ORIGINAL

No. 21-5966

In the Supreme Court of the United States

Cecile A. Brown,

Petitioner,

v.

Solicitor General of the United States,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF APPELLANT OF PRO SE / PETITIONER FOR DECEASED Vet. William H. Ellis IN SUPPORT OF APPELLANT RESPECTING MOOTNESS

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QUESTIONS PRESENTED FOR REVIEW

Whether nominal damages account for harms associated with past constitutional violations acknowledges that plaintiffs have suffered real injuries from alleged violations of fundamental rights, regardless of whether their injuries translate into dollar amounts? Whether the government deprived plaintiffs of their constitutional rights involve quintessential injuries that satisfy Article III standing requirements? Whether the long-standing role of nominal damages play in providing concrete redress for past constitutional injuries, and would enable governmental actors to evade accountability for their unconstitutional policies? Whether the government has acted rationally and arbitrarily? Whether the government has considered relevant factors and not considered any extraneous factors for its decision. Has the government considered what skills will be necessary for a person to effectively discharge the duties connected with the post? Has the government decision been tainted by the consideration of extraneous factors such as gender or religion, as the case maybe? Whether the executive action can be described as reasonable and not whether it is exactly what the court or the judge would have chosen to do in that situation? Judicial review of legislative action. That is when laws passed by law-making authorities are challenged by invoking Writ jurisdiction in such cases. The first aspect of the review is whether the legislation violates a fundamental right? Second, whether the legislation violates a constitutional right other than a fundamental right? And third, relevant in the case of delegated legislation such as the Bar Council of India rule, 1975, which have been made under the authority granted to the Bar Council of India by the Advocates Act. 1961 is whether the scope of the delegated legislation under review is ultra vires i.e whether it goes beyond the scope permitted of such delegated legislation by statute or otherwise? The court must consider objectively, as a matter of legality and constitutionality, whether the legislation can be sustained? Whether the question of constitutionality of delegated legislation itself?

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The background of the relationship between plaintiff and defendant applicable to the case the defendant owed a duty to the plaintiff. A duty arises when the law recognizes a relationship between the defendant and the plaintiff requiring the defendant to act in a certain manner, often with a standard of care, toward the plaintiff. A judge, rather than a jury, ordinarily determines whether a defendant owed a duty of care to a plaintiff, and will usually find that a duty exists if a reasonable person would find that a duty exists under similar circumstances. A defendant breaches such a duty by failing to exercise reasonable care in fulfilling the duty. Plaintiff is related to the words **plaintive and complain**. You can think of a plaintiff as the person who makes a complaint in court. Defendant is related to the word defend. A defendant is the person who must defend themselves against the complaints brought forward by the plaintiff.

The incident occurred over the Board of Veteran Appeals phone line. I was told in December of 2020 that BVA was finished with Finality of appeal and the decision was about to be mailed to me. This incident rolled over to January of 2021 and I did not receive my decision. I was told to file a lawsuit against the government because BVA refuses to send finality decision and benefits. I was told over the phone that VA calculations were $2 billion dollars with $10, 000.00 monthly benefits. I have not seen my decision or benefits and the BVA started conflict with me and told me to sue them because their company receives lawsuits all the time. Here I am suing because of the failure of duty for the BVA government to send...

APPENDIX

APPENDIX B, E, D

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10, A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. **Cases resolving clear conflicts of law, Important or unique cases, interesting cases.**

Appellate Jurisdiction.

Article III, § 2, cl. 2, which provides that all jurisdiction not original is to be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. 28 U.S. Code § 1251(a) - Original jurisdiction. **STATEMENT OF THE BASIS FOR JURISDICITION.**

> Jurisdiction is based on diversity of citizenship and federal question. The amount in controversy exceeds Two Million Dollars ($2,000,000.00). This Court has supplemental jurisdiction over Plaintiffs' state law claims arising under the statutory and common law pursuant to 28 U.S.C. § 1338(b), because those claims are joined with substantial and related claims under federal law. The Court also has subject matter jurisdiction over those claims pursuant to 28 U.S.C. § 1367, because Plaintiffs' state law claims are interrelated with Plaintiffs' federal claims and arise from a common nucleus of operative facts such that the adjudication of Plaintiffs' state law claims with Plaintiffs' federal claims furthers the interest of judicial economy.

Introduction

Concise statement of the grounds on which jurisdiction is invoked. R. 14.1 (e). The rule has been justified on the ground that persons should not be encouraged to circumvent the provisions made by a statute, providing for a mechanism and procedure to challenge administrative or quasi-judicial actions taken thereunder (Union of India v. TR Varma (AIR 1957 SC 882)). Grounds which jurisdiction is invoked in the high court under Article 226, claiming it can invoke its jurisdiction under the head of any other purpose. It could also, of course, approach a civil court and file a civil suit seeking appropriate reliefs against the government. The High Court would still apply the principle that the contractor must exercise that alternate equally efficacious remedy. Therefore, the mere fact that a claim is being made against the government does not mean that the High Court must exercise its jurisdiction.

Article 14, states that the state shall not deny to any person equality before the law. It may allege that its fundamental right under Article 14 has been violated because the government has unfairly discriminated against it by paying the nine other cement suppliers while withholding the amount due to it. Therefore, subject to the specific facts of a case rate, writ jurisdiction may be invoked against private parties as well if the nature of their activities calls for it. First, a high court is not likely to invoke its writ jurisdiction for the adjudication of a dispute involving a violation of purely private interests for which one or more alternate, equally efficacious remedies exist in law. Second, this is the case even if the party that is alleged to be in the wrong is the state. Third, a high court may invoke its jurisdiction for the adjudication of a dispute

involving the violation of private rights. If, at the same time the dispute involves the violation of a fundamental right or the violation of a law for which no other remedy has been provided. This is often the case when the party that is alleged to be in the wrong is the state. And finally, a high court may invoke Article 226 against a private person if its activities are of a public nature or they otherwise fall within the parameters of the third proposition above. It is shown that the authority of the law was guilty of a breach of natural justice or acted unreasonably. If the authority has considered the matters which it is its duty to consider and has excluded irrelevant matters, its decision is not reviewable unless so absurd that no reasonable authority could have reached it. The judiciary must ensure that the executive acts according to law.

I. **The burden of proving that particular legislation is unconstitutional or ultra-virus is a statute. The legislation carries a rebuttable presumption of constitutionality or legality.**[1]

If the delegated legislation involves the defects of substance or if the exercise of any power will be limited by the substance of power i.e., what the administrative authority *is empowered to do, it is called substantive* Ultra vires. It means that the delegated legislation goes beyond the scope of authority conferred by the parent statute or by the constitution. It is the fundamental principle of law that a public authority cannot act outside the powers i.e., ultra vires. The doctrine refers to the extent; scope and range of power conferred by the parent action the concerned authority to make rules. To be valid a rule must fulfill two conditions, they are:

1. It must conform to the provisions of statute under which it is framed; and

[1] 1. Substantive Ultra Vires
2. Procedural Ultra Vires
3. Substantive Ultra Vires

2. It must come within the scope and purview of the rule making power of the authority framing the rule.

If either of those conditions is not fulfilled, the rule would be void as parliament never intended to give authority to make such rules which are unreasonable and ultra vires. A delegated legislation may be held to be invalid on the ground of substantive ultra vires in the following circumstances.

1. **Constitutionality of Parent act:**

Constitutionality of parent act plays a dominant role for delegated legislation under which it is made. If the parent act, which empowers the administration to form necessary rule, bye laws, regulations or any form of delegated legislation, itself unconstitutional or Ultra vires the constitution, delegated legislation made under it is necessarily bad and will be ipso facto invalid. The parent act may be unconstitutional on the ground breach of fundamental rights, other constitutional provisions and on the ground of excessive delegation.

The supreme court of Nepal under the constitution has the power to declare the inconsistent laws void either ab initio or from the date of its decision but mostly it declares the inconsistent laws void from the date of its decision by calculating their pragmatic values.

2. **Delegated legislation ultra vires the constitution:**

Like the parent act delegated legislation may be challenged on the ground of its constitutionality. Sometimes, parent act may not be formed unconstitutional but delegated legislation made under it may conflict with the constitution. The courts may be asked to consider the question of constitutionality of delegated legislation itself.

Delegated legislation is ultra vires the parent act:

The validity of delegated legislation can be questioned on the ground that it is ultra vires the parent act. It has become an accepted principle of law that the delegated exercise of legislative power must be exercised in conformity with the principal power or authority. If delegated legislation does not conform exactly to the power granted or if it is in direct conflict with any provision of Act, under which it is made, it can be held invalid. Rules whether made under the constitution or a statute, must be intra vires the parent law under which power has been delegated. Thus, delegated legislation, repugnant to or in excess of or overriding the provision of parent act is ultra vires.

Delegated legislation Ultra vires the General rule:

The validity of delegated legislation can be challenged on the ground that it is ultra vires the general law. It takes place, when the delegated legislation makes a law in force unlawful and unlawful act lawful.

Unreasonableness:

Generally, statute cannot be challenged on the ground of unreasonableness. But, in exceptional cases, it can be challenged on the ground of unreasonableness.

Mala fide:

Mala fide means 'bad faith' or ulterior motive. Delegated legislation can be challenged on the ground of mala fide, if it has no relation to the purpose for which the law-making power was delegated. But in practice, it is extremely difficult to substantiate these grounds before the court.

Excessive Delegation:

A statute which is invalid on account of excessive delegation, or delegated legislation which is ultra vires the statute, will not cease to be so merely because the legislature has made certain amendment to the statute not directly curing the defect.

1. **Sub-delegation:**
   If the Executive i.e., the delegate further delegates such power to any subordinate authority or agency it is called sub-delegation. The principle of sub-delegation is subject to criticism and not accepted, unless there is a provision express as implied, to that effect. Hence, the validity of an act under sub-delegation can be questioned ultra vires.
2. **Procedural Ultra Vires:**
   If the administrative authority fails to follow required procedure prescribed by parent act or by the general rule, it is known as procedural ultra vires. To apply the doctrine of Ultra vires, the first question for the courts to decide is whether the provision in the act prescribing the procedure is mandatory or directory. Rules become invalid only in the case of non-compliance with the mandatory procedure.
   Noncompliance of directory procedure does not render them invalid. So, an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if directory enactment be obeyed or fulfilled substantially. Basically, non-compliance of following procedure declares delegated legislation void.
   Court issued a directory order in the name of the electricity authority to necessarily perform the task of publication for the purpose of Bye Law 22 and 27(1) of the said Bye-Laws.
   Court may exercise jurisdiction in the interests of justice.
   The first factor is whether the person seeking to invoke Writ jurisdiction has clean hands. That is whether the petitioner has engaged in inequitable or illegal behavior.
   The conduct of parties during Writ proceedings if the parties conduct during the proceedings is inequitable or illegal.
   That is whether the person seeking relief has acted diligently or whether there has been an inordinate delay on his or her part.

The rule of exhaustion of a remedy before invoking jurisdiction under Article 226 has been characterized as a rule of policy, convenience and discretion rather than a rule of law, as per decision of the Supreme Court in State of Uttar Pradesh v Md. Nooh (AIR 1958 SC 86) and Baburam Prakash Chandra Maheshwari v Antarim Zila Parishad (AIR 1969 SC 556).

The rule has been justified on the ground that persons should not be encouraged to circumvent the provisions made by a statute, providing for a mechanism and procedure to challenge administrative or quasi-judicial actions taken thereunder (Union of India v TR Varma (AIR 1957 SC 882)).

The Income-tax Act is a code in 3 itself as regards legal remedies too. Against impugned orders, petitioners have effective and comprehensive legal remedies by way of appeal under section 246(1)(i) of the Act, further second appeal to the Income-tax Appellate Tribunal, a reference to the High Court and further appeal to the Supreme Court. Article 226 is not meant to circumvent statutory legal remedies. It is quite often held and reiterated by Courts that ordinarily the High Court should not entertain writ applications filed, bypassing the statutory legal remedies, where violation of fundamental rights is not involved.

At times it becomes necessary for the Court to remind itself about the self-imposed restraints and limitations in exercise of the power granted to the Court by the Constitution under Article 226. The Court can take judicial notice of the fact that large numbers of writ petitions are filed in the High Court by persons without exhausting statutory alternative remedies or other remedies available to them.

Further, what can be gathered from the decisions of the Supreme Court in U P Jal Nigam v Nareshwar Sahai Mathur (1 SCC 21); Titaghur Paper Mills Co. Ltd. v State of Orissa (142 ITR 663) and HB Gandhi v Gopi Nath and Sons ((1990) 77 STC 1) is that

where statutory remedies are available or a statutory Tribunal has been set up, a petition under Article 226 should not be entertained, unless the statutory remedies are ill-suited to meet the demands of any extraordinary situation, for example, where the very vires of the statute is in question, or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require that recourse should be had to Article 226; or where the alternative remedy is onerous or burdensome or inadequate; or where it involves inordinate delay or is illusory in nature; where the impugned action is palpably wrong or goes to the root of the jurisdiction or where there is total lack of jurisdiction in the authority.

It is quite often stressed by Courts that judicial review is not against a decision under attack but against the decision-making process.

Likewise, the existence of an alternative remedy is not an absolute bar to the issue of a writ of certiorari; and a writ of mandamus would not be refused merely because the assesses could have filed a suit. A writ of prohibition or mandamus may be issued to restrain recovery proceedings in pursuance of an assessment order made without or in excess of jurisdiction, even if such a plea as to jurisdiction was not raised in the assessment proceedings.

...No other Court subordinate to High Court has got the power to issue such prerogative writs... Under Article 226 of the Constitution of India, the High Court has got the power, throughout the territories in relation to which it exercises its jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them for the enforcement of fundamental rights

conferred by Part III of the Constitution and for any other purpose. In fact, the power of the High Court to issue writs is larger than that of Hon'ble Supreme Court as Hon'ble Supreme Court can issue writs under Article 32 of the Constitution of India in cases where the fundamental rights of a person have been violated, whereas the High Court can issue writs in respect of the violation of fundamental rights or in respect of cases where the legal rights of the persons have been jeopardized. Article 226 read as under:

Article 226 - Power of High Courts to issue certain writs.

Article 227 - Power of Superintendence over all courts by the High Court.

The Public Interest Litigation has opened new gates for the litigants to invoke the jurisdiction of the High Court. Now, any public-spirited person or a social activist group can invoke the jurisdiction of the High Court by filing a Public Interest Petition. The filing of these petitions is now regulated by the Rules farmed by the High Court. The High Court has also exercised jurisdiction on the basis of news items published in the newspapers and on the basis of the letters written by the aggrieved persons to it.

Appellate and Revisional Jurisdiction

...As per Section 100 of the Code of Civil Procedure, an aggrieved party can file an appeal to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Section 100 of the Code of Civil Procedure reads as under: -

Section 100 - Second appeal.

Even under the fiscal statutes, such as Income-tax Act, the High Court exercises appellate jurisdiction. Section 260 A of the Income-Tax Act, 1961 confers the right of an appeal against any order passed in appeal by the Income Tax Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of Law.

Further, under Section 115 of the Code of Civil Procedure, the High Court may call for the record of any case, which has been decided by any court subordinate to the High Court and in which no appeal lies thereto, if it appears to the High Court that the subordinate court has exercised a jurisdiction not vested in it by law or has failed to exercise the jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity. The High Court can a withdraw any suit, appeal or other proceeding pending in any court subordinate to it and try or dispose of the same or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same or re-transfer the same for trial or disposal to the court from which it was withdrawn. Section 115 of the Code of Civil Procedure is as under:

115. Revision.

(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears –

(2) Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favor of the party applying for revision, would *have finally disposed of the suit or other* proceedings.

Subordinate Civil Courts

The Punjab Courts Act, 1918 determines the jurisdiction of the civil courts subordinate to the High Court. The said Act has been amended from time to time by the present States of Punjab and Haryana. The Union Territory of Chandigarh generally adopts the Laws enacted by State of Punjab under the Provisions of Punjab Reorganization Act, 1966. The civil judges in the States of Punjab, Haryana and Chandigarh have unlimited pecuniary jurisdiction i.e., that any suit of any value can be instituted before the civil judge. The District Judges including Additional

District Judges have power to hear appeals against the judgment and decree granted by civil judges under the Code of Civil Procedure. However, certain statues confer jurisdiction of first appeal before the High Court as well. The High Court has power to interfere with the judgment and decree if the civil court in second appeal if the findings recorded give rise to substantial question law.

INTEREST OF *APPELLANT*[1]

Appellant disagrees with many issues, but share the belief—informed by experiences—nominal damages play a critical role in preserving plaintiffs' ability to vindicate constitutional rights and to challenge unconstitutional government policies. This case involves petitioner seeking a ruling on the constitutionality of a university speech policy that the school applied to restrict their First Amendment rights, then changed mid-litigation. But the question presented implicates civil-rights litigants' ability to vindicate constitutional rights of every kind—the rights to speak, to worship, and to be free from compelled worship; rights to be free from unjust searches and excessive force; and rights to freedom of association and equal protection of the laws, among others.

Based on *appellants* experience, a ruling that nominal-damages claims are insufficient to prevent a case from becoming moot will substantially

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[1] Appellant affirm that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than appellant/petitioner, made a monetary contribution to its preparation or submission. No blanket consents filed. No oral argument because appellant cannot afford to come before the government since the matter is about the government not issuing funds for finality of litigation case.

undermine civil rights plaintiffs' ability to protect their constitutional rights.

SUMMARY OF ARGUMENT

Similar dynamics play out in a wide range of civil rights suits. When confronted with legal challenges to unconstitutional or illegal policies, governments often respond by changing those policies, and then contend that the cases are moot. If that governmental action ended the case, plaintiffs would obtain incomplete relief. The government would stop violating their rights going forward. But courts would be unable to remedy the real but often difficult-to-quantify harms that plaintiffs already suffered. The same scenario would recur for litigants whose entitlement to prospective relief becomes moot for other reasons, like prisoners' completion of their sentences or students' graduations.

Plaintiffs' ability to plead nominal damages to account for the harms associated with past constitutional violations acknowledges that plaintiffs have suffered real injuries from alleged violations of fundamental rights, regardless of whether their injuries readily translate into dollar amounts. Nominal damages thus play a key role in vindicating rights and holding governments accountable for unconstitutional policies.

ARGUMENT

I. Nominal Damages Afford Retrospective Relief for Hard-to-Quantify Harms

1. Claims that the government has deprived plaintiffs of their constitutional rights involve quintessential injuries that satisfy Article III standing requirements. "[I]ntangible injuries can

nevertheless be concrete." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Thus, this Court has held in myriad contexts that alleged constitutional violations constitute injuries-in-fact. *E.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) ("'[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage."); *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of [a] barrier, not the ultimate inability to obtain [a] benefit."); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[E]ven if [respondents] did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) ("The parties here are school children and their parents, who are directly affected by the laws and practices against which their [Establishment Clause] complaints are directed," and "[t]hese interests surely suffice to give the parties standing to complain."). It is hard to imagine how the law could be otherwise. The premise of plaintiffs' suits is that the government has deprived someone of the basic rights that our political system guarantees. If that injury is not actual and concrete, nothing is.

Many constitutional violations are of paramount significance but difficult to reduce to dollars and cents. "Unlike most private tort litigants, a civil-rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality op.). Take the loss when the government forces individuals to engage in ten minutes of involuntary worship, or silences speech on a particular day, or engages in a fleeting but

unconstitutional search. The constitutional violation is gravely important, but often the "plaintiff's economic injury [is] so minimal as to be essentially nominal." *Romanski v. Detroit Entm't, LLC*, 428 F.3d 629, 645 (6th Cir. 2005). Or the economic injury may be so difficult to value that supporting an award of compensatory damages through expert testimony or other competent evidence would be prohibitively expensive.

For centuries, nominal damages have supplied the answer to this valuation problem: by pleading a dollar or two, plaintiffs aver that they have experienced harms that are real, but difficult to value or prove in monetary terms. Petrs.' Br. 17. Thus, "[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." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986); *see Carey*, 435 U.S. at 308 n.11 (1978) (same).

Nominal damages therefore perform a critical function. Plaintiffs who allege an actual harm in the form of a constitutional violation need not adduce the type of evidence of particular costs, expenses, or losses attributable to that violation, as would be the case for proving compensatory damages. Nominal damages substitute for compensatory damages, avoiding the need to calculate "damages based on some undefinable 'value' of infringed rights" by allowing plaintiffs to recover without particularized proof of pecuniary harm. *Stachura*, 477 U.S. at 308 n.11; *see Carey*, 435 U.S. at 251-52 (similar); Petrs.' Br. 18-19. Put another way, "[a]n award of nominal damages does not mean that there were not actual economic damages, just that the exact amount of damages attributable to the improper conduct was not proven." 25 C.J.S. Damages § 24 (2020).

For some plaintiffs, nominal damages may be the *only* form of monetary relief available. Prisoners

cannot recover compensatory damages "for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e). Nominal damages are thus often the only monetary relief prisoners can seek to vindicate their constitutional rights.

Because nominal damage is designed to compensate for actual past harms, it follows that a case seeking nominal damages remains live even if the government changes the challenged policy going forward. To be sure, that change may moot *prospective* relief if the plaintiff will never again face the same unconstitutional policy, and the government is unlikely to resume its challenged practice. *E.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). But that change does not remedy the *past* violation that the plaintiff experienced.

That nominal-damages awards involve only small sums of money is irrelevant. A live Article III controversy requires only "a dollar or two." *Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 289 (2008); *see Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). That is because an award of damages, "whether compensatory or nominal," alters the legal relationship between the parties and "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). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); Petrs.' Br. 22-23.

2. The rule that nominal damages allow plaintiffs to continue litigating past constitutional wrongs also makes eminent sense. "Nominal relief does not necessarily a nominal victory make." *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring). "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." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999). "Regardless of the form of relief he actually obtains, a successful civil-rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards." *Rivera*, 477 U.S. at 574 (plurality op.).

Many civil-rights litigants thus place great significance on even a nominal recovery. Take Dennis Ballen, who successfully sued the city of Redmond, Washington, after the city tried to apply its sign code to stop him from advertising his bagel business using sidewalk signs. Ballen argued that the sign ordinance—which arbitrarily privileged some types of speech over others—violated the First Amendment. The court agreed. Ballen undoubtedly suffered some economic harm from diminished traffic to his store due to his inability to advertise. But because his harm was difficult to value, he decided not to seek compensatory damages, and instead sought—and obtained— one dollar in nominal damages. *Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006). Ballen now prominently displays the dollar bill, framed, above his shop's counter. Or take Eon Shepherd, a prisoner who successfully recovered one dollar when guards unconstitutionally touched and tore at his dreadlocks, violating his Rastafarian beliefs and the Free Exercise Clause. Notwithstanding the small award, Shepherd was "really satisfied because I feel like I've been vindicated." *NY lawyer gets paid $1.50 for civil rights victory*, N.Y. Post (Dec. 3, 2011).

Further, by preventing governments from terminating civil-rights cases prematurely, nominal-damages claims produce rulings that mark the path for government actors, helping them avoid future violations. Petrs.' Br. 20. The availability of nominal damages "guarantee[s] that a defendant's breach" of a plaintiff's rights "will remain actionable regardless of [its] consequences in terms of compensable damages." *Amato*, 170 F.3d at 318. Otherwise, governments

could freely implement illegal policies, as long as governments rescind those policies before a ruling on the merits. The government may defend unconstitutional policies on the merits against pro se plaintiffs, where it is likely to win, but then relent and moot the litigation when it faces sophisticated counsel and is likely to lose. This risk is particularly acute in prison litigation, where the government has significant discretion over when and how it will modify its policies. *See* Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 123 Y.L.J. Forum 325, 329-30 (Nov. 26, 2019) (hereinafter, Davis & Reaves).

By preventing the government from changing challenged policies to moot cases, nominal-damages claims also mitigate the government's ability to game its way into maintaining qualified immunity. Petrs.' Br. 37-39. A rule requiring courts to dismiss nominal-damages claims as moot prevents the development of "clearly established" law that would allow plaintiffs to hold government officials accountable for violating constitutional rights. That is especially true because, to defeat qualified immunity, plaintiffs must identify either "controlling authority" or "a robust consensus of *cases of persuasive authority*" *that "placed the* statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011). And those authorities must make clear that "the violative nature of *particular* conduct is clearly established . . . in light of the specific context of the case." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam). If government actors could unilaterally moot cases by amending official policies before a ruling on the merits, the government could perennially thwart the development of this "controlling authority."

Government officials, too, may benefit from adjudication of nominal-damages claims. In a case challenging civil-forfeiture policies, state and county officials successfully argued that the case was not

moot based on the plaintiffs' nominal-damages claims, and the court ultimately held that the officials were not subject to section 1983 liability. *Platt v. Moore*, 2018 WL 2058136, at *2 (D. Ariz. Mar. 15, 2018). Thus, a ruling on the merits of a nominal damages claim can clarify the legality—as well as the illegality—of governmental action.

Finally, a civil-rights plaintiff who recovers nominal damages is a prevailing party under 42 U.S.C. § 1988 and may be entitled to an award of attorneys' fees. Of course, if the award is nominal, courts may consider the small amount of the award as "bear[ing] on the propriety of fees awarded under § 1988." *Farrar*, 506 U.S. at 114; *see, e.g., Citizens for Free Speech, LLC v. Cty. of Alameda*, 2017 WL 912188, at *9-10 (N.D. Cal. Mar. 8, 2017) (awarding only 20% of requested fees in light of nominal-damages award); *Talley v. District of Columbia*, 433 F. Supp. 2d 5, 9-10 (D.D.C. 2006) (denying fee request in light of nominal nature of damages); Petrs.' Br. 48-49. But Congress provided for attorneys' fees precisely because the ability to obtain fees is often an important incentive for lawyers to take suits on behalf of plaintiffs who could not otherwise afford to vindicate their rights. And the availability of attorneys' fees may deter governmental actors from unconstitutional conduct in the first place.

3. The Ninth Circuit's contrary rule improperly dismisses nominal damages as a legal nullity, and thus confuses whether a plaintiff has suffered a *remediable* harm with whether the plaintiff has suffered a readily quantifiable one. The Ninth Circuit believed that because nominal damages are a "trivial sum," they must be "awarded for symbolic, rather than compensatory, purposes." *Flanigan's Enters. v. City of Sandy Springs*, 868

F.3d 1248, 1268 (9th Cir. 2017) (en banc). But the question is whether nominal damages are a remedy of

any sort, not how precisely they actually compensate alleged harms.

The notion that damages must be readily calculable or must fully compensate plaintiffs for the harm they have suffered to satisfy Article III is plainly incorrect. In several statutory schemes, for example, statutory damages serve the same remedial purpose as nominal damages, giving plaintiffs "some recompense for injury due to [them], in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (statutory damages under Copyright Act of 1909). In other civil cases, "it is the function of liquidated damages to provide a measure of recovery" when the damages resulting from an injury "may be difficult or impossible to ascertain." *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54 (1956). No one would argue that a plaintiff's entitlement to only these forms of monetary relief, rather than full compensatory damages, renders a claim nonjusticiable. From the standpoint of Article III, there is no principled difference between liquidated, statutory, and nominal damages.

The Ninth Circuit's approach also encourages absurd results. In *Freenor v. Mayor & Alderman of Savannah*, for example, Eleventh Circuit precedent foreclosed plaintiffs' argument that a nominal-damages claim saved their First Amendment challenge to a repealed tour-guide licensing ordinance. 2019 WL 9936663 (S.D. Ga. May 20, 2019). But two of the plaintiffs had also pleaded $10 in compensatory damages, reflecting the amount that they had paid for their tour-guide licenses under the old regime. The court expressed "concern" that "Plaintiffs' request for $10 in compensatory damages is simply an alternative way to plead nominal damages." *Id.* at *7. But because those two plaintiffs sought "retrospective compensatory damages in addition to the nominal damages pled by all

Plaintiffs," the court deemed the case not moot. *Id.* at *7. All four plaintiffs, however, suffered the same constitutional harm—infringement of their right to speak to members of the public about the history of Savannah. By holding that two plaintiffs could obtain redress because they also paid $10 for licenses, but the other two plaintiffs could not because their only harm was having their speech chilled, the Ninth Circuit missed the forest for the trees.

More broadly, the Ninth Circuit's approach arbitrarily treats similarly situated plaintiffs differently depending on semantic differences in their pleadings. Petrs.' Br. 42-43. Some plaintiffs might characterize damages as "compensatory," which would allow them to avoid mootness under the Ninth Circuit's rule. *E.g.*, *Nelson v. Miller*, 2011 WL 6400524, at *3 (S.D. Ill. Dec. 19, 2011) (characterizing as "actual damages" a $10 per day award to Catholic prisoner who received inadequate nutrition during Lent due to prison policy refusing meat-free meals). Others might include in their complaint only a general claim for relief, without distinguishing the nature of the damages they seek. Still others might plead a request for compensatory damages in their complaint, without any real intention to prove a precise measure. The underlying constitutional injury would be the same, as would the relief (some form of damages).

And in still other cases, courts may award nominal damages on finding a constitutional violation even if the plaintiffs did not specifically request them. *E.g.*, *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) ("an award of nominal damages is mandatory upon a finding of a constitutional violation"); *Risdal v. Halford*, 209 F.3d 1071 (8th Cir. 2000) (plain error to give the jury discretion not to award nominal damages on a finding of a violation of free-speech rights). But these groups of plaintiffs could face wildly varying outcomes should governmental actors change the challenged policy in response to litigation. This Court should reject the Ninth Circuit's unprincipled

approach, which would unjustifiably compromise civil-rights plaintiffs' ability to vindicate their constitutional claims.

II. Cases Involving Nominal Damages are Ubiquitous, and Illustrate the Critical Role Such Damages Play in Vindicating Rights

Jettisoning the longstanding rule that nominal-damages claims allow plaintiffs to continue seeking redress for past constitutional violations even when governments repeal the challenged policy would also compromise plaintiffs' ability to vindicate all sorts of constitutional rights. The sheer volume of cases involving this fact pattern illustrates the point across myriad constitutional claims. Indeed, the Court faced this issue in the Second Amendment context just last Term.

The following cases illustrate how often plaintiffs' access to justice hinges on the availability of nominal damages. The postures of these cases differ; in some cases, courts assessed whether plaintiffs' nominal-damages claims could proceed at the pleadings stage; in others, courts resolved the cases on the merits. *Amici* may disagree as to whether particular cases involved meritorious claims. But all agree that the nominal-damages claims matter, that these claims are not mere artifices to produce advisory opinions, and that plaintiffs pursuing nominal damages deserve their day in court.

1. **Second Amendment.** In January 2019, the Court granted review of whether New York City's ordinance prohibiting residents from carrying firearms to out - of city gun ranges, competitions, or second homes violated petitioners' Second Amendment rights. Shortly thereafter, New York City "quickly changed its ordinance," and New York State "enacted a law making the old New York City ordinance illegal." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527-28 (2020)

(Alito, J., dissenting). While the law barred petitioners from transporting their arms in the past, they sought only prospective relief. The Court dismissed the case as moot because petitioners did not seek even nominal damages, which multiple members of the Court acknowledged would have kept petitioners' Second Amendment claims alive. *Id.* at 1526-27 (per curiam op.); *id* at 1540 (Alito, J., *dissenting*).

2. **Freedom of Speech.** First Amendment cases in which governmental actors unconstitutionally abridge plaintiffs' free-speech rights and then change the challenged policies or ordinances are legion. These cases involve plaintiffs along all points of the political spectrum.

Start with content-based speech restrictions, *i.e.*, speech restrictions that privilege certain views or subjects above others. State and local governments have targeted everything from panhandling to erecting yard signs supporting George W. Bush. Some universities have disfavored pro-life student groups' messages by forcing those groups alone to post signs in deserted areas; other universities have disrupted student groups' programming by citing fears of offending Christian students. Localities have tried to silence residents' attempts to place "For Sale" signs in their parked vehicles because of opposition to encouraging that kind of commercial activity. A pro-life protestor of Planned Parenthood, a prisoner trying to send his mother drawings featuring partially nude women and marijuana leaves, and a volunteer trying to register voters all alleged differential treatment at the hands of governmental actors solely because of the content of their speech. The plaintiffs in these cases hailed from all over the country and all walks of life, but all sued to vindicate the same principles: the

unlawful prior restraints—whether those plaintiffs are strip-club owners challenging licensing requirements, animal-rights activists denied a timely decision on their permit for a planned protest, or university students and faculty required by university policy to pre-clear communications with prospective student-athletes. In one instance, an elementary school mandated that students submit for prior approval materials they wanted to distribute, including Christian students who sought to give out "pencils inscribed with 'Jesus is the reason for the season'" and "candy canes with cards describing their Christian origin."[3]

In all of those cases, when challenged, governmental actors tried to change their policies in order to moot the litigation. Plaintiffs challenging such prior restraints suffer real but difficult-to-quantify harms, making compensatory damages an inapt remedy. As the Seventh Circuit explained, "this *is exactly the situation for which nominal damages* are designed." *Six Star Holdings, LLC v. City of Milwaukee,* 821 F.3d 795, 805 (7th Cir. 2016). Without nominal damages, plaintiffs would obtain no remedies for the difficult-to-value harms they already

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[3] *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 799-800 (7th Cir. 2016) (strip club owner challenging licensing scheme); *Clarkson v. Town of Florence*, 198 F. Supp. 2d 997, 1016 (E.D. Wis. 2002) (similar); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1250 (10th Cir. 2004) (animal-rights activists challenging permit ordinance); *Crue v. Aiken*, 370 F.3d 668, 674 (7th Cir. 2004) (university faculty seeking to share concerns about university mascot, "Chief Illiniwek"); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (Christian students barred from distributing pencils, candy canes, "tickets to a church's religious musical programs, and tickets to a dramatic Christian play"); *accord Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010) (anti-spending group seeking to hold political press conference in city hall).

suffered, and governments could re-enact similar, unconstitutional policies with impunity.

3. **Free Exercise and Establishment Clauses.** Both religious and secular plaintiffs often challenge government policies under the First Amendment, bringing lawsuits alleging violations of the Free Exercise Clause, the Establishment Clause, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. In these contexts, too, governments often respond by amending their policies and arguing the challenges are moot. As in the free-speech context, nominal damages allow plaintiffs to remedy the intangible harms they already suffered—whether those harms involved being compelled to refrain from practicing their faiths, or being subjected to impermissible state support for religion.

For instance, prisons have refused to accommodate prisoners who seek kosher diets consistent with their religious beliefs. Another prison rejected an inmate's request for non-meat meals on Fridays and during Lent, prompting the inmate to abstain from eating the meat in his standard prison meals, and his weight "dropped as low as 119 pounds." When the prison attempted to moot the case three years into the litigation by offering the individual inmate a diet compatible with his faith, the Seventh Circuit refused to dismiss the case. Putting a price on having to "forego adequate nutrition on Fridays and for the forty days of Lent in order to comply with his sincerely held religious beliefs" might be challenging—but there was still "a substantial burden on his religious exercise," and damages claim for that retrospective harm kept the case alive.[4]

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[4] *Nelson v. Miller*, 570 F.3d 868, 880, 882 (7th Cir. 2009) (Catholic inmate seeking non-meat meals on Fridays and during Lent); *see also Rich v. Fla. Dep't of Corr.*, 716 F.3d 525, 532 (11th

Similarly, in the Establishment Clause context, plaintiffs in Slidell, Louisiana, challenged a display in the foyer of the City Court that depicted "Jesus Christ presenting the New Testament of the Bible," with large wording underneath reading "To Know Peace, Obey These Laws." *Doe v. Par. of St. Tammany*, 2008 WL 1774165, at *1 (E.D. La. Apr. 16, 2008). Shortly thereafter, the government "changed the display" to contain "various historical lawgivers" alongside Jesus Christ, and argued that the suit was moot. *Id.* But by then, the plaintiffs had already suffered the harms associated with the unwanted religious display. Nominal damages again allowed plaintiffs to vindicate that difficult-to-value harm. *Id.* at *5.

4. **Fourth Amendment.** Likewise, when official search-and-seizure policies violate plaintiffs' Fourth Amendment rights, nominal damages prevent governments from mooting the claims by changing or repealing the challenged policies, and enable plaintiffs to seek redress for past harms. The city of Flint, Michigan, subjected rental properties to its Comprehensive Rental Inspection Code, which allowed city inspectors to enter rental units without permission and penalized property owners who refused inspections. Karter Landon, one such property owner, sued and alleged that the Code unconstitutionally subjected him to warrantless searches under the threat of fines and other penalties if he did not consent. The city responded by amending its Code and argued that Landon's case was moot. The harm from an unconstitutional search does not lend itself to ready monetary valuations. But because Landon sought "nominal damages as a remedy for past wrongs," the district court allowed his claim to go forward. *Landon v. City of Flint*, 2017 WL 2806817, at *3, *6 (E.D. Mich. Apr. 21, 2017), *report and*

Cir. 2013) (prisoner seeking kosher diet); Davis & Reaves, *supra*, at 329 (collecting similar cases).

recommendation adopted, 2017 WL 2798414 (E.D. Mich. June 27, 2017).

5. **Due Process Clause.** Allowing governments to moot cases despite nominal-damages claims would also prevent plaintiffs from remedying due-process harms that government policies inflicted. As with other constitutional claims, the government's violation of a citizen's procedural due-process rights involves real, past injuries that are difficult to quantify. After the City of Costa Mesa towed Sidney Soffer's car and he was "[u]nwilling or unable to pay the towing fee," he sued the city for failing to provide an adequate hearing to challenge the city's decision to tow his car. The city amended the relevant ordinance, but Soffer's due-process claim survived and ultimately succeeded. The court awarded nominal damages of one dollar "[b]ecause due process rights are 'absolute,'" and the prior ordinance violated his right to adequate procedural protections. *Soffer v. Costa Mesa*, 607 F. Supp. 975, 977 (C.D. Cal. 1985), *aff'd* 798 F.2d 361 (9th Cir. 1986).[5]

III. Nominal Damages Allow Plaintiffs to Remedy Retrospective Harms in Cases That Become Moot on Other Grounds

Because nominal damages remedy retrospective but difficult-to-quantify harms, nominal-damages claims also preserve plaintiffs' ability to vindicate constitutional rights in cases were other intervening developments moot plaintiffs' claims for prospective relief.

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[5] Similarly, nominal damages allow inmates an opportunity to vindicate their procedural due-process rights in disciplinary proceedings, even when prisons seek to moot their claims by removing the infractions from the inmates' records. *Penwell v. Holtgeerts*, 295 F. App'x

Take cases that students bring to challenge school policies. Those policies often outlast individual students, who graduate by the time their cases work their way through the courts. Leaving the educational environment obviates any need for prospective relief. And the mootness exception for violations "capable of repetition but evading review" does not apply, because that doctrine requires "a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990).

But the students have nonetheless suffered wrongs in the past that remain unredressed. For instance, in *Griffith v. Butte School District No. 1*, the school barred valedictorian Renee Griffith from speaking at graduation because she refused to remove references to Jesus Christ from her graduation speech. 244 P.3d 321, 328 (Mont. 2010) (looking to federal law as instructive on mootness). Graduation freed her from that restriction, but did nothing to remedy the harm she suffered by having to forgo speech. *Id.* at 200. And in *Grimm v. Gloucester County School Board*, -- F.3d --, 2020 WL 5034430 (4th Cir. Aug. 26, 2020), Gavin Grimm challenged a school policy requiring students to use restrooms matching their "biological

877, 878 (9th Cir. 2008); *Jones v. Clemente*, 2006 WL 782474, at *2 (D.
Or. Mar. 27, 2006).
gender" under the Equal Protection Clause and Title IX, but graduated before the courts resolved his suit. Nominal damages again were the only way to recognize and remedy Grimm's harms. *Id.* at *11 & n.6. And in *Mellen v. Bunting*, a group of cadets brought an Establishment Clause challenge to the mandatory supper prayer at the Virginia Military Institute. 327 F.3d 355, 362-63 (4th Cir. 2003). Their graduation did not eliminate the harm they

experienced from the "unconstitutional toll" the supper prayer placed "on the consciences of religious objectors." *Id.* at 371. In all these cases, pleading nominal damages allowed students to hold schools accountable for the harms that school policies imposed and laid down markers for schools about what the law requires.

Nominal damages play a similar role in cases involving pretrial detainees and prisoners. Their release or transfer to another facility generally moots their claims for prospective relief. Further, because of the limitations on compensatory damages claims in 42 U.S.C. § 1997e(e), nominal damages are often the only relief prisoners can seek to vindicate their constitutional rights.

Indeed, the availability of nominal damages often *makes all the difference for prisoners to obtain some* recognition that they suffered a constitutional wrong. In *Jessamy v. Ehren*, 153 F. Supp. 2d 398, 403 (S.D.N.Y. 2001), for example, pretrial detainees alleged that corrections officers "punched, kicked, stomped upon, dragged and otherwise physically abused" them. Prospective relief was no help; the prison had already released the detainees. Compensatory damages would have been hard to establish; while one of the plaintiffs alleged emotional distress, he stipulated that he would "offer no evidence of physical injury at trial." Pleading nominal damages thus gave the detainees an opportunity to challenge the injuries they had already suffered, without having to translate that harm into dollars-and-cents figures for particular injuries. *Id.*; *accord Doe v. Delie*, 257 F.3d 309, 314 (3d Cir. 2001) (HIV-positive inmate's acquittal on retrial and release mooted claims for prospective relief in case alleging violations of right to medical privacy, but not nominal and punitive-damages claims for loss of privacy).

In sum, civil-rights plaintiffs in myriad constitutional contexts, and of all political persuasions

and beliefs, share one common thread: they have suffered real harms that transcend easy price tags. Nominal damages are often the only avenue available to remedy that wrong. And as a form of retrospective relief, nominal damages allow these plaintiffs to proceed when governments change their policies going forward but have not redressed a past wrong, or when other intervening events make prospective relief unavailable but leave a past wrong unremedied. The Ninth Circuit's outlier rule would upset the longstanding role that nominal damages have played in providing concrete redress for past constitutional injuries, and would enable governmental actors to evade accountability for their unconstitutional policies.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

"I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (8/6/2021).
("s"/Cecile A. Brown)".

Respectfully submitted,

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