No. 19-968

IN THE SUPREME COURT OF THE UNITED STATES

CHIKE UZUEGBUNAM, ET AL.,

Petitioners,

v.

STANLEY C. PRECZEWSKI, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE CHILD EVANGELISM FELLOWSHIP, INC. IN SUPPORT OF PETITIONERS

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***"If there is any chance of money changing hands, [the] suit remains alive." Mission Prod. Holdings, Inc. v. Technology, LLC*, 139 S. Ct. 1652, 1660 (2019) (emphasis added)**

INTEREST OF AMICUS[1]

Amicus Curiae, Child Evangelism Fellowship, Inc. ("CEF"), is an international non-profit organization that provides faith-based programs for children. Among the programs administered by CEF is a weekly after-school enrichment program, the Good News Club, which is held on public school campuses offering character-building instruction from a religious perspective. In numerous jurisdictions, CEF has successfully challenged school policies that have denied equal access for its Good News Clubs in violation of the First Amendment and Supreme Court precedent. In fact, CEF successfully litigated the seminal precedent mandating equal treatment for after-school enrichment programs that offer public school students character-building programming from a religious perspective. *See Good News Clubs v. Milford Cent. Sch.*, 531 U.S. 98 (2001).

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents have filed blanket consents to the filing of Amicus Briefs in favor of either party or no party.

CEF has also been successful in having this Court's *Good News Club* precedent expanded in Circuit Courts across the Country. *See, e.g.*, *Child Evangelism Fellowship of N.J., Inc. v. Stafford Tp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 373 F.3d 589 (4th Cir. 2004); *Child Evangelism Fellowship of S.C. v. Anderson Sch.. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006); *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996 (8th Cir. 2012); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994); *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004). CEF has also been successful in vindicating the rights of its after-school program in numerous federal district courts throughout the Country.

As CEF is often discriminated against in the provision of its after-school programs, it is frequently required to seek injunctive and declaratory relief, as well as nominal damages, from Article III courts to vindicate its cherished First Amendment right to be treated equally with other nonreligious programs of like kind. Yet, in some cases, public school districts may change (and indeed routinely change) policies during the middle of litigation in a flagrant attempt to moot CEF's claims for equitable relief. In those cases, CEF has still been able to vindicate the violation of its cherished First Amendment liberties by pursuing its claims for nominal damages. The Eleventh Circuit's decision

below, and its previous decision in *Flannigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) (en banc), holding that nominal damages claims alone are insufficient to maintain a live justiciable controversy, threaten to undermine two centuries of precedent firmly holding that every violation of a party's legal rights deserves a cognizable legal remedy. Indeed, courts "will not suffer a wrong without a remedy." *Indep. Wireless Tele. Co. v. Radio Corp. of Am.*, 269 U.S. 459, 472 (1926) (quoting 1 Pomeroy's Equity Juris. (4th ed.) §§423, 424)). Yet, countenancing the Eleventh Circuit's decision below will impose precisely this injury on CEF and countless other similar organizations that suffer unconstitutional policies in an attempt to secure a remedy, but are left wanting when the government attempts to avoid an unfavorable judgment by changing course during the litigation.

CEF submits this brief in support of Petitioners and requests that this Court reject the rationale of *Flannigan's* and adopt the view of the overwhelming majority of Circuit Courts which have held that nominal damages claims prevent a challenge from becoming moot and allow a party who suffered past unconstitutional injury to remedy that violation.

SUMMARY OF ARGUMENT

Damages are a remedy for past violations of constitutional rights and completed injuries. Such retrospective relief is not subject to mootness simply because the original policy or statute inflicting the injury for which relief is sought no longer exists. Damage, once done, cannot be undone. Thus, damages – including nominal damages – do not become moot once an unconstitutional policy is voluntarily rescinded in the midst of a constitutional challenge. Were it otherwise, those inflicted with constitutional injury would be subject to an anomaly of the law, namely, a right without a remedy. Such is not the law. Indeed, to find that a nominal damages claim is moot post-constitutional injury would ignore the vital watchman role nominal damages play in the Constitution's critical regime and would vitiate a critical deterrent to unconstitutional legislation and government action.

The Eleventh Circuit decisions below are in direct conflict with this Court's precedent and the virtually universal agreement among the Circuit Courts that nominal damages alone survive mootness, particularly in First Amendment cases. That a nominal-damages claim alone survives mootness in First Amendment cases has also been recognized in secondary education context. Amicus Curiae Child Evangelism Fellowship respectfully requests that this Court reverse the Eleventh Circuit and retain the vital protection that nominal damages provide to parties suffering injury to their cherished constitutional liberties.

ARGUMENT

The Eleventh Circuit's decision below and in *Flanigan's* are outliers that diminish cherished First Amendment freedoms, prevent CEF and other injured parties from receiving a legal remedy for past constitutional violations, and turn two centuries of precedent on its head. This Court should not allow this vitally important tool in constitutional jurisprudence to be so easily cast aside. Although a claim solely for injunctive relief can be rendered moot by a change in the defendant's behavior, claims for nominal damages present actual cases or controversies that hinge upon the inalterable past. *See N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (applying the voluntary cessation doctrine). Accordingly, this Court should stand with its past decisions and the near-universal consensus among the Circuits and hold that claims for nominal damages are alone sufficient to survive a mootness challenge.

I. IT IS AXIOMATIC THAT DAMAGES ARE A REMEDY FOR PAST INJURIES, WHICH – BY DEFINITION – CANNOT BE RENDERED MOOT, AND EXCLUDING ONLY NOMINAL DAMAGES FROM THIS INCONTROVERTIBLE PRINCIPLE IS LEGALLY UNSOUND.

As the Tenth Circuit has articulated succinctly, "**by definition claims for past damages cannot be deemed moot**." *O'Connor v. City & Cnty. of Denver*, 894 F.2d 1210, 1215 (10th Cir. 1990) (quoting *Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Cons. Dist.*, 739 F.2d 1472, 1479 (10th Cir. 1984)) (emphasis added). *See also Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1268 (10th Cir. 2004) (McConnell, J., concurring). This is true because "[m]oney damages are probably the purest and most recognizable form of **retrospective** relief." *Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998) (emphasis added). *See also Frew ex rel. Frew v. Hawkins*, 504 U.S. 431, 437 (2004) (noting that the prototypical form of retrospective relief is money damages).

"Nominal damages" are defined as "a trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated." Black's Law Dictionary 473 (10th ed. 2014). **Indeed, "[n]ominal damages are damages awarded for the infraction of a legal right** [and] made as a declaration that the plaintiff's right **has been violated**." *Flanigan's*, 868 F.3d at

1274 (Wilson, J., dissenting) (quoting Charles T. McMormick, *Handbook on the Law of Damages* §20, at 85 (1935)) (emphasis original). As is readily apparent, then, nominal damages relate to a legal wrong that has already been accomplished and completed. And, "the wrong once done cannot be undone." *State v. Marceaux*, 24 So. 611, 615 (La. 1898).

The Eleventh Circuit's decision below stands in stark contrast to an abundance of precedent recognizing the viability of nominal damages claims standing alone at the end of litigation that has otherwise been rendered moot. "Untold numbers of cases illustrate the rule that a claim for money damages is not moot, **no matter how clear it is that the claim arises from events that have completely concluded without any prospect of recurrence**." 13C Charles Alan Wright, et al., *Fed. Prac. & Proc.* §3533.3 (3d ed. 2020 Update) (emphasis added). *See also Grimm v. Gloucester Cnty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, *10 (4th Cir. Aug. 26, 2020) (same). This is so because the damages are intended to remedy the past wrong, not prevent future injury.

It is of no consequence that nominal damages are, by definition, miniscule in monetary value. It is still the exchange of money, and "[i]f there is any chance of money changing hands, [the] suit remains alive." *Mission Prod.*, 139 S. Ct. at 1660. An award of nominal damages unquestionably involves money changing hands. *See, e.g.*, *Kyle v. Patterson*, 196 F.3d 695, 697 (7th Cir. 1999) (noting that "$1 is the norm"

for nominal damages); *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1259 (11th Cir. 2006) (noting that even $100 is considered nominal damages). Nominal damages are thus on equal footing with all other damages claims and should be treated the same. Indeed,

> "**[a] plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages.** 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.

Farrar v. Hobby, 506 U.S. 103, 113 (1992) (emphasis added). That fundamental alteration in the legal relationship between a plaintiff and defendant is not materially altered by a de minimis monetary sum. *Id.* Thus, nominal damages deserve the same status for purposes of maintaining a live controversy as any demand for damages.

II. FINDING THAT A NOMINAL DAMAGES CLAIM ALONE IS NOT JUSTICIABLE UNDERMINES THE VITAL PURPOSE NOMINAL DAMAGES CLAIMS SERVE IN CONSTITUTIONAL LITIGATION.

It is beyond cavil that claims for nominal damages are available to an injured party in constitutional litigation because "the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1986). Providing a remedy for the violation of constitutional rights – even if only in the form of nominal damages – is of the utmost importance and unquestionably in the public interest. Indeed, "[v]indicating First Amendment rights is clearly in the public interest," *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005), because constitutional "rights are not private rights [but] rights of the general public [for] the benefit of all of us." *Machesky v. Bizzell*, 414 F.2d 283, 288-90 (5th Cir. (1969) (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). This is precisely why, throughout American jurisprudence (and before), "[c]ommon law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Id.* And, where equitable relief may not be available for an injured party or where actual damages are impossible to calculate, "nominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of vindicating rights." *Memphis*

Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309 n.11 (1986).

Every Circuit Court in the country has recognized this fundamental principle and the vital role nominal damages play in our Constitutional Republic. *See, e.g.*, *Campose-Orrego v. Rivera*, 175 F.3d 89, 98 (1st Cir. 1999) ("when a jury finds a violation of an 'absolute' constitutional right yet declines to award compensatory damages, the district court should ordinarily award nominal damages"); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999) ("**while the monetary value of a nominal damage award must, by definition, be negligible, its value can be of great significance to the litigant and to society**." (emphasis added)); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1077 (3d Cir. 1990) (noting that a constitutional right "cannot be so ephemeral that it evaporates" when an individual cannot prove actual damages, because "if there was a violation of due process, [the party] is entitled to have that right vindicated" via an award of nominal damages); *Price v. City of Charlotte*, 93 F.3d 1241, 1246 (4th Cir. 1996) ("the rationale for the award of nominal damages being that federal courts should provide some marginal vindication for a constitutional violation"); *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988) ("A violation of constitutional rights is never *de minimis*, a phrase meaning so small or trifling that the law takes no account of it . . . a party who proves a violation of his constitutional rights is entitled to nominal damages even when there is no actual injury."); *Turner v. City*

of Lebanon, 818 F.2d 31 (6th Cir. 1987) (noting that nominal damages are the mechanism by which violations of constitutional rights are vindicated and serve "to protect the integrity" of cherished liberties); *Smith v. City of Chicago*, 913 F.2d 469, 473 (7th Cir. 1990) (noting that "absent a demonstration of actual injury resulting from the constitutional violation, an award of nominal damages would still be appropriate" because of its importance to vindication of constitutional liberties); *Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000) ("The protection of [F]irst [A]amendment rights is central to guaranteeing our capacity for democratic self-government [and] requires an award of nominal damages upon proof of an infringement of the [F]irst [A]mendment right to speak"); *Cummings v. Connell*, 402 F.3d 936, 943-44 (9th Cir. 2005) ("Where a plaintiff proves a violation of constitutional rights, nominal damages must be awarded as a matter of law" to vindicate the rights of the plaintiffs and recognize the importance of cherished liberties); *Searles v. Van Bebber*, 251 F.3d 869, 878 (10th Cir. 2001) ("the rule seems to be that an award of nominal damages is mandatory upon a finding of a constitutional violation" because of their importance to society); *Brooks v. Powell*, 800 F.3d 1295, 1308 (11th Cir. 2015) ("the availability of nominal damages serves a symbolic function: 'it recognizes the importance to society that those rights be scrupulously observed' even if no injury occurs that would justify compensatory damages." (quoting *Carey*, 435 U.S. at 266)); *Doe v. D.C.*, 697 F.2d 1115, 1123 (D.C. Cir. 1983) (holding that nominal damages are "meant to extend the basic

'compensation principle' to *all* constitutional rights" because "constitutional rights protect particular interests and are to be valued solely by reference to those interests" (emphasis original)).

As is plainly evident by the universal agreement among the Circuit Courts, the award of nominal damages for violations of cherished constitutional liberties is well-established, critical to the importance of liberty, and necessary to protect the citizens from the overreach of government officials. Indeed, "[t]he force of stare decisis is at its nadir in cases concerning . . . fundamental constitutional protections," *Alleyene v. United States*, 570 U.S. 99, 116 n.5 (2013), and this Court should not countenance the Eleventh Circuit's casting it aside.

Put simply, "**nominal relief does not necessarily a nominal victory make**." *Farrar v. Hobby*, 506 U.S. 103, 121 (1992) (O'Connor, J., concurring) (emphasis added). Singling out nominal damages as the only form of retrospective, monetary relief that does not withstand a mootness challenge would render nominal damages insubstantial and incapable of providing redress for the vital constitutional liberties they were designed to defend. The Eleventh Circuit's decision below is in error and should be reversed by this Court.

III. CIRCUIT COURTS HAVE CONSISTENTLY HELD THAT NOMINAL DAMAGES ARE ALONE SUFFICIENT TO KEEP A CONTROVERSY JUSTICIABLE AND PREVENT MOOTNESS, PARTICULARLY IN FREE SPEECH CASES UNDER THE FIRST AMENDMENT.

Nominal damages in free speech cases, when claimed in a timely manner, preserve a case from being rendered moot. *E.g.*, *Rentberry, Inc. v. City of Seattle*, 814 F. App'x 309 (9th Cir. 2020); *Alpha Painting & Constr. Co. v. Del. River Port Auth.*, No. 19-2675, 2020 WL 4371283 (3d Cir. July 30, 2020).

The Second Circuit has held that an administration's repeal of a contested policy mooted university students' claims for declaratory and injunctive relief, but not their claim for nominal damages. *Husain v. Springer*, 494 F.3d 108, 113 (2d Cir. 2007) (holding that a plaintiff's nominal damages claim remained alive despite all other aspects of the litigation becoming moot)

Similarly, the Fourth Circuit found that Virginia Military Institute students' claims for equitable relief from a prayer policy were moot upon their graduation, but that "their [nominal] damage claim continue[d] to present a live controversy." *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003). Likewise, the University of Maryland-Baltimore County could not escape a First Amendment challenge by amending its speech policies, as the

students' claims for nominal damages preserved the case from mootness. *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 550 (4th Cir. 2010).

When students sued the chancellor of the University of Illinois challenging a restriction on speech, the Seventh Circuit held that the claims for nominal damages and declaratory relief were not mooted when the decree was rescinded and the chancellor resigned. *Crue v. Aiken*, 370 F.3d 668, 677 (7th Cir. 2004). Similarly, after student editors were fired, and a district court dismissed their § 1983 action due to insufficient proof of actual damages and the impropriety of an injunction, the Sixth Circuit remanded the case for consideration of the students' nominal damages claim. *Murray v. Bd. of Trustees*, 659 F.2d 77, 78-79 (6th Cir. 1981). Cases that present a close call on proof of actual damages are particularly prone to difficulty under the *Flanigan's* decision. To prevent mootness under the reasoning in *Flanigan's*, attorneys and clients would be forced to repackage nominal damage claims as requests for minute amounts of compensatory damages. This is formalism at its worst, and ignores the cherished liberties enshrined in the First Amendment.

In the Tenth Circuit, removal of a religious sculpture that a professor and student claimed violated the Establishment Clause mooted their claims for injunctive and declaratory relief; however, the case remained viable because the complaint "also include[d] a claim for nominal damages." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1220-

22 (10th Cir. 2005). When Oklahoma State University adopted a new policy that mooted the students' claim for injunctive relief, the Tenth Circuit held the following with respect to the claim for nominal damages:

> Neither the showing of the film on the originally scheduled dates, nor the subsequent enactment of the 1991 policy erases the slate concerning the alleged First Amendment violations in connection with the film. Therefore, the district court erred in dismissing the nominal damages claim which relates to *past* (not future) conduct. If proven, a violation of First Amendment rights concerning freedom of expression entitles a plaintiff to at least nominal damages.

Comm. for First Amendment v. Campbell, 962 F.2d 1517, 1526-27 (10th Cir. 1992) (emphasis original). The subsequent remedial conduct by the university could not "erase[] the slate" or undo the damage done. *Id.* at 1526.

In addition, Justice Alito, just last term, recognized that all of these cases represent the near-universal agreement that nominal damages survive a mootness challenge. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 140 S. Ct. 1525, 1536 n.6 (2020) (Alito, J., dissenting) (noting that only "**[a] single**

Circuit has held that a claim for nominal damages alone does not maintain a live dispute" (citing the *Flanigan's*, 868 F.3d 1248)) (emphasis added). But, as Justice Alito noted, the Eleventh Circuit's lone-ranger status in this area of jurisprudence "is difficult to reconcile with *Carey* and *Stachura*'s endorsement of nominal damages as an appropriate constitutional remedy." *Id.* This Court should adopt the view of the near universal agreement of the Circuits and Justice Alito and hold that nominal damages are alone sufficient to present a live controversy under Article III.

The *Flanigan's* decision encourages parties to disguise nominal damages as compensatory damages, or otherwise suffer the possibility that their cherished First Amendment freedoms will be unconstitutionally reduced to orphan status. Relatedly, the holding in *Flanigan's* that nominal damages claims alone do not otherwise present a live controversy gives the government a powerful weapon to suppress disfavored viewpoints and evade judicial review by abandoning unconstitutional policies or practices with a simple "never mind" after they are called to account in court. The First Amendment knows no such games of constitutional whack-a-mole.

IV. CIRCUIT COURTS HAVE CONSISTENTLY HELD THAT NOMINAL DAMAGES ARE ALONE SUFFICIENT TO PREVENT MOOTNESS IN FIRST AMENDMENT CHALLENGES TO SECONDARY SCHOOL POLICIES.

In free speech claims involving secondary schools, the Circuit Courts have consistently held that a claim for nominal damages alone is sufficient to survive a mootness challenge.[2] This rule applies even when policy changes are made that could moot claims for equitable relief. Additionally, the Circuit Courts have found that the existence of a nominal damages claim, despite a voluntary cessation, can continue to preserve a case.

In the First Circuit, a student's claims for injunctive and declaratory relief under the Individuals with Disabilities Education Act were

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[2] The Eleventh Circuit's decision finds its only potential companion from the Sixth Circuit, but even that decision is not supportive of the Eleventh Circuit's lone-ranger approach. In *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008), the Sixth Circuit held that a plaintiff lacked standing to challenge a school board's policies that were no longer in effect. *Id.* at 608. Because he lacked standing to challenge the previous policies, the Sixth Circuit held the controversy was not live even though the plaintiff purported to bring a nominal-damages claim. *Id.* at 611. And, even the Sixth Circuit recognized that a nominal damages claim would prevent mootness in a case where the plaintiff had standing. *Id.* ("we may have allowed a nominal-damages claim to go forward in an otherwise moot case [but] we are not required to relax the basic standing requirements that the relief sought must redress an actual injury.").

mooted by his graduation. *Thomas R.W. v. Mass Dep't of Educ.*, 130 F.3d 477, 479-80 (1st Cir. 1997). However, if he had requested damages, the court noted that his claims would have remained live; but he did not request such damages. *Id.* at 480.

In *Thomas*, the plaintiff conceded that the injunctive relief he had sought was moot, but argued that his claim for reimbursement should preserve the case. *Id.* The First Circuit disagreed, but found that "if pled in the alternative or otherwise evidenced from the record, a claim for damages would keep a case from becoming moot where equitable relief no longer forms the basis of a live controversy." *Id.* (internal quotations omitted). *See also McKenna v. Wells Fargo Bank*, 693 F.3d 207, 210 & n.2 (1st Cir. 2012) ("[A] 'generalized claim' for monetary damages may be sufficient to prevent dismissal on grounds of mootness, even where claims for injunctive relief 'appear to be moot.'" (citation omitted)).

In the Third Circuit, a student's graduation meant that her claims for injunctive and declaratory relief related to the high school's denial of equal access to a Bible club were moot, but "her damage[] . . . claim[] continue[d] to present a live controversy." *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216-18 (3d Cir. 2003).

Similarly, the Fourth Circuit held that while a student's move to another district mooted her prospective claims for relief, her claim for nominal damages was not moot because the constitutional

violation had already occurred. *Am. Humanist Ass'n v. Greenville Cty. Sch. Dist.*, 652 F. App'x 224, 231 (4th Cir. 2016). And, just last month, in *Grimm v. Gloucester Cnty. Sch. Bd.*, the Fourth Circuit again held that "plausible claims for damages defeat mootness challenges [and] [t]hat is true even when the claim is for nominal damages." No. 19-1952, 2020 WL 5034430, *10 (4th Cir. Aug. 26, 2020).

The Sixth Circuit also found, consistent with its sister circuits, that a middle-school-student's graduation rendered her injunctive and declaratory relief claims moot, but that "the existence of [the nominal] damages claim ensure[d] that this dispute [was] a live one." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005). A plaintiff's claims "remain viable to the extent that [he or she] seeks nominal damages as remedy for past wrongs." *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010).

Moreover, the Ninth Circuit has also found that, despite the fact that a plaintiff's graduation mooted his claims for equitable relief, his request for nominal damages preserved his case challenging a teacher's comments as "derogatory, disparaging, and belittling regarding religion and Christianity in particular." *C.F. v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 982-84 (9th Cir. 2011). This finding adhered to the Ninth Circuit's rule that "**[a] live claim for nominal damages will prevent a dismissal for mootness**." *Bernhardt v. Cty. of L.A.*, 279 F.3d 862, 872 (9th Cir. 2002) (emphasis added).

This rule among the circuits also applies in light of a voluntary cessation that moots claims for equitable relief. When a school adopted a new policy in response to a First Amendment challenge, the plaintiffs' claims for injunctive and declaratory relief were moot, but not the claim for nominal damages. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009). The Fifth Circuit noted that "**[t]his court and others have consistently held that a claim for nominal damages avoids mootness**." *Id*. (emphasis added).

In the Eighth Circuit, parents challenged a school district's decision to opt-out of a school transfer option. *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 959 (8th Cir. 2015). When the statute authorizing the transfer option was repealed, the claims for injunctive and declaratory relief were moot, but "the appellants could potentially recover money damages for any constitutional violation arising from" the alleged violation of the statute; "therefore, the money-damages claims [were] not moot." *Id.* at 965. The Tenth Circuit, likewise, found that claims for equitable relief were moot but claims for nominal damages were not. *Am. Humanist Ass'n v. Douglas Cnty. Sch. Dist. Re-1*, 859 F.3d 1243, 1250, 1253 n.3 (10th Cir. 2017) ("As the Supreme Court has instructed, nominal damages are the appropriate means of vindicating rights whose deprivation has not caused actual, provable injury."); *id.* ("[A]lthough it may seem odd that a complaint for nominal damages could satisfy Article III's case or

controversy requirement, **this Court has squarely so held**." (emphasis added)).

Months before deciding *Flanigan's*, the Eleventh Circuit held that since nominal damages are an "appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury," a suit by a homosexual rights group and one of its members challenging denial of school club status was not moot even though the student no longer attended the school and the club no longer sought recognition. *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty.*, 842 F.3d 1324, 1327-28 (11th Cir. 2016). After stating that "we must consider the forms of relief that the [plaintiffs] requested," *id.* at 1330, the Eleventh Circuit vacated the district court's dismissal for mootness, saying that there were "many instances" in which nominal damages are appropriate even though retrospective relief is "unavailable"; and that the plaintiffs' case was one of those instances. *Id.* 1330-31. Thus, even the Eleventh Circuit seems at odds even with itself on the important question before this Court.

This Court should reject the Eleventh Circuit's decision below and in *Flanigan's*, and unequivocally hold that nominal damages are alone sufficient to present a live controversy.

CONCLUSION

Because the decision below is inconsistent with this Court's precedent, contrary to the near-universal agreement among the Circuit Courts concerning nominal damages sufficing to survive mootness challenges, and contrary to the vital role nominal damages claims play in the vindication of cherished constitutional liberties, Amicus Curiae Child Evangelism Fellowship respectfully urges reversal of the Eleventh Circuit and a firm holding that a nominal damages claim alone suffices to maintain a live controversy under Article III.

Respectfully submitted,

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