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 THE DISTRICT OF COLUMBIA AND THE STATES OF FLORIDA, HAWAII, ILLINOIS, INDIANA, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, TENNESSEE, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

KARL A. RACINE
Attorney General for the District of Columbia
LOREN L. ALIKHAN
Solicitor General
Counsel of Record
CAROLINE S. VAN ZILE
Principal Deputy Solicitor General
CARL J. SCHIFFERLE
Deputy Solicitor General
JACQUELINE R. BECHARA
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
400 6th Street, NW
Suite 8100
Washington, D.C. 20001
(202) 727-6287
loren.alikhan@dc.gov
Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a potential award of nominal damages is redress that satisfies Article III and prevents mootness if intervening events have eliminated any threat of recurring or future injury to the plaintiff's legal rights or interests.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of Florida, Hawaii, Illinois, Indiana, Minnesota, New Jersey, New Mexico, North Carolina, Tennessee, Utah, and Virginia (collectively, "*Amici* States") submit this brief as *amici curiae* in support of respondents. The *Amici* States represent a broad coalition of jurisdictions of all political stripes. As stewards of their residents' health and safety, state governments are responsible for codifying and administering laws that affect the day-to-day lives of millions of people. Some of these laws, or their implementing regulations and policies, will inevitably become the subject of litigation implicating difficult constitutional questions. A suit may be filed just after a law is passed, or years later in response to evolving jurisprudence. In the *Amici* States' experiences, state governments have reasonably responded to some of this litigation by revising or repealing laws and policies raising significant constitutional questions.

Indeed, that is exactly what happened in this case. Petitioners filed a lawsuit against various officials of Georgia Gwinnett College, alleging that the school's Freedom of Expression Policy and Student Code of Conduct violated their free speech and free exercise rights under the First Amendment and their due process and equal protection rights under the Fourteenth Amendment. Pet. App. 25a. In response, the college revised its Freedom of Expression Policy so that students would generally be allowed to speak anywhere on campus without having to obtain a permit and removed the provision in the Student Code of Conduct that had defined "disorderly conduct" to include anything that disturbs the peace or comfort of others. Pet.

App. 5a. Because the only monetary relief petitioners had requested was nominal damages, and because that claim is not sufficient to sustain a case or controversy, the Eleventh Circuit held that petitioners' constitutional challenge to the since-revised Freedom of Expression Policy and Student Code of Conduct was moot. Pet. App. 16a.

Like respondents, the *Amici* States have a critical interest in ensuring that standalone nominal damages claims do not consume limited government resources after a state has amended or abandoned a law, regulation, or policy. In this vein, the Eleventh Circuit's rule incentivizes government actors to modify constitutionally questionable laws in response to their residents' concerns early in the course of litigation. At the same time, the Eleventh Circuit's rule avoids the harmful consequences of petitioners' position, namely protracted litigation that burdens government and judicial resources with limited benefit to plaintiffs. Therefore, the *Amici* States urge this Court to hold that a nominal damages claim is insufficient to avoid mootness when the government has revised or repealed the challenged law.[1]

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[1] To be sure, states and state officials acting in their official capacities are not subject to suit for damages under 42 U.S.C. § 1983 absent a waiver of sovereign immunity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). In such cases, a standalone claim for nominal damages will not overcome mootness. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997). However, because state officials acting in their personal capacities "are subject to § 1983 liability for damages," "even when the conduct in question relates to their official duties," *id.* at 69 n.24, as are political subdivisions of states, *Owen v. City of Independence*, 445 U.S. 622, 647-48 (1980), the *Amici* States maintain a critical interest in the question presented here.

SUMMARY OF ARGUMENT

1. This Court should adopt the Eleventh Circuit's rule because it incentivizes government actors to reconsider constitutionally questionable laws in response to litigation. That result is consistent with the purpose of 42 U.S.C. § 1983 to protect against unconstitutional action under color of state law. The experiences of the *Amici* States confirm that states have revised or repealed both civil and criminal laws following legal challenges, which better protects the constitutional rights of all residents, not just those who happen to be parties to a particular case. Further, the Eleventh Circuit's rule promotes settlement, which will conserve judicial resources by avoiding lengthy litigation. The fact that litigation may have motivated the government's change in policy, which often occurs as the government adjusts to new legal developments, cannot sustain an Article III case or controversy when a case is otherwise moot.

2. This Court should reject petitioners' proposed rule because it will have significant, adverse practical consequences for state and local governments and for the judicial system. The experiences of the *Amici* States illustrate that petitioners' rule fosters protracted litigation, consuming limited government and judicial resources long after a state has amended or abandoned a law or policy. Petitioners' proposed rule will further strain government resources by encouraging plaintiffs' counsel to proceed on standalone nominal damages claims in the hopes of recovering hefty fee awards. This rule will force government actors to divert resources from other important functions in order to defray the costs of increased litigation and potential fees—long after they have acted in good faith to remedy the alleged constitutional wrong.

ARGUMENT

I. The Eleventh Circuit's Rule Incentivizes Government Actors To Revisit Challenged Laws, Which Benefits All Residents And Not Just The Litigants.

Petitioners argue that a rule allowing a claim for nominal damages to proceed when all remaining claims are moot furthers the purposes of 42 U.S.C. § 1983. Pet. Br. 36-39. However, this Court has observed that the overarching function of Section 1983 is to "protect the people from unconstitutional action under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). The Eleventh Circuit's rule is consistent with that purpose because it incentivizes state and local governments to rectify constitutionally questionable policies in response to litigation. The experiences of the *Amici* States confirm that states will, in fact, respond to litigation in this way. Moreover, when a state amends or repeals a law or policy, that decision benefits many residents, not just those who happen to be parties to a particular case. The fact that litigation may have motivated the government to change its policy does not sustain the Article III case or controversy requirement when all other claims are moot.

A. State and local governments have reasonably responded to constitutional claims by revising their challenged laws and policies.

State and local governments, "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens," *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007), regulate many aspects of daily life. Of necessity, state regulation implicates significant

constitutional questions. As this Court's constitutional jurisprudence evolves, states serve an important role as "laboratories for devising solutions to difficult legal problems." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (internal quotation marks omitted). Sometimes, however, developments in the law require a state to revisit a law or policy. *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, Heller*, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 Hastings L.J. 1245, 1261 & n.99 (2009) (noting that several cities amended their gun control ordinances in response to litigation following this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008)); *see also* Randall J. Cude, Note & Comment, *Beauty and the Well-Drawn Ordinance: Avoiding Vagueness and Overbreadth Challenges to Municipal Aesthetic Regulations*, 6 J.L. & Pol'y 853, 856-58 & n.17 (1998) (noting that confusion over First Amendment standards has resulted in extensive litigation over municipal ordinances). A mootness rule that encourages government actors to respond to litigation by reconsidering problematic laws, instead of defending to final judgment laws that raise constitutional questions, better protects all residents from potentially unconstitutional state action.

1. State and local governments have revised laws implicating civil rights.

The experiences of the *Amici* States confirm that government actors have responded to constitutional claims by revising their challenged laws going forward. For example, a New York-based company challenged a Utah state law requiring that a professional fundraising consultant operating in Utah register and obtain a Utah permit, alleging that the law violated the Due Process Clause, the First Amendment, and

the Dormant Commerce Clause. *Am. Charities for Reasonable Fundraising Regul., Inc. v. O'Bannon*, No. 2:08-cv-875, 2017 WL 4539321, at *1-2 (D. Utah Oct. 10, 2017), *appeal dismissed and remanded*, 909 F.3d 329 (10th Cir. 2018). After the district court granted summary judgment for the state, Utah amended its law so that a professional fundraising consultant must register and obtain a Utah permit only under limited circumstances. 909 F.3d at 331. The Tenth Circuit dismissed plaintiff's appeal, reasoning that the "change in the law render[ed] the appeal moot." *Id.* at 333. As a result of the amendment, not only did the plaintiff company no longer have to register or obtain a permit, *id.* at 331, but also, other out-of-state professional fundraising consultants would not be bound by the strict registration and permit requirements going forward.

Similarly, in *Ravalli County Republican Central Committee v. McCulloch*, 154 F. Supp. 3d 1063 (D. Mont. 2015), plaintiffs alleged that Montana's open primary law violated their First Amendment rights because it allowed non-party members to select party leadership. *Id.* at 1066. The district court denied plaintiffs' motion for a preliminary injunction, *id.* at 1080, and, while their appeal was pending, the Montana legislature enacted a law allowing political parties to establish their own rules for selecting their internal leaders. Unopposed Motion to Voluntarily Dismiss Appeal at 2, *Ravalli Cnty. Republican Cent. Comm. v. McCulloch*, No. 15-35044 (9th Cir. May 12, 2015), ECF No. 17. Plaintiffs moved to dismiss their appeal as moot, *id.*, and the Ninth Circuit dismissed the case. Order, *Ravalli Cnty. Republican Cent. Comm. v. McCulloch*, No. 15-35044 (9th Cir. May 13, 2015), ECF No. 18. Thus, the legislature's decision to change the law not only rectified plaintiffs' First Amendment

concerns, but also benefited other political parties in Montana wishing to have greater control over selection of their leadership going forward.

And in *Committee for the First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992), a student organization brought a First Amendment challenge against a decision by the Board of Regents of Oklahoma State University to suspend the showing of a film with a controversial message. *Id.* at 1519. Subsequently, the Board of Regents reversed its decision, the film was shown on the originally scheduled dates, and the Board of Regents adopted a new policy governing extracurricular use of university facilities for purposes of expression. *Id.* at 1519-21. Thus, plaintiffs succeeded in showing their movie as intended, and as a result of the change in policy, the Board of Regents clarified the requirements for future students wishing to engage in similar expressive activities.

So, too, political subdivisions of states have amended or repealed regulations and policies in response to constitutional challenges. For example, after an advocacy group complained that Salt Lake City's ordinance governing demonstrations on public property violated the First and Fourteenth Amendments because of the delay in processing the group's application for a permit, the city amended its ordinance to require review of permit applications within 28 days. *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1253-54 (10th Cir. 2004). In another case, a business brought a First Amendment challenge when the town of Chapin, South Carolina sought to apply a zoning ordinance restricting the store's use of an electronic sign outside its place of business. *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566, 566 (4th Cir. 2007) (per curiam). After the district court

granted summary judgment for the town, it revised its ordinance, specifically to remedy the aspects challenged by the business. *Id.* at 570. Thus, in both cases, the municipalities responded to plaintiffs' complaints by permanently revising their ordinances to better accommodate First Amendment concerns.

In addition, by revising their challenged laws, state and local governments have been able to resolve litigation outside of court. Earlier this year, for example, a nonprofit sued Iowa State University, challenging its temporary ban on sidewalk-chalk messages and its policy against political email communications under the First Amendment. Complaint, *Speech First, Inc. v. Wintersteen*, No. 4:20-cv-2 (S.D. Iowa Jan. 2, 2020), ECF No. 1. After the university replaced the chalking ban with a permanent policy that was less restrictive and revised the email communication policy, the parties entered a settlement agreement, and the plaintiff voluntarily dismissed the case. Notice of Dismissal, *Speech First, Inc. v. Wintersteen*, No. 4:20-cv-2 (S.D. Iowa Mar. 12, 2020), ECF No. 25. Similarly, a woman brought a First Amendment challenge against a local nuisance ordinance, which allowed an Arizona city to declare a rental property a "nuisance" if there were four or more calls to police within 30 days, even when the tenant was the victim. Complaint, *Markham v. City of Surprise*, No. 2:15-cv-1696 (D. Ariz. Aug. 27, 2015), ECF No. 1. Pursuant to a settlement agreement, the city agreed to repeal the nuisance ordinance and not adopt a similar ordinance in the future. Ex. A at 2-3, *Markham v. City of Surprise*, No. 2:15-cv-1696 (D. Ariz. Apr. 13, 2016), ECF No. 57-1.

As these examples illustrate, the Eleventh Circuit's rule will conserve limited judicial resources by encouraging government actors to revise their challenged

laws and thereby resolve constitutional claims without lengthy litigation. This Court has recognized that a rule encouraging "settlements rather than litigation will serve the interests of plaintiffs as well as defendants," *Marek v. Chesny*, 473 U.S. 1, 10 (1985), and is not "incompatible" with federal civil-rights statutes, *id.* at 11; *see also* Resp. Br. 45.

2. State and local governments also have revised criminal laws subject to constitutional challenge.

States also have limited application of their criminal laws in response to constitutional challenges. For example, in *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016), a "plural" family alleged that Utah's bigamy statute violated their First and Fourteenth Amendment rights. *Id.* at 1155. Subsequently, the Utah County Attorney's Office adopted a policy of prosecuting bigamy "only against those who (1) induce[d] a partner to marry through misrepresentation or (2) [were] suspected of committing a collateral crime such as fraud or abuse." *Id.* The Tenth Circuit held that the case was moot, reasoning that the family no longer faced a "credible threat of prosecution" following the adoption of the policy. *Id.* at 1172. And, far from being "suspect," the court observed that "[a] government official's decision to adopt a policy in the context of litigation may actually make it more likely the policy will be followed, especially with respect to the plaintiffs in that particular case." *Id.* at 1171.

Similarly, constitutional challenges have prompted some states to repeal or amend their restrictions on those convicted of sex offenses. For example, a plaintiff challenged a Washington statute requiring in-person quarterly reporting by level II and level III sex offenders with fixed residences as violating the Ex

Post Facto Clause. *T.W. v. Spokane Cnty.*, No. CV-07-371, 2009 WL 672877, at *1 (E.D. Wash. Mar. 12, 2009), *vacated as moot*, 385 F. App'x 706 (9th Cir. 2010). Although the district court ruled that the statute did not violate the Ex Post Facto Clause, 2009 WL 672877, at *6, the state legislature nonetheless repealed the requirement of reporting in person, and the Ninth Circuit determined that the case was moot, 385 F. App'x at 707.

And in Tennessee, a group of plaintiffs brought a putative class action challenging a state law that would make it a felony for a person convicted of a sex offense against a child under the age of 12 to knowingly reside, spend the night, or be alone with any minor, including the offender's own minor child. Complaint, *John Does #1-3 v. Lee*, No. 3:19-cv-532 (M.D. Tenn. June 26, 2019), ECF No. 1. Plaintiffs alleged that the law violated the Ex Post Facto Clause, the Due Process Clause, and the Eighth Amendment. *Id.* After the district court entered a temporary restraining order preventing the law from taking effect, the Tennessee legislature amended it so that the restriction applies only if a court has found that the offender presents a danger of substantial harm to the minor. Joint Status Report, *John Does #1-3 v. Lee*, No. 3:19-cv-532 (M.D. Tenn. June 30, 2020), ECF No. 46. The state argued that the amendment rendered the case moot, *id.*, and the parties are currently negotiating a settlement, Joint Status Report, *John Does #1-3 v. Lee*, No. 3:19-cv-532 (M.D. Tenn. Oct. 30, 2020), ECF No. 52.

Taken together, these examples illustrate how government actors in jurisdictions across the country have reasonably responded to litigation by revising their challenged laws not only to resolve the concerns

of a particular plaintiff, but also to better protect the constitutional rights of all residents.

B. The motives of a government actor cannot keep a moot case alive.

Petitioners insist that the Eleventh Circuit's approach "is flawed and results in government officials avoiding judicial review and accountability through well-timed policy shifts." Pet. Br. 40. The government's motives for amending or repealing a challenged law, however, "do[] not defeat mootness." *Brown*, 822 F.3d at 1177. Instead, the decision to revise a challenged law often reflects the government's attempt to conform its conduct to new developments in the law. And in any event, if there is no further relief that a court can provide with respect to a law that no longer exists, then the government actor's motives alone cannot sustain an Article III case or controversy.

Consider *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924 (7th Cir. 2003), in which an association of advertising companies alleged that a Chicago ordinance prohibiting the placement of alcohol and cigarette advertisements in publicly visible places violated the First Amendment and was preempted by state and federal law. *Id.* at 927. After the district court held that federal law preempted part of the ordinance regulating cigarette advertising, Chicago amended the ordinance to remove several provisions, including the preempted one. *Id.* at 928. The following year, this Court decided *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), in which it held that a Massachusetts statute similar to the Chicago ordinance violated the First Amendment and was preempted by federal law. Chicago then repealed the ordinance altogether and moved to dismiss the case as moot. 326 F.3d at 928.

On appeal, the Seventh Circuit rejected the suggestion that the city had acted in bad faith. According to the court, Chicago's actions "just as likely reveal[ed] the City's good-faith attempts to initially maintain an effective ordinance that complies with the Constitution, and then its desire to avoid substantial litigation costs by removing a potentially unconstitutional law from the books." *Id.* at 931. The court could "hardly fault the City for its attempts to craft an ordinance that passes constitutional muster and complies with judicial decisions." *Id.*

Similarly, in *Brown*, the Tenth Circuit reiterated that it did "not matter" if the Utah County Attorney "ruled out prosecution" under the state's bigamy statute "because he wished to prevent adjudication of the federal [constitutional] claim on the merits." 822 F.3d at 1177. "Either a live controversy exists," the court explained, "or it does not." *Id.* Consequently, "[f]ederal courts may not exercise jurisdiction over a case simply because the defendant wished the suit to end when ceasing his or her allegedly unlawful conduct." *Id.*

In the same way, here, respondents' decision to revise the Freedom of Expression Policy and the Student Code of Conduct in response to this lawsuit "just as likely" signals their "good-faith attempts" to maintain student speech policies "that compl[y] with the Constitution." *Fed'n of Advert. Indus. Representatives, Inc.*, 326 F.3d at 931. And, in any event, respondents' motives in revising the school speech policies are not enough to keep this otherwise moot case alive.

II. Petitioners' Proposed Rule Will Have Significant Practical Consequences.

The United States, as *amicus curiae* supporting petitioners, asserts that the "[p]ractical [i]mpact" of allowing a claim for nominal damages to proceed after all other claims have become moot "[i]s [l]imited." U.S. Br. 28. But "[t]he vindication of constitutional rights and the exposure of official misconduct are not the only concerns implicated by § 1983 suits." *Town of Newton v. Rumery*, 480 U.S. 386, 395 (1987) (plurality op.). Indeed, "even when the risk of ultimate liability is negligible, the burden of defending [Section 1983] lawsuits is substantial." *Id.* For example, "[c]ounsel may be retained by the official" and "the governmental entity," and "[p]reparation for trial, and the trial itself, will require the time and attention of the defendant officials, to the detriment of their public duties." *Id.* at 395-96. Further, litigation may "extend over a period of years," *id.* at 396, a concern that has only grown over the last three decades.[2] For these reasons, "[t]his diversion of officials from their normal duties and the inevitable expense of defending even unjust claims is distinctly not in the public interest." *Id.*

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[2] Federal court management statistics confirm that the time from filing a complaint to trial in civil cases has nearly doubled over the years. *Compare* United States District Courts—National Judicial Caseload Profile, U.S. Courts (Sept. 30, 2014 – Sept. 30, 2019), https://bit.ly/2GXnyoI (last visited Nov. 23, 2020) (for the 12-month period ending September 30, 2019, the median time from filing to trial in civil cases was 27.8 months), *with* United States District Courts—National Judicial Caseload Profile, U.S. Courts (Sept. 30, 1992 – Sept. 30, 1997), https://bit.ly/38LeDCx (last visited Nov. 23, 2020) (for the 12-month period ending September 30, 1992, the median time from filing to trial in civil cases was 15 months).

Likewise, here, the experiences of the *Amici* States reveal that petitioners' proposed rule will have significant practical consequences. This rule invites protracted litigation, tying up government and judicial resources for years on end. *See* Resp. Br. 45. In addition, hefty fee awards that may accompany standalone nominal damages claims will strain already-limited state and local government budgets. The public interest counsels against adopting such a rule because it will impose heavy burdens on government actors and the court system.

A. Petitioners' proposed rule will consume limited government and judicial resources in protracted litigation.

The experiences of the *Amici* States illustrate that petitioners' proposed rule invites protracted litigation over laws and policies that the government has since changed or abandoned. At the same time, their experiences belie the United States' suggestion that "the defendant should be able to end the litigation without a resolution of the constitutional merits, simply by accepting the entry of judgment for nominal damages against him." U.S. Br. 29.

Consider the extensive litigation over a Texas school district's policy governing student messages broadcast over the public address system at football games. In 1995, a family brought a First Amendment challenge against the policy of Santa Fe Independent School District permitting students to read sectarian and proselytizing prayers over the broadcast system at football games. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810-11 (5th Cir. 1999). Four years later, the Fifth Circuit held that the policy violated the Establishment Clause, *id.* at 818, and the following year, this Court affirmed, 530 U.S. 290, 317 (2000).

In the meantime, in 1999, the school district adopted a new policy prohibiting students from including prayer or reference to a deity in messages broadcast at football games. *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 601 (5th Cir. 2004). That change brought on more litigation. The parents of a student who was selected as the student speaker for the 1999 football season filed a lawsuit alleging that the new policy violated their daughter's rights to free speech and free exercise of religion, in violation of the First and Fourteenth Amendments. *Id.* The district court entered a preliminary injunction prohibiting the school district from implementing the new policy, and the student delivered unrestricted messages at each 1999 home football game. *Id.* In 2000, the school district rescinded the new policy and discontinued the practice of having students deliver messages at football games. *Id.* The district court dismissed the case as moot, and the plaintiffs appealed. *Id.* Initially, a panel of the Fifth Circuit affirmed. *Ward v. Santa Fe Indep. Sch. Dist.*, 34 F. App'x 150 (5th Cir. 2002) (per curiam). On petition for rehearing, the Fifth Circuit reversed and remanded, holding that the case was not entirely moot because of plaintiffs' claim for nominal damages. *Ward v. Santa Fe Indep. Sch. Dist.*, 35 F. App'x 386 (5th Cir. 2002) (per curiam).

On remand, the school district made an offer of judgment under Federal Rule of Civil Procedure 68, offering to pay the plaintiffs $36 in nominal damages and reasonable attorney's fees. 393 F.3d at 602. Plaintiffs rejected the offer. *Id.* The district court ultimately entered judgment for plaintiffs, awarding $1 in nominal damages and $52,397.34 in attorney's fees and costs. *Id.* Despite having prevailed in the district court, plaintiffs appealed, arguing, *inter alia*, that the court had failed to issue findings of fact and

conclusions of law and miscalculated attorney's fees. *Id.* at 602-03. Nearly ten years after the first complaint challenging the school district's student speaker policy was filed, the Fifth Circuit affirmed in all respects. *Id.* at 608. Significantly, the court "sua sponte conclude[d] that the plaintiffs lack[ed] standing to appeal the judgment in their favor." *Id.* at 603. The court explained that "[a] winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear, such as that his opponent is a lawbreaker." *Id.* at 604 (quoting *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000)). Further, the court underscored, "[c]oncluding that the plaintiffs are not aggrieved by a failure of the district court to state the reasons for its entry of judgment in their favor does not weaken civil rights jurisprudence." *Id.* at 605.

The extensive litigation over the school district's student speaker policy highlights several of the problems created by petitioners' proposed rule, which the Fifth Circuit applies. *See Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 & n.32 (5th Cir. 2009). First, multiple lawsuits and multiple appeals consumed the resources of the school district and the judicial system for a decade. Second, despite multiple attempts at revising the student speaker policy, the school district could not win, first facing a challenge for violating the Establishment Clause, then facing a challenge for violating the Free Speech and Free Exercise Clauses. Third, the result of all this litigation was that the school district abandoned the student speaker policy altogether, such that no students had the opportunity to speak before football games. *Ward*, 393 F.3d at 601. Fourth, contrary to the United States' suggestion, U.S. Br. 29, plaintiffs' conduct in *Ward* reinforces this Court's holding that a defendant's offer

of judgment alone will not end the litigation. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165-66 (2016). Instead, petitioners' proposed rule incentivizes plaintiffs to challenge even favorable judgments in order to secure hefty fee awards.

Similar issues arose in *Campbell*, discussed *supra*, which involved a First Amendment challenge to the decision of the Board of Regents of Oklahoma State University to suspend the showing of a film with a controversial message. 962 F.2d at 1519. After the plaintiffs filed their complaint, the Board of Regents reversed its decision, and the film was shown on the originally scheduled dates in October 1989. *Id.* at 1519-20. After the district court granted summary judgment for the defendants, plaintiffs appealed to the Tenth Circuit. *Id.* at 1520-21. The court of appeals affirmed the district court's finding that plaintiffs' claims for injunctive relief were moot but reversed and remanded as to plaintiffs' claims for nominal damages. *Id.* at 1526-27. On remand, the district court found that plaintiffs were not entitled to nominal damages because the defendants enjoyed qualified immunity and that plaintiffs were entitled to attorney's fees only for work performed up to the dates the film was shown. *Cummins v. Campbell*, 44 F.3d 847, 849 (10th Cir. 1994).

Plaintiffs again appealed to the Tenth Circuit. Although the district court had awarded plaintiffs $18,000 in attorney's fees for work performed before the film was shown, plaintiffs appealed the denial of about $28,000 in fees for work performed after the film was shown. *Id.* at 853-54. Five years after the movie had been shown and Oklahoma State University had adopted a new policy governing extracurricular use of university facilities, the Tenth Circuit affirmed the district court's decision in all respects. *Id.* at 855.

Again, the Tenth Circuit's application of petitioners' proposed rule resulted in protracted litigation and multiple visits to the court of appeals, long after the alleged constitutional violation had been rectified. Additionally, this rule incentivized plaintiffs' counsel to continue litigating in an effort to recoup more attorney's fees than were necessary to resolve any constitutional issue.

Similarly, in this case, petitioners filed their complaint nearly four years ago, Pet. App. 157a, and respondents revised their Freedom of Expression Policy and Student Code of Conduct more than three years ago, Pet. App. 5a. The Eleventh Circuit properly concluded that petitioners' "claim for nominal damages cannot save their otherwise moot constitutional challenge to the [p]rior [p]olicies." Pet. App. 16a. If this Court reverses, however, litigation over petitioners' nominal damages claim and potential fee award will continue to consume the resources of the state government and the federal courts. Instead, this Court should reject petitioners' proposed rule because of the significant burdens it will impose on state and local governments and on the judicial system. *See, e.g.*, *Briscoe v. LaHue*, 460 U.S. 325, 343 (1983) (holding that Section 1983 does not allow a criminal defendant to assert a claim for damages against a police officer based on perjured trial testimony and reasoning that such litigation would "impose significant burdens on the judicial system and on law-enforcement resources").

B. Fee awards for standalone nominal damages claims will strain already-limited government budgets.

Because the prevailing party in a federal civil-rights action may recover his attorney's fees, 42 U.S.C. § 1988(b), petitioners' proposed rule also invites plaintiffs'

attorneys to continue litigating the constitutionality of policies that have been amended or abandoned in order to recover large fee awards. *See Utah Animal Rights Coal.*, 371 F.3d at 1269 (McConnell, J., concurring) ("Indeed, the most likely reason why a plaintiff would continue to pursue litigation, despite the cost, when a favorable judgment would have no practical effect, is the possibility of obtaining fees."). For this additional reason, petitioners' proposed rule is not in the public interest because awards of attorney's fees for standalone nominal damages claims will impose an outsized burden on state and local governments.

In *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court held that "a plaintiff who wins nominal damages is a prevailing party under § 1988," *id.* at 112, but recognized that "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all," *id.* at 115. Where "litigation accomplishe[s] little beyond giving petitioners the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated in some unspecified way," this Court concluded that an award of attorney's fees is not appropriate. *Id.* at 114 (internal quotation marks omitted). Nevertheless, several courts of appeals have subsequently distinguished *Farrar* and upheld fee awards against government actors despite plaintiffs having obtained only $1 in nominal damages for past, completed violations. *See, e.g.*, *Guy v. City of San Diego*, 608 F.3d 582, 589-90 (9th Cir. 2010) (holding that plaintiff was entitled to attorney's fees after obtaining $1 in nominal damages on his Fourth Amendment claim against city police officer for excessive use of force); *Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 124-26 (1st Cir. 2004) (upholding attorney's fee award for plaintiffs who obtained $1 per plaintiff in nominal damages on due

process claim against city officials for wrongful termination); *Koopman v. Water Dist. No. 1*, 41 F.3d 1417, 1420-21 (10th Cir. 1994) (holding that plaintiff was entitled to attorney's fees after obtaining $1 in nominal damages on his due process claim against county officials for wrongful termination).

Recent litigation confirms that significant fee awards for standalone nominal damages claims pose a real problem for state and local governments. For example, in *Deferio v. City of Syracuse*, No. 5:16-cv-361, 2018 WL 3069200 (N.D.N.Y. June 21, 2018), the district court awarded the plaintiff $1 in nominal damages on his First Amendment claim against two city police officers. *Id.* at *1. Although the district court denied plaintiff's requests for permanent injunctive and declaratory relief and dismissed the City of Syracuse and the Chief of Police as defendants, *id.* at *2, the court nonetheless ordered the defendant officers to pay plaintiff over $117,000 in attorney's fees, *id.* at *10. Similarly, in *Stoedter v. Gates*, No. 2:12-cv-255, 2015 WL 3382526 (D. Utah June 17, 2015), the district court awarded plaintiff $1 in nominal damages on his Fourth Amendment claim against two police officers. *Id.* at *20. Still, the court ultimately awarded plaintiff over $260,000 in attorney's fees and costs incurred through trial and appeal. *Stoedter v. Gates*, 320 F. Supp. 3d 1265, 1282 (D. Utah 2018).

The prospect of hefty fee awards for plaintiffs proceeding on standalone nominal damages claims increases exposure for government actors. As a result, state and local governments will have to divert resources from other important government functions to cover increased litigation and judgment costs. For example, a former attorney for the City of Chicago lamented that the city had to divert resources in its

budget from lead poisoning screening for Chicago children to increased lawsuit payouts. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1178 (2016). This problem existed even before the COVID-19 pandemic triggered substantial budget shortfalls in state governments across the country, which are likely to continue for the next several years. Ctr. on Budget & Pol'y Priorities, *States Grappling with Hit to Tax Collections* 2-5 (Nov. 6, 2020).[3] By increasing the opportunities for large fee awards, petitioners' proposed rule would further burden government actors already facing resource constraints, without any practical benefit.

[3] *Available at* https://bit.ly/2H2ubGu.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

LOREN L. ALIKHAN
Solicitor General
Counsel of Record

CAROLINE S. VAN ZILE
Principal Deputy
Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

JACQUELINE R. BECHARA
Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
400 6th Street, NW
Suite 8100
Washington, D.C. 20001
(202) 727-6287
loren.alikhan@dc.gov

Counsel for Amici Curiae

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ASHLEY MOODY
Attorney General
State of Florida

CLARE E. CONNORS
Attorney General
State of Hawaii

KWAME RAOUL
Attorney General
State of Illinois

CURTIS T. HILL, JR.
Attorney General
State of Indiana

KEITH ELLISON
Attorney General
State of Minnesota

GURBIR S. GREWAL
Attorney General
State of New Jersey

HECTOR BALDERAS
Attorney General
State of New Mexico

JOSHUA H. STEIN
Attorney General
State of North Carolina

HERBERT H. SLATERY III
Attorney General
State of Tennessee

SEAN D. REYES
Attorney General
State of Utah

MARK R. HERRING
Attorney General
Commonwealth of Virginia