

No. 17-869

IN THE
Supreme Court of the United States

MELISSA DAVENPORT AND MARSHALL G. HENRY,
Petitioners,

v.

CITY OF SANDY SPRINGS, GEORGIA,
Respondent.

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

**BRIEF OF RESTORING RELIGIOUS FREEDOM
PROJECT AND STUDENT PRESS LAW CENTER
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONERS**

Sarah M. Shalf
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROJECT
1301 Clifton Road
Atlanta, Georgia 30322
(404) 712-4652
sarah.shalf@emory.edu

Mark A. Goldfeder,
Director
mgoldfe@emory.edu
Amin Sadri, Litigation
Coordinator
amin.sadri@emory.edu
Restoring Religious
Freedom Project
CENTER FOR THE STUDY
OF LAW & RELIGION
Emory Law School
1301 Clifton Road
Atlanta, Georgia 30322
(404) 712-0213

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INTERESTS OF *AMICI CURIAE*¹

The Restoring Religious Freedom Project (“RRFP”) at Emory University School of Law is a program dedicated to providing students with hands-on experience while providing accessible, nonpartisan information and opening up new opportunities for dialogue regarding freedom of religion issues. The project convenes scholars and students from around the world to share research in this growing field. RRFP engages in litigation regarding religious freedom rights, the violation of which causes harms not easily quantified as compensatory damages. RRFP is interested in ensuring that it remains able to vindicate religious freedom rights even when forward-looking relief has been mooted.

The Student Press Law Center (“SPLC”) is a 501(c)(3) nonprofit advocate for the rights of student journalists. Founded in 1974, SPLC is the nation's leading provider of legal training and research to journalism students and advisers. To serve its mission of advancing the safety and welfare of student journalists, the SPLC assists students bringing constitutional claims against their

¹ Pursuant to Rule 37.2, *amici* notified counsel of record for all parties of their intent to file an *amicus* brief at least ten days prior to the due date for the brief. Further, *amici* have obtained written consent of all parties to file this *amicus* brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and its counsel made a monetary contribution to its preparation or submission.

institutions through a 210-member nationwide network of pro-bono lawyers. The SPLC is concerned that students have effective remedies to vindicate their constitutional rights that will not be mooted by graduation from the institution.

SUMMARY OF ARGUMENT

In *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1255 (11th Cir. 2017), the Eleventh Circuit *en banc* determined that the Petitioners' claims of constitutional injury did not constitute a live case or controversy because nominal damages were the Petitioners' only available remedy. According to that court, vindicating the Petitioners' constitutional injuries solely through an award of nominal damages "does not even rise to the level of a controversy, let alone one that is real, earnest, and vital." *Id.* at 1268. Instead, a ruling on nominal damages "would surely constitute an impermissible advisory opinion of the sort federal courts have consistently avoided." *Id.* In light of this decision, this Court has a special responsibility to resolve a disagreement among the circuits regarding the proper scope of judicial power and protection of constitutional rights. If other circuits were to adopt the Eleventh Circuit's decision, it would profoundly change the scope of constitutional litigation.

First, a rule following the Eleventh Circuit's decision would prevent federal courts from protecting constitutionally guaranteed rights. If nominal damages alone were insufficient to sustain a live case or controversy, violations of constitutional rights that cause no financial loss and are not eligible for forward-looking relief would go unpunished. Governments would be free to undermine these constitutional rights by stopping an unconstitutional policy or practice during litigation, but repeating it in the future. By way of example,

the Eleventh Circuit's rule would render the constitutional rights of prisoners, and rights protected by the First, Fourth, and Fourteenth Amendment unenforceable. This Court should grant certiorari to consider the impacts of the Eleventh Circuit's rule on these rights.

Second, the Eleventh Circuit's rule would effectively force plaintiffs to proceed under strained theories of compensatory damages, which would harm the individual litigant and be against the public interest. Such a rule would require plaintiffs alleging constitutional injury, who may not desire money as compensation, to plead and litigate compensatory loss to avoid a potential mootness issue. Further, federal courts would be required to hear and decide issues of compensatory damages in every case alleging constitutional injury. This would bog down the federal court system with claims that plaintiffs may not want to litigate.

Finally, decisions based on nominal damages serve important purposes. Such a ruling informs parties of the boundaries, consequences, and responsibilities of their actions. Although constitutional injuries premised on nominal damages may not cause economic loss or support forward-looking relief, nominal damages vindicate the past harm and provide a deterrent effect against future conduct. Further, suits supported by nominal damages inform private parties and government officials of the boundaries of their conduct. Thus, this Court should grant certiorari to consider the

grave impacts of the Eleventh Circuit's rule on the protection of constitutional rights.

ARGUMENT

I. The Eleventh Circuit's Rule Would Prevent Courts from Protecting Constitutional Rights from Tangible Harm in Important Classes of Cases.

This Court should grant certiorari because the Eleventh Circuit's decision, if followed by other courts, would prevent federal courts from vindicating constitutional rights whenever the government starts down a path of violating citizens' constitutional rights and changes its policy mid-litigation. This Court, and lower federal courts, have historically decided numerous constitutional cases in which genuine, but unquantifiable, harm has occurred. Those courts have remarked on the importance of nominal damages to vindicate that harm in such cases. The cases involve rights implicating the First, Fourth, and Fourteenth Amendments to the Constitution.

The Eleventh Circuit's rule would enable governments to test the limits of the Constitution, particularly in cases involving rights whose violation is unlikely to cause economic or physical harm. Without a basis for courts to set boundaries and vindicate the intangible, but still fundamental, harm suffered by the victims of that experimentation, these rights will be relegated to second-class status — unenforceable so long as the government knows when to quit.

**A. Nominal Damages Vindicate Citizens' Rights
When a Violation of the First Amendment Has
Caused Harm to Their Conscience.**

Violation of the rights guaranteed by the Free Exercise Clause and Establishment Clause are similar to each other in that the damage they cause — a violation of the conscience of individual citizens — often escapes quantification that can be made right by compensatory damages. Numerous cases illustrate the need for nominal damages to vindicate these violations.

For instance, in *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000), the Third Circuit held that nominal damages were permitted by the Prison Litigation Reform Act (“PLRA”), Pub. L. No. 104-134, 110 Stat. 1321 (1996), for violation of the Free Exercise clause by failing to provide a minister of the prisoner’s faith, even though his injunctive relief claim was moot due to his transfer to another prison. *Id.* at 252. At the same time, the PLRA prohibits prisoners from obtaining compensatory damages for past emotional harm unless they suffered physical injury. *Id.*; see 42 U.S.C. § 1997(e).

Indeed, in cases where a constitutional violation would not result in physical injury – including violations of the right to free exercise under RLUIPA, as well as the right to access to the courts and law libraries, the right to counsel, and the right to be free from unlawful discrimination on the basis of race, religion or disability – violations of prisoners’ constitutional rights would be virtually

unenforceable as long as the challenged practice (or its application to the prisoner) was stopped prior to trial. However, as in *Allah*, courts have generally held that suits for nominal damages are permissible under the PLRA, thus allowing prisoners to maintain suits for violations of constitutional rights even when injunctive relief has been mooted by a change in the prisoner's housing or policies. *See, e.g., Allah*, 226 F.3d at 250 (citing *LeBlanc–Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (awarding nominal damages for Fair Housing Act and conspiracy to violate First Amendment rights claims); *Wolfel v. Bates*, 707 F.2d 932, 934 (6th Cir. 1983) (per curiam) (affirming an award of nominal damages for violation of prisoner's First Amendment rights)).

In particular, a rule that nominal damages do not preserve a prisoner's free exercise claim when forward-looking relief would be moot could open up an avenue of abuse by prison officials who realize that prisoners have no recourse for violations of their religious rights so long as the prisoner is transferred to a prison with a different rule, or the policy is changed internally. Meanwhile, prisoners subject to the whims of correctional officers may be deprived of access to religious services, or may be required to act in ways that their religion considers to be a sin. *See, e.g., Holt v. Hobbs*, 135 S. Ct. 853, 856, 864–65 (2015) (finding a violation of RLUIPA for a prison to require Muslim men to shave their beards in violation of Islamic law); *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) (determining nominal

damages are available for a Jewish prisoner forced to eat non-kosher meals in violation of Jewish law).

Establishment Clause claims are similarly unlikely to cause compensable damages, and yet undoubtedly cause plaintiffs harm. In the classic Establishment Clause case *Lee v. Weisman*, the Supreme Court ruled that schools were not allowed to sponsor clerics conducting prayer of any kind at a graduation. *Lee v. Weisman*, 505 U.S. 577 (1990). However, even though the Supreme Court found that it was “likely, if not certain, that an invocation and benediction will be conducted at her high school graduation” at the plaintiff’s school, the case would not have reached oral argument before the Supreme Court had the plaintiff graduated prior to that time, mooting any forward-looking relief. *Id.* at 584.

In a parallel situation involving a determination that the plaintiff lacked initial standing for forward-looking relief, the court in *Am. Humanist Ass’n, Inc. v. Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243 (10th Cir. 2017) held that the plaintiffs could pursue nominal damages to vindicate violation of the rights protected by the Establishment Clause after a public school partnered with a Christian organization and repeatedly solicited the plaintiff to donate and join the organization. *Id.* at 1252–54. It is difficult to assess the value of being able to act in accord with one’s conscience, rather than being forced to go along with the religious practices of the majority. Without nominal damages, litigants will be unable to vindicate violations of their conscience imposed by governments in violation of the First Amendment.

B. Nominal Damages Vindicate the Intangible Harm Caused When the Government Attempts to Suppress Speech.

While freedom of speech is “the matrix, the indispensable condition, of nearly every other form of freedom,” *Palko v. State of Connecticut*, 302 U.S. 319, 327 (1937), violations of this right often escape vindication by means of claims for compensatory damages. Because opportunities for speech are often time-limited, a government’s success in suppressing speech temporarily through official action can mean the speech is forever muted. In these cases, claims for nominal damages are the lifeblood of any legal remedy.

In *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), three teenagers sought to wear black armbands to protest the Vietnam War for a specific period of time. *Id.* at 504. When they wore the armbands, they were suspended from school until after the end of the planned protest period. *Id.* The teenagers, through their parents, brought suit seeking injunctive relief and nominal damages. *Id.* Although this Court did not rule on appropriate relief, it ruled on the merits and found that the school board’s actions in barring students from wearing armbands violated the First Amendment because the protest was not disruptive. *Id.* at 514.

Because the time period for the protest had passed, the request for injunctive relief was arguably moot. *See id.* at 504–05. In any event, there was no way to quantify the harm caused by the school

board's prohibiting the planned protest of three teenagers. *See id.* Nevertheless, this Court issued an opinion in the case that has been cited as guidance in over two thousand cases. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) ("This Court acknowledged in *Tinker* [] that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 106 (3d Cir. 2013) (stating that *Tinker* is the leading case in the student-speech context); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) ("The Court set out the framework for student free speech claims in *Tinker*"). Not only did nominal damages allow the courts to vindicate the past harm caused to the plaintiffs when school officials prevented their protest, but it has served an important public purpose thereafter.

More directly, in *Comm. for First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992), the Tenth Circuit specifically held that the plaintiffs' claims for nominal damages for the violation of their First Amendment rights were not moot simply because the underlying state policy causing the violation was repealed. *Id.* at 1525–26. Oklahoma State University attempted to bar the university's Student Union from showing *The Last Temptation of Christ* because of its controversial and religious subject matter – a blatantly content-based determination. *Id.* at 1519. Only after the district court suggested its ruling was not likely to favor the university did the

university modify its policy and allow the showing (though requiring a disclaimer of the content). *Id.* The Tenth Circuit found the injunctive relief moot (notwithstanding requests for an injunction regarding the university's underlying speech policy), but held that "[n]either the showing of the film on the originally scheduled dates, nor the subsequent enactment of the 1991 policy erases the slate concerning the alleged First Amendment violations in connection with the film." *Id.* at 1526–27. It was important to redress the university's attempt to stifle the students' speech, yet impossible to measure the cost of the First Amendment violation in dollars.

The case *Fitzgerald v. City of Portland*, No. 2:14-CV-00053-NT, 2014 WL 5473026 (D. Me. Oct. 27, 2014) provides another example of an intangible harm caused by an unlawful restriction on speech. The City of Portland, Maine, enacted an ordinance that prohibited anyone other than clinic visitors, employees, law enforcement, passers-by, and public-transit users from entering within thirty-nine feet of any reproductive health care facility. *Id.* at *1. This ordinance was based on a similar Massachusetts law that was declared unconstitutional by this Court in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), during the pendency of the Maine suit. *Id.* The plaintiffs, anti-abortion protesters, filed suit alleging violations of their First Amendment rights. *Id.* The city repealed the ordinance and argued that, since the Massachusetts law had been declared unconstitutional, the plaintiffs' claims for injunctive and declaratory relief were moot. *Id.* at *2. The

district court held that the plaintiffs could still recover nominal damages for the plausibly-alleged First Amendment violation, thereby surviving any mootness concerns. *Id.* at *5. From the plaintiffs' perspective, the inability to attempt to persuade women not to have an abortion undoubtedly caused them great distress, but it would be hard to quantify that distress in terms of economic damages. Nominal damages existed to vindicate the plaintiffs' rights, and therefore the case was not moot.

The rights protected by the First Amendment can often only be vindicated and defended through claims for nominal damages. These claims remain even when all other remedies are unavailable, and not only vindicate past violations but can provide guidance to avoid future infringement, even if the underlying offending action or policy in that particular instance is repealed.

C. Nominal Damages Are Necessary to Protect Citizens from the Harm Felt When the Government Encroaches Upon Their Persons, Houses, and Property.

Violations of the Fourth Amendment, while felt deeply by citizens who value the sanctity of their bodies, homes, and property, often fail to give rise to monetary damages. Yet, they are not susceptible of any other remedy if the defendant is searched or seized but never prosecuted. Accordingly, courts have repeatedly held that nominal damages claims are sufficient to sustain such cases.

Ray Shain was arrested for first degree harassment of his wife, a misdemeanor. Based on the written policy of the Nassau County Correctional Center requiring strip searched of all new detainees, he was strip searched upon his arrival, including a visual body cavity search and being asked to bend over, spread his buttocks, and hold up his genitals to facilitate inspection. *Shain v. Ellison I*, 273 F.3d 56, 60 (2d Cir. 2001). The detention center changed its policy, and in any event, Shain could not show a likelihood of being arrested and detained (and thus strip-searched) again, so he did not have standing for injunctive relief under this Court's test in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *Shain v. Ellison II*, 356 F.3d 211, 214 (2d Cir. 2004). Nevertheless, the Second Circuit found that the strip search violated clearly-established law, and a jury found in Shain's favor. *Shain*, 356 F.3d at 214–15. Under this Court's precedent in *Lyons*, in the absence of the assertion of damages claims, it is virtually impossible to sustain claims that arrest and search policies are unconstitutional because most individuals cannot show they are likely to be arrested again. *Lyons*, 461 U.S. at 96. At the same time, in the absence of a policy causing physical injury such as that alleged in *Lyons*, only the availability of nominal damages will allow plaintiffs to bring unlawful search and arrest policies to the attention of courts. *See Shain*, 356 F.3d at 214–15.

While causing a tremendous violation to a citizen's sense of privacy and safety, violations of the Fourth Amendment often do not create economic or

financial loss. Without a ruling on nominal damages, a municipality would be free to maintain or reinstate a policy in the future that violated those rights.

D. Nominal Damages Are Necessary to Protect Citizens When Their Lives or Liberties Have Been Deprived Without Due Process.

Nominal damages are essential to protect the Due Process Clause. Decades ago, this Court, in *Carey v. Piphus*, 435 U.S. 247 (1978), recognized that an automatic entitlement to nominal damages in a Section 1983 action provided recognition for the denial of a constitutional right. *Id.* at 266. This Court also held that a denial of procedural due process should be actionable for nominal damages without proof of actual injury, whether financial, economic, or physical. *Id.* This holding laid the groundwork for future vindication of due process violations through nominal damages.

In *Gates v. City of Chicago*, 623 F.3d 389, 391 (7th Cir. 2010), petitioners who had been arrested by officers with small amounts of cash in their pockets had the cash confiscated. After criminal proceedings were terminated, the city refused to return the petitioners' cash pursuant to a municipal policy, although it did not instigate proper forfeiture actions. *Id.* at 393. The petitioners brought due process claims for their deprivation of property, and sought certification as a class in order to obtain a determination that the policy violated their due process rights. *Id.* The city attempted to moot the

case and avoid judgment against them (while defending their procedures as adequate) by sending checks for the cash taken to each of the plaintiffs and offering to pay interest. *Id.* Although the plaintiffs had received their money back, so that the restitution claims were moot, there was a separate issue of the overall policy of confiscating cash without providing due process. *Id.* at 394. The nominal damages claim in the case ensured the plaintiffs had the opportunity to vindicate their rights to procedural due process in obtaining the return of their money.

E. Nominal Damages Are Necessary to Protect Citizens When They Have Been Denied Equal Protection of the Law.

Nominal damages are equally essential to protect the Equal Protection Clause. Nominal damages provide a vehicle for equal protection claims, preventing substantial violations and remedying non-economic injury.

An instance of nominal damages allowing a court to decide an equal protection claim occurred in *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016). The facts of this case are well-known to the Court: The plaintiff was denied admission to the University of Texas, and challenged the defendant university's race-conscious affirmative action admissions program. *Id.* at 637. The Fifth Circuit had held that the plaintiff lacked standing for any forward-looking relief because the plaintiff denied any intention to reapply to the

university. *Id.* at 639–40. However, nominal damages allowed the plaintiff to proceed with her claims. *Id.* Judge Garza, although dissenting from the majority opinion, agreed with the majority that Fisher had standing to pursue her claim, but on a different ground. *Id.* at 662 (Garza, J., dissenting). The defendant asserted that the non-refundable nature of the plaintiff's application fee rendered her claim unredressable. *Id.* Judge Garza observed that the defendant's argument "misconstrues the nature of Fisher's alleged injury—it is not her rejection, but the denial of equal protection of the laws during the admissions decision process. Fisher correctly explains that the application fee represents nominal damages for the alleged constitutional harm stemming from the University's improper use of racial classifications." *Id.*

These precedents make it clear that a claim for nominal damages is a sufficient basis for a court to decide a constitutional case. Cases are not made valid by economics; they are not settled purely by dollars and cents. Violations of rights that give rise to no economic damages are no less deeply felt by those who suffered the violation, and repealing an unconstitutional policy does not erase the injury. Constitutional injuries are too important to depend entirely on a finding of economic injury or a defendant's decision to repeal what never should have existed. The law recognizes this, and provides acknowledgment and remedy. The Court should decide this case and reaffirm these principles in the face of the Eleventh Circuit's decision rejecting them.

II. The Eleventh Circuit's Rule Would Effectively Force Plaintiffs to Proceed Under Strained Theories of Economic and Compensatory Damages, Leading to Less Efficient Claim Resolution.

This Court has acknowledged that the basic purpose of Section 1983 damages awards are to compensate individuals for constitutional harms. *Carey*, 435 U.S. at 254. However, constitutional violations do not always produce a quantifiable economic harm. Moreover, plaintiffs often do not seek or desire monetary awards to remedy a constitutional violation. Plaintiffs often merely desire for their constitutional rights to be vindicated, and for citizens not to have to endure the same violation in the future. In these situations, nominal damages are the appropriate remedy.

The Eleventh Circuit's rule would, in at least some cases, require some form of compensatory damages to be alleged in order to ensure the constitutional claim would survive. This would force plaintiffs to proceed under strained theories of compensatory or economic damages to address potential mootness concerns, even when the compensatory damages are not the remedy that the plaintiffs desire. Such an outcome creates a negative incentive for litigants and decreases judicial economy.

A. Requiring Plaintiffs to Assert Compensatory Damages Claims is Contrary to Public Policy.

Determining that cases seeking injunctive relief and nominal damages do not survive when the government has mooted the forward-looking relief will have negative consequences upon the legal system. This rule would effectively require future plaintiffs to include strained compensatory damages claims to avoid having the rug yanked out from under them when the government moots the forward-looking relief. Courts addressed the same concern of requiring strained damages theories when courts allowed presumed damages for constitutional violations, towards which this Court has traditionally been hostile in the Section 1983 context. *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 311 (1986) (holding that an instruction to award damages for the value of the right *in addition to* compensatory damages for the actual injury was inappropriate, although presumed damages “may possibly be appropriate” when it is impossible to establish the value of the compensatory damages).

One harm of strained prayers for compensatory damages is an evidentiary problem. Circuits that allowed presumed damages for constitutional violations often found themselves relying heavily on the uncorroborated testimony of plaintiffs. Anthony DiSarro, *When a Jury Can't Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. 333, 366 (2012). Requiring strained requests for compensatory damages would lead to an even more difficult problem. Chiefly, plaintiffs may allege

compensatory damages based on allegations of emotional harm that would be difficult (or expensive) to substantiate with outside evidence, and courts would find themselves attempting to assess the sincerity and value of the emotional harm to the plaintiff. Alternatively, courts might find themselves attempting to assign value to, for instance, a “fair” suspension procedure in a case like *Carey*. See *Carey*, 435 U.S. at 261–62.

The consequences of undesired and unnecessary requests for compensatory damages are even more problematic in the context of class action recoveries. Forcing plaintiffs to assert compensatory damages in a class action suit could threaten the financial stability of the local governments and municipalities against which Section 1983 actions are directed. See, e.g., *Ciraolo v. City of New York*, 216 F.3d 236, 240 (2d Cir. 2000) (stating that punitive damage awards against a municipality in Section 1983 suits would create “an increase in taxes or a reduction of public services for the [innocent] citizens footing the bill”). Plaintiffs in many cases would not go through the expense of proving noneconomic damages if they could be assured of vindicating their constitutional rights through nominal damages.

Moreover, a rule effectively requiring every constitutional complaint to contain a prayer for compensatory damages would significantly decrease judicial economy. Federal courts would have to hear and decide complex issues of compensatory damages in every single constitutional case, even if the damages are not even the plaintiff’s desired remedy.

A rule based on the Eleventh Circuit's decision would place a greater burden on federal courts to determine which claims for compensatory damages are meritorious and what value to place on them. This would lead to procedural morass in the federal court system, with parties required to produce more information in discovery and hire experts to support or defend such claims. Also, it would require courts to hold more hearings on issues that may not be the primary concern in the case. This Court should grant certiorari to examine the potential impacts of the Eleventh Circuit's rule on parties and the federal court system.

B. Nominal Damages Vindicate Past Constitutional Violations Without a Need to Assess the Value of the Harm, Allowing for Efficient and Important Claim Determination.

The purpose of proceeding under a claim for nominal damages is not to restore a person economically. Nominal damages can be awarded even when a plaintiff cannot demonstrate an economic harm resulting from a constitutional violation. *Carey*, 435 U.S. at 266. Nominal damages, therefore, exist to vindicate constitutional, not economic, violations against a citizen. *See Mark T. Morrell, Who Wants Nominal Damages Anyway – The Impact of an Automatic Entitlement to Nominal Damages Under 1983*, 13 REGENT U. L. REV. 225, 231 (2000).

Carey demonstrates the policy reasons supporting nominal damage awards. *See Carey*, 435 U.S. at 266

("[B]ecause of the importance to organized society that procedural due process be observed . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury."). This demonstrates the driving reason behind nominal damages awards – the vindication of constitutional rights.

In fact, courts have noted that nominal damages serve purposes distinct from compensatory damages. *See Stachura*, 477 U.S. at 303 (nominal damages are available to vindicate constitutional violations in absence of actual injury); *see also Schneider v. County of San Diego*, 285 F.3d 786, 795 (9th Cir. 2002) ("Compensatory damages and nominal damages serve distinct purposes. Nominal damages . . . are awarded regardless of whether the constitutional violation causes any actual damage."). Declaring a dispute moot when the plaintiff seeks to vindicate constitutional violations simply because the violation did not create an expressly economic harm would be contrary to public policy and the underpinnings of the Constitution.

The importance of nominal damages lies in the value to the individual litigant, and thus the value provided to society, by protecting rights granted by the Constitution. *See Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (1999). Nominal damages exist for something much greater than monetary restitution: The awards exist as the means of protection of constitutional rights. *See Guzman v. City of Chicago*, 689 F.3d 740, 748 (7th Cir. 2012) ("[nominal damages] are an appropriate means of

vindicating rights whose deprivation has not caused actual, provable injury"). This purpose is compelling enough to defeat mootness without requiring an accompanying plea for compensatory damages.

Indeed, nominal damages have been held to be sufficient to maintain suit even where compensatory damages are simply unavailable. For instance, the PLRA prohibits compensation for emotional or psychological harm if no physical injury has been asserted. However, federal courts have held that nominal damages may still be asserted for such claims. Nominal damages thus play a critical role in the enforcement of the rights afforded to incarcerated persons, without which they would be unable to vindicate many constitutional rights unless they suffered physical injury.

Another class of plaintiffs who would not be able to maintain claims for constitutional injury but for nominal damages are students in First Amendment suits whose claims do not involve compensatory damages. Due to their brief, fixed term of enrollment at an institution, students claiming First Amendment violations will frequently have their claims mooted by their own graduation. This precise scenario occurred in *Lane v. Simon*, where the plaintiffs, former student-editors of a newspaper affiliated with Kansas State University, brought claims under Section 1983 alleging the university violated their First Amendment rights when it removed the paper's faculty advisor from his advising post due to concerns about its content. *Lane v. Simon*, 495 F.3d 1182, 1184–85 (10th Cir.

2007). The court held the plaintiffs' claims for declaratory and injunctive relief were moot because the plaintiffs graduated from the university and no longer served as editors of the student newspaper. *Id.* at 1186–87. Because nominal damages were not claimed, the plaintiffs were unable to vindicate their First Amendment rights simply because they had graduated.

Further, although this Court has scrutinized the prevailing party status of plaintiffs seeking attorney's fees under Section 1988, it has held that an award of nominal damages, without more, can be sufficient to confer prevailing party status on plaintiffs. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). If nominal damages alone would support the finding that the plaintiff is a prevailing party, surely they would be sufficient to allow a party to maintain a suit in the first place. Indeed, in *Farrar*, the plaintiff's downfall was that he claimed compensatory damages for the violation of his due process rights in the amount of \$17 million, but only succeeded in obtaining \$1. *Id.* Had he instead sought only nominal damages for violation of his due process rights without attempting to claim \$17 million in compensable injury, he might have been able to retain an attorney's fee award. Yet the Eleventh Circuit's decision encourages plaintiffs to plead such speculative compensatory damages claims.

Given that this Court recognizes nominal damages exist as a vessel of constitutional protection, it follows for this Court to allow a claim

based upon nominal damages to suffice in defeating a determination of mootness. This Court should grant certiorari to consider whether Article III compels these consequences before the Eleventh Circuit or any other court proceeds down this course.

III. A Ruling Premised on Nominal Damages is Valuable Because It Impacts the Legal Rights of Private Parties and the Government, and Informs Them of the Boundaries, Consequences, and Responsibilities of Their Actions.

Courts are permitted only to render decisions when an "actual controversy" has been presented. *Nashville, C. & S. L. Ry. v. Wallace*, 288 U.S. 249, 260 (1933). The fact that a decision is premised on nominal damages does not mean it does not arise out of "actual controversy." A ruling on nominal damages may be hard-fought because a federal court greatly impacts parties, both private and government. It has a deterrent effect and provides clarification regarding the legality of parties' future courses of conduct, particularly with respect to qualified immunity determinations.

In the absence of the availability of forward-looking relief, nominal damages function as a measure of deterrence against future constitutional violations, both by the defendant and by similarly situated government agencies. Granted, nominal damages do not create an economic burden onerous enough to singlehandedly eliminate constitutional violations. The deterrent effect of nominal damages arises from secondary impacts, both in the potential

for a judgment and reported opinion with the government agency named publicly as a violator of civil rights, and in the incentive it creates for other citizens to litigate similar constitutional violations. *See Amato*, 17 F.3d at 317–18 (“[Nominal damages] encourage the municipality to reform the patterns and practices that led to [the] constitutional violations, as well as alert the municipality and its citizenry to the issue.”).

Additionally, suits supported by nominal damages serve to inform other officials of the bounds of constitutional conduct. In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court required courts assessing qualified immunity defenses to first determine whether a constitutional violation has occurred before turning to the question of whether the constitutional right was clearly established, in large part because “[t]he law might be deprived of this explanation [of the content of the constitutional right] were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.” *Id.* at 201. However, this Court modified the approach in 2009, holding that the order of decision set out in *Saucier* was “beneficial,” but not mandatory, recognizing that in some cases it might be easier to determine that a right is not clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Although it may be more efficient for courts to start with a determination that a particular right is not clearly established, it is still true that the law is

deprived of the explanation regarding the constitutional right in that case. *Id.* The Eleventh Circuit’s rule, which would allow governments to moot cases and avoid a published decision on the merits by changing their policy late in litigation, would further restrict the availability of precedents to guide other public officials as to the content and scope of constitutional rights.²

In *Carey*, this Court recognized that, in permitting nominal damages where actual damages cannot be proved, “the law recognizes the importance to organized society that [certain absolute] rights be scrupulously observed.” *Id.* at 266. If allowing nominal damages in such cases is designed to demonstrate the importance of those rights, then this Court should grant certiorari to ensure that nominal damages can sustain suits to vindicate those rights and guide future conduct.

² There is a further public, and jurisprudential, harm in this case, where the original reason the Eleventh Circuit took the case *en banc* was to determine the continuing viability of a line of Eleventh Circuit cases in light of more recent Supreme Court precedent, at the suggestion of the original Eleventh Circuit panel. See *Flanigan’s Enters. Inc. of Ga. v. City of Sandy Springs, Ga.*, 831 F.3d 1342, 1348 (11th Cir. 2016). The public has been deprived of a decision on the merits – which the Eleventh Circuit panel *itself* indicated would be valuable – determining whether the prior precedent should remain binding in the Eleventh Circuit.

CONCLUSION

This Court should grant the petition for certiorari in order to examine and reaffirm the importance of nominal damages in civil rights suits.

Respectfully submitted,

Sarah M. Shalf
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROJECT
1301 Clifton Road
Atlanta, Georgia 30322
(404) 712-4652
sarah.shalf@emory.edu

Mark A. Goldfeder,
Director
mgoldfe@emory.edu
Amin Sadri, Litigation
Coordinator
amin.sadri@emory.edu
Restoring Religious
Freedom Project
CENTER FOR THE STUDY
OF LAW & RELIGION
Emory Law School
1301 Clifton Road
Atlanta, Georgia 30322
(404) 712-0213
mark.aaron.goldfeder@e
mory.edu