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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Georgia Gwinnett College officials say that a plaintiff who suffers just 1¢ in compensatory harm can litigate a case to final judgment, while a plaintiff who suffers the loss of an invaluable constitutional right alone has no remedy at all. No principle compels such an anomalous result, and this Court should not create an Article III exception that excludes nominal-damages awards from ordinary justiciability rules.

The officials do not contest that their actions caused Chike and Joseph real injury. Their argument is that nominal damages do not redress past injuries. But nominal damages vindicate constitutional violations, including where the harm is not quantifiable. *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11 (1986) (quoting *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978)). And contrary to the Eleventh Circuit's belief, they do so "for the plaintiff's benefit." *Farrar* v. *Hobby*, 506 U.S. 103, 113 (1992). Those principles, common-law history, and common sense all show that a nominal-damages award provides a personal, tangible benefit that redresses a plaintiff's injury. Article III requires nothing more.

Providing a remedy to plaintiffs like Chike and Joseph has neither flooded the courts with lawsuits nor bankrupted officials in the many circuits that allow standalone nominal-damages awards. Nominal damages, like compensatory damages, have "coexisted with our constitutional system since the dawn of the Republic." *Tanzin* v. *Tanvir*, __ S. Ct. __, 2020 WL 7250100, at *5 (Dec. 10, 2020). And a nation of laws *requires* a way for courts to make things right when officials violate rights. Because nominal-damages claims satisfy Article III, this Court should reverse.

REPLY ARGUMENT

I. This Court should decline to create an Article III exception that excludes nominal-damages awards from ordinary justiciability rules.

The officials do not deny that Chike and Joseph suffered a concrete injury-in-fact, nor do they deny causation. Their only objection is redressability. In making that objection, they confuse redressability with *quantifiability*. Because nominal damages vindicate past legal violations, Chike and Joseph's nominal-damages claims satisfy Article III and are not moot.

A. Nominal damages redress past constitutional injury.

Article III standing requires a plaintiff to show he has suffered (1) a concrete and particularized injury-in-fact, (2) caused by the defendant, (3) that is likely to be redressed by a favorable court ruling. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016). The officials do not dispute injury or causation. And redressability requires only that a plaintiff personally "benefit in a tangible way from" court intervention. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (quotation omitted). A plaintiff satisfies that test by showing that a court order would "partially redress" his injury. *Meese* v. *Keene*, 481 U.S. 465, 476 (1987). Nominal-damages awards, though small, satisfy that standard.[1]

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[1] The officials articulate a second redressability requirement: that the relief "target and redress the plaintiff's asserted injury" rather than someone else's. Resp.Br.12. But that is no different than requiring that the remedy "personally" benefit the plaintiff.

The officials confuse redressability with quantifiability. Consider a student who shared her faith on campus by chalking messages about Jesus Christ on the sidewalk, only to see a professor direct his class to erase them.[2] Even if the officials modified their policies to prevent this First Amendment violation from happening again, the officials admit that this student could litigate to final judgment her 1¢ compensatory-damages claim for the consumed chalk. Even a single penny of relief partially benefits the student personally and in a tangible way.

Now consider Chike. The officials do not dispute he was injured when they twice stopped him from speaking. The problem is that he cannot monetize the lost speech's value. But Chike's lost speech is far more valuable than the consumed chalk. And it is the lost speech that gives Chike the right to seek judicial redress; the $1 in nominal damages that officials must pay Chike is no less a partial redress that personally and tangibly benefits him than is the penny that redresses the chalk user. A nominal-damages award "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*, 506 U.S. at 113. And in this way, the payment of nominal damages "materially alters" the parties' legal relationship, *id.* at 111–12, in the same way as a modest compensatory-damages award.

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[2] Compare with *Fresno State Students for Life* v. *Thatcher*, No. 1:17-at-00382 (E.D. Cal.), available at https://perma.cc/566E-6EBZ.

The officials say that while one dollar in compensatory damages redresses a past injury, one dollar in nominal damages does not. Resp.Br.17–19. Again, this is confusion over quantifiability. Contra *City of Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986) (plaintiff's vindication of "important civil and constitutional rights that cannot be valued solely in monetary terms"). Courts award nominal damages primarily when there has been an "infraction of a legal right" but the "extent of loss is not shown." CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 20 at 85 (1935). So it's not that nominal damages offer "*zero* legally recognized relief for a past injury," Resp.Br.19 (emphasis added), it's that they offer partial relief. *Skyline Wesleyan Church* v. *Cal. Dep't of Managed Health Care*, 968 F.3d 738, 749 (9th Cir. 2020) ("Nominal damages would redress Skyline's injury, even if only to a minimal extent."). And because nominal damages "materially alter[ ]" the parties' relationship, *Farrar*, 506 U.S. at 111–12, that is sufficient for Article III. *Meese*, 481 U.S. at 476. "Nothing more is needed to establish redressability." *Skyline*, 968 F.3d at 749. Otherwise, justiciability of identical claims turns on mere semantics. ACLU Br. 11–12 (discussing *Freenor* v. *Mayor & Alderman of Savannah*, No. CV414-247, 2019 WL 9936663 (S.D. Ga. May 20, 2019)).

As this Court intimated in *Carey*, nominal damages make a constitutional deprivation "actionable." 435 U.S. at 266. That is because they redress a plaintiff's concrete and particularized injury in a personal, tangible way. U.S.Br.17–19 (same result if Congress authorized a minimum $1,000 award for First Amendment violations). A nominal-damages award partially redresses a loss of incalculable value.

B. This Court's decisions confirm that nominal damages' primary purpose is past redress of valuable—even priceless—rights.

Nominal damages—like other remedies—have multiple effects that can include the declaration of rights or the protection of prospective rights. But this Court's precedents and numerous lower-court decisions show that nominal damages' primary purpose is to redress past legal violations.

Carey decided that nominal damages, rather than presumed damages, were the appropriate award for constitutional violations where harm cannot be monetized. 435 U.S. at 266. But the context was *not* "prospective redress." Contra Resp.Br.24. It was about remedying a *past* "deprivation" of rights. 435 U.S. at 266. That is why the Court did not speak in terms of any "prospective" due-process problem but to the past "denial of procedural due process." *Ibid*. Accord, *e.g.*, *Stachura*, 477 U.S. at 308 & n.11 (same point in free-speech context); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 69 & n.24 (1997) (contrasting nominal damages and injunctive relief).

Likewise, in *Farrar*, the plaintiff dropped a claim for injunctive relief and pursued only an unsuccessful compensatory-damages claim. 506 U.S. at 106. In determining that a nominal-damages award made the plaintiff a prevailing party under § 1983, this Court emphasized that "*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his [constitutional] right." *Id.* at 112. That is, this Court correctly saw the award of nominal damages as retrospective redress, not prospective protection.

Unsurprisingly, lower courts have consistently relied on this Court's cases to hold that a plaintiff whose constitutional rights have been violated "should not lose his right to proceed" if "only nominal damages are at stake." *Amato* v. *City of Saratoga Springs*, 170 F.3d 311, 319 (2d Cir. 1999) (discussing *Carey*). Petitioners' opening brief discussed many such cases. Pet.Br.27–28. Yet the officials fail to respond to many. There are more examples, in countless settings. *E.g.*, ACLU Br. 13–19; Found. for Individual Rights in Educ. [FIRE] Br. 5–9; Becket Fund Br. 20–25; Pacific Legal Found. Br. 1–4, 12–16.

The officials' rule also violates this Court's precedent in analogous contexts. For example, the officials insist that statutory damages are "different in kind" because they "do not signify *nothing*." Resp.Br.19–20. But statutory and nominal damages serve the same purpose: providing "recompense for injury" where "the rules of law render difficult or impossible proof of damages." *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935). The officials concede that it "is good enough for Article III" when Congress sets statutory damages where it "might be hard to measure" actual damages. Resp.Br.19–20. It is no different when courts award nominal damages for the same reason.

The same is true of liquidated damages, which assign a fixed value to harm where actual damages "may be difficult or impossible to ascertain." *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153–54 (1956). And punitive damages are non-compensatory and sometimes awarded without compensatory harm. U.S.Br.19–20. Yet the officials do not dispute that a plaintiff with a standalone claim for statutory, liquidated, or punitive damages has failed to present an Article III case or controversy.

The officials criticize Chike and Joseph for equating "vindication" of rights with Article III redress. Resp.Br.21–23. But where "there has been a violation of a right, the person injured is entitled to an action. If he is entitled to an action, he is entitled at least to nominal damages, or else he would not be entitled to a recovery." *Parker* v. *Griswold*, 17 Conn. 288, 303 (1846).

C. At common law, courts routinely awarded standalone nominal damages solely to redress past injuries.

No one disputes that English and American common-law courts consistently adjudicated claims for nominal damages in a wide array of cases, and that such claims arose from a past violation of rights. Yet the officials insist that when common-law courts did award nominal damages, it was only for continuing or threatened injuries. Resp.Br.28–40. Centuries of cases debunk this theory.

For one thing, the officials concede that entire categories of common-law cases involved the award of nominal damages even "when they would not plainly serve as prospective relief." *Id.* at 34. These include cases (like this one) when the plaintiff "proved a legal violation" but failed to establish or quantify compensatory damages, *ibid.*, "as a vehicle for costs," *id.* at 32–34, or for "dignitary harms," *id.* at 38. And these categories of cases—which alone undermine the officials' historical analysis—are just a few examples.

English courts inferred nominal damages whenever the plaintiff established an invasion of a legal right, no matter if there was a continuing or threatened injury. "[I]njury imports a damage, though it does not cost the party one farthing." *Ashby*

v. *White*, 92 Eng. Rep. 126, 137 (1703) (Holt, J.). Courts "import[ed] a damage" for various claims, including breach of contract, trespass, and personal injury. *Ibid.* ("a cuff on the ear" would be actionable "for it is a personal injury").

For personal rights, nominal damages served to remedy past harms, not to protect against future injury. In *Ashby*, for example, the House of Lords held that an elector who was wrongfully turned away from the polls by an official could sue without proving the "possibility of a future profit" or the "possibility of a future" damage. 87 Eng. Rep. 810, 810, 813 (1703) (Powell, J., & Gould, J.). Often these violations occurred when an official failed to perform his duty but cured the defect before suit. In these cases, plaintiffs could still recover nominal damages for the past injury even though they had no need for prospective relief. *E.g.*, *Barker* v. *Green*, 130 Eng. Rep. 327, 327 (1824) (sheriff's one-day delay in arrest on writ); *Bales* v. *Wingfield*, 4 Q.B. 580, n. (multi-week delay by sheriff in executing a lien writ); *Clifton* v. *Hooper*, 115 Eng. Rep. 175, 175, 178 (1844) (sheriff delay in executing process). This was also true for actions brought against private citizens. *E.g.*, *Marzetti* v. *Williams*, 109 Eng. Rep. 842, 845–47 (1830) (one-day delay in issuing check); *Godefroy* v. *Jay*, 131 Eng. Rep. 159, 159–62 (1831) (client could receive nominal damages for attorney's negligence).

American courts followed suit. Plaintiffs could recover at least nominal damages for injuries caused by public officials without showing the threat of future harm. *E.g., Mickles* v. *Hart*, 1 Denio 548, 550 (N.Y. Sup. Ct. 1845) (sheriff deputy's delay in executing debt); *Laflin* v. *Willard*, 33 Mass. 64, 67 (1835) (same); *Waterhouse* v. *Waite*, 11 Mass. 207, 210

(1814) (same); *Burns* v. *Erben*, 26 How. Pr. 273, 277 (N.Y. Super. Ct. 1864) (false imprisonment); *Doherty* v. *Munson*, 127 Mass. 495, 496 (1879) (detention under illegal warrant). And American courts routinely awarded nominal damages in private actions when such an award could provide no prospective relief. *E.g., Thompson* v. *New Orleans, J. & G.N.R. Co.*, 50 Miss. 315, 320 (1874) (train conductor passed passenger's stop by two miles); *Crosby* v. *Humphreys*, 60 N.W. 843, 844 (Minn. 1894) (assault); *Young* v. *W. Union Tel. Co.*, 11 S.E. 1044, 1044–45 (N.C. 1890) (negligent delay in delivering telegraph); *McKim* v. *Bartlett*, 129 Mass. 226, 229 (1880) (estate administrator liable for at least nominal damages after court discharged future liability).

This partial list shows that early American courts—like their English counterparts—undeniably awarded nominal damages solely for past injuries. Accord, *e.g.*, U.S.Br.10–11; Nat'l Right to Work Legal Def. Found. Br. 4–10.

Even a nominal-damages award in a trespass, riparian-rights, or other property case was intended, first and foremost, to vindicate the past "violation of the plaintiff's right." *Delaware & Hudson Canal Co.* v. *Torrey*, 33 Pa. 143, 148 (1859); accord *Embrey* v. *Owen*, 155 Eng. Rep. 579, 585 (1851) (same). And that is why common-law courts awarded nominal damages in property cases even when the parties' future rights and obligations were *not* at stake. *E.g.*, *Hefley* v. *Baker*, 19 Kan. 9, 11 (1877) (pure trespass case with no property-line dispute); *Curtis* v. *Paggett*, 27 P. 109, 109–10 (Kan. 1891) (same); *Cook* v. *Loomis*, 26 Conn. 483, 486 (1857) (trover case where property already returned); *Mears* v. *Cornwall*, 40 N.W. 931, 932–34 (Mich. 1888) (same); *Warder* v. *Baldwin*, 8 N.W. 257,

258 (Wis. 1881) (same); *Moon* v. *Raphael*, 132 Eng. Rep. 122, 122 (1835) (same). And plaintiffs at common law could waive their right to compensatory damages and choose to seek nominal damages alone. Pet.Br.42; accord *Daniels* v. *Bates*, 2 Greene 151, 152 (Iowa 1849); *Pastorius* v. *Fisher*, 1 Rawle 27, 29 (Pa. 1828).

The officials' failure to address so many of these cases is no mere oversight. Many are on all fours with the constitutional violations at issue here and establish the common-law rule that nominal damages support a claim for past constitutional violations. So do cases involving intentional torts. Frederick Douglass Found. Br. 6–8 (comparing Petitioners' injuries to those caused by intentional torts, for which courts awarded nominal damages); *Stachura*, 477 U.S. at 306 (level of § 1983 damages "determined according to principles derived from the common law of torts").

The officials say that, even if common-law courts awarded nominal damages with no "prospective remedial benefits," such awards were meaningless and insufficient "for maintaining an action." Resp.Br.35–36. But as detailed above, countless cases held that a standalone nominal-damages claim sustained a case having no effect on future rights. It would be passing strange for so many courts, over so many years, to adjudicate nominal-damages claims that they thought served no purpose and, in the officials' view, violated redressability requirements.

Finally, while early common-law courts may have been unwilling to reverse a trial court's failure to award nominal damages in trifling or frivolous cases, Resp.Br.34–35; *Fleming* v. *Gilbert*, 3 Johns 528, 532 (N.Y. Sup. Ct. 1808); *Robertson* v. *Gentry*, 5 Ky. 542,

543 (Ct. App. 1812), that reluctance faded when "important" rights were at stake. *Blackburn* v. *Ala. Great S. R. Co.*, 39 So. 345, 346 (Ala. 1905); *Hecht* v. *Harrison*, 40 P. 306, 309–10 (Wyo. 1895). Modern courts view nominal damages the same way when a plaintiff alleges a constitutional violation. *E.g.*, *Risdal* v. *Halford*, 209 F.3d 1071, 1073 (8th Cir. 2000) (reversing for plain error because the district court failed to instruct the jury to award nominal damages if it found a free-speech violation); *Zok* v. *State*, 903 P.2d 574, 579 (Alaska 1995) (failure to award nominal damages for unlawful arrest was plain error because the "right to be free from unlawful confinement is sufficiently important and fundamental in our society"). Indeed, circuit courts uniformly hold that an award of nominal damages is mandatory upon proving a constitutional violation. Pet.Br.30–31 n.4 (collecting cases). The officials' cramped theory of nominal damages cannot explain away this history.

D. Nominal damages are not a mere analogue for declaratory relief.

Nominal damages' primary purpose is to redress a past injury. Yet the officials continue to assert that "[d]eclaratory judgments are the analogue," Resp.Br.41, unless sovereign or qualified immunity is at stake, in which case the officials feel differently, *id.* at 42 n.3. The officials are incorrect. U.S.Br.23–27.

To be sure, "all judgments of courts declare jural relations." Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 4 (1918). Yet courts do not equate all forms of relief with declaratory judgments just because they share this one trait.

Nor do the officials rebut the many other differences between declaratory judgments and nominal damages that unravel their flawed analogy. First, nominal damages are legal relief, while declaratory judgments are equitable. Resp.Br.42 n.3. Second, declaratory judgments were designed to determine legal rights "*before breach*." Edwin M. Borchard, *The Uniform Act on Declaratory Judgments*, 34 HARV. L. REV. 697, 707 (1921). Nominal damages remedy past harm, unavailable until an injury has occurred. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 20 at 85 (1935) ("Nominal damages are awarded for the infraction of a legal right.").

Third, declaratory judgments are primarily prospective relief, *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 676 n.6 (2010), while nominal damages, which require a past violation, are primarily retrospective, *Arizonans for Official English*, 520 U.S. at 69 & n.24. Fourth, the Declaratory Judgment Act "confers a discretion on the courts," not an "absolute right upon the litigant." *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 287 (1995). Nominal damages are mandatory. *Farrar*, 506 U.S. at 112 ("*Carey* obligate[d] a court to award nominal damages when a plaintiff establishes the violation of his right"). And finally, unlike declaratory judgments, courts have held that nominal damages are subject to sovereign- and qualified-immunity defenses. *E.g.*, *Am. Civil Liberties Union* v. *U.S. Conf. of Cath. Bishops*, 705 F.3d 44, 53 n.7 (1st Cir. 2013) (sovereign immunity); *Hopkins* v. *Saunders*, 199 F.3d 968, 978 (8th Cir. 1999) (qualified immunity).

In sum, the disparities between declaratory judgments and nominal damages are stark. And rightly so, as their primary purpose is decidedly different.

E. The officials' view of nominal damages contradicts Article III requirements.

Rationalizing some of the many instances in which common-law courts awarded nominal damages for the past violation of rights, the officials argue that the "jurisdictional hook" is "the plaintiff's live claim for compensatory damages." Resp.Br.26. This hook saves a nominal-damages claim from mootness, say the officials, even if the plaintiff's compensatory-damages claim fails on the merits. *Ibid.* That reasoning cannot be right.

To begin, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester* v. *Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). It is impossible for a compensatory-damage remedy to be a "jurisdictional hook" for a separate, moot remedy. A nominal-damages remedy must (and does) stand on its own merits from the case's inception.

In addition, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English*, 520 U.S. at 67 (citation omitted). Once a plausible claim for compensatory damages fails at the merits stage, it is again impossible for that claim to be a "jurisdictional hook" for a separate, moot claim.

Moreover, a plaintiff must quantify injury to claim compensatory damages. Yet the loss of First Amendment freedoms like speech and religious exercise constitutes "irreparable injury." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, __ S. Ct. __, 2020 WL 6948354, at *3 (Nov. 25, 2020). Such injury "cannot be adequately measured or compensated by money." *Irreparable Injury*, BLACK'S LAW DICTIONARY

(11th ed. 2019). The officials' position would lead to the indefensible result that the appropriate remedy for a past violation of rights is one that in some cases will not be available.

Finally, the officials' position deprives some victims of government misconduct of any remedy. The officials say that without plausible compensatory-damages remedies, plaintiffs can still "vindicate their rights through claims for prospective relief like injunctions and declaratory judgments." Resp.Br.46–48. But that only underscores the correctness of Chike and Joseph's position: that eliminating the nominal-damages remedy would allow officials to make a strategic post-filing change in policy solely to moot prospective relief. Such a risk is real because government officials have strong incentives to moot cases. Becket Fund Br. 8–14; Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J. FORUM 325 (2019). The officials propose a phantom remedy to insulate their unconstitutional acts from legal accountability.

II. The officials' reasons for creating a nominal-damages exception to Article III are indefensible.

The officials predict dire effects if this Court allows partial redress for the violation of Chike and Joseph's rights. Yet it has been "widely recognized" for ages "that a claim for nominal damages precludes mootness" based on later events. *N.Y. State Rifle & Pistol Ass'n* v. *City of N.Y.*, 140 S. Ct. 1525, 1536 (2020) (Alito, J., dissenting); Pet.Br.14 n.2 (cataloguing eight circuits' rule). None of these asserted consequences have materialized in the jurisdictions that have rejected the Eleventh Circuit's novel and indefensible approach. The officials' arguments lack merit.

A. The majority rule does not require advisory opinions.

The officials say that nominal-damages claims invite advisory opinions. Resp.Br. 2, 9–10, 22, 41–42. Not so. To quote the officials' own cases, advisory opinions "advis[e] what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. of Hartford* v. *Haworth*, 300 U.S. 227, 241 (1937). Accord, *e.g.*, *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (same); *Ashcroft* v. *Mattis*, 431 U.S. 171, 172 (1977) (per curiam). That's not the request here.

Chike and Joseph present real-world facts and "concrete legal issues, presented in [an] actual case[ ]," *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969): whether officials violated their free-speech rights. It is not clear why the officials believe that question is more hypothetical here than if Chike's speech had consumed 1¢ of chalk, particularly when the officials do

not contest he suffered a cognizable injury-in-fact. There is nothing advisory about deciding the question and awarding nominal damages. Young Ams. for Liberty Br. 12; Christian Legal Soc'y Br. 5–6.

B. The majority rule does not eliminate the mootness doctrine.

The longstanding majority rule has not "swallowed" the mootness doctrine in the eight circuits that follow it. Contra Resp.Br.43–45. Many constitutional cases seek only prospective relief, either because damages are barred by sovereign immunity or because the injury is threatened or imminent but has not yet occurred at the time of filing. The mootness doctrine is alive and well for those cases. The situation here—where the officials already violated Chike's and Joseph's constitutional rights—presents the flip side of mootness: federal courts are obligated to adjudicate live controversies. *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012).

Plus, the officials' concern for the vitality of the mootness doctrine is selective. They concede that the doctrine has not crumbled even though a plaintiff can avoid mootness by seeking compensation for negligible financial damages. Resp.Br.49. So, it will not disintegrate if a plaintiff seeks justice without putting himself and the courts through the trouble and disproportionate expense of monetizing, proving, and assessing those injuries, as long experience in the courts of appeals attests. Article III does not require plaintiffs to repackage nominal-damages claims as small damages claims. Both types of claims ensure a live controversy.

Far more troublesome problems arise under the officials' rule, which allows governments to moot cases unilaterally and strategically. That approach allows officials to reinstate unconstitutional policies, a phenomenon that the amici have well documented. FIRE Br. 24–27; Becket Fund Br. 10–14; Just. & Freedom Fund Br. 9, 15–16 & n.4. It creates incentives for officials to run out the clock on many claims, *e.g.*, delaying until students graduate, or prisoners get transferred. Islam & Religious Freedom Br. 14–15; Inst. for Free Speech Br. 14–15; Becket Fund Br. 23–25; Christian Legal Soc'y Br. 15–17; FIRE Br. 5–7.

In short, the officials' mootness-related policy concerns do not justify their invitation to jettison the majority rule and create a nominal-damages exception to Article III.

C. The majority rule neither wastes judicial resources nor prolongs cases.

The officials and their amici say that the enduring majority rule wastes judicial resources, prolongs lawsuits, and increases attorney fees. Resp.Br.45; D.C.Br. 13–21. But government officials who quickly and "reasonably respond" when initially alerted to an unconstitutional policy, D.C.Br. 4–11, rarely face protracted litigation.

Consider what happened here. Three years before Chike tried to speak on campus—in *2013*—counsel informed Georgia Gwinnett officials that their policies were unconstitutional. Pet.App.89a–90a. The officials did nothing. Chike questioned the overbreadth and inconsistency of the officials' policies when he was ordered to stop speaking in 2016. *Id.* at 100a–02a. Again, officials did nothing. When Chike filed suit in

December 2016, the officials did not recant; they doubled down, insisting that sharing the Christian faith "arguably rose to the level of 'fighting words'" that the First Amendment does not protect. *Id.* at 155a.

It was not until much later in the case that the officials changed their unconstitutional policies and then promptly moved to dismiss. *Id.* at 160a. Imagine how much litigation and how many constitutional deprivations the officials could have avoided simply by "reasonably responding" in 2013.

The reality is officials often stubbornly refuse to concede that they have violated someone's constitutional rights. *E.g.*, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1538–39 (Alito, J., dissenting) (city fought the plaintiffs' Second Amendment rights "tooth and nail" in lower courts, then strategically changed policy to "moot" the case on the eve of oral argument in this Court). The amici briefs are replete with such examples. *E.g.*, Becket Fund Br. 3 (prison changed policy "[t]wo weeks before oral argument"); CatholicVote.org Br. 12 n.4 (city repealed ordinance "years into litigation" and "days" after grant of en banc review); Pacific Legal Found. Br. 1–2 (city repealed ban "[o]n the eve of oral argument"); FIRE Br. 7 (universities "disavow[ ]" policies "after the start of litigation"). And though the District of Columbia amici say the Eleventh Circuit's rule "incentivizes government actors to revisit challenged laws," the brief's listed examples all come from outside the Eleventh Circuit. D.C.Br. 4–11. Indeed, the officials here changed their policies several months *before* the Eleventh Circuit adopted its outlier rule, further proving that the majority rule already encourages officials to do the right thing.

Conversely, the longstanding rule does not encourage plaintiffs to pursue pointless litigation simply to inflict an attorney-fee award. This "Court's decision not to grant fees in *Farrar* was born of its reluctance to reward attorneys for bringing less than meritorious claims that seek, but fail to obtain, large monetary judgments or fail to promote a larger public good." *Project Vote/Voting for Am., Inc.* v. *Dickerson*, 444 F. App'x 660, 664 (4th Cir. 2011) (per curiam) (citing *Farrar*, 506 U.S. at 116). The same will be true in cases brought simply to harass. But a meritorious civil-rights claim brought to stop unconstitutional government conduct "is the very form of litigation Congress wished to encourage by enacting § 1988." *Ibid.* (citing *Daly* v. *Hill*, 790 F.2d 1071, 1084 (4th Cir. 1986)). Accord, *e.g.*, *Fox* v. *Vice*, 563 U.S. 826, 832–33 (2011) (characterizing a successful § 1983 plaintiff pursuing § 1988 fees as "a private attorney general") (citation omitted). "Deterring meritorious lawsuits on constitutional issues because they offer a small likelihood of a significant money judgment presents as grave a danger to our legal system as frivolous litigation." *Project Vote*, F. App'x at 664–65 (quoting *Koopman* v. *Water Dist. No. 1 of Johnson Cnty.*, 41 F.3d 1417, 1421 (10th Cir. 1994)). Accord Rutherford Inst. Br. 7–12 (discussing implications of tactical mooting).

It's not even clear that following the majority rule would appreciably increase caseloads. The officials have provided no evidence that the circuits applying the majority rule have been overwhelmed with nominal-damages cases. Contra Inst. for Free Speech Br. 16–17 n.11 (statistics showing the opposite). In the long run, reaching the merits conserves judicial

resources by producing precedent that obviates future disputes—sometimes on precisely the same issue, where unconstitutional policies are reinstated after a case has been strategically mooted. *Id.* at 17; *The Point* Isn't *Moot*, 129 YALE L.J. FORUM at 338–41.

Finally, the most effective way to minimize constitutional violations is to hold recalcitrant officials accountable, not to deny victims the remedy Article III allows. Just. & Freedom Fund Br. 17–18; contra Br. of Nat'l Conf. of State Legislatures 23–24. When, as here, a prospective plaintiff sends government officials a warning letter, alerting them to unconstitutional conduct, the potential negative consequences of a future judgment, see Br. of Nat'l Conf. of State Legislatures 23–24, are precisely what motivate the officials to change course. Officials who know they can violate constitutional rights without cost have no incentive to stop violating the Constitution.

In sum, allowing the government to unilaterally moot claims for past constitutional violations would undermine the vindication of constitutional rights and the Constitution itself. After all, courts are the "department of the government to whom the protection of the rights of the individual is by the constitution especially confided." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, App. 357 (1803). Prohibiting the government from doing so would not change the prevailing legal landscape.

III. The officials' rule would leave plaintiffs without a remedy and result in more violations of constitutional rights.

Abandoning the majority rule would leave some victims of constitutional violations without a remedy. Equitable relief is often unavailable or easily mooted (as shown here), and constitutional violations often do not cause quantifiable harm. Pet.Br.37; FIRE Br. 5–9. The officials fail to meaningfully engage these points.

The officials first insist that these claims "can often be adjudicated" via "prospective relief." Resp.Br.46. But "can often" means "not always," since such relief is available only when the illegal conduct "might happen again." *Ibid.* Those mistreated under a later-repealed policy or subjected to "one-off" violations have no such remedy. This gives officials at least one "free pass" to violate the Constitution.

Such a rule also artificially constricts the judiciary's ability and duty to protect individual rights based on an unsupported assurance that officials will use this leeway altruistically and correct mistakes quickly. Perhaps the officials' suggested approach would work if we were governed by angels rather than mere "men." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). But amici recount myriad experiences demonstrating that the judiciary serves as an important check-and-balance.

Worse, civil-rights litigants already face daunting terrain: persuading attorneys to pro bono represent them, exhausting administrative remedies, and surviving immunity, which shields all but those who defy clearly established law. And at least six circuits

have even lowered the burden on officials to show a case is moot. *The Point* Isn't *Moot*, 129 YALE L.J. FORUM at 333, n.50. The Eleventh Circuit, like others, gives government officials "considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Coral Springs St. Sys., Inc.* v. *City of Sunrise*, 371 F.3d 1320, 1328–29 (11th Cir. 2004).

This flipped burden forces plaintiffs to prove—usually with no discovery—that officials *will* revert to the original policy. Yet officials are "more likely to strategically moot cases, not less" than private defendants. *The Point* Isn't *Moot*, 129 YALE L.J. FORUM at 335. Accord Becket Fund Br. 8–14; FIRE Br. 24–28; CAIR Br. 15–17.

For "one-off" violations, the officials insist the remedy is compensation. Resp.Br.49–52. But again, this helps only those who have suffered quantifiable harm. And examples abound of constitutional injuries that often are not compensable, including unlawful entry of private residences, denial of kosher meals in prison, zoning restrictions on religious institutions, door-to-door proselytizing restrictions, and free speech claims on campus—all examples that would transform difficulty proving damages into a jurisdictional bar. *Hudson* v. *Michigan*, 547 U.S. 586, 610 (2006) (Breyer, J., dissenting) ("the majority, like Michigan and the United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation"); Just. & Freedom Fund Br. 5 n.2; CatholicVote.org Br. 16; ACLU Br. 17–18; Islam & Religious Freedom Br. 8–9; Becket Fund Br. 20–25; Seventh-Day Adventists Br. 20.

Plus, some religiously motivated plaintiffs only want justice or are reluctant to seek money damages for theological reasons. It's a perverse incentive to *force* such plaintiffs to demand compensatory damages they do not want or need.

Nor are compensatory damages for intangible injuries a cure-all. Many circuits require plaintiffs to prove those injuries without relying on their subjective testimony, and statutes and immunities impose more hurdles. Becket Fund Br. 15–18. In these and other civil rights cases, plaintiffs steer clear of compensatory damages because "causation and quantification of damages are burdensome to litigate," "there is little prospect of substantial recovery," and these claims "profoundly irritate[ ] the judge." Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 63 (1993). Discarding the majority rule on nominal damages leaves no remedy for those plaintiffs who do not have monetizable harm, rendering their rights unenforceable and effectively nonexistent.

If the Court creates an artificial jurisdictional bar that renders rights unenforceable in certain circumstances, it is not difficult to predict that more violations of constitutional rights will follow. As this Court has already recognized, nominal-damages awards ensure that constitutional rights are "scrupulously observed." *Carey*, 435 U.S. at 266. Excluding such awards from Article III would guarantee the opposite outcome. Although this problem extends to many backdrops, the context presented here—free speech on public college and university campuses—provides a stark illustration.

Nearly 90% of public, postsecondary institutions maintain policies that severely restrict protected speech or could be applied to do so. FIRE Br. 14–23. Many of these policies are vague and overbroad, including granting officials unfettered discretion to silence and punish, or prohibiting offensive expression based on third-party perceptions (*i.e.*, heckler vetoes).

Given that evidence, there is a real risk that a new rule disallowing standalone nominal-damages claims would lead university officials to strategically moot controversies *after* a student's rights are violated. Doubling down on constitutional deprivations would inevitably extend off campus to other government officials, endangering not just free speech and religious exercise, but also Second Amendment rights, the right to be free from illegal searches, unlawful detentions, and many others.

A constitutional right that cannot be enforced is no right at all. This Court should say so and reverse.

CONCLUSION

For the foregoing reasons, and those stated in Petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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