NO. 19-968

IN THE

Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,

Petitioners,

v.

STANLEY C. PRECZEWSKI, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

KRISTEN K. WAGGONER
Counsel of Record
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
kwaggoner@adflegal.org

Counsel for Petitioners

CHRISTOPHER M. CARR
ANDREW A. PINSON
Counsel of Record
OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, GA 30334
(404) 651-9453
apinson@law.ga.gov

Counsel for Respondents

Petition for Writ of Certiorari filed January 31, 2020
Petition for Writ of Certiorari granted July 9, 2020

TABLE OF CONTENTS

Docket Entry Excerpts
United States Court of Appeals for the Eleventh Circuit
No. 18-12676

* * * * *

Date Filed	Docket Text
06/25/2018	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellants Joseph Bradford and Chike Uzuegbunam on 06/25/2018. Fee Status: Fee Paid. No hearings to be transcribed. The appellant's brief is due on or before 08/06/2018. The appendix is due no later than 7 days from the filing of the appellant's brief. Awaiting Appellant's Certificate of Interested Persons due on or before 07/09/2018 as to Appellant Chike Uzuegbunam. Awaiting Appellee's Certificate of Interested Persons due on or before 07/23/2018 as to Appellee Stanley C. Preczewski [Entered: 06/27/2018 10:15 AM]
* * * * *	
08/06/2018	Appellant's brief filed by Joseph Bradford and Chike Uzuegbunam. (ECF: Travis Barham) [Entered: 08/06/2018 03:19 PM]
* * * * *	
08/06/2018	Appendix filed [4 VOLUMES] by Appellants Joseph Bradford and

Date Filed	Docket Text
	Chike Uzuegbunam. (ECF: Travis Barham) [Entered: 08/06/2018 04:18 PM]
	* * * * *
08/08/2018	Received paper copies of EBrief filed by Appellants Joseph Bradford and Chike Uzuegbunam. [Entered: 08/09/2018 02:45 PM]
08/08/2018	Received paper copies of EAppendix filed by Appellants Joseph Bradford and Chike Uzuegbunam. 4 VOLUMES - 2 COPIES [Entered: 08/09/2018 02:46 PM]
08/13/2018	Amicus Brief as of right or by consent of the parties filed by Samuel S. Woodhouse for Foundation for Individual Rights in Education. (ECF: Samuel Woodhouse) [Entered: 08/13/2018 02:06 PM]
08/14/2018	Received paper copies of EBrief filed by Amicus Curiae Foundation for Individual Rights in Education. [Entered: 08/14/2018 02:28 PM]
	* * * * *
09/19/2018	Appellee's Brief filed by Appellees Aileen C. Dowell, Catherine Jannick Downey, Jim B. Fatzinger, Corey Hughes, Tomas Jiminez, Rebecca A. Lawler, Shenna Perry, Stanley C.

Date Filed	Docket Text
	Preczewski, Lois C. Richardson, Gene Ruffin and Terrance Schneider. [18-12676] (ECF: Angela Cusimano) [Entered: 09/19/2018 02:05 PM]
09/19/2018	MOTION for initial hearing en banc filed by Joseph Bradford and Chike Uzuegbunam. Opposition to Motion is Unknown. [8567539-1] [18-12676] (ECF: Travis Barham) [Entered: 09/19/2018 04:01 PM]
	* * * * *
09/21/2018	Received paper copies of EBrief filed by Appellees Aileen C. Dowell, Catherine Jannick Downey, Jim B. Fatzinger, Corey Hughes, Tomas Jiminez, Rebecca A. Lawler, Shenna Perry, Stanley C. Preczewski, Lois C. Richardson, Gene Ruffin and Terrance Schneider. [Entered: 09/24/2018 03:01 PM]
	* * * * *
10/17/2018	Reply Brief filed by Appellants Joseph Bradford and Chike Uzuegbunam. [18-12676] (ECF: Travis Barham) [Entered: 10/17/2018 02:47 PM]
10/18/2018	Received paper copies of EBrief filed by Appellants Joseph Bradford and Chike Uzuegbunam. [Entered: 10/25/2018 10:48 AM]

Date Filed	Docket Text
	* * * * *
10/26/2018	Amicus Brief filed by Amicus Curiae Child Evangelism Fellowship. Service date: 09/27/2018 email - Attorney for Amicus Curium: Bush, McAlister, Woodhouse; Attorney for Appellants: Barham, Cortman, Langhofer, Waggoner; Attorney for Appellee: Cusimano; US mail - Attorney for Appellant: Mattox. [Entered: 10/29/2018 11:54 AM]
10/26/2018	Amicus Brief filed by Amicus Curiae Foundation for Individual Rights in Education. Service date: 09/19/2018 email - Attorney for Amicus Curium: Bush, McAlister, Woodhouse; Attorney for Appellants: Barham, Cortman, Langhofer, Waggoner; Attorney for Appellee: Cusimano; US mail - Attorney for Appellant: Mattox. [Entered: 10/29/2018 01:01 PM]
11/05/2018	Received paper copies of EBrief filed by Amicus Curiae Child Evangelism Fellowship. [Entered: 11/05/2018 11:44 AM]
02/21/2019	ORDER: Motion for initial hearing en banc filed by Appellants Chike Uzuegbunam and Joseph Bradford is DENIED. [8567539-2] RSR [Entered: 02/21/2019 11:39 AM]

Date Filed	Docket Text
03/25/2019	The Court has determined that oral argument will be necessary in this case. Please forward 3 additional copies of the 4 volumes of Appendix, which conform to all formatting requirements, filed 8/6/18 by Attorney Travis Christopher Barham for Appellants Chike Uzuegbunam and Joseph Bradford to the Clerk's Office, Attention: Jenifer Tubbs. Your prompt attention to this matter is appreciated. [Entered: 03/25/2019 01:54 PM]
03/25/2019	Calendar issued as to cases to be orally argued the week of 05/13/2019 in Atlanta, Georgia. Counsel are directed to electronically acknowledge receipt of this calendar by docketing the Calendar Receipt Acknowledged event in ECF. Counsel must be logged into CM/ECF in order to view the attached calendar. [Entered: 03/25/2019 02:17 PM]
03/25/2019	Attorney Travis Christopher Barham for Appellants Joseph Bradford and Chike Uzuegbunam hereby acknowledges receipt of a copy of the printed calendar for 05/14/2019. Travis C. Barham, 770-339-0774 will present argument. [18-12676] (ECF:

Date Filed	Docket Text
	Travis Barham) [Entered: 03/25/2019 02:52 PM]
03/25/2019	Oral argument scheduled. Argument Date: Tuesday, 05/14/2019 Argument Location: Atlanta Courtroom: Atlanta 339. [Entered: 03/25/2019 03:09 PM]
03/27/2019	Attorney Angela Ellen Cusimano for Appellees Aileen C. Dowell, Catherine Jannick Downey, Jim B. Fatzinger, Corey Hughes, Tomas Jiminez, Rebecca A. Lawler, Shenna Perry, Stanley C. Preczewski, Lois C. Richardson, Gene Ruffin and Terrance Schneider hereby acknowledges receipt of a copy of the printed calendar for 05/14/2019. Ellen Cusimano 404 656 3370 will present argument. [18-12676] (ECF: Angela Cusimano) [Entered: 03/27/2019 11:51 AM]
04/03/2019	Additional (3) copies of Appendix received from David Andrew Cortman for Chike Uzuegbunam and Joseph Bradford and Kristen K. Waggoner for Chike Uzuegbunam and Joseph Bradford and forwarded to the record room. [Entered: 04/03/2019 02:28 PM]
05/14/2019	Oral argument held. Oral Argument participants were Travis Christopher

Date Filed	Docket Text
	Barham for Appellants Chike Uzuegbunam and Joseph Bradford and Angela Ellen Cusimano for Appellees Stanley C. Preczewski, Lois C. Richardson, Jim B. Fatzinger, Tomas Jiminez, Aileen C. Dowell, Gene Ruffin, Catherine Jannick Downey, Terrance Schneider, Corey Hughes, Rebecca A. Lawler and Shenna Perry. [Entered: 05/14/2019 11:57 AM]
07/01/2019	Judgment entered as to Appellants Joseph Bradford and Chike Uzuegbunam. [Entered: 07/01/2019 12:44 PM]
07/01/2019	Opinion issued by court as to Appellants Joseph Bradford and Chike Uzuegbunam. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions. [Entered: 07/01/2019 12:47 PM]
07/22/2019	Petition for rehearing en banc (with panel rehearing) filed by Appellants Joseph Bradford and Chike Uzuegbunam. [18-12676] (ECF: Travis Barham) [Entered: 07/22/2019 11:45 AM

Date Filed	Docket Text
	* * * * *
09/04/2019	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellants Chike Uzuegbunam and Joseph Bradford are DENIED. [8869536-1] [Entered: 09/04/2019 10:16 AM]
09/12/2019	Mandate issued as to Appellants Joseph Bradford and Chike Uzuegbunam. [Entered: 09/12/2019 10:11 AM]
10/28/2019	Extension for filing certiorari GRANTED by U.S. Supreme Court as to Appellants Joseph Bradford and Chike Uzuegbunam. [Entered: 11/14/2019 09:54 AM]
02/03/2020	Notice of Writ of Certiorari filed as to Appellant Chike Uzuegbunam. SC# 19-968. [Entered: 02/06/2020 12:02 PM]
	* * * * *
07/09/2020	Writ of Certiorari filed as to Appellant Chike Uzuegbunam is GRANTED. SC# 19-968. [Entered: 07/13/2020 08:38 AM]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CHIKE UZUEGBUNAM and JOSEPH BRADFORD,	)	
Plaintiffs,	)	Civil Action No.: 1:16-cv-04658-ELR
v.	)	
STANLEY C. PRECZEWSKI, et al.,	)	
Defendants.	)	

AFFIDAVIT OF AILEEN DOWELL

Personally appeared before me, an officer duly authorized to administer oaths, the undersigned, **AILEEN DOWELL,** who, upon being duly sworn, testifies as follows:

1.

I, Aileen Dowell, am of legal age, and under no legal disability. I authorize the use of this Affidavit for any and all purposes allowed by Georgia law. The statements set forth in this Affidavit are based upon my personal knowledge and I state that they are true and correct. I am competent to testify to the matters stated herein.

2.

I am the Director of Student Integrity at Georgia Gwinnett College ("GGC").

3.

As the Director of Student Integrity, I am responsible for implementing programmatic and policy changes, supervising the Office of Student Integrity staff, and adjudicating all disciplinary and non-disciplinary infractions for GGC, including academic integrity violations, disorderly conduct, etc.

4.

On February 28, 2017, the GGC Cabinet approved revisions to GGC's Freedom of Expression Policy, as well as revisions to the Student Code of Conduct Section in the GGC Student Handbook for 2016-2017.

5.

A copy of the revised Freedom of Expression Policy is attached hereto as Attachment A.

6.

Relevant portions of the revised Student Code of Conduct are attached hereto as Attachment B.

7.

The Freedom of Expression Policy was revised to allow students to speak anywhere on campus and at any time without having to first obtain a permit. (Attach. A).

8.

Under the new policy, the only time students must obtain a permit is when they plan to engage in expressive activity on campus in a group that is expected to consist of 30 or more persons. (Id.).

9.

Under the new policy, GGC has designated two areas on campus as "public forum areas. However, while students may utilize the public forum areas, they are not required to do so under the new policy and can, instead, speak anywhere on campus. (Id.).

10.

The revised Freedom of Expression Policy is available to the public and has been published on GGC's website at http://www.ggc.edu/about-ggc/at-a-glance/freedom-of-expression/.

11.

As for GGC's Student Code of Conduct Policy, it has been revised so that "behavior which disturbs the peace and/or comfort of person(s)" is no longer listed as an example of prohibited disorderly conduct. (Attach. B).

12.

The revised Student Code of Conduct Policy is available to the public and has been published on GGC's website at http://www.ggc.edu/student-life/get-involved-on-campus/student-affairs/docs/current-student-handbook.pdf#page=23.

13.

Both of the revised policies supersede their predecessors and have been in full force and effect since February 28, 2017.

14.

GGC has no intention of returning to or enforcing the former policies.

FURTHER AFFIANT SAYETH NOT

Aileen Dowell

Sworn to and subscribed before me this 30th day of March, 2017.

NOTARY PUBLIC
MY COMMISSION EXPIRES: 10/28/18

ATTACHMENT A

Georgia Gwinnett College Freedom of Expression Policy

A. Purpose and Overview of Policy

Georgia Gwinnett College ("GGC") is committed to respecting the First Amendment rights of all individuals, including freedom of speech, freedom of expression, and the right to peaceably assemble. GGC also recognizes its responsibility to provide a secure learning environment that allows individuals enrolled at or employed by GGC ("members of the GGC community") to express their views in ways that do not disrupt the operation of the College. This policy in no way prohibits members of the GGC community from engaging in conversations on campus and does not apply to College-sponsored activities or classroom instruction or participation, but rather only establishes as designated public forums certain

outdoor areas of GGC's campus and sets forth requirements for forum reservations in the following limited circumstances: (1) members of the GGC community who plan an event with 30 or more persons; and, (2) individuals or groups who are not members of the GGC community who wish to speak on GGC's campus. By placing reasonable limitations on time, place, and manner of speech, GGC does not take a position on the content or viewpoint of the expression, but allows for a diversity of viewpoints to be expressed in an academic setting.

B. Designation of Public Forums on GGC's Campus

To accommodate the need for immediate and spontaneous demonstration and to better facilitate the free exchange of ideas, GGC has designated ZONE A and ZONE B as public forums on GGC's campus ("Public Forum Areas"), which are depicted on the enclosed map. These Public Forum Areas are generally available from 9:00 a.m. to 7:30 p.m. Monday through Friday, provided that the Public Forum Areas have not previously been reserved. Reservations will only be processed on days that GGC's Administrative Offices are open for business ("college business days"). Though reservations to use the Public Forum Areas are only required as set forth in Section C and Section D below, GGC recommends that all parties interested in utilizing the Public Forum Areas submit a completed Forum Reservation Request Form to GGC's Office of Student Integrity in the Division of Academic and Student Affairs prior to use so that GGC may minimize scheduling conflicts, accommodate all interested users, and provide adequate security for the speaker and the audience.

C. Provisions for Members of the GGC Community

I. Planned Large Group Expression

Members of the GGC community who plan to engage in expressive activity on campus in a group that is expected to consist of 30 or more persons must submit a completed Forum Reservation Request Form to GGC's Office of Student Integrity in the Division of Academic and Student Affairs two college business days prior to the scheduled activity and must receive approval in writing from a Student Affairs official prior to engaging in such activity. Prior notice is required to ensure that there is sufficient space for the large group event, that necessary College resources are available for crowd control and security, and that the academic and other operations of the College are not disrupted. The Student Affairs official may grant a reservation for one of the Public Forum Areas or another available area of campus, as requested by the applicant, and may only deny a reservation for the limited reasons set forth in Section E below. The reservation request must be processed and the requesting party must be notified within one college business day after its submission. Any denial may be appealed to GGC's Senior Vice President for Academic and Student Affairs and Provost in writing setting forth the reasons why the appeal should be granted. GGC's Senior Vice President for Academic and Student Affairs and Provost or his or her designee must respond to the appeal in writing within one college business day.

II. Spontaneous Large Group Expression

If an individual or small group of individuals within the GGC community, while engaging in spontaneous expression, attracts a group of 30 or more persons, then a representative from the group should provide the College with as much notice as circumstances reasonably permit. GGC reserves the right to direct a group of 30 or more persons to one of the Public Forum Areas or another available area of campus in order to ensure the safety of campus members, to provide for proper crowd control, and to limit disruption of the academic and other operations of the College. The GGC official must not consider or impose restrictions based on the content or viewpoint of the expression when relocating any expression.

D. Provisions for Non-Campus Members

Individuals or groups of people who are not enrolled at or employed by GGC may only engage in expressive activity on GGC's campus in the Public Forum Areas and only after submitting a completed Forum Reservation Request Form to GGC's Office of Student Integrity in the Division of Academic and Student Affairs at least two college business days prior to the scheduled speech and obtaining approval for such use in writing from a Student Affairs official pursuant to the procedures set forth in Section E below. Organizers are encouraged to submit their requests as early in the planning stages of the event as possible. The reservation request must be processed and the requesting party must be notified within one college business day after its submission. Any denial may be appealed to GGC's Senior Vice President for Academic and Student Affairs and Provost in writing

setting forth the reasons why the appeal should be granted. GGC's Senior Vice President for Academic and Student Affairs and Provost or his or her designee must respond to the appeal in writing within one college business day. This provision does not apply to GGC Classroom Visitors, who are covered by APM 3.1.5, or to any College-sponsored events.

E. Procedures for Forum Reservation Requests

Completed Forum Reservation Request Forms should be submitted to GGC's Office of Student Integrity in the Division of Academic and Student Affairs in person or by email to forumreservationrequests@ggc.edu. Any written materials that will be distributed in connection with the expression must be attached to the Forum Reservation Request Form and submitted to GGC's Office of Student Integrity in the Division of Academic and Student Affairs at least two college business days prior to the distribution of the written materials. College officials may not deny any request to distribute written materials based on the content or viewpoint of the expression. However, no publicity for a speaker or program may be released prior to authorization of the Reservation Request Form.

Reservation scheduling will be coordinated by a Student Affairs official, who will schedule forums for expression on a first-come, first-served basis. The Student Affairs official must respond to all requests in writing as soon as practicable, but in no event more than one college business day following receipt of the request, either authorizing the reservation and noting any special instructions, if applicable, or setting forth the reason for denial of the reservation.

The Student Affairs official may only deny a reservation request for one of the following reasons:

(1) The Forum Reservation Request Form is not fully completed;

(2) The Forum Reservation Request Form contains a material falsehood or misrepresentation;

(3) The Public Forum Areas have been reserved by persons who previously submitted a completed Forum Reservation Request Form(s), in which case the College must provide a reservation for the applicant at an alternate location, alternate date, or alternate time;

(4) The use or activity intended by the applicant would conflict with or disturb previously planned programs organized and conducted by the College;

(5) The Public Forum Areas are not large enough to accommodate the expected or actual number of persons engaging in large group expression, in which case the College must provide a reservation for the applicant at an alternate location that can safely accommodate the applicant provided that the applicant is a member of the GGC community and that such a location exists on GGC's campus;

(6) The use or activity intended by the applicant would present a danger to the health or safety of the applicant, other members of the GGC community, or the public; or

(7) The use or activity intended by the applicant is prohibited by law or GGC policy.

When assessing a reservation request, the Student Affairs official must not consider or impose restrictions based on the content or viewpoint of the expression.

Appeals related to the decision of the Student Affairs official should be made in writing to GGC's Senior Vice President for Academic and Student Affairs and Provost. GGC's Senior Vice President for Academic and Student Affairs and Provost or his or her designee must decide all appeals within one college business day. The decision of GGC's Senior Vice President for Academic and Student Affairs and Provost or his or her designee is final. All campus reservations are subject to the general provisions in Section G. below.

F. Distribution of Written Material

Members of the GGC community may distribute non-commercial pamphlets, handbills, circulars, newspapers, magazines, and other written materials on a person-to-person basis in open outdoor areas of the campus. An individual who is not a member of the GGC community may only distribute written materials within the Public Forum Areas and only during the time in which the individual has reserved Public Forum Area. Unauthorized use of the College's trademark on any written material is strictly prohibited. The Campus Solicitation Policy, which may be found at APM 7.61, covers the distribution of commercial materials and publications.

G. General Provisions

In addition to the requirements set forth above, all individuals expressing themselves on GGC's campus must comply with the following provisions:

- No interference with the free flow of vehicular or pedestrian traffic within and/or under the control of the GGC campus or the ingress and egress to buildings on campus is permitted.
- Any use of amplified sound, other than amplified sound used in connection with College sponsored events, must only be intended to be heard in the immediate area of the expression in order to minimize any disruption of the central academic mission of the College. Use of amplified sound by student organizations is covered by the Outside Amplified Sound Provision of the Registered Student Organization Policy and Procedures Manual.
- No interruption of the orderly conduct of college classes or other college activities, including college ceremonies and events, is permitted.
- No commercial solicitations, campus sales, or fundraising activities shall be undertaken which are not authorized by GGC. For GGC's policies on solicitation and fundraising, refer to APM 7.61 and APM 8.2.54.
- The individual who makes the reservation shall be responsible for seeing that the area is left clean and in good repair. If not accomplished, persons, or organizations responsible for the event may be held financially responsible for cleanup costs.

- The individual/organization using the area must supply their own tables, chairs, etc., if needed (unless already part of the location).
- Individuals who are not members of the GGC campus community may not camp or erect temporary structures (e.g. tents) on GGC's campus.
- Damage or destruction of property owned or operated by the College, or property belonging to students, faculty, staff, or guests of the College is prohibited. Persons or organizations causing such damage may be held financially and/or criminally responsible.
- Individuals and groups of individuals expressing themselves on GGC's campus must comply with all applicable federal, state, and local laws and GGC policies, rules, and regulations

Authorization of a speech, event, or demonstration is contingent upon compliance with the criteria listed above. Speakers and/or organizations failing to comply with the above policy may be asked to leave, a trespass warning may be issued, and/or College disciplinary action or judicial action may be pursued.

Freedom of Expression Policy Questions

Questions about this policy may be addressed to the Office of Student Integrity in the Division of Academic and Student Affairs at 678.407.5882 or forum reservationrequests@ggc.edu.

ATTACHMENT B

GGC Student Handbook 2016-2017 – Excerpt from Student Code of Conduct

Amending GGC 4.6.5 (3)

(3) Disorderly Conduct. Examples of specific prohibited actions include but are not limited to the following:

A. Behavior which disrupts or obstructs the orderly functioning of the College, including but not limited to teaching, research, administration and/or service or other College activities on or off campus including but not limited to study abroad experiences or other authorized non-College activities taking place on College property.

B. Engaging in conduct that disrupts the academic pursuits or infringes upon the rights or privacy of another person.

C. Physical abuse, battery, fighting, and/or other physical contact that threatens or endangers the health or safety of another person or puts another in reasonable apprehension or fear for his or her safety or other conduct used to coerce club/ organization membership.

D. Verbal abuse, threats, intimidation, harassment, coercion, bullying/cyber bullying, and/or other conduct that (i) threatens or endangers the health or safety of another person; (ii) puts another in reasonable apprehension or fear for his or her safety; (iii) is so severe or pervasive that it deprives an individual the benefits of any GGC education

program or activity; or (iv) that is used to coerce club/organization membership.

E. Violation of Board of Regents Policy or College policy, rules, and regulations.

F. Conduct or behavior that is obscene, including but not limited to public exposure of one's own sexual organs and voyeurism, including but not limited to video voyeurism.

G. Failure to comply with directions of College officials or law enforcement officers acting in performance of their duties and/or failure to identify oneself to these persons when requested to do so.

H. Intentional obstruction, which unreasonably interferes with freedom of movement (pedestrian or vehicular) on campus.

I. Entering an athletic contest, dance, social or other College event without the proper credentials for admission (e.g., ticket, identification, invitation).

J. Circulating any advertising media without approval from proper College officials or in a manner that violates or is contrary to policies of Georgia Gwinnett College and state or local law.

K. Unauthorized recordings (audio/visual/other related devices) without permission of the applicable GGC official.

In recognition and support of the First Amendment of the United States Constitution, freedom of expression and academic freedom shall be considered in investigating and reviewing these types of alleged conduct violations.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHIKE UZUEGBUNAM and JOSEPH BRADFORD, Plaintiffs, v. STANLEY C. PRECZEWSKI, et al., Defendants.	)	Civil Action No. 1:16-cv-04658-ELR

UNITED STATES' STATEMENT OF INTEREST

* * * * *

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." In the view of the United States, and for the reasons explained below, Plaintiffs have properly pleaded claims under the First and Fourteenth Amendments—namely, that the speech regulations imposed by Georgia Gwinnett College ("GGC" or "the College") violated Plaintiffs' constitutional rights.

INTEREST OF THE UNITED STATES

The United States has an interest in protecting the individual rights guaranteed by the First Amendment. The right to free speech lies at the heart of a free society and is the "effectual guardian of every other right." Virginia Resolutions (Dec. 21, 1798), *in* 5 THE FOUNDERS' CONSTITUTION, 135, 136 (Philip B. Kurland & Ralph Lerner, eds., 1987). Content-based restrictions on speech in public fora require "the most exacting scrutiny," *Widmar v. Vincent*, 454 U.S. 263, 277 (1981), and state-run colleges and universities are no exception from this rule, *id.* at 267–68.

The United States has a significant interest in the vigilant protection of constitutional freedoms in institutions of higher learning. Congress has declared that "an institution of higher education should facilitate the free and open exchange of ideas." 20 U.S.C. § 1011(a)(2). In recent years, however, concerns have been raised

* * * * *

The United States does not advance any position as to whether the Plaintiffs' claims are moot or whether qualified immunity applies to the individual claims. Taking the facts alleged as true, the United States is satisfied, for the reasons below, that Plaintiffs have stated claims for violations of the First and Fourteenth Amendments.

ARGUMENT

The free speech protections of the First Amendment are as applicable to private religious speech as they are to secular speech, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760

(1995), and are as applicable to state-run universities as they are to any other government institution, *Healy v. James*, 408 U.S. 169, 180 (1972). Plaintiffs' allegations, if proven, demonstrate that GGC's speech policies and practices were not content-neutral, enshrined an impermissible heckler's veto, and did not satisfy strict scrutiny. Plaintiffs therefore have stated a claim under the First Amendment. Plaintiffs also have stated a claim under the Fourteenth Amendment because the College's content-based policies and practices discriminate against Plaintiffs' religious message. *See Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).[1]

I. PLAINTIFFS' COMPLAINT ADEQUATELY PLEADS FIRST AND FOURTEENTH AMENDMENT CLAIMS AGAINST GGC'S CONTENT-BASED SPEECH PRACTICES

Under the First Amendment, the power of the government to regulate speech on college and university campuses is contingent on the character of the forum in question. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) ("[t]he existence of a right of access to public property and the standard by which limitations upon such right must be evaluated differ depending on the character of the property at issue"); *United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000) ("an initial step in analyzing whether the regulation is unconstitutional is determining the nature of the

[1] The United States also notes that Plaintiffs have challenged the Speech Zone Policy's authorization requirement as an unconstitutional prior restraint. Doc. 13 ¶¶ 379–83; *Forsyth Cty.*, 505 U.S. 123 at 133–34.

government property involved"). A "public forum" is "public property which the state has opened for use by the public as a place for expressive activity," either by tradition or designation. *Perry Educ. Ass'n*, 460 U.S. at 45. In a "public forum," the government may impose "[r]easonable time, place, and manner restrictions . . . but any restriction based on the content of the speech

* * * * *

protest against affirmative action; a pro-life student may feel emotional distress when a pro-choice student distributes Planned Parenthood pamphlets on campus." *Id.* at 251. The university's policy was "not based on the speech at all" but "on a *listener's reaction to speech*" and therefore violated the First Amendment. *Id.* (emphasis added).

GGC's sole stated justification for shutting down Mr. Uzuegbunam's religious expression in the Speech Zone fails for precisely the same reason: it rests on "a listener's reaction to speech," not the speech itself. *Id.* According to the Complaint, GGC's rationale for its "fire and brimstone" prohibition was that Mr. Uzuegbunam's religious message generated complaints from other people that he was disturbing "their peace and tranquility." Doc. 13 ¶ 289. Indeed, the campus police officer explained that "the only reason" he interrupted Mr. Uzuegbunam's speaking "was because GGC officials had received calls from people complaining about his expression." *Id.* ¶ 271; *see also id.* ¶¶ 268–72, 289–90.

Thus, GGC officials branded Mr. Uzuegbunam's speech as "disorderly conduct" under the Student Code of Conduct because it "disturb[ed] the peace

and/or comfort of person(s).” Doc. 13, Ex. 9 at 26; Doc. 13 ¶¶ 289–90. This “mere desire to avoid the discomfort and unpleasantness” among listeners is not a compelling government interest, let alone sufficient to justify the content-based restriction of Mr. Uzuegbunam’s religious speech.

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CHIKE UZUEGBUNAM, *et al.*, *Plaintiffs*, v. **STANLEY C. PRECZEWSKI**, *et al.*, *Defendants*.	Case No. 1:16-cv-04658-ELR **THE HONORABLE ELEANOR L. ROSS**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR MOOTNESS

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motivated policy changes do not moot Mr. Bradford's injunctive claims, including how they perpetuate the Speech Zone Policy's most glaring constitutional flaws. *See* Pls.' Resp. in Opp'n to Defs.' Mot. to Dismiss for Mootness ("Pls.' Mootness Resp.") at 3–25, Apr. 24, 2017, ECF No. 27.

In short, Mr. Bradford's injunctive claims remain live. Mr. Uzuegbunam's graduation has no practical effect on this case.

II. Plaintiffs pleaded claims for monetary damages (not just nominal damages) that are not moot, particularly on a motion to dismiss.

Defendants' damages argument rests on one case. *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017). But that decision does not control here as (1) Plaintiffs pleaded claims for actual damages and (2) Defendants oversimplified its holding. Regardless of its application, Plaintiffs would have the chance to amend the Complaint to clarify the relief sought. So once again, Defendants' latest brief changes nothing about this case.

First, *Flanigan's Enterprises* involved plaintiffs who "did not request actual or compensatory damages." *Id.* at 1263 n.11. It recognized that a "claim for actual damages maintains the live controversy." *Id.* at 1270 n.23. It only governs when plaintiffs seek solely nominal damages. *Id.* That situation is not before this Court as Plaintiffs pleaded compensatory damages claims.

Plaintiffs repeatedly pleaded that they "are entitled to an award of monetary damages," Compl. ¶¶ 417, 434, 450, 469, and to "damages in an amount to be determined by the evidence and this Court." *Id.* ¶¶ 418, 435, 451, 470. "Monetary damages" does not refer exclusively to the nominal variety. *See, e.g., Quinlan v. Pers. Transp. Servs. Co.*, 329 F. App'x 246, 249 (11th Cir. 2009) (using "monetary damages" to refer to compensatory and punitive damages); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198 (11th Cir. 2007) (same). And as nominal damages serve a symbolic function, *Flanigan's Enters.*, 868 F.3d at 1268, their amount is not determined by the evidence presented in court. Hence, Plaintiffs stated claims not just for nominal damages, but also for actual, compensatory damages—particularly when

this Court construes the Complaint "broadly," *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007), and "in the light most favorable to [P]laintiff[s]." *Id.*; *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012); *see also Gates v. Khokar*, 884 F.3d 1290, 1296 (11th Cir. 2018) (noting courts must "draw[] all reasonable inferences in the plaintiff's favor" on a motion to dismiss). Thus, *Flanigan's Enterprises* does not control, and these claims remain live.

Defendants ignore these paragraphs and focus solely on the prayer for relief. *See* Defs.' Mootness Suppl. at 5 (citing Compl. at 79). But the prayer does not limit the types of relief Plaintiffs seek. FED. R. CIV. P. 54(c) notes that courts must "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Here, in addition to Plaintiffs having pleaded such relief for compensatory damages, federal courts "should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65 (1978). The prayer for relief can provide insight on the types of claims being brought, but "its omissions are not in and of themselves a barrier to redress of a meritorious claim." *Id.* at 66.

Where allegations are placed in the complaint does not matter as courts must "read the complaint as a whole." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1252 n.11 (11th Cir. 2005). For example, a district court dismissed a case, saying the plaintiff "failed to specify his damages" because the prayer for relief just cited a statute and sought "any

and all other relief that the Court deems just and appropriate." *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118, 1123 (11th Cir. 2006). The Eleventh Circuit reversed because each count requested various remedies. *Id.* Under notice pleading, this stated claims for "for all of the available damages." *Id.*[1]

Here, each count pleaded compensatory damages. Compl. ¶¶ 417–18, 434–35, 450–51, 469–70. The prayer for relief also seeks "[a]ll other further relief to which Plaintiffs may be entitled." Compl. at 79 ¶ I. Thus, like the *Levine* plaintiff, Plaintiffs stated claims for all available types of damages. Defendants cannot

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[1] Other federal circuits have similarly ruled that the prayer for relief does not curtail the available types of relief. *See, e.g., Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1108–09 (8th Cir. 2011) ("The sufficiency of a pleading is tested by the Rule 8(a)(2) statement of the claim for relief and the demand for judgment is not considered part of the claim for that purpose, as numerous cases have held. Thus, the selection of an improper remedy in the Rule 8(a)(3) demand for relief will not be fatal to a party's pleading if the statement of the claim indicates the pleader may be entitled to relief of some other type." (quoting WRIGHT & MILLER, 5 FED. PRAC. & PROC. CIV. § 1255 (3d ed. 2004)); *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) ("[T]he demand is not itself a part of the plaintiff's claim . . . and so failure to specify relief to which the plaintiff was entitled would not warrant dismissal under Rule 12(b)(6) (dismissal for failure to state a claim)." (internal citations omitted)); *Kan. City, St. L. & Chi. R.R. Co. v. Alton R.R. Co.*, 124 F.2d 780, 783 (7th Cir. 1941) ("The prayer may be looked to to help determine the relief to which the appellant is entitled, but it is not controlling."); *Pension Benefit Guar. Corp. v. E. Dayton Tool & Die Co.*, 14 F.3d 1122, 1127 (6th Cir. 1994) ("If a pleading provides a defendant notice of the plaintiff's claims and the grounds for the claims . . . omissions in a prayer for relief do not bar redress of meritorious claims.").

say they did not receive notice simply because these statements were in "another section of the complaint." *Aldana*, 416 F.3d at 1252 n.11. Thus, *Flanigan's Enterprises* does not control; these claims remain live.

These claims also survive qualified immunity as Plaintiffs pleaded facts showing Defendants violated clearly established rights. *Kyle K. v. Chapman*, 208 F.3d 940, 942 (11th Cir. 2000) ("Defendants are entitled to qualified immunity in a Rule 12(b)(6) motion to dismiss only if the complaint fails to allege facts that would show a violation of a clearly established constitutional right."). Plaintiffs pleaded facts showing that Defendants enforced policies against Mr. Uzuegbunam that conferred multiple levels of unbridled discretion, making them viewpoint-based. Their Speech Code, used to silence him, established a heckler's veto. Their Speech Zone Policy, used to stop him, imposed an illegal prior restraint that cannot pass any level of constitutional scrutiny. These are just a few ways these policies violate clearly established law. *See* Pls.' Resp. in Opp'n to Defs.' Mot. to Dismiss Am. Compl. at 8–45, Apr. 7, 2017, ECF No. 22.

Second, Defendants ignore critical nuances on nominal damages. The Eleventh Circuit did not categorically hold that all nominal damages claims are moot once claims for other relief are moot. *Flanigan's Enters.*, 868 F.3d at 1270 n.23 ("Our holding today . . . does not imply that a case in which nominal damages are the only available remedy is always or necessarily moot."). It reiterated that "'[n]ominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual

injury sufficient to entitle him to compensatory damages.'" *Id.* (quoting *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006)). "Thus, where an alleged constitutional violation presents an otherwise live case or controversy, a district court is not precluded from adjudicating that dispute" and awarding nominal damages if actual damages cannot be proven. *Id.*

Here, a live case or controversy remains, with fundamental constitutional rights at stake. In 2016, Defendants silenced Mr. Uzuegbunam, saying he could only speak in two tiny locations on campus provided no one complained. For almost two years (*i.e.*, the rest of his GGC career), his and Mr. Bradford's speech was (and remains) chilled. Once sued, they replaced a policy they knew was flawed (*see* Compl. ¶¶ 197–203) with a new one that perpetuated the same flaws—that still confines student speech to two (now more vague) zones on campus, grants unbridled discretion, and requires students to let officials review in advance any leaflets they want to distribute. Pls.' Mootness Resp. at 16–25. Plaintiffs deserve the opportunity to prove their case. Whether they ultimately receive compensatory damages, *Flanigan's Enterprises* says they may still receive nominal damages. Hence, even those claims are not moot.

Last, any dismissal due to Defendants' supplement would have to be without prejudice. In general, "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), *overruled*

in part by Wagner v. Dae-woo Heavy Indus. Am. Corp., 314 F.3d 541 (11th Cir. 2002).[2] Here, clarifying

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[2] Per *Wagner*, *Bank* does not apply "when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner*, 314 F.3d at 542. Plaintiffs here request leave to amend if the Court deems it necessary.

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Plaintiffs-Appellants

v.

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Defendants-Appellees.

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The Honorable Eleanor L. Ross

BRIEF OF PLAINTIFFS-APPELLANTS

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TRAVIS C. BARHAM
ALLIANCE DEFENDING FREEDOM

KRISTEN K. WAGGONER
TYSON C. LANGHOFER
ALLIANCE DEFENDING FREEDOM

1000 Hurricane Shoals Road N.E.,
Ste. D-1100
Lawrenceville, Georgia 30043
Telephone: (770) 339–0774
Facsimile: (770) 339–6744

440 1st Street, NW,
Ste. 600
Washington, D.C. 20001
Telephone: (202) 393–8690
Facsimile: (202) 347–3622

Attorneys for Appellants

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in the "wrong" place and then because he said the "wrong" thing in the "right" place. A.A.99-132 (first motion to dismiss); A.A.440-73 (second motion). At one point, GGC insisted that the Christian Gospel—a message the First Amendment has protected for centuries—"arguably rose to the level of 'fighting words.'" A.A.119. Throughout, it defended its officials' decision to ratify and enforce a heckler's veto by silencing Mr. Uzuegbunam due to complaints. If the Defendants' conduct were found to be illegal, Mr. Uzuegbunam could be entitled to compensatory damages. *See supra* Argument I.A.

Second, awarding nominal damages here "would have a practical effect on the parties' rights or obligations," and thus, Plaintiffs' claims are not moot and "the exercise of jurisdiction is plainly proper." *Flanigan's*, 868 F.3d at 1263-64. Explaining the "practical effect" that would prevent mootness, *Flanigan's* pointed to nominal damages claims for trespass, where the parties "wish to obtain a legal

determination of a disputed boundary," and for libel, where the parties seek "to vindicate their reputations by proving that the supposed libel was a falsehood." *Id.* at 1263 n.12 (quotations & citations omitted). Plaintiffs' claims are akin to both.

Again, Plaintiffs sued because GGC officials repeatedly censored Mr. Uzuegbunam, first because he was outside the tiny "speech zones" and then because someone complained. Plaintiffs' nominal damages claims would determine the disputed boundary over how public colleges can restrict student expression. Can they confine student speech to small, arbitrary zones on campus? Can they effectuate a heckler's veto by silencing complaint-inducing speech? Regardless of the current policies, these are questions that will recur. People will doubtlessly complain about what others say. So officials may try to do the same things, relying on different policies or no policies at all. Thus, determining the legal boundaries of where students may speak and what they may say on campus would have a practical, clarifying effect on all parties—students and officials. Especially given qualified immunity's "clearly established" analysis, determining the boundaries of students' freedoms and when officials have trespassed on them is a critical practical effect.

Moreover, a nominal damages award would answer an important question: Did GGC officials violate Mr. Uzuegbunam's rights when they censored him twice? GGC officials publicly silenced him twice—in full view of fellow students. The effect of this is unmistakable, declaring to all watching that he had misbehaved. This besmirching of his reputation

has continued here, where GGC has claimed he was uttering "fighting words," A.A.119, and a "divisive message," A.A.119, that "bothered" students and "was disruptive." A.A.460. Just as "proving that [a] supposed libel was a falsehood" constituted a sufficiently practical effect to ward off mootness, *Flanigan's*, 868 F.3d at 1263 n.12, proving that GGC's actions violated Mr. Uzuegbunam's rights would as well.

In sum, the district court erred by applying only portions of *Flanigan's*. That decision "does not foreclose the exercise of jurisdiction in all cases where a plaintiff claims only nominal damages." *Id.* Here, a nominal damages award would have "practical effect[s]," declaring Plaintiffs' rights and Defendants' obligations. *Id.* at 1263. *Flanigan's* does not moot Plaintiffs' nominal damages claims, and the district court erred in holding otherwise.

II. *Flanigan's* was wrongly decided and should be overruled.

In declaring Plaintiffs' nominal damages claims moot, the district court relied exclusively on *Flanigan's*, A.A.720-24—a decision that conflicts with long-established precedent from the Supreme Court and almost every other circuit and lacks any legal grounding. It should be reversed and *Flanigan's* overturned.

A. *Flanigan's* conflicts with Supreme Court precedent.

Flanigan's focuses on what the Supreme Court allegedly did *not* say and ignores what it *has* said. *Flanigan's*, 868 F.3d at 1266 ("[N]othing that it held,

or even said, controls…."); *id.* at 1267 ("In the absence of any guidance from the Supreme Court…."). But what the Supreme Court *has* said makes it clear that nominal damages claims remain live.

1. In general, damages claims prevent mootness.

The Supreme Court has repeatedly ruled in many different contexts that damages claims prevent mootness. A congressman's damages claim for back pay "remains viable even though he has been seated" and ensured a live case. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). A prisoner's "transfer did not moot the damages claim" arising from his solitary confinement, meaning there was no "sufficient ground for affirming the

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TRAVIS C. BARHAM
ALLIANCE DEFENDING FREEDOM

KRISTEN K. WAGGONER
TYSON C. LANGHOFER
ALLIANCE DEFENDING FREEDOM

1000 Hurricane Shoals Road N.E.,
Ste. D-1100
Lawrenceville, Georgia 30043
Telephone: (770) 339–0774
Facsimile: (770) 339–6744

440 1st Street, NW,
Ste. 600
Washington, D.C. 20001
Telephone: (202) 393–8690
Facsimile: (202) 347–3622

Attorneys for Appellants

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ARGUMENT

I. *Flanigan's* was wrongly decided and should be overruled.

In mooting Plaintiffs' nominal damages claims, the district court relied exclusively on *Flanigan's*, A.A.720-24—a decision that conflicts with long-established precedent from the Supreme Court and almost every circuit, lacks legal grounding, and should be overturned.

A. *Flanigan's* conflicts with Supreme Court precedent.

1. Damages claims generally prevent mootness.

The Supreme Court has repeatedly ruled that damages claims prevent mootness. A congressman's damages claim for back pay "remains viable even though he has been seated." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). A prisoner's "transfer did

not moot the damages claim" arising from his solitary confinement. *Boag v. MacDougdall*, 454 U.S. 364, 364-65 (1982); *Bd. of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987) ("The action is not moot …. [because] the complaint sought damages…."). The Court does not distinguish among sub-species of damages.

This holds true when a policy changes mid-litigation. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 182 n.1 (2007) (claims remained live "[b]ecause petitioners sought money damages for respondent's alleged violation of the prior version of § 760"); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (challenge to race-based school assignments continued because one plaintiff "sought damages"); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 608-09 (2001) (if plaintiff maintains a damages claim, "defendant's change in conduct will not moot the case"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) (challenge to an expired ordinance remained a "live controversy" due to damages claim); *Ellis v. Brotherhood of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 442 (1984) (challenge to expired program remained live—though injunctive claims were mooted—where petitioners "sought money damages"); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568-69, 571 (1984) (after layoffs and demotions reversed, lawsuit not moot because of damages claim).

Here, Plaintiffs' "[c]laims for damages [based on the College's censorship] … automatically avoid mootness" and "should be denied on the merits, not on grounds of mootness." 13C WRIGHT & MILLER, FED.

PRAC. & PROC. JURIS. § 3533.3 (3d ed. 2018). *Flanigan's* should be overturned.

2. Nominal damages claims vindicate the priceless and should not be mooted as worthless.

Under *Flanigan's*, "nominal damages is not the type of 'practical effect' that should, standing alone, support Article III jurisdiction." *Flanigan's*, 868 F.3d at 1270. This renders such claims worthless. When combined with other relief, they serve no purpose. Alone, they cannot prevent mootness. That result ignores controlling law.

Those who passed the Civil Rights Act of 1871 knew federal courts had jurisdiction over solitary nominal damages claims. An opponent observed: "The deprivation may be of the slightest conceivable character,

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2. Two circuits briefly adopted—and quickly rejected—*Flanigan's* position.

While *Flanigan's* stands alone in mooting unaccompanied nominal damages claims, it is not the first to do so. The Fifth Circuit mooted a high school graduate's nominal damages claim against a subsequently rescinded policy. *Ward v. Santa Fe Indep. Sch. Dist.*, 2002 WL 494510, *1 (5th Cir. Mar. 14, 2002). Weeks later, it reversed course, concluding its nominal damages ruling "was in error" under *Carey*. *Ward v. Santa Fe Indep. Sch. Dist.*, 2002 WL 753502, *1 (5th Cir. Apr. 9, 2002).

The Ninth Circuit similarly dismissed a RLUIPA appeal as moot after the church moved. *Praise Christian Ctr. v. City of Huntington Beach*, 352 F. App'x 196, 198 (9th Cir. 2009). On rehearing, it reversed course, holding a "claim for nominal damages creates the requisite personal interest necessary to maintain a claim's justiciability." *Id.*

No other circuit has embraced *Flanigan's*' notion—implemented here to excuse blatant censorship—that unaccompanied nominal damages claims are moot. This Court should resolve the circuit split and overturn *Flanigan's*.

C. *Flanigan's* relies on two opinions that have no legal force and two misplaced analogies.

Flanigan's primarily rests on two concurrences. *Flanigan's*, 868 F.3d at 1267 n.19 (citing *Freedom from Religion Found., Inc. v. New Kensington Arnold Sch. Dist. ("FFRF")*, 832 F.3d 469, 482-92 (3d Cir. 2016) (Smith, J.,

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Flanigan's next likened nominal damages to declaratory relief, concluding neither has a practical effect sufficient for Article III jurisdiction. *Flanigan's*, 868 F.3d 1268-70. But the Supreme Court has rejected this very analogy, reversing decisions that minimized nominal damages' practical effects and declaring these awards confer prevailing party status. *Farrar*, 506 U.S. at 112. This "actual relief on the merits … materially alters the legal relationship … by modifying the defendant's behavior." *Id.* at 111-12.

This is true for "damages in any amount, whether compensatory or nominal." *Id.* at 113.

A decision that contradicts everything the Supreme Court has said about nominal damages, stands athwart almost every other circuit, and has such tenuous legal grounding should be overturned. Using it to immunize censorship of students on a college campus from review highlights the need for reversal.

CONCLUSION

Two students were unconstitutionally censored in their "marketplace of ideas" where free speech should be celebrated, not quarantined. But the district court mooted their nominal damages claims, relying exclusively on *Flanigan's*—an *en banc* decision that contradicts Supreme Court precedent, conflicts with the rule in every other circuit that had addressed this issue, lacks legal grounding, and should be overturned. Initial *en banc* review is warranted.

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Telephone: (770) 339–0774
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Ste. 600
Washington, D.C. 20001
Telephone: (202) 393–8690
Facsimile: (202) 347–3622

Attorneys for Appellants

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Students often use nominal damages to ensure their freedoms are "scrupulously observed," *Carey*, 435 U.S. at 266, as officials play the clock, knowing graduation will moot equitable claims, or bury illegal actions with new policies. No other circuit has embraced *Flanigan's*' notion—which here excused blatant censorship—that solitary nominal damages claims are moot.[1] This Court should resolve the circuit conflict by overturning *Flanigan's*.

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[1] Two circuits briefly adopted—and quickly rejected—*Flanigan's* position. *Ward v. Santa Fe Indep. Sch. Dist.*, 2002 WL 494510, *1 (5th Cir. Mar. 14, 2002) (mooting nominal damages claim against rescinded policy); *Ward v. Santa Fe Indep. Sch. Dist.*, 2002 WL 753502, *1 (5th Cir. Apr. 9, 2002) (concluding nominal damages ruling "was in error" under *Carey*); *Praise Christian Ctr. v. City of Huntington Beach*, 352 F. App'x 196, 198 (9th Cir. 2009) (reversing decision mooting nominal damages and holding they "create[] the requisite personal interest necessary to maintain a claim's justiciability").

2. No circuit moots nominal damages in as-applied cases.

The panel effectively extended *Flanigan's*' nominal-damages holding to as-applied claims. Op. at 17 n.3. If limited to claims against never-enforced policies, it at least more closely resembles rulings in two circuits. The Eighth mooted nominal damages when plaintiffs challenged a later-amended ordinance in a city they never visited, let alone endured enforcement. *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 684, 687 (8th Cir. 2012). The Fourth Circuit ruled similarly, finding no deprivation when the ordinance "was never enforced against" the plaintiff. *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566, 571-72 (4th Cir. 2007). But even in those circuits, a "request for retrospective relief in the form of nominal damages, based on an alleged unconstitutional … restriction on speech, is not moot." *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (rejecting mootness as plaintiff "might be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures"). Avoiding this distinction, the panel exacerbated the conflict *Flanigan's* created.

A decision that contradicts everything the Supreme Court has said about nominal damages, stands athwart almost every circuit, and lacks legal grounding should fall,[2] especially when it immunizes

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[2] *Flanigan's* rests on two concurrences, *Flanigan's*, 868 F.3d at 1267 n.19, that are not law. *Freedom from Religion Found., Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 486 (3d Cir.

censorship of students from review and blocks them from amending their claims.

II. The panel wrongly applied *Flanigan's* to as-applied claims.

Flanigan's mooted nominal damages claims involving a never-enforced ordinance. This non-enforcement heavily influenced its equitable ruling. *Flanigan's*, 868 F.3d at 1262 ("Appellants … have not suggested that the City ever attempted to enforce the sanctions attending the Ordinance."); *id.* at 1263 ("[I]t has expressly, repeatedly, and publicly disavowed any intent to reenact a provision that it never enforced in the first place.").

It also impacted *Flanigan's*' nominal-damages reasoning. This Court noted the "only injury of which Appellants complained … was the existence of a constitutionally impermissible prohibition." *Id.* at 1264-65. They simply wanted the "removal of the challenged Ordinance provision." *Id.* at 1265. They had no enforcement-related injuries because the eventually-repealed provision was never enforced.

Here, Defendants twice enforced their policies to stop Mr. Uzuegbunam from leafleting, A.A.170-72, and speaking. A.A.173-82. This chilled both students, A.A.183-92, who now seek redress for legal injuries

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2016) (Smith, J., concurring *dubitante*) ("I concede that my concerns about nominal damages and justiciability do not appear to be shared by the majority of appellate courts…."). Judge McConnell ruled solitary nominal damages claims are *not* moot, *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1264, 1257-58 (10th Cir. 2004), before outlining his personal views. *Id.* at 1262-71 (McConnell, J., concurring).

they suffered. Their as-applied claims differ from the claims in *Flanigan's*.

The panel said Plaintiffs sought a "new exception." Op. at 17 n.3. Not so. *Flanigan's* addressed its facts; this case's facts differ. *Flanigan's*, being distinguishable, should not control here.

The panel claimed this argument was waived. *Id.* Not so. "Parties can … waive positions and issues on appeal, but not individual arguments." *Sec'y, U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017). On a preserved issue, parties "can make any argument in support of" it and "are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Before the district court, Plaintiffs argued *Flanigan's* should not control. A.A.691 ("But that decision [*Flanigan's*] does not control here…."). While the arguments supporting this position have been refined, the issue was preserved.

Flanigan's should be limited to minimize circuit conflict. Two circuits have mooted nominal damages where there was no enforcement, but not in as-applied cases. *See supra* Argument I.B.3. By not distinguishing between enforced and unenforced policies, the panel exacerbated this Court's conflict with other circuits. It should be overruled.

III. The panel wrongly conflated two instances where nominal damages remain live under *Flanigan's*.

The panel noted *Flanigan's* does not moot all nominal damages. First, "'there are cases in which a judgment in favor of a plaintiff requesting only

nominal damages would have a practical effect on the parties' rights or obligations.'" Second, "'there are situations in which nominal damages will be the only appropriate remedy to be awarded to a victorious plaintiff in a live case or controversy." In each, "jurisdiction is plainly proper." Op. at 14 (quoting *Flanigan's*, 868 F.3d at 1263-64). The first is the "practical effects" exception, exemplified by trespass and libel, *Flanigan's*, 868 F.3d at 1263 n.12; the second, the "consolation prize" where compensatory damages are sought but not proven. *Id.* at 1264 n.13, 1270 n.23.

Plaintiffs satisfied the "practical effects" test. Appellants' Br. at 23-24. Just as trespass cases determine "a disputed boundary," *Flanigan's*, 868 F.3d at 1263 n.12, Plaintiffs' claims would determine if Defendants crossed the constitutional boundary in these enforcement actions. The panel wrongly dubbed this an advisory opinion. Op. at 16. Here, no court need opine on "what the law would be" using hypothetical facts.

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