -- how the school threatened Chike with
6 discipline, and his speech was chilled because
7 he didn't want to receive expulsion or
8 suspension or some other form of discipline by
9 engaging in these conversations.

10 CHIEF JUSTICE ROBERTS: Justice Alito.

11 JUSTICE ALITO: You have said that
12 nominal damages serve to vindicate a past
13 violation of a constitutional right. And it
14 would be helpful to me if you could perhaps
15 explain more specifically what you mean by the
16 vindication of a constitutional right that was
17 violated.

18 Do you mean simply a statement that
19 there was a violation, which sounds a lot like
20 an advisory opinion, or do you mean the award of
21 some damages for a real concrete violation that
22 can't be easily monetized?

23 So, if a person is told you cannot
24 speak about a certain subject and that's a
25 violation of a constitutional right, there may

1 not be any way to monetize the -- the violation
2 -- the -- the harm that is awarded to the
3 person, but is the theory that nominal damages
4 assign a certain monetary value to this harm
5 that can't easily be quantified in monetary
6 terms?

7 MS. WAGGONER: That's precisely the
8 theory. And it's the holding that the Court
9 reached in Carey and Stachura and the lower
10 courts have followed. It's that nominal damages
11 vindicate the constitutional violations by
12 entering the judgment, by requiring the payment
13 when other damages are not quantifiable.

14 It's similar to statutory or
15 liquidated damages, where there isn't
16 necessarily quantifiable damages in those
17 instances, but there's no question it meets
18 Article III.

19 JUSTICE ALITO: Well, then the
20 challenge for you is to show that early English
21 and American nominal damages cases were based on
22 that theory.

23 Now Respondents say that they fall
24 roughly into two categories: cases where
25 nominal damages served as prospective relief

1 from ongoing or future harms and cases where
2 they were merely a consolation prize for failing
3 to prove compensatory damages.

4 Very briefly, what would be your best
5 case or your best cases to show that that's an
6 -- an incorrect understanding of the common law
7 situation?

8 MS. WAGGONER: There are hundreds of
9 cases that demonstrate that, including Christian
10 versus Hooper, delayed writ executions, Burns
11 versus Elrod, which involve false imprisonment,
12 multiple cases involving mistreated staff, like
13 Thompson versus New Orleans, as well as
14 Dougherty versus Munson, which involved a legal
15 warrant.

16 CHIEF JUSTICE ROBERTS: Justice --

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: -- Sotomayor.

19 JUSTICE SOTOMAYOR: Counsel, the
20 government, at page 30 of its brief, says that
21 if a defendant moved for entry of judgment on a
22 plaintiff's nominal damages claim, "a district
23 court" -- and I'm quoting -- quoting them --
24 "should enter judgment on the basis of the
25 defendant's concession alone, without

1 adjudicating the merits of the
2 constitutional claim."

3 Your reply brief didn't address that
4 argument by the government directly. Do you
5 think that's possible? And, if it's not, why
6 not?

7 MS. WAGGONER: I -- I believe that --
8 is your question related to whether entry of
9 judgment would be on the merits?

10 JUSTICE SOTOMAYOR: Well, that's the
11 question. If no, how about if the defendant
12 deposits a dollar in an account payable to your
13 clients, and the district court enters judgment
14 on that basis? Would your claim then be moot?
15 That was what the government was arguing.

16 MS. WAGGONER: I believe that's an
17 open question in this Court following
18 Campbell-Ewald. Certainly, an offer in and of
19 itself wouldn't be sufficient, but whether a
20 tender would be sufficient is something this
21 Court hasn't decided.

22 JUSTICE SOTOMAYOR: Well, if that --

23 MS. WAGGONER: If --

24 JUSTICE SOTOMAYOR: -- if it's a
25 tender, do you -- what would require that tender

1 to be more than the compensable damage of one
2 dollar? Would you require an admission of
3 liability as well? And what in our case law
4 would require that?

5 MS. WAGGONER: Certainly, a full
6 tender of the relief that the plaintiff
7 requested would involve an enforce -- a judgment
8 that would be entered on behalf of the
9 plaintiff, as well as the damages, reasonable
10 attorney's fees and costs.

11 What the form of that judgment might
12 look like seems to be in the judge's discretion.
13 Neither party, I think, would have a right to
14 insist on a disclaimer of an admission of
15 liability, but that would be up to the district
16 court's discretion. But I do think that's an
17 issue this Court should have briefing on to
18 sharpen the issues in those instances.

19 JUSTICE SOTOMAYOR: Finally, counsel,
20 on the Bradford claim, there was never
21 enforcement against him, so what was the injury?
22 If the government doesn't know that he wants to
23 speak and denies that opportunity, what's the
24 injury?

25 MS. WAGGONER: The injury --

1 JUSTICE SOTOMAYOR: It may not be that
2 his case is -- is -- is moot, but it may be that
3 he hasn't suffered a First Amendment injury.

4 MS. WAGGONER: That may well be. I
5 think his injury was that his speech was
6 chilled, and he would satisfy this Court's test
7 in SBA List, but that isn't the issue that this
8 Court would need to decide today. I think that
9 proves the point that injury-in-fact essentially
10 ferrets out cases that may be advisory in nature
11 or where a concrete and particularized harm
12 hasn't been proven.

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

14 JUSTICE KAGAN: Ms. Waggoner, are --
15 are you saying that nominal damages are a form
16 of compensatory damages, or are you saying
17 something else?

18 MS. WAGGONER: No, they're not a form
19 of compensatory damages, although I don't think
20 that undermines the argument. I think that they
21 are compensation in the sense that they are
22 providing money to reflect the fact that damage
23 has been done.

24 But the amount of money pales in
25 comparison to the harm. It's not that the

1 dollar means so little; it's that the violation
2 means so much. That's why we award the damages
3 in those instances.

4 JUSTICE KAGAN: And -- and -- well, I
5 -- I guess, when you say that, how is it
6 different from compensatory damages?

7 MS. WAGGONER: Well, compensatory
8 damages have to be proven with specificity at
9 trial. They have to result in quantifiable
10 harm.

11 The value of free speech or the loss
12 of procedural due process is nearly impossible
13 to measure, as this Court has held. And there
14 are many reasons why plaintiffs may not want to
15 assert compensatory damages, and those are very
16 valid reasons. And at the common law, you could
17 even waive compensatory damages and seek
18 nominal.

19 JUSTICE KAGAN: I guess I always
20 thought that -- that our Article III
21 requirements meant that people can't bring a
22 suit for pure vindication alone, for just
23 saying, you know what, I was right, you were
24 wrong, for the psychic satisfaction that it
25 gives to hear a court say that.

1 And I guess I wonder, if this is not,
2 by your own admission, compensatory damages, how
3 is it that we're not in that world, where the --
4 where the suit really is one for, you know, just
5 a -- a -- a declaration that somebody else
6 committed a wrong?

7 MS. WAGGONER: Well, it is
8 compensatory in that it's requiring a defendant
9 to play -- to pay a plaintiff money. And that's
10 currency. Chike can go out and buy a package of
11 tracts for one, 10, or 20 dollars. Certainly,
12 in that sense, it is.

13 But I think the overall purpose is
14 that because we can't measure how harmful a
15 violation of speech is or how harmful an
16 unreasonable search and seizure is, we want to
17 ensure that some redress is provided in that to
18 the plaintiff for the past injury, and damages
19 do that.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch.

23 JUSTICE GORSUCH: Good morning,
24 counsel. Your friends on the other side suggest
25 that very little would be lost if -- if we

1 required more than nominal damages for standing.
2 They point out that your client initially had a
3 compensatory damages claim as part of this
4 lawsuit.

5 Why aren't they right? Perhaps your
6 client has scruples against seeking more than a
7 dollar and others might as well, but why should
8 the law care about that?

9 MS. WAGGONER: For several reasons.

10 First of all, there are many
11 plaintiffs who would be victims of government
12 misconduct that may not be able to demonstrate
13 compensable damages.

14 In Chike's case, our argument was that
15 he could because he drove to campus. But think
16 of a student who didn't drive to campus and who
17 couldn't quantify that harm.

18 JUSTICE GORSUCH: Well, presumably,
19 they'd have bus fare or they could -- they could
20 ask for the time that it took them to walk and
21 some sort of compensation for that. It -- it
22 doesn't -- we have very imaginative lawyers.
23 One thing the country doesn't lack for is
24 imaginative lawyers with -- with imaginative
25 damages theories.

1 MS. WAGGONER: Well, I would think
2 that would be of some concern to the Court, that
3 we would be creating a rule urging plaintiffs
4 and their counsel to make up damages that they
5 neither want nor need nor think they should
6 qualify for when the government's rationale for
7 changing this rule is that they believe it would
8 be too costly, when, really, it will lead to
9 protracted litigation.

10 In unreasonable search-and-seizure
11 cases, for example, a knock and announce,
12 Justice Breyer recognized in Hudson that those
13 are all nominal damages cases because it's so
14 difficult to prove one-off violations in
15 quantifiable ways.

16 JUSTICE GORSUCH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh.

19 JUSTICE KAVANAUGH: Thank you, Chief
20 Justice.

21 Good morning, Ms. Waggoner. I want to
22 pick up on Justice Sotomayor's questions and try
23 to figure out what's really at stake on this
24 issue.

25 Judge Jacobs in the Second Circuit

1 opinion in Amato and Judge Henry in the Tenth
2 Circuit opinion in Utah Animal Rights, their
3 separate opinions, both suggested, as the
4 government does here, that there's not much at
5 stake because a defendant can always surrender
6 to the judgment on the nominal damages claims
7 when no other claims remain, and the district
8 court simply enters judgment without
9 adjudicating the merits.

10 Justice Sotomayor asked you this, but
11 I want to probe deeper on the answer. Isn't
12 that exactly right?

13 MS. WAGGONER: I don't think that
14 there's -- I don't think that it's right in the
15 sense that there isn't much at stake for someone
16 like Chike, who is silenced on his campus, or
17 someone subject to an unlawful announce -- knock
18 and announce or a graduation speaker --

19 JUSTICE KAVANAUGH: No, my question --

20 MS. WAGGONER: -- who can't --

21 JUSTICE KAVANAUGH: -- my question is
22 really, aren't Judge Jacobs and Judge Henry and
23 the Solicitor General here correct that a
24 defendant can surrender the judgment on a
25 nominal damages claim when no other claims

1 remain, and the district court enters judgment
2 without adjudicating the merits? Isn't that
3 correct?

4 MS. WAGGONER: I think that that's an
5 open question before this Court, and how it
6 would apply in a nominal damages situation would
7 be something that the Court would want to
8 consider. But, certainly, if the Court --

9 JUSTICE KAVANAUGH: Okay. And then --

10 MS. WAGGONER: -- held that that was
11 full redress, then -- then that -- that would be
12 acceptable, but full redress would need to be
13 provided. And Georgia's offered --

14 JUSTICE KAVANAUGH: And then --

15 MS. WAGGONER: -- absolutely nothing.

16 JUSTICE KAVANAUGH: -- and then, in
17 that instance, what -- what's the attorney's fee
18 situation? Because that may be what's really at
19 stake here. What -- what's the attorney's fee
20 situation, in your view, with a nominal --
21 successful nominal damages claim?

22 MS. WAGGONER: I think the Court has
23 discretion to determine what the attorney's fees
24 are. Under Farrar, the Court said that they
25 would be a prevailing party. But most courts at

1 the lower levels have applied the Justice
2 O'Connor factors to look at various aspects of
3 the case, what was asked for, and the
4 significance of the issue that was decided.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett.

7 JUSTICE BARRETT: Counsel, I want to
8 go back to Justice Kagan's question. When she
9 asked you if nominal damages were a form of
10 compensatory damages, you said no. And, I mean,
11 I -- I understand that they are not compensatory
12 damages, you know, that they -- they are
13 distinct categories and you can't prove them
14 with specificity, can't prove nominal damages, I
15 mean.

16 But I would have thought that your
17 argument depended on nominal damages being
18 retrospective. I -- I took your argument to be
19 that they were compensation for a hard-to-
20 quantify or impossible-to-quantify harm.

21 So can you explain a little bit more
22 why you are not describing to Justice Kagan that
23 nominal damages are backward-looking relief?

24 MS. WAGGONER: All damages are
25 backward-looking relief. And I -- I think, in

1 terms of the compensatory nature of the damages,
2 they're compensatory in that they're redressing
3 a harm that has occurred. They're the same
4 pedigree as compensatory damages, as well as
5 statutory or liquidated damages.

6 JUSTICE BARRETT: So it is your
7 position that they are compensating for a -- an
8 unquantifiable harm?

9 MS. WAGGONER: Absolutely. As this
10 Court articulated in Carey and Stachura, it's
11 just that it's not a quantifiable harm. And so
12 that's the distinction I was making.

13 JUSTICE BARRETT: Okay. Now I want to
14 go back to your colloquy with Justice Breyer,
15 and he was talking to you about Bradford's claim
16 and asking why that wouldn't be moot.

17 Can you identify any situation in
18 which a case would be moot if the plaintiff also
19 sought nominal damages? Putting aside
20 Bradford's particular one, is there any case
21 that would be moot if nominal damages were
22 attached?

23 MS. WAGGONER: No. This Court has
24 held that damages can't be mooted, but
25 prospective relief can be mooted. But that

1 doesn't mean that everyone who asserts a nominal
2 damages claim would prevail. There are many
3 reasons why nominal --

4 JUSTICE BARRETT: But -- but why not?

5 MS. WAGGONER: -- damages can't be
6 looking forward.

7 JUSTICE BARRETT: Why not? Because
8 you can always come up -- I mean, you were
9 coming up with reasons why Bradford might have
10 suffered some -- some damage. It's then hard to
11 conceive of any -- any suit that sought
12 prospective relief, like a declaratory judgment,
13 or injunctive relief that had a tag-along claim
14 for nominal damages that could survive -- sorry,
15 I mean that would be mooted.

16 MS. WAGGONER: Well, that's true if --
17 if there's a past injury, first of all. And not
18 everyone who seeks prospective relief even has a
19 past injury.

20 It also assumes that there's a cause
21 of action and a defendant amenable to those
22 things. So, while damages can't be mooted since
23 you may --

24 JUSTICE BARRETT: Thank you, counsel.
25 My time is up.

1 CHIEF JUSTICE ROBERTS: A minute to
2 wrap up, counsel.

3 MS. WAGGONER: Thank you, Your Honor.

4 In terms of the courts being flooded,
5 this Court -- in terms of the true concern about
6 being -- courts being flooded with frivolous
7 claims for relief, protracted litigation, or
8 avoiding a drain on government resources, the
9 long-standing rule is the rule that best
10 resolves those concerns. Injury-in-fact ensures
11 that cases and controversies involving concrete
12 harms -- and they're not made up, they're --
13 excuse me, and they're not made-up claims.

14 There's no one that contests the
15 injury in this case. And the majority rules,
16 consistent with Carey and Stachura, it hasn't
17 led to a flood of claims but instead provides
18 remedies for victims who were subject to
19 discriminatory stop and frisk or prisoners who
20 can't have kosher -- need kosher meals.

21 And the Prison Litigation Reform Act
22 doesn't even allow compensation. In those
23 situations, nominal damages is the only
24 resolution. And it fosters a quicker and fairer
25 resolution because the government can't roll the

1 dice and then say never mind at the end of the
2 case when the -- when the odds switch.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Mooppan.

6 ORAL ARGUMENT OF HASHIM M. MOOPPAN
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE PETITIONERS

9 MR. MOOPPAN: Mr. Chief Justice, and
10 may it please the Court:

11 Petitioners suffered an unquestionable
12 Article III injury when Respondents censored
13 their speech, and Petitioners seek the
14 paradigmatic type of Article III redress for
15 that past injury, a tangible award of money.

16 That the amount of money is nominal is
17 immaterial to whether an Article III case or
18 controversy exists.

19 Recognizing that the deprivation of a
20 personal right is generally not harmless, common
21 law courts have long awarded nominal damages as
22 partial redress, and Congress incorporated that
23 practice in Section 1983.

24 Respondents' position would not just
25 break from history and tradition but create

1 confusion in the law. Like nominal damages,
2 many other forms of monetary relief are not tied
3 to either evidence of quantifiable harm or
4 likelihood of future violations, such as
5 punitive, treble, and statutory damages.

6 This Court should reaffirm that such
7 monetary relief for past injuries is proper
8 Article III redress.

9 I welcome this Court's questions.

10 CHIEF JUSTICE ROBERTS: Counsel, it --
11 it seems to me that one of the difficulties with
12 your case is that it melds the inquiries into
13 standing and the merits. We have always been
14 adamant about the necessity of addressing
15 standing or, you know, the flip side of it,
16 responding to mootness concerns before reaching
17 the merits.

18 But, if you have -- you have a case
19 where there's no compensable damages, there's no
20 concern about future injury, no -- no
21 repetition, and all that's on -- on the books
22 assume nominal damages as, you know, in name
23 only, is a ruling on the merits, then the
24 standing inquiry and the merits inquiry are
25 precisely the same.

1 Why is that not right?

2 MR. MOOPPAN: I don't think that's
3 right for the reason this Court gave in Spokeo.
4 The question for standing is whether there is an
5 injury-in-fact.

6 Now, in this case, that's quite easy
7 because being -- having your speech suppressed
8 or being subject to a threat of suppression of
9 speech is a paradigmatic injury.

10 CHIEF JUSTICE ROBERTS: No, no, no.
11 That -- that's exactly my point. That is the --
12 simply the Court saying that you're right. You
13 know, you immediately discuss the -- the -- the
14 merits. Having your speech suppressed is an
15 injury.

16 What we always do is look for -- for
17 standing first. Okay. You say something bad
18 has happened to you. How have you been injured?
19 What gives you the right to come into federal
20 court? I don't think you can answer your injury
21 question without saying this is the resolution
22 of the merits, and that violates the principle
23 that standing and the absence of mootness are
24 issues that have to be addressed before the
25 merits.

1 MR. MOOPPAN: No, I don't think so,
2 Your Honor, because it might be that the
3 suppression of speech is permissible under the
4 First Amendment. But the point is that the
5 plaintiff wasn't able to speak. They were not
6 able to engage in certain speech. That is an
7 injury-in-fact.

8 Now, whether the --

9 CHIEF JUSTICE ROBERTS: That's a
10 violation of rights. The injury is always been
11 understood to be something separate from
12 prevailing on the merits.

13 MR. MOOPPAN: So I don't think that's
14 consistent with the common law, Your Honor,
15 which Article III is derived from. Take, for
16 example, trespass. Merely breaking the close of
17 someone's property, setting one foot on --

18 CHIEF JUSTICE ROBERTS: Well, that --
19 that --

20 MR. MOOPPAN: -- someone else's --

21 CHIEF JUSTICE ROBERTS: -- that has
22 future effect since it establishes the boundary
23 of the property.

24 But anyway, Justice Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

2 Counsel, I'd like to follow up on the
3 point that Justice Kavanaugh was addressing.
4 You suggest that the defendants in these nominal
5 damages cases should just basically surrender
6 and accept the judgment. But wouldn't that open
7 them up to attorney's fees?

8 MR. MOOPPAN: So, under this Court's
9 decision in *Farrar*, they -- the plaintiff would
10 be a prevailing party. But then, under the
11 second step of this Court's analysis in *Farrar*,
12 whether the -- the amount of fees that would be
13 reasonable in a -- in a nominal damages only
14 case would potentially be quite minimal.

15 JUSTICE THOMAS: And, again, just
16 piggybacking a bit on what the Chief Justice was
17 raising, the -- if you -- if there was a case
18 for nominal damages that was similar to this,
19 but -- one of the plaintiffs here, but there was
20 no enforcement, as we had in the *Flanigan* case,
21 would there be standing to pursue nominal
22 damages then?

23 MR. MOOPPAN: I think it would turn on
24 whether there was a credible threat of
25 enforcement. This Court has recognized that

1 there's an injury-in-fact when there's a
2 credible threat of enforcement.

3 So, to answer both your question and
4 Justice Breyer's question from earlier, if you
5 think of a case like Poe versus Ullman, where
6 you had a law on the books that had never been
7 enforced for decades, there, there might not be
8 Article III standing to get into court in the
9 first place.

10 But, if you have a credible threat of
11 injury that would let you bring a suit,
12 prospective suit for injunctive relief, you can
13 likewise get -- bring a retrospective suit for
14 damages, whether those damages be compensatory
15 or nominal.

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer.

19 JUSTICE BREYER: Thank you.

20 I'd like -- I'd like you to think of
21 two opposite situations. One, Blackacre. I own
22 Blackacre, and you come in and have picnic all
23 the time. Now you won't do it anymore, but I
24 bring a lawsuit for trespass. I can't measure
25 the damages. And nominal damages always have

1 been given there.

2 The opposite situation, what we have
3 are 400 million laws, actions, policies, and
4 let's take the subset where we don't know
5 whether it violates the Constitution or not. We
6 don't know. Border case.

7 In those circumstances, if you bring
8 the courts into every single case, they would
9 spend an awful lot of time adjudicating those
10 cases, though nobody is really hurt, when there
11 are lots of people who are really hurt who need
12 their time and effort. Okay?

13 So we have to draw a line. And the
14 Eleventh Circuit's line, not perfect, but a
15 line, is allow it if you also could plead a
16 claim for compensatory damages, which I think
17 they did here. I don't know why nobody said
18 that. But -- but, nonetheless, that's their
19 line.

20 Now, if you don't like that line, you
21 tell me what's a better line.

22 MR. MOOPPAN: So I think the better
23 line is your example of Blackacre. Just like in
24 property cases, you could bring a trespass suit
25 even if the trespass question was a very

1 difficult one.

2 JUSTICE BREYER: I'm going to cut you
3 off because, in trespass, you could bring a
4 claim for compensatory damages. Just very hard
5 to prove.

6 MR. MOOPPAN: But you never did. As
7 Justice --

8 JUSTICE BREYER: Well, but you could.

9 MR. MOOPPAN: -- as Justice Story
10 explained in his Webb decision, you don't need
11 to bring a nominal -- a compensatory damages
12 suit to bring a trespass suit. And it doesn't
13 matter how complicated the property law
14 questions posed by the trespass suit are. The
15 -- the -- the alleged violation of property
16 rights was enough to let you into court and
17 bring a nominal damages suit.

18 To answer the flip side of your
19 concern, again, the defendant, if it doesn't
20 want to pay the dollar -- again, doesn't want to
21 adjudicate the suit, can just pay the dollar.

22 So there's no reason why this --

23 JUSTICE BREYER: And he pays a dollar,
24 and nobody has to adjudicate whether it is or is
25 not unconstitutional?

1 MR. MOOPPAN: No, because the courts
2 resolve constitutional questions not in and of
3 themselves but as a means to resolving a
4 controversy between the parties.

5 So, if the plaintiff says he's
6 entitled to a dollar and the defendant says,
7 great, I'm willing to pay a dollar, there's --
8 that's the end of the case.

9 JUSTICE BREYER: I see. So --

10 CHIEF JUSTICE ROBERTS: Justice Alito.

11 JUSTICE BREYER: -- the only cases
12 that we really have left are we have two
13 die-hards and they really won't give in and
14 they're fighting over a dollar.

15 MR. MOOPPAN: That's exactly right --

16 CHIEF JUSTICE ROBERTS: Okay. Justice
17 --

18 MR. MOOPPAN: -- just like if you have
19 two neighbors who insisted on fighting over a
20 trespass suit over a dollar.

21 CHIEF JUSTICE ROBERTS: Justice Alito.

22 MR. MOOPPAN: That doesn't happen in
23 -- in the real world very often.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 MR. MOOPPAN: Sorry.

1 JUSTICE ALITO: Counsel, could you say
2 something about Mr. Bradford's claim? The
3 policy was never actually enforced against him.
4 So in what sense did he suffer a past injury?

5 MR. MOOPPAN: So, in the sense of SBA
6 List and the Virginia Booksellers, he clearly
7 faced a credible threat of enforcement given
8 that the policy was actively enforced against
9 others at the time and he knew it. As a result,
10 he -- he chilled his own speech.

11 But that's not self-censorship in the
12 way of Clapper because there was a credible
13 threat of enforcement. So that is a concrete
14 harm that's fairly traceable to the government's
15 policy.

16 It would be a different situation if
17 the government didn't have a policy or if the
18 government didn't enforce their policy. Then
19 his failure to speak would be attributable to
20 his own actions.

21 But, in a case where the government
22 had a policy that they were robustly, actively
23 enforcing at the time, his self-censorship is
24 attributable to their conduct, and that's why he
25 had an injury that's fairly traceable.

1 And I don't think anyone would dispute
2 if he had brought a suit for injunctive relief;
3 in fact, no one did dispute it.

4 JUSTICE ALITO: Is his situation
5 different from that of any other student? Could
6 every -- could every student come forward and
7 say, I -- I might have liked to engage in speech
8 that is prohibited by this policy, and,
9 therefore, I should get nominal damages?

10 MR. MOOPPAN: I -- I think they would
11 have to say I would have. I don't think it
12 would be necessary to say I might have, but if
13 they came in and said I intended to engage in
14 speech, but I refrained from doing so because I
15 was threatened with severe campus discipline if
16 I did so under the policy, yes, I think every
17 one of those people has suffered an
18 injury-in-fact that's traceable to the
19 government's policy.

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, it -- it
24 seems to defy our case law that says a
25 generalized grievance that everyone is subject

1 to, every student, seems the quintessential lack
2 of standing question, that why should every
3 citizen who believes a law is unconstitutional
4 come into court and challenge it?

5 And that what -- that's what it
6 appears Mr. Bradford is doing. Does he have any
7 burdens on this issue? Does he have to prove
8 what plans he actually made, when he developed
9 this plan, et cetera? I -- I'm a little lost as
10 to how someone can just walk into court and say
11 that chilled me from speaking, and that would be
12 enough.

13 MR. MOOPPAN: So I guess two points,
14 Your Honor. The first is it's not a generalized
15 grievance precisely because he has to make the
16 sort of allegations you just talked about. So,
17 if someone was on a college campus and never had
18 any intention engaging in any of this speech,
19 that person could --

20 JUSTICE SOTOMAYOR: How do you prove
21 -- how do you a prove a negative? Meaning I --
22 generally, you look at what a person does, not
23 what they say they wanted to do.

24 MR. MOOPPAN: Well, so no, and it
25 would be --

1 JUSTICE SOTOMAYOR: How do you read a
2 mind -- a person's mind?

3 MR. MOOPPAN: Well, so the plaintiff
4 would have to allege it. He would -- he would
5 have to declare it and testify to it. You could
6 cross-examine him as to his sincerity. But,
7 yes, ultimately, the question is, was he
8 intending to do something and was he chilled
9 from doing it because the government had a
10 policy that prohibited it?

11 And, again, the plaintiffs -- the
12 Respondents in this case haven't disputed that
13 he had standing to sue if they hadn't restricted
14 -- eliminated their policy. No one is disputing
15 that he had an injury-in-fact that would have
16 let him bring a prospective suit. That is based
17 on the same exact injury-in-fact that supports
18 his retrospective claim for damages.

19 JUSTICE SOTOMAYOR: But would -- is
20 that an injury-in-fact that's compensable, even
21 with nominal damages?

22 MR. MOOPPAN: Yes, Your Honor.

23 JUSTICE SOTOMAYOR: Meaning if he
24 never took a step to effectuate what he wanted
25 to do, and unlike his colleague, who actually

1 was in the midst of speaking and was stopped, so
2 that could be -- I see easily how that's an
3 injury. But I'm not quite sure that it can be
4 an injury-in-fact when you don't take actual
5 concrete steps to do something and just merely
6 say I had a desire.

7 MR. MOOPPAN: Well, his concrete step
8 is he refrained from taking action. He intended
9 to engage in speech and didn't do so because the
10 government threatened him with sanctions. I
11 think --

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: General Mooppan, you
14 have a lot of history on your side, but I think
15 I want to give you a theory about why that
16 history is not very relevant.

17 I think that these cases that you have
18 fall into three groups. The one are they are
19 declaratory judgment actions in a world before
20 declaratory judgment actions. In other words,
21 they're ways to try to determine legal rights
22 going forward before the declaratory judgment
23 form existed.

24 The second group of cases are cases in
25 which there's injury that's hard to monetize,

1 and -- and these cases are asking for something
2 to recompense that injury. But the reason why
3 those cases aren't very relevant anymore is
4 that, in our world, we monetize those claims all
5 the time. We now live in a world, unlike the
6 historical world, in which we acknowledge claims
7 for emotional distress, claims for dignitary
8 harms of all kinds, which makes the nominal
9 damages claim unnecessary.

10 The third group of cases is a case in
11 which what the plaintiff really wants is
12 vindication. It's a statement that I'm right,
13 the defendant is wrong. And as to those cases,
14 modern Article III jurisprudence says that, you
15 know, you don't -- that's not a case or
16 controversy.

17 So, given all that, what role is there
18 anymore for nominal -- nominal damages claims?

19 MR. MOOPPAN: Your Honor, I -- I don't
20 think that that's an accurate characterization
21 of the common law, and I'd like to make two
22 points about that.

23 So the first is I would point this
24 Court, again, to Justice Story's opinion in
25 Webb, where his primary reason that he gave for

1 why nominal damages were appropriate is that he
2 viewed it as essential in the common law that
3 every injury imports damage in the nature of it.
4 And if no other damage is established, the party
5 injured is entitled to a verdict for nominal
6 damages.

7 That is essentially a recognition of a
8 form of liquidated compensatory harm of at least
9 a dollar because the violation of a right isn't
10 harmless, and if it's not harmless, it's
11 entitled to at least a dollar.

12 He then went on to say, a fortiori, if
13 there's a risk of future harm, that would
14 support nominal damages. But I think the
15 critical point to recognize is the likelihood of
16 a future trespass or a future assault or a
17 future mistrain. None of that future likelihood
18 would become close to meeting the Article III
19 requirements we have today of likelihood of
20 future injury.

21 JUSTICE KAGAN: Thank you --

22 CHIEF JUSTICE ROBERTS: Justice --

23 JUSTICE KAGAN: -- General Mooppan.

24 CHIEF JUSTICE ROBERTS: -- Justice
25 Gorsuch.

1 JUSTICE GORSUCH: Counsel, you said
2 you had two points in response to Justice Kagan.
3 Before proceeding, I just want to make sure you
4 got both of them out there.

5 MR. MOOPPAN: Yeah. So the last point
6 I was going to make is about a bucket of cases
7 that the Respondents cite in their brief that I
8 think actually cuts the exact opposite way.
9 There are a -- a series of cases they -- they
10 cite at pages 34 to 35 of their brief where
11 common law courts, appellate courts, said it was
12 harmless error to not have awarded nominal
13 damages precisely because there wasn't a
14 likelihood of future harm.

15 The Respondents emphasize harmless,
16 but the real key is that error. The appellate
17 courts there recognized it was error not to
18 award nominal damages even though there was no
19 likelihood of future harm.

20 So I think that very clearly
21 demonstrates that the common law courts were not
22 viewing nominal damages as some sort of
23 proto-declaratory judgment. They recognized it
24 for exactly what Justice Story said it was. It
25 was a recognition that every injury imports

1 damage in the nature of it.

2 JUSTICE GORSUCH: Just to make sure I
3 understand at least part of that response,
4 Justice Kagan posited -- I believe it was her
5 second bucket of cases in which today we're able
6 to and -- and do monetize what maybe had been
7 before hard-to-monetize claims of emotional
8 distress and things like that.

9 Is -- is -- is the essence of your
10 response, yes, maybe we do and we have great
11 lawyers and economists who can do that today,
12 but one need not do that for Article III
13 purposes because, historically, it was not done?

14 MR. MOOPPAN: That's right. Common
15 law courts -- and Congress ratified that through
16 Section 1983 -- were entitled to decide that you
17 at least get a dollar.

18 Now, if you have clever lawyers and
19 you can do the sort of thing that Justice Kagan
20 identified, then you can get more. You can get
21 quantified -- you can get compensatory damages
22 for quantifiable, specific evidence of harm.

23 JUSTICE GORSUCH: But perhaps one
24 shouldn't be penalized for lacking a clever
25 lawyer.

1 MR. MOOPPAN: That's right. Or
2 another way of thinking about it is Congress is
3 entitled to determine that the deprivation of a
4 constitutional right isn't harmless, and if it's
5 not harmless, then you're entitled to at least a
6 dollar.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.

10 JUSTICE KAVANAUGH: Thank you.

11 And good morning, counsel. Picking up
12 on Justice Thomas's question and the last part
13 of Justice Breyer's question, I'm trying to,
14 again, figure out what's really at stake here.

15 This is not about the one dollar, I
16 wouldn't think. The concern about litigation
17 being prolonged or an advisory opinion, you say
18 that can be answered, as I understand it,
19 because the defendant can always just surrender
20 to the judgment and the district court would
21 enter judgment without adjudicating the merits,
22 is that correct?

23 MR. MOOPPAN: That's correct.

24 JUSTICE KAVANAUGH: Okay. So that
25 leaves me with the strong suspicion that

1 attorney's fees is what's driving all this on
2 both sides because, under Buckhannon, correct me
3 if I'm wrong, if you sue for injunctive relief,
4 the defendant changes the policy, as happened
5 here, you get no attorney's fees, correct?

6 MR. MOOPPAN: Yes, that's correct.

7 JUSTICE KAVANAUGH: Okay. But, if you
8 have nominal damages, you can get attorney's
9 fees potentially, correct?

10 MR. MOOPPAN: Right, under Farrar.

11 JUSTICE KAVANAUGH: Right. So what
12 seems to be driving this is that the reason the
13 plaintiffs want nominal damages, plaintiffs
14 generally want nominal damages to be available,
15 is attorney's fees, and the reason defendants do
16 not want them to be available is they don't want
17 to pay attorney's fees, correct?

18 MR. MOOPPAN: At least partly. I
19 think at least some respondents -- or defendants
20 might also want not -- might not want to pay the
21 dollar because they don't want to admit any sort
22 of wrongdoing --

23 JUSTICE KAVANAUGH: Right.

24 MR. MOOPPAN: -- even in the passive
25 sense of paying a dollar without saying that

1 they were wrong on the merits.

2 JUSTICE KAVANAUGH: Got it. Okay.

3 And then Judge Jacobs and Judge Henry,
4 though, say -- and I think this cuts in favor of
5 your ultimate position here -- but they say the
6 attorney's fees can be -- a concern of allowing
7 nominal damages can be handled and already have
8 been handled under Farrar by saying you don't
9 get much in the way of attorney's fees when you
10 get nominal damages.

11 Is that how you see it?

12 MR. MOOPPAN: I think that's right. I
13 think, under Farrar, it's a reasonableness
14 inquiry, and I think there are two main things
15 you would look at. I think you would look at
16 what the plaintiffs sought. Did they seek 17
17 million dollars and only get one, or did they
18 seek one dollar from the outset and only get it?

19 And then the other thing I think you
20 --

21 JUSTICE KAVANAUGH: What if they --

22 MR. MOOPPAN: -- would look at --

23 JUSTICE KAVANAUGH: -- what if they
24 sought injunctive relief and nominal damages and
25 the party, the defendant, changed its policy, so

1 no injunctive relief, but they still get the
2 nominal damages? How do you think attorney's
3 fees works there?

4 MR. MOOPPAN: I think it would depend
5 on when it happened. I think that if the
6 defendant changed their policy years into the
7 litigation, I think there would be a much
8 stronger case for the plaintiffs saying -- being
9 able to say that they litigated the case,
10 ultimately did get some relief that makes them
11 really --

12 JUSTICE KAVANAUGH: That sounds like
13 an end run around Buckhannon, what you just
14 said, but maybe I'm wrong about that.

15 MR. MOOPPAN: Look, I think it partly
16 depends on -- it's a question about
17 reasonableness. Farrar tells us that the dollar
18 isn't an end run around Buckhannon, you are a
19 prevailing party, and then the question is who
20 acted reasonably. I think it --

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett.

23 JUSTICE BARRETT: Mr. Mooppan, last
24 term, in New York State Rifle and Pistol
25 Association, we held the case, the Second

1 Amendment challenge, moot because the City of
2 New York changed its policy.

3 Was that then really just kind of a
4 technicality? If the pistol association had
5 sought nominal damages, would that case have had
6 to come out the other way under your theory?

7 MR. MOOPPAN: Yes. I think, if they
8 had always had a live nominal damages claim in a
9 case like that, once you were already at the
10 appellate court, the court -- the award would
11 have been a live claim and they wouldn't have
12 been able to just say, oh, we'll pay the dollar.

13 Under this Court's decision in Young,
14 which we cite in our brief, an appellate court's
15 ability to just accept a concession like that is
16 different from a district court.

17 JUSTICE BARRETT: Okay. Well, then
18 let me circle back to some of the questions that
19 various of my colleagues were pressing Ms.
20 Waggoner on. You had Justice Breyer, and then I
21 asked this question. We're trying to get Ms.
22 Waggoner to identify any case that would ever be
23 moot under your theory so long as nominal
24 damages were sought.

25 What -- another way of getting at that

1 point is, no, the majority of circuits do accept
2 your theory and say that there -- that nominal
3 damages can keep a case live or, put
4 differently, that seeking nominal damages, a
5 plaintiff would have standing to seek nominal
6 damages alone.

7 So, in that majority of circuits that
8 follow the rule that you want us to adopt, do
9 cases moot out?

10 MR. MOOPPAN: They do. But I think
11 the primary reason they do is there are a set of
12 cases where nominal damages just aren't
13 available, the most obvious for us being the
14 federal government isn't subject to nominal
15 damages, and lots of other statutes besides 1983
16 don't authorize nominal damages.

17 But, if nominal damages are otherwise
18 legally available, then it would be difficult
19 for a suit to moot out if nominal damages were
20 sought, but, with the one caveat that, as a
21 practical matter, lots of people aren't going to
22 keep litigating a case just over nominal
23 damages, especially given Farrar's rule about
24 the reasonableness of attorney's fees.

25 So, as a practical matter, a lot of

1 these cases will moot out even if, as a legal
2 matter, they don't.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Mooppan.

5 MR. MOOPPAN: So I'd just -- I'd just
6 like to make one last point, which I think is a
7 pretty important one, which is there are lots of
8 types of monetary relief that are neither
9 dealing with future harm nor based on
10 quantifiable evidence of past harm: punitive
11 damages, statutory damages, treble damages. All
12 of those would seem to violate under -- Article
13 III under Respondents' theory, but all of those
14 are unquestionably permissible.

15 I think the solution that -- for why
16 all of those are permissible shows why nominal
17 damages are permissible too. It is that
18 monetary relief has traditionally been
19 recognized as a proper form of redress for past
20 injury-in-fact, and that simple rule is
21 sufficient to rule for the Petitioners here.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 General Pinson.

25

1 ORAL ARGUMENT OF ANDREW A. PINSON
2 ON BEHALF OF THE RESPONDENTS

3 MR. PINSON: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 At bottom, the question whether
6 nominal damages resists mootness in a case like
7 this one reduces to the question whether nominal
8 damages redress past injuries.

9 When there's no longer any threat that
10 a plaintiff's injury will recur in the future, a
11 case is safe from mootness only if the court
12 could still give the plaintiff something that
13 redresses what's now a purely past injury.

14 But nominal damages do not fit that
15 bill. Generally, past injuries are redressed
16 through compensation. But both modern and
17 historical authorities agree that nominal
18 damages aren't compensation.

19 Unlike other kinds of damages, the law
20 affirmatively strips nominal damages of that
21 role. They're an indeterminate and trivial sum
22 precisely because they're given as a symbol
23 that, although the plaintiff proved a legal
24 violation, they're entitled to exactly zero
25 compensation for it.

1 That means nominal damages can't serve
2 as independent redress for purely past injuries.

3 And the body of common law bears that
4 out. It's full of cases awarding nominal
5 damages when giving them to establish or protect
6 the plaintiff's legal rights going forward or
7 when they're a symbolic gesture given after a
8 plaintiff failed to prove compensable injury for
9 a legal violation.

10 But Petitioners haven't cited a single
11 common law case that decided the merits of a
12 legal claim where a plaintiff had sought only
13 nominal damages and awarding them couldn't
14 affect the plaintiff's ongoing legal rights or
15 interests.

16 Without a working theory for how
17 nominal damages can actually redress past
18 injuries or historical evidence for that claim,
19 the conclusion has to be that they aren't
20 retrospective relief that saves the case from
21 mootness when there's no longer a threat of
22 continuing injury.

23 I welcome this Court's questions.

24 CHIEF JUSTICE ROBERTS: Counsel, is
25 your position that nominal damages are never

1 sufficient on their own to establish standing or
2 prevent mootness? In other words, they're --

3 MR. PINSON: That's not --

4 CHIEF JUSTICE ROBERTS: -- present
5 from -- sort of under our modern jurisprudence,
6 that there should be no such thing as nominal
7 damages?

8 MR. PINSON: That's not our position,
9 and that's because, at common law, nominal
10 damages were available in the same role as -- as
11 what you would normally see a declaratory
12 judgment claim brought today when it concerns
13 the legality of past conduct.

14 So our -- our test would be whether
15 the nominal damages could redress a continuing,
16 present, adverse effect on a plaintiff's legal
17 rights or interests. So they can't --

18 CHIEF JUSTICE ROBERTS: Well, then
19 you're --

20 MR. PINSON: -- redress anything.

21 CHIEF JUSTICE ROBERTS: Yeah. Well,
22 then today you're saying that, or under today's
23 legal regime, that if you ask for nominal
24 damages, you're really just asking for a
25 declaratory judgment. And if there's some

1 reason a declaratory judgment is not available,
2 then the nominal damages are not sufficient. In
3 other words, it's just using the wrong label for
4 the type of action you're bringing.

5 MR. PINSON: It -- it -- I could
6 envision a case where nominal damages might have
7 a separate role because they aren't
8 discretionary, like equitable remedies, but,
9 generally, that's -- that's correct, Your Honor.

10 CHIEF JUSTICE ROBERTS: Joseph Story's
11 name has been bandied about a little bit. What
12 -- what is your answer to his position?

13 MR. PINSON: Sure. And it's this --
14 this Webb case that my colleagues on the other
15 side have referred to, and there's -- there's
16 two points there.

17 One is that the -- the general notion
18 that you hear of every injury importing a
19 damage, what that meant at the common law was
20 that the Petitioners or the plaintiffs had a
21 damages claim and so they would bring that
22 damages claim, and you see that in all of
23 Petitioners' cases. And if they weren't able to
24 prove it, then nominal damages could be given to
25 reflect that outcome.

1 But I think the more important thing
2 about Webb is, in that case, that -- that's a
3 riparian rights case. That is the paradigmatic
4 kind of case where nominal damages could be
5 sought on their own because they offered some
6 sort of prospective relief. In those cases,
7 they allowed plaintiffs to fend off creation of
8 prescriptive rights or show boundaries or
9 establish riparian rights.

10 CHIEF JUSTICE ROBERTS: What if
11 Congress passed a law and they wanted private --
12 encouraged private enforcement, so they said
13 that, if you -- you prevail, you get statutory
14 damages of one dollar? Is that a suit that can
15 be brought?

16 MR. PINSON: So, Mr. Chief Justice, I
17 think that's a difficult question. Normally,
18 statutory damages, we would say, served this
19 role that -- that Petitioners want nominal
20 damages to serve. They're a compensation for
21 sometimes harms that are hard to quantify.

22 But, if it's only a dollar, I think it
23 likely depends on the injury being redressed,
24 because the whole reason that common law courts
25 would allow giving him a nominal dollar is

1 because it was a trivial sum, which meant that
2 it could serve as that symbol.

3 So, arguably, Congress, when they do
4 that, if all they're doing is giving that same
5 trivial sum and it's really a vehicle for
6 advisory opinions, I think the Court would have
7 to look carefully at that.

8 CHIEF JUSTICE ROBERTS: Well, I mean,
9 is your answer the same with the allegation
10 that, you know, for the gas that it took to
11 drive the three blocks to -- to the -- to the
12 campus or something like that, would you say
13 that's just too small?

14 MR. PINSON: No. That -- a different
15 answer there because that's -- compensatory
16 damages, whatever the amount, are recognized as
17 relief of a past injury. That was true at
18 common law, even when the amount of damages were
19 small, and it's true today in this Court's
20 decisions like SCRAP.

21 I think it's only in -- in the
22 circumstances where the -- the damages being
23 given are the specific nominal damages remedy or
24 something that's -- that's sort of trying to do
25 that by some other means that -- that you run

1 into the problem of not having any sort of
2 compensation for a past harm.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

7 General Pinson, are there cases in
8 which the Court has awarded nominal damages
9 because of failure of proof of actual damages?

10 MR. PINSON: Cases -- cases of this
11 Court, I think, at least the Court said in cases
12 like Carey and Stachura that at the end of the
13 case, that -- that nominal damages could be
14 awarded, and Farrar did the same thing.

15 JUSTICE THOMAS: So why would -- why
16 would there be standing in a case like that?

17 MR. PINSON: You have standing in a
18 case like that because a compensatory damages
19 claim allowed the court to decide the case. And
20 -- and I -- I understand the -- the potential
21 resistance to that, right, that you need
22 standing for a separate -- for each separate
23 claim of relief.

24 The answer is that, at the common law,
25 these claims were not pled in the alternative.

1 The -- the claim that allowed Petitioner -- that
2 allowed the plaintiffs to seek relief was a
3 damages claim. If they stated a legal injury,
4 they got -- it imported the damage and they got
5 that claim. That would allow the court to
6 adjudicate the merits.

7 And then the nominal damages awarded
8 if they weren't able to prove substantial
9 damages was just a symbolic gesture. It
10 reflected the outcome and allowed the court to
11 give costs. But -- but courts said over and
12 over that it wasn't actually compensating
13 anything.

14 JUSTICE THOMAS: Well, that seems to
15 be at war with the -- with the existence of
16 standing, though, don't you think?

17 MR. PINSON: It -- it is -- again, if
18 you -- if you treat that as a separate claim for
19 relief, that's an understandable response, and
20 -- and all I can say is that at the common law,
21 those courts didn't treat it like that. And
22 they didn't treat it as -- as giving any
23 separate relief. They treated it as an outcome
24 or a symbol for that outcome. So -- so it's --
25 it's bound up with that damages claim in a way

1 that allowed the courts to give it.

2 JUSTICE THOMAS: In -- in this case at
3 the Eleventh Circuit, the -- the court of
4 appeals seemed to dispose of this simply with --
5 with Flanigan, by citing Flanigan's. And I
6 don't quite understand why that case should
7 cover this case, where there was actual
8 enforcement here but no enforcement in
9 Flanigan's.

10 MR. PINSON: So Flanigan's -- you're
11 correct that in Flanigan's there was no actual
12 enforcement. Our position is that enforcement
13 or not does not matter because even if there was
14 enforcement and what the plaintiffs are seeking
15 is redress for a past injury, nominal damages
16 aren't the answer to that.

17 So you could view the decision below
18 as a slight extension of Flanigan's if you -- if
19 you view Flanigan's as turning on the lack of
20 enforcement. But, in our view, the -- our
21 position doesn't change, and we would say that
22 -- that neither case presented a justiciable
23 controversy.

24 JUSTICE THOMAS: Did the court of
25 appeals say that, make the same point that

1 you're making?

2 MR. PINSON: Well, both in Flanigan's
3 and the court of appeals applying Flanigan's
4 below make the point that nominal damages do not
5 redress past harm. That -- that's -- that's the
6 basis for Flanigan's and it's the basis for the
7 decisions that Flanigan's relied on, like Judge
8 McConnell's important concurrence in Utah Animal
9 Rights Coalition.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: Thank you.

14 What about when they do redress past
15 harm? Jones owns Blackacre. Smith, his hostile
16 neighbor, regularly picnics on Blackacre, and
17 then he dies or some unfortunate thing. He's
18 never going to do it again. Well, what's the
19 damage? I mean, all he did was picnic. Pretty
20 hard to measure. And so nominal damages.

21 Or a college says: You can't pray
22 here, young student. And imagine that policy is
23 unconstitutional. And suppose he was stopped
24 from praying. What's the damage? Can you say
25 there was no damage? There was. But what is

1 it? How do you measure it? I don't know.

2 And the same with speech. He wanted
3 to speak there. He was constitutional --
4 unconstitutionally forbidden to do it. Well, he
5 was about to give his speech. What's the
6 damage?

7 Now don't nominal damages have a place
8 right there where there is damage, but it's just
9 impossible to measure?

10 MR. PINSON: Justice Breyer, they do
11 not. Certainly, that's Petitioners' position.
12 They want nominal damages to redress harms that
13 are difficult or impossible to quantify.

14 But that's just not what nominal
15 damages did at the common law. There were other
16 solutions that the common law had for that
17 problem. One was presumed damages, which were
18 compensatory damages given even if plaintiffs
19 weren't able to prove a certain -- a certain
20 amount.

21 JUSTICE BREYER: Right. I accept what
22 you say there. It wasn't the theory of common
23 law, hypothetically, but isn't it a fairly good
24 line to draw to keep the -- to keep the cases
25 out of a court, where all you have is a

1 theoretical argument that this is
2 unconstitutional and never hurt you from --

3 MR. PINSON: Just --

4 JUSTICE BREYER: -- those cases where
5 there is unconstitutionality and genuine harm
6 but difficult to measure?

7 MR. PINSON: Justice Breyer, I -- I
8 don't think it's a -- a line that this Court is
9 allowed to draw because it draws -- well, it --
10 Article III draws from the common law, and the
11 common law said that nominal damages don't serve
12 that role.

13 But, in addition, there -- there are
14 other solutions to that concern --

15 JUSTICE BREYER: What?

16 MR. PINSON: -- first, of course --

17 JUSTICE BREYER: Go ahead, please.

18 MR. PINSON: First, of course, that
19 those kinds of harms often result in more
20 established kinds of compensable injury, whether
21 it's intangible injuries, like emotional
22 distress, or tangible ones.

23 In addition, in -- in some kinds of
24 cases, Petitioners can seek compensation
25 precisely for lost opportunities to exercise

1 constitutional rights.

2 The voting rights context is an
3 important one, and that's one that the -- the
4 Court noted in Stachura, where plaintiffs can
5 actually seek compensatory damages for those
6 lost opportunities, separate and apart from the
7 abstract value of the right itself.

8 And -- and then, of course, beyond
9 that, petitioners in these kinds of cases --
10 often the object of the suit is not the -- the
11 small or difficult-to-measure past harm. What
12 they want is a change in the law or policy, and,
13 of course, prospective relief is available for
14 that.

15 And then -- and then, finally, it's
16 always on the table for Congress to offer a kind
17 of statutory damages of a non-trivial amount
18 to -- if -- if it turns out that there's a class
19 of cases where those kinds of harms aren't and
20 need to be compensated.

21 JUSTICE BREYER: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Alito.

23 JUSTICE ALITO: Let -- let me pick up
24 exactly where you left off. So let's say
25 Congress amends 1983. It says whenever a

1 violation of the First Amendment is proven, a
2 past violation, plaintiffs shall be awarded
3 statutory damages of one dollar.

4 You would say there is no -- there is
5 no standing there because that's -- that sum is
6 too low, is that right?

7 MR. PINSON: Justice Alito, I --
8 again, I think that's a difficult question, and
9 I -- I think it's difficult because you have two
10 different common law analogs that you have to
11 try to square.

12 The first analog is that at the common
13 law too, you had statutory damages and those
14 plaintiffs could -- could seek statutory damages
15 alone and they had standing to do that. Those
16 were compensation often for kinds of harms that
17 either were very easy to assign a value to or
18 very hard.

19 But then you also had nominal damages.
20 And the reason nominal damages worked in their
21 symbolic role at common law is because they were
22 trivial.

23 So, when Congress assigns that trivial
24 amount to "statutory damages," I think you have
25 to look hard at it to know whether it's actually

1 something giving compensation or not.

2 In the case of --

3 JUSTICE ALITO: So your -- your
4 answer -- to cut to the chase, your answer is
5 that statutory -- that when there is
6 injury-in-fact and there must be injury-in-fact,
7 statutory damages cannot be awarded unless they
8 can reasonably be regarded as a quantification,
9 a monetization of the amount of the harm, is
10 that it?

11 MR. PINSON: Justice Alito, I don't
12 think they have to precisely quantify the harm.
13 And, in fact, the statutory --

14 JUSTICE ALITO: Well, what if it's 10
15 dollars? What if it's not one dollar? What if
16 it's 10?

17 MR. PINSON: I -- I think it's a hard
18 line-drawing problem, and -- and I --

19 JUSTICE ALITO: Well, that's why I'm
20 asking the question, because I need help with
21 this hard line-drawing problem.

22 MR. PINSON: Right. And -- and,
23 Justice Alito, again, what I'd say is I -- I
24 think if -- if you can reasonably say that
25 that's compensation, even if it's partial

1 compensation or compensation for
2 difficult-to-prove injuries, then -- then that
3 provides Article III redress.

4 And I -- and I -- I think that that
5 should be the presumption. I think it's only
6 when you get down to that very small level,
7 maybe a dollar or below because that's -- that's
8 where we -- we assign nominal damages today,
9 that you get into the -- the problem with
10 Congress possibly trying an end around this
11 Court's standing doctrine.

12 JUSTICE ALITO: All right. Another --
13 another question. Is it necessary for a
14 plaintiff to have standing with respect to every
15 form of relief that the plaintiff seeks in a
16 complaint?

17 MR. PINSON: It is. That's -- that's
18 the Court's rule in -- in Town of Chester and
19 other cases.

20 JUSTICE ALITO: So, if we agree with
21 you here, I don't quite see how nominal damages
22 could ever be awarded.

23 MR. PINSON: Justice Alito, I think --
24 I think there are two ways. First, their --
25 their principal purpose at common law, of

1 course, was nominal damages awarded to establish
2 a right, so they would still serve that role
3 here.

4 But what I gather you're getting at is
5 -- is the -- the sort of secondary role where
6 you have a compensatory damages claim that fails
7 before the end of the case.

8 And the answer there is, one, that's
9 what common law courts did. We see that over
10 and over, that they didn't treat nominal damages
11 as a separate claim of relief but just
12 reflecting the outcome.

13 And then, second, I -- I think it gets
14 to what we're really -- what we're really
15 getting at by asking this question. We know
16 that common law courts did that. The Plaintiffs
17 say that it shows, therefore, that they
18 compensated past harm. But the common law
19 courts say that they didn't do that.

20 JUSTICE ALITO: Well, you rely very
21 heavily -- you're relying very heavily on -- on
22 the common law.

23 Do you want us just to apply the
24 common law rule, and, if so, weren't nominal
25 damages available at common law?

1 MR. PINSON: Nominal damages were
2 available at common law, but they -- they
3 weren't independently justiciable redress for
4 past harms.

5 For -- for all of the cases that
6 Petitioners cite and that the government cites
7 and -- and that we cite, there are no common law
8 cases out there where plaintiffs were bringing
9 nominal damages claims alone without any
10 prospect of -- of future redress.

11 All of those cases, Petitioners -- the
12 plaintiffs had brought actual damages claims and
13 then they failed for lack of proof.

14 JUSTICE ALITO: All right. Thank you.

15 MR. PINSON: That -- that --

16 JUSTICE ALITO: My time -- I think my
17 time is up. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor.

20 JUSTICE SOTOMAYOR: Counsel, in
21 addition to the questions that Justice Alito
22 had, it seems that your argument doesn't make
23 any sense of other of our precedents where we
24 held -- and you don't dispute in your briefing
25 or here -- that the award of punitive damages

1 can qualify you to have standing.

2 But we very clearly have stated that
3 punitive damage -- damages are not to compensate
4 the injured party but, rather, to punish the
5 tortfeasor and deter him and others from similar
6 extreme conduct.

7 If a case has been mooted because an
8 act is not capable of repetition, there's no
9 need to impose punitive damages, no matter how
10 reprehensible the conduct may be.

11 So I don't know how you can concede
12 that punitive damages give you standing under
13 your theory of the case.

14 MR. PINSON: Justice Sotomayor, I -- I
15 think the difference between punitive damages
16 and nominal damages and -- and, frankly, between
17 other kinds of monetary relief and nominal
18 damages is only nominal damages are -- are
19 conceived of as a symbol for zero compensation.

20 Punitive damages, although their
21 purpose is to deter and to punish, they can --
22 they -- they don't have that sort of legal
23 roadblock that prevents them from being any kind
24 of relief for past harms.

25 And, in fact, Professor Dobbs and --

1 and other remedy scholars explain that they do
2 provide some incidental compensation, although
3 the law authorizes them for other purposes.

4 And I think one -- one example from
5 this Court's cases, Steel Company, notes that
6 the civil penalties that were awarded in that
7 case, if they were awarded to the plaintiff,
8 even though they were punitive, would provide a
9 sort of compensation or redress to the plaintiff
10 themselves, even though that's not their
11 purpose.

12 JUSTICE SOTOMAYOR: See, my --

13 MR. PINSON: So I think those -- those
14 are just distinct from nominal damages.

15 JUSTICE SOTOMAYOR: -- my -- my
16 problem, counsel, is that then you're talking
17 about quantifying an amount of damage, the
18 ex-ante. You're basically saying one dollar's
19 not enough, when we've said, even for
20 compensatory damages, that no matter how small
21 your injury, and even if a jury gives you one
22 dollar, that that would be enough as
23 compensatory damages, not nominal damages.
24 You've proven an injury.

25 And nominal damages are directed to be

1 paid to the plaintiff. He or she may not think
2 they got too much. I certainly presided over
3 many cases in which the jury's award was
4 infinitesimally small compared to the claimed
5 injuries, but you can feel compensated. I don't
6 understand why one dollar is not viewed as a
7 form of alternative compensation.

8 MR. PINSON: Justice Sotomayor, the
9 reason that the dollar of compensatory damages
10 is compensation for a past injury is because
11 we've accepted that, which is really a legal
12 fiction, that it offers -- that it offers the
13 plaintiff some substitutionary relief for
14 whatever their loss was, whether it's tangible
15 or intangible.

16 The problem is that, again, nominal
17 damages at common law weren't conceived of in
18 that way. A chorus of commentators and cases
19 say that they aren't compensation, but they're
20 symbolic only. McCormick on Damages said
21 they're in no sense compensation. English
22 cases, like Beaumont versus Greathead, say that
23 they have no existence in point of quantity.
24 And then -- and then a whole host of --

25 JUSTICE SOTOMAYOR: But neither --

1 counsel, we go back to the -- to the starting
2 point of my question. Neither are punitive
3 damages. They're not viewed as compensation.
4 But what they are is a measure of recovery.
5 Whether we call it compensation, punitive
6 damages, statutory damages, these are monies
7 that are paid to the plaintiff. Whether it's
8 one cent or 100 million dollars, it's still
9 money that the plaintiff is entitled to receive.

10 MR. PINSON: But, Justice Sotomayor,
11 if -- if nominal damages are not compensation,
12 it's not clear to me what else that dollar could
13 be doing to redress the plaintiff. Again, the
14 reason that dollars redress past harms is
15 because they are compensation.

16 But, when they're not -- and -- and
17 the common law says that nominal damages are not
18 -- then you need an alternative explanation for
19 what they're doing to specifically redress the
20 plaintiff's injury. And -- and we don't see
21 that from -- from the Petitioner or from
22 anywhere else.

23 CHIEF JUSTICE ROBERTS: Justice Kagan.

24 JUSTICE KAGAN: General, you said
25 several times that nominal damages are just

1 symbolic. And what -- what are they symbolic
2 of?

3 MR. PINSON: They are symbolic of the
4 fact that a plaintiff has proved a legal
5 violation but is entitled to zero compensation
6 for it.

7 JUSTICE KAGAN: I mean, that makes it
8 sound like it's a dismissal of the plaintiff's
9 claim almost, you know, like the libel suit
10 where, well, technically, you committed libel,
11 but you really don't have any damages because
12 you're, you know, such a terrible person to
13 begin with. But that's not mostly what we're
14 dealing with here.

15 I mean, I -- I would have thought that
16 most of these suits that we're talking about are
17 suits where the dollar is actually symbolic of
18 -- of -- of your winning, of vindication, not of
19 nothingness.

20 MR. PINSON: Justice Kagan, it is --
21 it is symbolic of the fact that the plaintiff
22 proved a legal violation. One of the practical
23 reasons common law courts gave nominal damages
24 was -- was so that they could say -- they --
25 they could count that a victory in the sense

1 that they could carry costs.

2 The -- the problem is that it was also
3 symbolic of the fact that the plaintiffs either
4 didn't have a compensable injury or wasn't able
5 to prove it in any amount.

6 JUSTICE KAGAN: Let me give you --

7 MR. PINSON: And --

8 JUSTICE KAGAN: -- let me give you a
9 case. I don't know what -- what case -- who
10 this cuts in favor of, you or the Petitioners,
11 but I thought I'd ask it because it's the most
12 famous nominal damages case I know of in recent
13 time, which is Taylor Swift's sexual assault
14 case. Do you know that one?

15 MR. PINSON: Vaguely, Your Honor.

16 JUSTICE KAGAN: Yeah, you know, it was
17 a few years ago, and she brought a suit against
18 a radio host for sexually assaulting her, and
19 she said, I'm not really interested in your
20 money, I just want a dollar, and that dollar is
21 going to represent something both to me and to
22 the world of women who have experienced what
23 I've experienced.

24 And that's what happened. The jury
25 gave her a dollar. And -- and it was -- it was

1 unquestionable physical harm, but she just asked
2 for this one dollar to say that she had been
3 harmed. Why -- why -- why not?

4 MR. PINSON: A couple things, Justice
5 Kagan. First of all, that sounds like
6 compensatory damages. She may have only asked
7 for a dollar of it, but she alleged clear
8 compensable injuries, and so the jury could
9 award that dollar in response.

10 JUSTICE KAGAN: I thought you might
11 say that, but then why isn't that the same as
12 this? The Petitioner here said he was harmed.
13 He wasn't able to speak when he should have been
14 able to speak. And, you know, whether it's hard
15 to monetize or it's not hard to monetize, he's
16 just asking for a dollar to redress that harm.

17 MR. PINSON: If -- if the dollar,
18 Justice Kagan, isn't actually compensating that
19 harm -- and -- and, again, it's unique to
20 nominal damages that these harms aren't --

21 JUSTICE KAGAN: But these are just
22 words. In the same way that Taylor Swift's harm
23 compensated her, so too here. I mean, they
24 don't really compensate anybody, but it's all
25 the place of wants for a -- for -- for an

1 acknowledged harm.

2 MR. PINSON: Two things. One is there
3 -- there is a difference in the law between
4 small damages and no damages. The common law
5 cases say that -- that nominal damages are no
6 damages, not -- not small --

7 JUSTICE KAGAN: Nobody thinks that
8 being sexual assaulted is really only worth a
9 dollar. Nobody thinks that. It's worth a lot
10 more than that. But that's all she wanted. She
11 wanted to prove a point.

12 MR. PINSON: And -- and -- and she had
13 the ability to seek compensatory damages for
14 that. The proving the point, however, is -- is
15 not something that federal courts exist to do.

16 However important that dollar is to
17 Taylor Swift or -- or -- or anyone else in
18 constitutional claims or otherwise --

19 JUSTICE KAGAN: Well, could she or
20 couldn't she? Could she bring that suit or
21 couldn't she bring that suit?

22 MR. PINSON: For nominal damages
23 alone, outside of some prospect of recurrence,
24 which I -- I would hope would not be the case,
25 then, no, that -- that claim is moot. It -- the

1 -- she needs to allege a compensable injury and
2 ask for compensation for that. That's just
3 fundamentally different from what nominal
4 damages were.

5 JUSTICE KAGAN: Thank you, General.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch.

8 JUSTICE GORSUCH: Good morning,
9 counsel. I'd like to kind of pick up there just
10 so -- just so we start on an agreed slate.

11 It isn't the amount that's the
12 problem. One dollar isn't the problem. So, if
13 the plaintiff here had introduced a -- a bus
14 receipt for its fare of less than a dollar and
15 demonstrated that was tied to his injury, that
16 would count. And if Ms. Swift had come in with
17 some sort of receipt of some kind, that would
18 support her one-dollar claim, right?

19 MR. PINSON: Right.

20 JUSTICE GORSUCH: Okay. So it all
21 turns on the label of compensation, and -- and
22 courts are going to have to figure that out. Is
23 that fair?

24 MR. PINSON: I think that's fair,
25 although I --

1 JUSTICE GORSUCH: Okay.

2 MR. PINSON: -- I mean, I would say
3 there are plenty of kinds of compensation. The
4 only thing that --

5 JUSTICE GORSUCH: Sure.

6 MR. PINSON: -- doesn't work is
7 nominal damages.

8 JUSTICE GORSUCH: Sure, I understand.
9 I got that point. So I think the result is a
10 rule that disadvantages perhaps two classes of
11 persons particularly.

12 First may be those like Ms. Swift who
13 have some scruple or reason not to seek more,
14 who could. And we have a lot of -- of amici
15 briefs from religious groups that indicate, for
16 example, that they have religious scruples
17 against seeking damages for some injuries
18 they've suffered. So they'd lose out, people
19 like Ms. Swift and groups like that.

20 And then it seems to me the second
21 group that -- that -- that loses out are
22 individuals whose claims are not sufficiently
23 great to attract the attention of clever lawyers
24 and economists to come up with damages theories.
25 Emotional harm and distress is a particular

1 example. Areas where it's difficult to quantify
2 damages and expensive to do so require a large
3 enough damage to justify the effort. So we
4 disadvantage persons like that.

5 It seems to me that's -- those are the
6 kind of classes of persons exactly for whom
7 nominal damages were designed in the first
8 place. And can you -- can you respond to that
9 concern?

10 MR. PINSON: Justice Gorsuch, I -- I
11 guess, first, I would say -- I'll start with the
12 end. I'm not sure that's what nominal damages
13 were designed for in the first place.

14 JUSTICE GORSUCH: Well, I -- I -- I --
15 I -- fair. But perhaps they were designed, in
16 part, to ensure that someone who had suffered a
17 legal wrong does not lose out simply because of
18 a failure of proof about damages. And I think
19 that's often going to happen in that second
20 class of cases I talked about where the damages
21 are not great enough to warrant the work.

22 So what do you say about that?

23 MR. PINSON: Again, Justice Gorsuch,
24 and I -- I guess going back to my colloquy with
25 Justice Breyer, I -- I think there are lots of

1 ways that those plaintiffs could still seek
2 compensatory damages, and -- and maybe it's a
3 little bit of extra work, but I'm -- I'm not
4 sure it's -- it's a great deal. It -- it just
5 requires us to think about the established kinds
6 of damages that you can get as a result of
7 violations of those particular legal rights.

8 Adding an emotional distress claim, if
9 a plaintiff, you know, has an objective -- a
10 reasonable basis, in fact, for that claim, is
11 not, I think, a -- so heavy a lift that you're
12 going to cut out plaintiffs from court.

13 The -- the other thing I'd say is that
14 I'm not sure why nominal damages is a
15 satisfactory solution if that's the concern.
16 After all, it is a trivial sum. And -- and if
17 what the plaintiffs are after is not the dollar
18 but having the court tell them that their rights
19 have been violated, again, that -- that's not
20 what federal courts --

21 JUSTICE GORSUCH: All right. I --

22 MR. PINSON: -- take this to do.

23 JUSTICE GORSUCH: I -- thank you. One
24 -- one last question I'd like to squeeze in
25 quickly. You'd agree that in -- in those cases

1 where we have the bus receipt showing 25 cents,
2 less than a dollar, the attorney's fees problem
3 recurs; you're going to have attorney's fees in
4 those cases, so that can't be a good reason not
5 to allow the fees, right?

6 MR. PINSON: I agree that attorney's
7 fees would be available if compensatory damages
8 are awarded. Sure.

9 JUSTICE GORSUCH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Thank you.

13 And good morning, Mr. Pinson. Picking
14 up on things that Justice Alito and Justice
15 Sotomayor said, it seems that there are a number
16 of things working against you here:
17 potentially, the history, the common law cases;
18 the precedent of this Court that seems to have
19 recognized in certain situations nominal
20 damages, cases like Carey that we'd have to deal
21 with; the line-drawing problem that Justice
22 Alito raised; in other words, how do we
23 distinguish potential statutes Congress might
24 enact that awarded a dollar or -- or that kind
25 of statutory damages. And Justice Sotomayor

1 asked about various forms of damages too. So
2 we'd have line-drawing.

3 And then one thing I wanted to ask you
4 about, this seems to be working fine in all the
5 other circuits that allow nominal damages. At
6 least I'm not aware that there's huge problems.
7 Is that incorrect? Just I realize that's not a
8 legal point, more a practical point, but can you
9 respond to that?

10 MR. PINSON: Justice Kavanaugh, I -- I
11 would point you at least to the states' amicus
12 brief at 14 through 18. I -- I can't say that
13 there are -- are sort of floodgates opened of
14 nominal damages claims in those circuits, but
15 you do have cases where governments, even those
16 sort of acting in good faith to make policy
17 changes, have still sort of faced the problems
18 of litigating suits for long periods of time and
19 getting hit with large damages awards despite
20 sort of quick resolutions of any prospective
21 relief claim.

22 JUSTICE KAVANAUGH: Well, let me --
23 let me ask you about that. And you, obviously,
24 have answers to everything I just mentioned on
25 the law, but some of the practical problems

1 you've raised, and one of them right there, the
2 extended or wasteful litigation, can't a
3 defendant avoid that by paying the one dollar?
4 The district court or the trial court enters
5 judgment. That's not a judgment on the merits.
6 It has no preclusive effect.

7 What's the -- what's the problem with
8 that approach?

9 MR. PINSON: Justice Kavanaugh, it --
10 it's not so clear to me that that judgment
11 wouldn't have not only preclusive effect but --
12 but other effects. At -- at least one Second
13 Circuit case, Radha, at 909 F.3d 534, and -- and
14 I guess a couple of others have noted that a
15 default judgment -- Wright and Miller says
16 this -- is actually treated as a conclusive and
17 final adjudication of the issues necessary to
18 justify the relief awarded.

19 So I -- I think a preclusive effect is
20 a real concern. But, even beyond that, we often
21 have individual public servants who are -- who
22 have been sued in these cases. I think it's
23 probably not fair to them for governments to
24 force them to accept, particularly if there's a
25 liability judgment on the line, to accept that

1 kind of liability against them in their
2 individual capacities just to avoid prolonged
3 litigation. And then -- and then there are --
4 there are other various harms to governments as
5 well from just accepting judgments.

6 It might be a different case if we
7 could literally just deposit the dollar and the
8 case becomes moot, but I'm not sure of a
9 procedural mechanism for doing that.

10 JUSTICE KAVANAUGH: Okay. And then,
11 on the attorney's fees question that's been
12 raised, those -- if those were fully available,
13 then that would provide, obviously, an incentive
14 for some plaintiffs to continue litigating even
15 if there was no other injunctive or compensatory
16 relief at stake.

17 But my understanding of the case law,
18 Farrar, and it seems to be how it's applied in
19 most lower courts, is that plaintiffs do not
20 receive much in the way of attorney's fees when
21 they only receive nominal damages, and,
22 therefore, the incentive to litigate wastefully
23 is not as present. It's not zero, I would
24 acknowledge, but it's not as present.

25 Can you respond to that?

1 MR. PINSON: Yes. So I do think that
2 the better reading of Farrar is that generally
3 you shouldn't get any attorney's fees for a
4 nominal damages award. But -- but that isn't
5 necessarily borne out in practice.

6 We see from the -- again, the states'
7 amicus brief at -- at 20 lists several
8 six-figure attorney's fees awards from nominal
9 damages cases, and I think those are sort of
10 just examples of cases. There are -- there are
11 quite a few more out there.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: Counsel, I
16 understood in your briefing you to make two
17 points about why nominal damages are
18 insufficient under Article III, one being
19 they're the prospective, not retrospective,
20 point, these are really declaratory judgments,
21 and then the other focusing on the amount and
22 saying the very trivial amount shows that these
23 really can't be compensatory.

24 But it seems to me that, in your
25 responses to Justice Alito's questions, Justice

1 Kagan's questions, Justice Gorsuch's questions,
2 you've kind of gone back and forth on the
3 triviality of the money point.

4 So, you know, you suggested to Justice
5 Alito that at some point it's so little money
6 that really should be taken into account. But,
7 of course, our precedents say that, you know,
8 even -- even a small amount is enough.

9 And so, in the Taylor Swift example or
10 in Justice Gorsuch's bus fare example, I -- I
11 heard you -- at least I took you to concede that
12 even a very trivial amount would constitute a
13 compensatory injury under Article III.

14 So is that part of your argument still
15 with respect to nominal damages? Are you -- are
16 you still hanging your hat on the amount, the
17 one dollar being too little, and just
18 exclusively focusing on the -- focusing on the
19 prospective nature?

20 MR. PINSON: The -- the -- the trivial
21 nature of the award, Justice Barrett, matters
22 only because that -- that was the way that the
23 common law set nominal damages as a symbol.

24 And so my response to Justice Alito
25 reflected that, that what Congress is really

1 doing is -- is -- is setting a trivial amount so
2 that it serves as a symbol but doesn't offer any
3 compensation that would be different.

4 But our -- our primary argument is --
5 is simply that nominal damages in their nature
6 do not serve as any compensation, regardless of
7 whether the court decides in a given case --

8 JUSTICE BARRETT: So what does the
9 money have to --

10 MR. PINSON: -- to give the dollar or
11 not.

12 JUSTICE BARRETT: -- so what does the
13 money have to do with it? Are we trying to
14 figure out -- you know, Justice Kagan's question
15 suggested that, really, what Taylor Swift wanted
16 was, you know, vindication of -- of the -- the
17 moral right, the -- the legal right, that sexual
18 assault is reprehensible and wrong.

19 Are we looking at the motivation for
20 the suit, so could nominal damages actually be
21 compensatory for one person but not for another?

22 MR. PINSON: No, no. I -- I -- I
23 don't think that's right, Justice Barrett. The
24 -- the nominal damages dollar isn't -- isn't
25 compensation in any sense.

1 The -- the difference, I guess, is --
2 is that, again, in those cases where vindication
3 is sought, that's just not enough, right? So it
4 doesn't matter what their motivation is.
5 Vindication under Steel Company and -- and other
6 cases is -- is not Article III redress because
7 it doesn't redress any injury.

8 JUSTICE BARRETT: So what's the --

9 MR. PINSON: And that -- so --

10 JUSTICE BARRETT: Oh, go ahead. I'm
11 sorry.

12 MR. PINSON: I was just going to say
13 and that -- and so those are the two aspects --
14 those are really the two big things that nominal
15 damages do. There's the dollar and there's the
16 vindication. The dollar, common law cases say,
17 doesn't compensate, and vindication isn't enough
18 by itself.

19 JUSTICE BARRETT: So what is the
20 effect of your argument on the very, very many
21 consumer protection statutes we have, like the
22 Telephone Consumer Protection Act or the Fair
23 Debt Collection Practices Act? You know, I -- I
24 think, in those cases, statutory damages, we
25 might think of them, you know, let's say it's

1 100 dollars, but you also get attorney's fees,
2 as about vindicating, you know, a right and
3 having a deterrent effect on, you know, the --
4 the industry.

5 If Congress reduced that amount of
6 statutory damages down to a dollar, I mean, I
7 don't see why it's any different. So would this
8 call into question whether those causes of
9 action really are unconstitutional under Article
10 III in many cases? I mean, you know, under the
11 Telephone Consumer Protection Act, you get a
12 couple annoying texts. You know, that's --
13 that's pretty slight.

14 Is a statutory damage -- you know, if
15 you seek statutory damages, are you seeking
16 anything other than to -- to vindicate? Is that
17 compensatory?

18 MR. PINSON: Justice Barrett, I -- I
19 think it is. And -- and the last example you
20 gave, I think, is a -- a helpful one. But, if
21 the injury at issue is a slight injury, then a
22 slight amount of damages would still be viewed
23 as -- or -- or we should presume that it's still
24 compensatory damages, when -- when it's given as
25 statutory damages. So I -- I don't think

1 there's any problem with the --

2 JUSTICE BARRETT: But the Petitioners
3 here haven't suffered such a slight injury?

4 MR. PINSON: Well, I -- I -- I
5 wouldn't say that it's a -- a slight injury. I
6 think the problem for Petitioners is that --
7 that the injury they've alleged is not one
8 susceptible to proof. And -- and, again, I -- I
9 don't --

10 JUSTICE BARRETT: So you can seek the
11 damages for receiving a couple annoying texts
12 but not for having your First Amendment rights
13 violated?

14 MR. PINSON: You can't seek nominal
15 damages for the -- the bare violation of First
16 Amendment rights. You can seek compensatory
17 damages.

18 JUSTICE BARRETT: Thank you, counsel.

19 CHIEF JUSTICE ROBERTS: A minute to
20 wrap up, counsel.

21 MR. PINSON: I'll end with -- with two
22 quick points. First, I want to stress that the
23 way that this case was resolved is a good thing.
24 Litigation prompted college officials to review
25 their policies and just 10 weeks later to revise

1 them in a way that maximized and respected First
2 Amendment rights on campus not just for
3 Petitioners but for all students.

4 And it even led to an enduring
5 state-wide policy change for every public
6 college in Georgia. That kind of early
7 out-of-court resolution should be encouraged.
8 And keeping nominal damages in their limited
9 historical role does that, while still allowing
10 existing mootness doctrine to guard against bad
11 faith or strategic mooting.

12 And then, second, whatever the policy
13 implications, this case comes down to what kinds
14 of cases Article III allows federal courts to
15 resolve.

16 Article III takes its court -- cues
17 from common law practice, and the common law
18 made clear over and over that it's just wrong to
19 think of nominal damages as a small amount of
20 compensation.

21 That means nominal damages can't save
22 the case from mootness when changed
23 circumstances relieve any threat of future
24 injuries.

25 This Court should affirm the judgment

1 below. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Ms. Waggoner.

5 REBUTTAL ARGUMENT OF KRISTEN K. WAGGONER
6 ON BEHALF OF THE PETITIONERS

7 MS. WAGGONER: Thank you, Mr. Chief
8 Justice. Four points in response.

9 First to return to first principles.
10 Partial redress is still redress. This Court
11 has held that rule over and over again. When
12 money changes hands, that is a tangible benefit
13 for Article III purposes.

14 Several Justices have raised questions
15 as to what the purpose of nominal damages are.
16 Symbolic has come to mind. Yes, they're
17 symbolic in the sense that there -- there is an
18 intrinsic value to the lost constitutional right
19 that far exceeds the one, ten, or 100 dollars
20 that is afforded in response for that.

21 Second, vindication. And vindication
22 does occur through a nominal damages award just
23 as with any other award.

24 Third, compensation. Yes, it provides
25 compensation in an amount that recognizes the

1 damages done. And that too serves a valid
2 purpose under Article III.

3 My second point is that, as Justice
4 Alito mentioned with my friend, statutory
5 damages -- statutory damages should satisfy
6 Article III. And my friend on the other side
7 suggests that they do.

8 The reason that they do is for the
9 reasons I just mentioned. And there's no
10 principled basis to deny nominal damages claims
11 here.

12 The common law has a number of cases
13 where there is no compensatory claims asserted
14 and there's no prospective relief at issue, yet
15 the Court still awarded nominal damages.
16 Doherty, Moon, Thompson, even Ashby recognizes
17 that a cut on the ear is sufficient for nominal
18 damages. That's on pages 8 through 10, all of
19 those cases, of our reply brief.

20 There are so many carve-outs under my
21 friend's rule that it proves the rule, and the
22 practical effect boxes out especially civil
23 rights victims.

24 The rule works. It's a long-standing
25 rule that's been in place for hundreds of years.

1 And it hasn't resulted in protracted litigation.
2 And there is no incentive for plaintiffs or
3 their attorneys to file standalone damages with
4 Farrar in place in terms of the fees.

5 But a word about the fees. Section
6 1988 and 1983 and this Court have held that it's
7 critical to not only the plaintiffs that are
8 losing their civil rights and injured in these
9 actions, but it's critical to our nation and
10 it's a noble purpose to vindicate those
11 constitutional rights. A change of the rule
12 here leaves victims that have serious
13 constitutional injuries unredressed out in the
14 cold.

15 It also forces victims to reveal
16 intrusive information, as in Flanigan's, or
17 about their mental health records, or churches
18 who have scruples about asserting compensatory
19 damages to -- to prove those damages and,
20 instead of limiting the litigation, it actually
21 expands it, complicates it, and actually causes
22 more liability for the government.

23 In closing, in 2013, Georgia Gwinnett
24 officials knew that this rule was
25 unconstitutional. They received a letter

1 telling Chike that he was silent not only
2 violated his rights, but it results in the
3 government walking away from past harms that
4 they caused.

5 This is a solution that is in search
6 of a problem, but a reversal actually creates
7 the problem.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 11:32 a.m., the case
12 was submitted.)

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