No. 19-968

In The Supreme Court of the United States

CHIKE UZUEGBUNAM, ET AL.,

Petitioners,

v.

STANLEY C. PRECZEWSKI, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

CHRISTOPHER M. CARR
Attorney General of Georgia
ANDREW A. PINSON
Solicitor General
Counsel of Record
KATHLEEN M. PACIOUS
Deputy Attorney General
ROGER CHALMERS
Senior Assistant Attorney General
DREW F. WALDBESER
Assistant Solicitor General
ELLEN CUSIMANO
Assistant Attorney General
OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 651-9453
apinson@law.ga.gov
Counsel for the State of Georgia

QUESTION PRESENTED

Two college students sued state college officials seeking declaratory and injunctive relief against enforcement of campus speech policies on First Amendment grounds, but they did not allege or seek actual damages. Their claims for declaratory and injunctive relief became moot after the college permanently abandoned the challenged policies. The question presented is:

Does a federal court still have jurisdiction to decide the constitutionality of the abandoned policies because the students also asked for nominal damages?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The court of appeals' orders denying rehearing en banc are available at Pet. App. 47a–52a. The opinion of the court of appeals affirming the dismissal of the amended complaint as moot (Pet. App. 1a–19a) is unpublished but reported at 781 F. App'x 824 (11th Cir. 2019). The district court's order dismissing the amended complaint as moot (Pet. App. 22a–46a) is reported at 378 F. Supp. 3d 1195 (N.D. Ga. 2018).

JURISDICTION

The court of appeals entered judgment on July 1, 2019, and denied rehearing en banc on September 4, 2019. Justice Thomas extended the deadline to file the petition for certiorari until January 31, 2020, when the petition was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the United States Constitution states that "The judicial power shall extend to . . . cases [and] . . . to controversies." U.S. Const. Art. III.

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution states that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

1. One day in July 2016, Chike Uzuegbunam began handing out religious literature in a plaza outside the library of Georgia Gwinnett College, where he was then enrolled as a student. Pet. App. 90a. A campus police officer came by and asked him to stop, explaining that he would need to reserve one of the campus's two designated "speech zones" to distribute written materials. *Id.* at 92a–93a.

Towards the end of August, Uzuegbunam reserved one of those campus speech zones, a patio outside the food court. *Id.* at 95a–96a. On August 25, he went to the patio and began to speak, accompanied by a friend. *Id.* at 96a. After about 20 minutes, a campus police officer approached and asked him to stop. *Id.* at 97a. The officer told Uzuegbunam that the college had received some complaints about his speaking and that he had reserved the patio only for distributing literature and having conversations, not for "open-air speaking." *Id.* at 97a–99a. The officer also asserted that, based on the complaints, Uzuegbunam was engaging in "disorderly

conduct," a violation of the college's Student Code of Conduct. *Id.* at 99a–100a. After further conversation with the officer, Uzuegbunam stopped speaking and left the patio. *Id.* at 103a.

Since that time, Uzuegbunam has not tried to speak publicly or distribute religious literature on campus. *Id.* at 104a–105a. He graduated from Georgia Gwinnett College in August 2017. Pet. App. 26a. Another student, Joseph Bradford, wished to speak publicly and distribute religious literature on campus, but he did not. *Id.* at 59a–60a. Bradford has now graduated, too.

2. Uzuegbunam and Bradford sued Georgia Gwinnett College officials in federal district court, claiming that the college's speech and conduct policies violated the First and Fourteenth Amendments both on the face of the policies and as applied to Uzuegbunam and Bradford. The operative complaint's "prayer for relief" asked for (1) several declaratory judgments that the officials' speech policies and restriction of the plaintiffs' speech violated their rights under the First and Fourteenth Amendments; (2) preliminary and permanent injunctions prohibiting the college from enforcing the challenged speech policies; (3) "nominal damages"; (4) costs and attorney's fees; and (5) "[a]ll other further relief to which Plaintiffs may be entitled." *Id.* at 132a–33a. At the end of each section describing a cause of action, the amended complaint also stated that the plaintiffs were "entitled to damages in an amount to be determined by the evidence and this Court." *See id.* at 123a, 126a, 128a–29, 132a.

3. While a motion to dismiss the complaint for failure to state a claim was pending, the college overhauled the challenged policies. Pet. App. 5a. The new speech policy generally allows students to speak publicly, distribute literature, and otherwise engage in expressive activities anywhere on campus without prior approval. R. 21-2 at 3. Planned expressive activities involving a group of more than 30 people require a reservation of one of two new designated public forums; for smaller groups, those forums are open for use without reservations. *Id.* at 3–4. The college also removed the challenged portion of the Student Code of Conduct. *Id.* at 3–4.

4. After the policy revision, the district court dismissed the case as moot. Pet. App. 22a–46a. The claims for declaratory and injunctive relief were moot because (1) the college "unambiguously terminated the Prior Policies and there [was] no reasonable basis to expect that it will return to them," and (2) Uzuegbunam graduated. *Id.* at 40a. Contrary to petitioners' argument, they had not alleged compensatory damages because their prayer for relief included only nominal damages, and their "after-the-fact contentions" that they sought compensatory damages were "not supported by the First Amended Complaint." *Id.* at 41a–42a. And the remaining claim for nominal damages was "insufficient to save this otherwise moot case." *Id.* at 42a (citing *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1264–70 (11th Cir. 2017) (en banc)).

5. The court of appeals affirmed in an unpublished opinion. *Id.* at 1a–19a. Petitioners first argued that they alleged actual damages, but the court rejected that argument, concluding that their complaint rested only "on the abstract injury suffered as a result of the violation of their constitutional rights." *Id.* at 10a. The court also affirmed the district court's conclusion that the remaining nominal-damages claim did not save the case from mootness, holding that *Flanigan*'s, the en banc decision from 2017, controlled. *Id.* at 13a (citing *Flanigan's*, 868 F.3d 1248). The court explained that a nominal-damages claim cannot preserve jurisdiction when an award of nominal damages "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." *Id*. at 13a (quoting *Flanigan's*, 868 F.3d at 1264). Because petitioners never alleged "any concrete injuries" for which they sought compensation, the case presented "no live controversy" after the college's policy revisions and Uzuegbunam's graduation. *Id.* at 14a. A nominal-damages award "would have no practical effect on the parties' rights or obligations," so the case was moot. *Id.*

REASONS FOR DENYING THE PETITION

Petitioners are correct that some circuits disagree on whether a standalone claim for nominal damages provides a federal court jurisdiction to decide an otherwise moot case. That conflict, however, does not presently warrant review. This Court recently denied a

petition that presented the same question, *Davenport v. City of Sandy Springs, Ga.*, 138 S. Ct. 1326 (2018) (No. 17-869), and the unpublished decision below does not deepen the conflict. The conflict also concerns a narrow question that is unlikely to recur frequently, since plaintiffs can and often do allege actual damages and by doing so surely avoid the mootness problem here. And the conflict is both shallower and less defined than petitioners contend.

Even if that conflict is one this Court wishes to address, this is not a suitable vehicle. First, a vigorous dispute below about whether the operative complaint alleged actual damages stands as a potential impediment to resolving the narrow question that divides the circuits. Second, an argument that features prominently in the petition—that a claim for nominal damages prevents mootness at least when a challenged law or policy has been enforced against the plaintiffs—was not properly pressed or passed upon below.

Finally, the court of appeals correctly affirmed the district court's dismissal for mootness, and that decision does not conflict with this Court's precedents about nominal damages.

I. The circuit conflict does not presently warrant review.

Although the circuits are split over the question presented, that conflict does not presently demand review. This Court recently denied a petition raising the same question and identifying the same conflict in an

en banc case out of the same circuit; the conflict concerns a narrow, preventable issue unlikely to recur with much frequency; and the conflict is shallow: 3-1, not 6-2-1 as petitioners claim.

A. This Court recently declined to address this circuit conflict, and the unpublished decision below does not deepen it.

As petitioners admit, this case "is not the first time" the Eleventh Circuit has addressed the question presented. Pet. 2. That same question was teed up in *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs* after the city repealed a portion of its municipal code—a ban on selling sexual devices in the city limits—that had been challenged on First Amendment grounds. 868 F.3d at 1270 (11th Cir. 2017). In a thorough, reasoned opinion, the en banc Eleventh Circuit held that the ordinance's repeal mooted the plaintiffs' claims for declaratory and injunctive relief, and that "a mere prayer for nominal damages [cannot] save an otherwise moot case." *Id.*

The resulting petition for certiorari presented this same question for review, *see* Pet. for Writ of Certiorari at i, *Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018) (No. 17-869), without apparent vehicle issues. Indeed, the question had received deep and careful analysis in majority and dissenting opinions from an en banc court that acknowledged the same circuit split petitioners identify now. *Flanigan's*, 868 F.3d at

1265 n.17, 1270. Yet this Court denied certiorari. 138 S. Ct. 1326 (2018).

The unpublished Eleventh Circuit panel decision below does not deepen the split this Court declined to address in *Flanigan's*. Petitioners point out that *Flanigan's* involved a policy that was repealed before it was ever enforced, while the policies here were invoked against petitioners before the college ended them. Pet. 10. *Flanigan's*, however, turned not on the lack of enforcement, but rather on the lack of any remaining redress to provide after the repeal of the challenged ordinance. 868 F.3d at 1264–65. Indeed, had the plaintiffs "suggested that they [we]re entitled to actual damages" on top of removal of the ordinance, their case would have stayed alive without regard for whether the ordinance had been enforced. *Id.* at 1265. Thus, as the panel below correctly acknowledged, a holding in this case that nominal damages could prevent mootness if the challenged policy had been enforced against the plaintiff would have been "a new exception" to *Flanigan's* rule, not an expansion of it. Pet. App. 16a n.3. The decision below is thus a straightforward application of *Flanigan's*. If that en banc decision did not warrant review two years ago, neither does this unpublished one now.

B. The issue that divides the circuits is narrow and not likely to recur with any frequency.

The question that divides the circuits arises only in a narrow set of circumstances: when claims for prospective relief become moot in a case where the plaintiff has alleged no actual damages. That is because the law is clear that when a plaintiff *has* alleged actual damages, that claim keeps the case alive regardless of whether a claim for nominal damages remains. *See*, *e.g.*, *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) ("[Damages] claims, if at all plausible, ensure a live controversy."). The law is also clear that once a court decides that a plaintiff's constitutional rights were violated, it may award nominal damages if the plaintiff was ultimately unable to *prove* any actual damages. *See Farrar v. Hobby*, 506 U.S. 103, 115 (1992); *Carey v. Piphus*, 435 U.S. 247, 266 & n.24 (1978); *accord Flanigan's*, 868 F.3d at 1270 n.23; *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1267 (10th Cir. 2004) (McConnell, J., concurring). The circuits only disagree about what to do when a plaintiff never alleged actual damages at all, leaving him with only a naked claim for nominal damages after claims for prospective relief become moot.

But those narrow circumstances should be rare. Although bare violations of certain constitutional rights like the freedom of speech or religion can seem abstract, they also tend to cause, or at least generate plausible claims for, actual damages. Many such cases will involve some direct financial injury. *See*, *e.g.*, *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795,

799 (7th Cir. 2016) (affirming award of compensatory damages to a plaintiff who would have opened a club providing nude entertainment but for the challenged ordinance); *Hood v. Keller*, 229 F. App'x 393, 394 (6th Cir. 2007) (finding the case not moot because the plaintiff challenging the speech-permit rule sought compensatory damages related to the permit fee and fine for noncompliance); *Knapp v. City of Coeur d'Alene*, 172 F. Supp. 3d 1118, 1134 (D. Idaho 2016) (finding standing to challenge an ordinance prohibiting sexual-orientation discrimination because the plaintiffs sought lost profits for the time their business was closed).

And beyond those tangible injuries, plaintiffs can allege all manner of intangible-yet-compensable harms, including impairment of reputation, personal humiliation, and mental and emotional distress. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Carey*, 435 U.S. at 263; *see also Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 963–64 (8th Cir. 2015) (seeking compensatory damages in a challenge to a school-choice statute where transfer requests were denied because the students were Caucasian and the district remained under a desegregation order); *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 834 & n.5 (9th Cir. 2006) (seeking compensatory damages because the plaintiff was denied admission to a private school for lack of Hawaiian ancestry); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1266 (11th Cir. 2006) (seeking $25,000 in damages in a First Amendment challenge to Atlanta's festival ordinance). And even good-faith allegations of

these kinds of actual damages prevent the question presented from arising in a given case. *Flanigan's*, 868 F.3d at 1270 n.23; *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 490–91 (3d Cir. 2016) (Smith, J., concurring dubitante) (granting the "uncontroversial point that a plaintiff may receive . . . an award of nominal damages for past harm" when the plaintiff alleges but fails "to show actual damage").

These kinds of actual damages can be and are pleaded in cases like this one, where students have brought constitutional challenges to school policies. *See*, *e.g.*, *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1099 (9th Cir. 2000) (seeking actual damages in a challenge to a school policy prohibiting sectarian speeches during graduation); *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1306 (8th Cir. 1997) (seeking actual damages in a due process challenge brought after a school forced a student to remove a tattoo at a cost of $500); *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1992) (seeking actual damages in due process and equal protection challenge to student's removal from the basketball team); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293, 1327 (M.D. Fla. 2018) (awarding emotional-distress damages of $1,000 to a transgender student who challenged a school policy prohibiting the student from using the boy's restroom); *Pucket v. Rounds*, No. CIV. 03-5033, 2006 WL 120233, at *7 (D.S.D. Jan. 17, 2006) (finding standing for students to challenge a school busing

policy because their father had to drive them to school, inflicting transportation costs). Such claims prevent students' constitutional challenges from becoming moot after they graduate or policies are revised. *Cole*, 228 F.3d at 1099; *Stephenson*, 110 F.3d at 1306 n.3; *Pucket v. Rounds*, 2006 WL 120233, at *7.

In fact, petitioners in this case could have alleged actual damages and avoided this issue altogether. During oral argument before the court of appeals, petitioners asserted that Uzuegbunam *had* incurred actual damages: he made a "special trip to campus," thus incurring travel expenses, and also sustained reputational harm. Oral Arg. at 1:26–59. And they argued to the court of appeals and the district court that they should have been permitted to amend their complaint to allege such damages. R. 40; Appellant's Br. at 13–21. Had they plausibly alleged these or other actual damages in the first instance—rather than years after filing suit—the Eleventh Circuit (and all others) would have concluded that their case remained justiciable. *But see* Pet. App. 10a (agreeing with district court that petitioners failed to "allege that they suffered any actual injury" and "could not have been requesting compensatory damages").

In short, the question presented appears to be more academic than real. The circuits uniformly agree that claims for actual damages prevent mootness, and plaintiffs can mostly, if not always, plausibly allege actual damages—even in cases involving violations of constitutional rights that do not cause direct physical or financial injury. Whether a claim for nominal

damages can avoid mootness when a plaintiff has not alleged actual damages is therefore not a question likely to arise often enough to warrant certiorari review.

C. Most of the circuits have not squarely or definitively answered the question presented.

Petitioners call the circuit split "deep" and score it 6-2-1. Pet. App. 22. On closer inspection, only four circuits have squarely answered the question presented, and they split 3-1. Five circuits have not addressed the question, and the remaining four have not settled on a clear answer.

1. Just four circuits have squarely answered the question presented.

The only circuit to answer the question in a carefully reasoned opinion—the Eleventh—has concluded that, when all other claims have become moot, "a prayer for nominal damages will not save the case from dismissal." *Flanigan's*, 868 F.3d at 1264. When claims for prospective relief are moot and the plaintiff never alleged actual damages, awarding nominal damages "would no longer have any practical effect on the rights or obligations of the litigants." *Id.* And when the requested relief will not redress any injury, federal courts lack jurisdiction. *Id.*

The Fifth, Ninth, and Tenth Circuits have each held that a standalone claim for nominal damages

prevents dismissal of an otherwise moot case. *See Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345 (5th Cir. 2017); *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *Utah Animal Rights Coal.*, 371 F.3d 1248. The Fifth and Ninth Circuit cases that petitioners cite reach this holding in conclusory fashion, offering little or no explanation of how nominal damages standing alone could provide further redress to plaintiffs who had sought prospective relief but not actual damages. Same for the Tenth Circuit, until Judge McConnell pointed out the problem with those conclusory precedents. *Utah Animal Rights Coal.*, 371 F.3d at 1257 (explaining that the panel was bound by "odd" prior holdings that "a complaint for nominal damages [will] satisfy Article III's case or controversy requirements, when a functionally identical claim for declaratory relief will not"); *id.* at 1263 (McConnell, J., concurring with his own majority opinion to explain why "those decisions were incorrect").

2. Five circuits have not answered the question presented.

The First, Third, Seventh, D.C., and Federal Circuits have not answered the question presented. One Third Circuit judge recently filed a thorough concurrence raising doubts that a lone claim for nominal damages can prevent mootness, relying heavily on Judge McConnell's opinions in *Utah Animal Rights*. *See Freedom from Religion Found.*, 832 F.3d at 482 (3d Cir. 2016) (Smith, J., concurring dubitante). A D.C. Circuit panel has also expressed skepticism. *See People for*

Ethical Treatment of Animals, Inc. v. Gittens, 396 F.3d 416, 421 (D.C. Cir. 2005) (assuming, without deciding, that the nominal damages award prevented mootness on appeal but citing Judge McConnell's concurrence). The First and Federal Circuits do not appear to have addressed the question at all.

Despite petitioners' assertion to the contrary, the Seventh Circuit has not decided the question either. The two Seventh Circuit cases petitioners cite did not present the question at issue here because the nominal-damages claims in each traveled to the end of the case with other live claims. Pet. 14 (citing *Koger v. Bryan*, 523 F.3d 789, 804 (7th Cir. 2008) (finding the suit not moot because the plaintiff sought nominal, compensatory, and punitive damages, but also clarifying that the plaintiff would be statutorily barred from recovering actual damages unless he showed a physical injury); *Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004) (affirming award of declaratory relief and $1,000 in damages)). Notably, district courts in the Seventh Circuit view the question as open. *See Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1032–33 (E.D. Wis. 2008) (finding that the Seventh Circuit has not resolved this question and deciding the "claim for nominal damages [was] not sufficient to keep this case alive") (citing *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 465 (7th Cir. 2007) (suggesting, in dicta, that nominal damages can be recovered only on showing of "a violation of sufficient gravity")); *see also Freedom From Religion Found.,*

Inc. v. Franklin Cty., Ind., 133 F. Supp. 3d 1154, 1160 (S.D. Ind. 2015).

3. Four circuits have not settled on a definitive answer to the question presented.

The only Second Circuit case with a square holding on the question presented sides with the Eleventh Circuit. *Kerrigan v. Boucher*, 450 F.2d 487, 488–90 (2d Cir. 1971) (holding that a suit in which only a claim for nominal damages remained was moot because there was "no existing relationship between the parties," and so the claim for nominal damages was "clearly incidental to the relief sought"); *contra* Pet. 11. The more recent cases cited by petitioners muddy the waters, but none cite *Kerrigan* nor squarely hold that a claim for nominal damages alone avoids mootness. *See Husain v. Springer*, 494 F.3d 108, 135 n.17 (2d Cir. 2007) (no mootness analysis); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) (dicta); *Davis v. Vill. Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978) (confirming that a failure to *prove* actual damages does not moot the case).

The Fourth Circuit has summarily held—relying on cases that addressed or involved claims for actual damages—that a remaining nominal-damages claim is sufficient to avoid mootness. *See*, *e.g, Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016) (finding case not moot because defendants did not dispute that the nominal-damages claim remained live,

relying on a case where the plaintiff sought *actual* damages). But other cases put those holdings in question. *See Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 190 n.5 (4th Cir. 2018) ("Because appellants have standing to seek injunctive relief, we need not reach their novel contention that nominal damages alone, without any other cognizable form of relief, can create standing from the outset of the case."); *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566, 571 (4th Cir. 2007) (finding a claim for nominal damages moot because the plaintiff suffered no constitutional deprivation).

The Sixth Circuit's precedent on the question also leaves its answer unsettled. In *Morrison v. Board of Education of Boyd County*, the court held that a plaintiff lacked standing to bring a standalone claim for nominal damages, explaining that such damages could only ever provide relief "'with respect to future dealings between the parties'," and "[n]o readily apparent theory emerges as to how nominal damages might redress" the "past chill" the plaintiff had alleged as an injury. 521 F.3d 602, 610–11 (6th Cir. 2008) (quoting *Utah Animal Rights Coal.*, 371 F.3d at 1267–68). But two years later, the Sixth Circuit held that "the plaintiffs' claims remain viable to the extent that they seek nominal damages as a remedy for past wrongs," apparently ignoring *Morrison* and instead citing *Murray v. Bd. of Trustees, Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981)—yet another case holding merely that a failure to *prove* actual damages does not moot a case. *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir.

2010). The Sixth Circuit has yet to reconcile *Morrison* and *Miller*.

Finally, like the Fourth Circuit, the Eighth Circuit has held that claims for nominal damages prevent mootness, also relying on cases that included claims for actual damages. *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006). But more recently, the en banc Eighth Circuit held that a "request for nominal damages" did not save claims against superseded ordinances from mootness. *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 687 (8th Cir. 2012) (en banc) (quoting *Morrison*, 521 F.3d at 611). Although petitioners seek to distinguish *Phelps-Roper* as a case that turned on a lack of enforcement against the plaintiffs, the en banc court there failed even to mention that fact in its brief analysis, which simply explained that the request for nominal damages did not allow them to "revive an otherwise moot claim against 'a regime no longer in existence.'" *Id.* (quoting *Morrison*, 521 F.3d at 611). That said, the en banc court did not expressly overrule *Advantage Media*.

* * *

In sum, petitioners have identified a relatively shallow circuit split on a narrow issue unlikely to recur with any frequency, and one which this Court recently declined to address. Such a split does not presently warrant this Court's review.

II. This case has vehicle problems.

Even if the Court wishes to address the question presented at some point, this case is a poor vehicle for at least two reasons.

First, a vigorous dispute below about whether the operative complaint alleged actual damages stands as an impediment to resolving the narrow question that divides the circuits. As explained above, the circuits all agree that a claim for actual damages prevents mootness even after claims for prospective relief become moot; the disagreement is about whether a standalone claim of nominal damages does the same. *See infra* section I.B. But petitioners primarily argued below that their complaint *did* allege actual damages. *See* Pet. App. 8a–12a; Appellant's Br. at 13–21; R. 40 at 3. The court of appeals rejected that argument and petitioners do not renew it here, but that does not mean this Court could simply ignore it on certiorari review: "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). And if this Court were to determine later that the complaint in this case in fact alleges actual damages, that would prevent the Court from resolving the narrow question that divides the circuits. If this Court is interested in resolving the circuit split on that question, it would be better to wait for a case that indisputably presents it.

Second, the record in this case limits the arguments at this Court's disposal for resolving the question presented. This Court ordinarily will not review arguments not pressed or passed on below. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."). To be sure, petitioners preserved their overarching argument that their claims for nominal damages are not moot. But until they reached the court of appeals, they did not raise the narrower position that a claim for nominal damages prevents mootness at least when a challenged law or policy has been enforced against the plaintiffs. That argument now features prominently in their petition. *See* Pet. 9, 10, 17, 20, 22, 30. They even contend that the alleged "actual enforcement" of the speech policies in this case makes this a stronger vehicle. *Id.* at 30. The court of appeals, however, expressly declined to consider that argument because "[t]he issue is not well-developed in the record below" and petitioners "never presented the district court with" it. *See* Pet. App. 16a n.3 (declining to consider a "new exception . . . for cases involving an as-applied challenge to an allegedly unconstitutional law or policy that has been enforced against a plaintiff"). Rather than review this argument for the first time on certiorari review, this Court should wait for a case in which the argument was presented and the courts below considered it.

III. The decision below is correct.

The court of appeals correctly affirmed the district court's dismissal of this case for mootness, and that decision does not conflict with this Court's precedents addressing nominal damages.

1. A federal case becomes moot when the court can no longer grant any effectual relief. This is because Article III's prerequisites for the jurisdiction of federal courts—an injury in fact caused by the defendant and likely to be redressed by a favorable decision—apply "at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). If it appears at any time before a case has been decided that no requested relief is likely to redress the injuries alleged, the case is moot and must be dismissed for lack of jurisdiction. *Id.* at 67.

As a form of independent Article III redress, an award of nominal damages is limited. Such damages are "trivial sums" that are "damages in name only" and "do not purport to compensate for past wrongs." *See Utah Animal Rights*, 371 F.3d at 1264 (McConnell, J., concurring) (quoting 1 Dan B. Dobbs, Dobbs Law of Remedies § 3.3(2), at 294 (2d ed.1993)). Instead, the practical relief an award of nominal damages can provide, if any, is usually similar to that of a declaratory judgment: it could in some cases serve as an authoritative legal determination of a dispute that settles the legal relationship between the parties going forward. *Id.* (citing Douglas Laycock, *Modern American*

Remedies: Cases and Materials 561 (3d ed. 2002); Dobbs, *supra* at 294; 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.3, (3d ed.)) ("Nominal damage awards serve essentially the same function as declaratory judgments; indeed, scholars tell us that nominal damages were originally sought as a means of obtaining declaratory relief before passage of declaratory judgment statutes."). For example, a judicial award of nominal damages could effectively resolve a boundary dispute in a trespass case or rehabilitate reputational harm in a libel case. *See Flanigan's*, 868 F.3d at 1263 n.12 (citing *Utah Animal Rights*, 371 F.3d at 1264).

But an award of nominal damages would not provide that kind of declaratory redress in this case because the college's policy changes already did. Petitioners alleged that their college's speech policies restricted their ability to share their faith as students on campus in the manner they desired. Pet. App. 104a–113a. The college then unambiguously and permanently overhauled the speech policy and eliminated the challenged part of the conduct policy, *id.* at 6a & n.1, making it clear petitioners were free to express themselves and share their faith on campus as they wished while they were students. Nominal damages would not provide petitioners any further forward-looking redress beyond what they received when the

college permanently abandoned the policies they had challenged.[1]

Petitioners contend that a claim for nominal damages nonetheless saves this case (and perhaps every other constitutional case) from mootness because an award of nominal damages "vindicates" a past violation of constitutional rights. *See*, *e.g.*, Pet. i. But they have not shown that mere "vindication" of constitutional rights provides the kind of redress that Article III requires. A judicial award of nominal damages may well validate a challenge to a repealed law or policy as worthy, but mere "vindication of the rule of law . . . is not an acceptable Article III remedy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106–07 (1998). Indeed, making a "judicial pronouncement" to provide a plaintiff nothing more than the "satisfaction of knowing that a federal court concluded that [a litigant's] rights had been violated" would be an "advisory opinion," not "proper judicial resolution of a 'case or controversy.'" *Hewitt v. Helms*, 482 U.S. 755, 761–62 (1987). If that is the only role left for nominal damages to play in a case, Article III does not permit federal courts to decide the case based on the presence of a nominal-damages claim. *Flanigan's*, 868 F.3d at 1264; *Utah*

[1] Not even petitioners dispute that the same reasoning requires dismissing their claims for injunctive and even declaratory relief. Pet. App. 6a–7a. When a case otherwise becomes moot, a claim for declaratory relief does not keep it alive. *See Preiser v. Newkirk*, 422 U.S. 395, 402 (1975); *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

Animal Rights Coal., 371 F.3d at 1266; *Freedom from Religion Found.*, 832 F.3d at 488.

2. The conclusion that a claim for nominal damages generally will not save an otherwise moot case is not, as petitioners suggest, in conflict with this Court's precedents addressing nominal damages. *See* Pet. 22–28 (citing *Carey*, 435 U.S. 247; *Stachura*, 477 U.S. 299; *Farrar v. Hobby*, 506 U.S. 103 (1992)). As the Eleventh Circuit explained in *Flanigan's*, none of those cases addressed Article III jurisdiction or had occasion to address whether a claim for nominal damages could by itself prevent mootness. *Flanigan's*, 868 F.3d at 1265; *Utah Animal Rights Coal.*, 371 F.3d at 1265.

Carey v. Piphus was not even about nominal damages, much less jurisdiction. Instead, the core dispute was whether a federal court could award "substantial nonpunitive damages" in a § 1983 case even if the plaintiffs were not able to prove that a denial of procedural due process caused them actual injury. 435 U.S. at 248. Declining to import the common-law doctrine of "presumed damages" for defamation per se into a § 1983 due process case, this Court held that such compensatory damages may be awarded for the denial of procedural due process only based on proof of actual injury. *Id.* at 264. But, the Court explained, if the plaintiffs were not able to prove actual damages on remand, the court could award nominal damages, because "common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Id.* at 266. In other words, after a

court had *decided the case* and found a constitutional violation, in a case where a plaintiff had sought actual damages, the court could award nominal damages if the plaintiff could not prove the actual damages. That is a long way from a holding that a federal court retains jurisdiction to decide an otherwise moot case in the first instance because the plaintiffs still desire a symbolic damages award. *See also Flanigan's*, 868 F.3d at 1266 (11th Cir. 2017) (explaining that a "nominal damages award" was never "the only remedy available" to the plaintiffs in *Carey* because "a live claim for actual damages existed at all levels of the litigation," and "[a]ccordingly, it did not address mootness and nothing that it held, or even said, controls the mootness issue before us"); *Utah Animal Rights Coal.*, 371 F.3d at 1266 (same).

Memphis Community School District v. Stachura likewise did not concern nominal damages or jurisdiction. The question there was much like the one in *Carey*: whether a court could award compensatory damages based on only the deprivation of a constitutional right rather than any actual injury to the plaintiff. 477 U.S. at 300, 304. Finding *Carey* controlling, the Court held broadly that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages" in § 1983 cases. *Id.* at 310. The sole reference to nominal damages appears in a footnote, where the Court noted that *Carey*'s discussion of nominal damages "makes clear that nominal damages, and not damages based on some undefinable 'value' of infringed

rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Id.* at 308 n.11. "The Court's comment that nominal damages—and not some abstract value of the right—are the appropriate remedy for a constitutional violation with no attendant actual damages says nothing at all about whether nominal damages can save from mootness a case which is otherwise moot." *Flanigan's*, 868 F.3d at 1266; *Utah Animal Rights Coal.*, 371 F.3d at 1266 (same); *Freedom from Religion Found.*, 832 F.3d at 488 ("*Carey* was not a case about justiciability and was more about the availability of nominal damages where other damages claims were ultimately not susceptible to proof.").

Finally, *Farrar v. Hobby* held that a plaintiff awarded nominal damages is a "prevailing party" for purposes of entitlement to attorney's fees. *Farrar*, 506 U.S. at 115. "That is not inconsistent with the proposition that a claim for nominal damages can become moot. It stands only for the proposition that where nominal damages are properly awarded in a case within the court's Article III jurisdiction, the plaintiff has 'prevailed' within the meaning of 42 U.S.C. § 1988." *Utah Animal Rights Coal.*, 371 F.3d at 1267.[2] Petitioners assert that the Eleventh Circuit "would have resolved *Farrar* the other way" after the jury in *Farrar* found that the defendants committed a constitutional violation but that their conduct did not cause actual

[2] Of course, if the only remaining dispute in a case is over attorney's fees, there is no Article III case or controversy. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990).

damages. Pet. 25. The Eleventh Circuit, however, would disagree. Because the plaintiff had alleged and sought actual damages, the Eleventh Circuit would say that it was a live case that the district court properly adjudicated. *Flanigan's*, 868 F.3d at 1270 n.23. And "[i]f that court determines that a constitutional violation occurred, but that no actual damages were proven, it is within its Article III powers to award nominal damages." *Id.*

In short, although each of these cases describe nominal damages as offering "vindication" of constitutional rights, the nominal damages in each were contemplated as an award to a victorious plaintiff in a decided case that remained live through the final decision, because the plaintiffs had sought actual damages. They therefore do not control the question presented, which asks whether a federal court retains jurisdiction to decide an otherwise moot case if all it can give a successful plaintiff is a symbolic award.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

CHRISTOPHER M. CARR
Attorney General of Georgia
ANDREW A. PINSON
Solicitor General
Counsel of Record
KATHLEEN M. PACIOUS
Deputy Attorney General
ROGER CHALMERS
Senior Assistant Attorney General
DREW F. WALDBESER
Assistant Solicitor General
ELLEN CUSIMANO
Assistant Attorney General
OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 651-9453
apinson@law.ga.gov
Counsel for the State of Georgia