No. 19-968

IN THE

Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,

Petitioners,

v.

STANLEY C. PRECZEWSKI, JANN L. JOSEPH, LOIS C. RICHARDSON, JIM B. FATZINGER, TOMAS JIMINEZ, AILEEN C. DOWELL, GENE RUFFIN, CATHERINE JANNICK DOWNEY, TERRANCE SCHNEIDER, COREY HUGHES, REBECCA A. LAWLER, AND SHENNA PERRY,

Respondents.

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

BRIEF OF *AMICUS CURIAE* FREDERICK DOUGLASS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

ERIC D. MCARTHUR*
JOHN L. GIBBONS
J. MANUEL VALLE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
emcarthur@sidley.com

Counsel for Amicus Curiae

*Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

The Frederick Douglass Foundation, Inc. ("FDF"), is a public policy and educational organization that favors limited government and the free market as the best tools to address the hardest problems facing our nation. FDF consists of individuals who seek to develop innovative solutions to today's problems with the help of elected officials, university scholars, and community activists. A national organization, FDF has local chapters across the United States.

Especially given FDF's work on university campuses across the country, the organization has an acute interest in ensuring that publicly funded schools remain free from the sort of coercive, unconstitutional speech restrictions petitioners were subjected to here. As FDF's namesake, Frederick Douglass, understood: "Liberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist." Frederick Douglass, A Plea for Freedom of Speech in Boston (Dec. 3, 1860) (available at https://lawliberty.org/frederick-douglass-plea-for-freedom-of-speech-in-boston/). FDF believes that the Eleventh Circuit's anomalous mootness rule effectively makes the right to free speech meaningless in cases where government officials violate civil liberties without causing calculable harm, and then, after being sued, change their unconstitutional policies to avoid legal liability.

Accordingly, FDF writes to offer its perspective on the legal infirmity of the Eleventh Circuit's rule and

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[1] Counsel of record for all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the harmful effects it will have in civil-rights litigation. FDF respectfully urges the Court to reverse the decision below and hold that a claim for nominal damages for a past violation of one's constitutional rights presents a justiciable case or controversy. For "[i]t is just as criminal to rob a man of his right to speak and hear as it would be to rob him of his money." Douglass, A Plea for Freedom of Speech in Boston, *supra*.

SUMMARY OF THE ARGUMENT

This Court has long recognized that "nominal damages . . . are the appropriate means of 'vindicating' rights" when the deprivation does not cause measurable harm. *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11 (1986). Indeed, nominal damages have served precisely this purpose for *centuries* under the common law, which allows parties to sue for nominal damages for violations of their private rights, regardless of whether the violations caused quantifiable damages. The outlier rule that the Eleventh Circuit adopted in *Flanigan's Enterprises, Inc. of Georgia* v. *City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) (en banc), and extended in the decision below, thus represents a departure not just from this Court's jurisprudence, but from bedrock common-law principles that inform the meaning of Article III.

Whether analyzed through the lens of mootness or standing, a claim for nominal damages for a past violation of an individual's constitutional rights presents a justiciable case or controversy under Article III. A violation of an individual's constitutional rights is an actionable injury, and nominal damages are the traditional method of vindicating such injuries. The fact that state officials voluntarily altered an unconstitutional policy during litigation does not change the re-

ality that the past injuries were traceable to their official actions. And nominal damages are not simply "gold stars" given out by courts; they are real damages paid from the defendant to the plaintiff to redress the violation of the plaintiff's rights.

Not only is the Eleventh Circuit's rule wrong, it would undermine the enforcement of civil rights. By requiring dismissal of cases where the violation did not result in provable economic or other quantifiable harm, the rule adopted below would close the courthouse doors on individuals whose civil rights were violated, leaving them without any judicial remedy for a violation of their rights. It would further undermine access to justice by eliminating the prospect of attorney's fees when the plaintiff's lawsuit prompts the defendant to rescind an unconstitutional policy, thereby discouraging attorneys from representing indigent plaintiffs with meritorious claims. And it would hinder the development of the law, depriving public officials of guidance in the execution of their duties and allowing officials who violate individuals' rights to escape accountability for their unconstitutional action.

For these reasons, the Court should reverse the decision below and hold that a claim for nominal damages for the past violation of an individual's constitutional rights presents a justiciable case or controversy.

ARGUMENT

I. A CLAIM FOR NOMINAL DAMAGES FOR A PAST VIOLATION OF AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS PRESENTS A JUSTICIABLE CASE OR CONTROVERSY.

Because respondents changed their unconstitutional speech codes only after having been sued, and because there was never any dispute that petitioners' claims

for declaratory and injunctive relief were justiciable while the policies remained in effect, the question presented in this case sounds in mootness. See Pet. for Cert. at i. Had respondents instead changed their policies before being sued, and had petitioners sought only nominal damages from the outset, the question presented would sound in standing. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (describing the mootness doctrine as "standing set in a time frame"). In either case, however, the fundamental question is the same: Does a claim for nominal damages for a past violation of a person's constitutional rights, by itself, present a justiciable "Cas[e]" or "Controvers[y]" within the meaning of Article III?[2] U.S. Const. art. III, § 2.

It does. A plaintiff asserting a claim for nominal damages for a past violation of his constitutional rights has the requisite personal interest to satisfy each element of the Article III inquiry—(1) injury-in-fact, (2) causation, and (3) redressability. Thus, such claims do not become moot merely because the government has changed the unconstitutional policy pursuant to which the plaintiff's rights were violated.

A. Violations Of An Individual's Constitutional Rights Are Actionable Injuries.

According to the decision below, petitioners "did not allege they suffered any actual injury" because they

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[2] This Court has suggested that mootness and standing may not overlap perfectly, such that some interests that are insufficient to support initial standing may nonetheless be sufficient to defeat mootness. See *Laidlaw*, 528 U.S. at 189–92; but cf. *id.* at 212 (Scalia, J., dissenting) ("[W]hat is required for litigation to continue is essentially identical to what is required for litigation to begin . . . ."). But where, as here, an interest would have been sufficient by itself to support initial standing, there is no question that its continued existence prevents a case from becoming moot.

merely sought nominal damages based "on the abstract injury suffered as the result of the violation of their constitutional rights" rather than on some more concrete injury—*e.g.*, "monetary loss" or "physical pain and suffering." Pet. App. 9a–10a. But the lower court misconstrued what constitutes a cognizable injury. As a matter of historical practice and under this Court's precedent, the deprivation of petitioners' First Amendment rights—the forcible restriction of their liberty to speak—is an injury sufficient to satisfy Article III.

1. This Court has given content to Article III's "Cas[e]" or "Controvers[y]" requirement by looking to the types of cases and controversies that were "traditionally amenable to, and resolved by, the judicial process" at common law. *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co.* v. C*itizens for a Better Env't*, 523 U.S. 83, 102 (1998)). Historically, the direct invasion of a private right—like the right to freedom of speech—would have been actionable in tort without any additional proof of loss or harm. See, *e.g.*, *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 279–86 (2008).

As Justice Thomas's *Spokeo* concurrence elaborated, "[m]any traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." 136 S. Ct. at 1551. Put differently, "[a]n individual who demonstrated the violation of a private right . . . did not have to demonstrate that the violation had resulted in some other factual harm: the violation alone entitled the plaintiff to relief." Hessick, *supra*, at 279.

The paradigmatic example of the common-law rule is the famous eighteenth-century English decision *Entick* v. *Carrington*, which affirmed that "no man can set his foot upon his neighbour's close without his leave; [and] if he does he is a trespasser, though he does no damage at all." (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 275, 291. Indeed, under the traditional rule, such a trespasser was liable for damages—*nominal* damages—even if he improved the land on which he trespassed. 1 *Restatement (First) of Torts* § 163 cmt. d, cmt. e (Am. Law Inst. 1934).

And what was true for trespass was true for many other intentional torts such as trespass to chattels, false imprisonment, and assault. See 1 *Restatement (Second) of Torts* §§ 218 cmt. d, 35(1)(c), 21 cmt. c (Am. Law Inst. 1965). As Justice Story explained, the common law "tolerates no farther inquiry than whether there has been the violation of a right," and, if such a violation is shown, "the party injured is entitled to maintain his action for nominal damages." *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506, 507–08 (C.C.D. Me. 1838) (No. 17,322) (Story, J.).

This rule—that the violation of a private right by itself constitutes an actionable injury—was the bedrock rule of tort law that the United States adopted from the English common-law tradition. See Hessick, *supra*, at 279–86. And petitioners' First Amendment rights are the sort of private rights whose violation would have been actionable at common law without any further inquiry into injury. See *id.* at 280 ("Blackstone explained that private rights included the 'absolute' rights of personal security, life, liberty, and property, as well as 'relative' rights which individuals acquired 'as members of society, and standing in various relations to each other.'" (footnotes omitted) (citing 1 William Blackstone, *Commentaries* *117–41)); *id.* at 286–

87 ("Private rights now include not only those common-law rights that Blackstone enumerated but also those rights created by legislatures. The Constitution also provides private rights." (footnotes omitted)).

Importantly, this does not mean that every constitutional violation is necessarily actionable. Some constitutional protections, such as the structural protections inherent in the separation of powers, do not create private rights. Indeed, Congress itself observed this distinction in Section 1983, which does not create a cause of action for every constitutional violation, but only for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983; see, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002). In creating this cause of action, Congress incorporated common-law tort principles—including the venerable principle that the violation of a private right is, by itself, an actionable injury sufficient to support a claim. See, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 266–67 (1978); *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 727–28 (1999) (Scalia, J., concurring in part and concurring in the judgment).

2. To the extent this Court's Article III precedent is read to require not just the violation of a private right, but also "de facto" harm, it is inconsistent with the historical precedent recounted above.[3] Regardless, the deprivation of petitioners' First Amendment rights was an "injury-in-fact" under this Court's precedent.

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[3] One commentator has argued that *Lewis* v. *Casey*, 518 U.S. 343 (1996), and *Texas* v. *Lesage*, 528 U.S. 18 (1999) (per curiam), required a showing of factual harm over and above a violation of a private constitutional right. See Hessick, *supra*, at 310–17. But that is debatable; both decisions can just as plausibly be read as resting on the conclusion that the rights at issue had not been violated. See *Lewis*, 518 U.S. at 351; *Lesage*, 528 U.S. at 20–21.

Under this Court's standing jurisprudence, standing "requires a concrete injury"—*i.e.*, an injury that is "'real,' and not 'abstract.'" *Spokeo*, 136 S. Ct. at 1548–49; see *id.* at 1548 ("A 'concrete' injury must be '*de facto*'; that is, it must actually exist."). The injury must also be "particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). There can be no dispute that the latter two requirements are met here—petitioners suffered a particularized deprivation of their *own* rights to free speech, and the deprivation has actually and already occurred.

The violations of petitioners' First Amendment rights also inflicted "concrete" injury. There is nothing "abstract" about being compelled by an officer of the state, upon threat of sanction, to cease speaking. When Uzuegbunam was told he must stop speaking about his religion, this was, for all intents and purposes, a restriction of his bodily liberty—a prohibition on the use of his vocal cords, mouth, and tongue. It was in that respect akin to the tort of false imprisonment or to a Fourth Amendment seizure (whereby a person may be physically immobilized without actual physical contact, let alone physical damage). *E.g.*, *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988) (seizure occurs when "a reasonable person would have believed that he was not free to leave" (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion)). Bradford was injured too when he self-censored to avoid punishment. Just as a person is injured when he is prevented from going where he wants to go, he is injured when he is prevented from speaking words he wants to speak—regardless of whether the restriction of his liberty causes any further harm.

Moreover, suppressing speech inflicts a double injury because, in addition to restricting one's bodily liberty, it inflicts dignitary and psychic harms. Because expression and communication are integral to human personality, "[i]t is just as criminal to rob a man of his right to speak and hear as it would be to rob him of his money." Douglass, A Plea for Freedom of Speech in Boston, *supra*. Here, for example, petitioners were prevented from sharing their most fundamental religious beliefs and convictions—beliefs and convictions they felt a religious obligation to share. See Pet. App. 90a (¶¶ 204–205). Although such harms may be intangible, they are no less real and no less concrete than tangible harms. Indeed, this Court expressly recognized in *Spokeo* that "intangible harm" may nevertheless be "concrete," and specifically identified "free speech" as a right whose deprivation would inflict such a cognizable injury. See *Spokeo*, 136 S. Ct. at 1549 (citing *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009)).[4]

Other violations of an individual's constitutional rights also inflict real and concrete, even if intangible, harms. For example, with racial discrimination, the "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the

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[4] The idea that the deprivation of the right to speak is somehow insufficiently harmful runs contrary not only to this Court's standing jurisprudence but also to other related doctrines. For instance, the mere credible *threat* of enforcing an unconstitutional speech restriction is enough to give a plaintiff the right—pre-enforcement—to challenge that restriction. See *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2342–43 (2014). And the threatened loss of a right to speak constitutes "irreparable harm" sufficient, by itself, to warrant injunctive relief. See *Elrod* v. *Burns*, 427 U.S. 347, 373–74 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

disfavored group as 'innately inferior' . . . can cause serious non-economic injuries." *Heckler* v. *Mathews*, 465 U.S. 728, 739–40 (1984) (quoting *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982)). Thus, a person who is detained based on unlawful racial profiling suffers a real, concrete injury—even if the detention is brief and causes no compensable harm. And an applicant who is denied admission to a public university based on his race suffers a real, concrete injury—even if the applicant would have attended a different university in any event. See *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (denial of equal treatment in and of itself can be a sufficient injury for standing).

To be sure, there may be cases where the violation of a constitutional right does not necessarily inflict a separate factual harm—as where one is denied procedural due process but the additional process would have made no difference to the ultimate outcome. See *Carey*, 435 U.S. at 266–67. Such a case may require a court to decide whether a showing of factual harm, over and above the violation of a private right, is necessary to establish an Article III case or controversy. As discussed above, the history of the common law, on which Article III is based, demonstrates that, when private legal rights are violated, no such showing is required.

Regardless, under any test, the petitioners here have sufficiently alleged that they suffered actionable injuries when they were prevented from speaking in violation of their First Amendment rights.

B. The Change Of An Unconstitutional Policy Does Not Obviate Causation For Past Violations Of Constitutional Rights.

Little need be said about causation. The revocation of the challenged policies does not change the fact that the injuries discussed above are "fairly . . . trace[able]

to the challenged action." *Lujan*, 504 U.S. at 560–61 (omission and alteration in original) (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Petitioners seek redress for *completed* constitutional violations—for what happened in the past and not what may happen in the future. The policies' revocation cannot sever the causal link between respondents' past enforcement of those policies and the harms petitioners suffered.

C. Nominal Damages Provide Judicial Redress For Past Violations Of Rights.

The third requirement for Article III standing is "redressability"—that is, there must be "a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103–04. The Eleventh Circuit held that "the only redress" nominal damages provide is "judicial validation" insufficient to maintain a live controversy. See *Flanigan's*, 868 F.3d at 1268. That conclusion is legally and factually wrong. Nominal damages historically were the appropriate redress for violations of private rights unaccompanied by compensable monetary damages. And they force the defendant to provide real, tangible relief to the plaintiff.

1. At common law, a claim for nominal damages was the standard remedy for legal violations that did not cause compensable monetary loss. In those circumstances, nominal damages were not some second-best, partial remedy; nominal damages were *the* redress to which the wronged party was entitled. See Hessick, *supra*, at 284. As Justice Story expounded, echoing Chief Justice Marshall's opinion in *Marbury*, "wherever there is a wrong, there is a remedy to redress it; . . . and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." *Webb*, 29 F. Cas. at 507; see also *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("where there is a

legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded" (quoting 3 William Blackstone, *Commentaries* *23)).

This Court's cases addressing the significance of nominal damages affirm these common-law principles. In *Memphis Community School District*, for example, this Court held that "nominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights" when the deprivation does not cause compensable harm. 477 U.S. at 308 n.11. "By making the deprivation of such rights actionable for nominal damages without proof of actual injury," this Court has explained, "the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266.

In short, an award of nominal damages is not mere "judicial validation," but full vindication, in the legal sense, of the private right that has been violated—vindication, moreover, that is integral to "organized society" and the rule of law. *Id.*

2. Nominal damages also provide real, tangible redress. They involve a court judgment requiring real money to be paid by the defendant to the plaintiff in recognition of past wrongs. See *Farrar* v. *Hobby*, 506 U.S. 103, 113 (1992) ("A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay."); cf. *Steel Co.*, 523 U.S. at 106–07 (injury is *not* redressed where civil fines are paid to the government rather than to the plaintiff).

The resistance to recognizing that nominal damages provide redress arises from the fact that nominal damages are small. Suppose, for example, that Congress—

recognizing that the value of constitutional rights is not readily reducible to monetary terms but is certainly not zero—created a statutory damages remedy under Section 1983 of, say, $1,000 for each violation of a person's constitutional rights. In that hypothetical event, there would seem to be no question that a judgment awarding the plaintiff $1,000 in statutory damages would satisfy the redressability requirement.

But there is no difference of constitutional dimension between $1 and $1,000. After all, "[o]ne dollar is not exactly a bonanza, but it constitutes relief on the merits." *Farrar*, 506 U.S. at 116 (O'Connor, J., concurring). And courts cannot refuse to decide cases they deem insufficiently significant. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). Section 1983's mandatory text—which provides that state officers who deprive a person of his constitutional rights "*shall be liable* to the party injured," 42 U.S.C. § 1983 (emphasis added)—is perfectly clear that courts have no discretion to carve out some sort of abstention doctrine based on judicial disdain for "parties' right to a single dollar." *Flanigan's*, 868 F.3d at 1270.

Nor is there any principled legal basis for suggesting that nominal damages are meaningless simply because they remedy *intangible* harms or because they offer only *partial* redress for those harms. Other standard measures of damages, such as damages for pain and suffering from a traumatic injury or damages for loss of consortium following the wrongful death of a spouse, likewise remedy harms that are impossible to quantify in dollars and cents. Cf. *Lukhard* v. *Reed*, 481 U.S. 368, 382–83 (1987) (plurality opinion) ("Compensating for the noneconomic inequities of life is a task

daunting in its complexity . . . ."). Nor could those measures of damages ever fully make up for the loss of a limb or of a loved one, any more than the payment of damages can fully recompense—other than by vindicating a person's rights—a constitutional injury. But that is no reason to find those damages awards meaningless or insufficient to support a live controversy.

Indeed, the Eleventh Circuit's redressability analysis cannot be reconciled with the fact that courts, including the Eleventh Circuit, frequently *do* redress constitutional and other injuries with nominal damages alone. See *Flanigan's*, 868 F.3d at 1270 n.23. The court's basis for distinguishing these myriad cases—that the plaintiffs in those cases *also* sought compensatory damages—is incoherent. By the court's own logic, those cases should have been dismissed as moot as soon as it was determined that actual damages were unavailable. See *id.* at 1273 (Wilson, J., dissenting) (pointing out that, under the majority's logic, "whenever nominal damages are the last remedy still in play, no matter how late in the case, the case is moot").

If nominal damages by themselves were insufficient to sustain a case or controversy, then federal courts sitting in diversity would have to dismiss state-law tort cases for lack of jurisdiction if the plaintiff sought only nominal damages from the outset or if the court determined that the plaintiff was not entitled to any other remedy. But judgments awarding only nominal damages are routine. See Hessick, *supra*, at 286 & n.55. And there is no basis to adopt a different rule for "constitutional torts" under Section 1983. Constitutional rights are at least as valuable as the private rights protected by tort law. They are certainly "worth a dollar." *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 305 (2008) (Roberts, C.J., dissenting).

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Petitioners' claims for nominal damages for past violations of their constitutional rights satisfy each of the requirements for an Article III case or controversy. The violations inflicted actionable injuries; the injuries were caused by respondents; and they would be redressed by an award of nominal damages. Petitioners' claims for nominal damages were justiciable from the start, separate and apart from their claims for prospective relief; and they remain so despite the revocation of the unconstitutional policies pursuant to which petitioners' rights were violated. The case is not moot.

II. THE ELEVENTH CIRCUIT'S ERRONEOUS RULE WOULD FRUSTRATE THE ENFORCEMENT OF CIVIL RIGHTS.

In addition to being legally erroneous, the Eleventh Circuit's rule would make it more difficult for individuals to enforce their civil rights. Violations of an individual's civil rights do not always inflict provable, quantifiable harm, separate from the violation itself. Under the Eleventh Circuit's rule, however, a person who suffered such a violation could not even get in the courthouse door if the violation was a one-time, past action that did not give rise to a claim for prospective relief. And individuals, like petitioners, who bring claims for prospective relief would be deprived of any judicial remedy for completed violations of their rights if the defendants changed their unconstitutional policies before the case could be litigated to judgment.

This result—in which courts are powerless to provide any remedy at all for proven violations of civil rights—is anathema to our constitutional tradition and turns the role of the judiciary on its head. As James Madison explained when he introduced what would eventually become the Bill of Rights, he envisioned that "independent tribunals of justice will consider themselves in a peculiar manner the guardians

of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Congress 439 (1789) (Joseph Gales ed., 1834).

The harmful effects of the Eleventh Circuit's rule would extend well beyond the suppression of students' free-speech rights on campus. It would also close the courthouse doors to individuals who seek to enforce their constitutional and statutory rights to racial equality—"the only principle which can . . . give peace, strength and security to the Republic." Frederick Douglass, Composite Nation, Lecture in the Parker Fraternity Course 8 (1867) (on file with the Library of Congress), https://bit.ly/3hyg87A. For example, many forms of unlawful racial discrimination—such as a racially motivated stop-and-frisk or traffic stop—may not cause provable or quantifiable economic injury. But the dignitary and psychic harms that result when officers of the state subject citizens to unequal treatment on the basis of their race are no less real and no less worthy of judicial redress than other harms. For such individuals, a claim for nominal damages may be the only option they have to enforce their civil rights.

The Eleventh Circuit's rule would further frustrate enforcement of individuals' civil rights by undermining an essential tool that Congress provided to facilitate their enforcement—the availability of attorney's fees. See 42 U.S.C. § 1988. Attorney-fee awards provide the necessary economic incentives for attorneys to represent poor or disadvantaged Section 1983 plaintiffs, in order to address critical access-to-justice shortages. See *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 559 (2010) ("Section 1988 serves an important

public purpose by making it possible for persons without means to bring suit to vindicate their rights."); see also Legal Servs. Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf ("86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.").

In a case like this one, where the plaintiff's lawsuit prompts the defendant to rescind an unconstitutional policy, the Eleventh Circuit's rule would prevent the recovery of attorney's fees, even when the plaintiff had a meritorious claim and would have been a "prevailing party" entitled to fees had the case been litigated to judgment. See *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (rejecting the "catalyst theory" for prevailing-party status and requiring a plaintiff to receive at least some relief on the merits to recover fees). This would make it more difficult for indigent plaintiffs to secure legal representation. Lawyers whose only hope of compensation is an award of attorney's fees may hesitate to take on even meritorious cases if they know that, after they have devoted the time and effort to file and prosecute a lawsuit, the defendant can unilaterally moot the case and eliminate the possibility of attorney's fees. Conversely, allowing those claims to proceed to final judgment—for nominal damages—would allow civil-rights attorneys to obtain fees, preserving a critical incentive driving civil-rights litigation. See *id.* at 604 ("We have held that even an award of nominal damages suffices [for prevailing-party status].").[5]

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[5] True, not all nominal-damages awards will warrant attorney's fees. See *Farrar*, 506 U.S. at 115 (1992). But those cases are

Finally, by preventing meritorious claims from being litigated to judgment, the Eleventh Circuit's rule would hinder judicial elucidation of the law. This, in turn, would exacerbate the sometimes harsh effects of qualified immunity, which can prevent plaintiffs whose civil rights were violated from recovering damages when the law was not sufficiently clear. See, *e.g.*, *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 589–90 (2018). And it would deprive public officials of needed guidance as to their legal obligations. When cases like this one are dismissed without a judicial determination of the parties' rights and liabilities, state officials may, in the gray areas, continue to operate without accountability. Allowing claims for nominal damages to go forward thus helps ensure that state officials do not get "one free pass at violating your constitutional rights." *Flanigan's*, 868 F.3d at 1275 (Wilson, J. dissenting).

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typically ones where—unlike here—the plaintiffs alleged significant compensatory damages but were awarded only nominal damages after failing to prove their central theory of liability. See *id.* at 114–15. Where nominal damages are one of the principal forms of relief sought, a prevailing plaintiff should be entitled to fees. See *id.* at 114 ("'[T]he most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 436 (1983))). Perversely, the Eleventh Circuit's incoherent rule (under which nominal damages keep a case alive only if the plaintiff also sought, but failed to prove, compensatory damages) preserves claims that should, under *Farrar*, result in no fee awards, but dooms those that should result in significant ones.

CONCLUSION

For these reasons, the Court should reverse the judgment below and hold that a claim for nominal damages for the past violation of an individual's constitutional rights presents a justiciable case or controversy.

Respectfully submitted,

ERIC D. MCARTHUR*
JOHN L. GIBBONS
J. MANUEL VALLE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
emcarthur@sidley.com

Counsel for Amicus Curiae

September 29, 2020 *Counsel of Record