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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Eleventh Circuit forthrightly conceded that "a majority of [its] sister circuits to reach th[e] question" whether federal courts may adjudicate a plaintiff's claims for nominal damages when prospective relief claims become moot "have resolved it differently." Pet. App. 28a. In the face of this reality, the City's purported demonstration that there is "no circuit split," BIO 19, could not succeed. Indeed, the City gives up midway, conceding there is nothing to be said to deny a conflict with at least four circuits. *See* BIO 33.

The question's importance is equally indisputable. It implicates such "fundamental principles of justiciability" that Judge McConnell called for "the Supreme Court [to] examine the question" even before the decision here precipitated a conflict. *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1263, 1271 (10th Cir. 2004) (McConnell, J., concurring) (*UARC*). And the effects of the Eleventh Circuit's rule are anything but "speculati[ve]," BIO 31. District courts are already facing motions to add compensatory damages claims brought by plaintiffs who earlier chose to seek only nominal damages. *See infra* p. 10.

The City is thus left to argue that the Eleventh Circuit's decision was correct, and to float various "other disputed issues" that, it says, might "encumber[]" the Court's resolution of the mootness question, *see, e.g.*, BIO 14, 36. The City's defense of the Eleventh Circuit is unpersuasive and, in any event, no basis for denying review: If courts elsewhere are impermissibly exercising jurisdiction, this Court should step in. As for the "ancillary issues," BIO 36, the Court *could not* consider "substantive" questions

without first reversing the Eleventh Circuit's subject-matter-jurisdiction decision. And most of what the City calls "injury-in-fact" arguments also go to petitioners' entitlement to relief, *see* BIO 12, not their standing, but plainly fail when analyzed under settled Article III precedent.

I. Petitioners have standing.

1. Having vigorously defended its ordinance until the writing was on the wall, the City now argues that because it never really enforced its ordinance, petitioners lacked standing to challenge it. The City is wrong.

Petitioners did not sue because they considered the Sandy Springs law "offensive," BIO 18 (quoting *CMR D.N. Corp v. City of Philadelphia*, 703 F.3d 612, 628 (3d Cir. 2013)). Rather, they alleged a classic injury-in-fact: that they wished to purchase and sell within the City devices covered by the ordinance and would have done so but for the ordinance. Intervenors' Compl. ¶ 14.

2. Petitioners' standing does not depend on their pleading that some official "enforced or threatened to enforce the ordinance against them," BIO 4. This Court held in *Doe v. Bolton*, 410 U.S. 179 (1973), that parties whose activities a statute directly targets can "have standing despite the fact that . . . [n]one of them has been prosecuted, or threatened with prosecution." *Id.* at 188.

The City's heavy reliance on the plurality opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), is misplaced. *Poe* concerned a moribund law that had, since 1879, been the subject of an "undeviating policy of nullification." *Id.* at 502. By contrast, the obscenity ordinance here

was enacted in 2006. The City's decision to add the criminal prohibition on top of a pre-existing zoning restriction, *see* BIO 1-2, itself signaled that the law was no quaint holdover. *See* Pet. App 23a n.9 ("imprisonment for a term not exceeding six months [and] confinement at labor"). And of course, the City asserted its public morality interest in suppressing device purchases—until the Eleventh Circuit indicated that the ordinance would likely be held unconstitutional.[1] *See* Pet. 5-7.

3. The City's various other case-specific "no injury" arguments fare no better.

Availability in Sandy Springs and Elsewhere. The asserted availability of sexual devices "on Amazon," BIO 3, might affect damages, but it does nothing to undercut petitioners' standing. Indeed, the City advanced this below—and the district court ruled upon it—as a merits argument. *See, e.g.*, Def.'s Mot. J. Pleadings at 3; Pet. App. 79a. Regardless, the argument is plainly wrong. Under the City's reasoning, Sandy Springs could ban the sale of romance novels within city limits, and no would-be purchaser would have standing to raise a First Amendment challenge, because the books would be one click away.

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[1]The BIO's attempt to find post-*Doe* support rests on a misreading of *CMR*, 703 F.3d 612. *CMR* did not *dismiss* the nominal damages claim once it held prospective relief claims moot, but rather decided it on the merits; the language respondent quotes involved an application of rules unique to zoning challenges, which make exhaustion a precondition of "entitle[ment] to nominal damages." *Id.* at 628.

There is no proper basis for the City's much-repeated assertions that devices were sold—unlawfully—in Sandy Springs "throughout all litigation below," BIO 1.[2] But even if that were true, it would be irrelevant. No doubt, beer was being sold to male college students in Oklahoma while *Craig v. Boren*, 429 U.S. 190 (1976), was being litigated, but that did not divest courts of jurisdiction to decide the statutory prohibition's constitutionality.[3]

Residency. Nor is petitioners' residence outside Sandy Springs relevant to their standing. Constitutional protections are not limited to persons who reside within the governmental unit's jurisdiction. If a plaintiff may sue over unlawful pollution twenty miles from where she lives, based on allegations that she would have visited the site but for

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[2]The City relies on a paragraph in another party's complaint describing its business as including device sales. BIO 1 (citing R. 1 at 7, ¶19). If that 2013 allegation may even be considered in deciding petitioners' standing, it does not—and obviously could not—say anything about what in fact occurred between 2013 and the 2017 repeal.

[3]The City also wrongly suggests that petitioners were at liberty to purchase devices in Sandy Springs because the ordinance "did not apply" to purchases "for bona fide [medical] purposes," BIO 2. The provision referenced is undeniably inapplicable to petitioner Henry, and Ms. Davenport expressly denied that her purposes were medical. Intervenors' Compl. ¶ 19. In any event, the law *applied* to all purchasers, providing only an "affirmative defense" for qualifying sales. There is a fundamental difference between a regime where buyers are free to purchase devices and one where every seller is subject to trial, at which he must "prove, on pain . . . of conviction," *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002), that each customer's use was for medical, rather than sexual gratification, purposes.

the discharges, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 182 (2000), then Ms. Davenport has standing to challenge restrictions on her ability to buy and sell devices twenty miles from where *she* lives.

3. All of the City's arguments ignore Ms. Davenport's well-pleaded allegation that she would have *sold* devices in Sandy Springs absent the ordinance. Thus, like the plaintiffs whose standing was sustained in *Craig* and *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977), she was "'obliged either to heed the statutory [prohibition], thereby incurring a direct economic injury . . . or to disobey the statutory command and suffer' legal sanctions." *Id.* at 683 (quoting *Craig*, 429 U.S. at 194). Regardless whether Ms. Davenport could prove lost profits in Sandy Springs with sufficient certainty to obtain compensatory damages, that injury plainly suffices for Article III.

4. The City's final argument on standing is that nominal damages cannot "redress" petitioners' injury. BIO 14. This argument is unpersuasive. *See infra* p. 10. But whatever its merits, it is not "ancillary," BIO 36, to the question presented. It *is* the question: The notion that nominal damages do not constitute sufficient redress is central to the Eleventh Circuit's holding. Pet. App. 32a-34a.

II. The circuit conflict over fundamental justiciability principles is sharp, intractable, and undeniable.

1. In the face of the case law and judicial discussion, it is hard to take seriously any claim that there is "no circuit split," BIO 19. As already noted, the

Eleventh Circuit repeatedly acknowledged that its resolution of "this question"—whether "nominal damages alone can save a case from mootness"—Pet App. 28a, was "contrary to" that of "the circuit courts that have reached the issue," *id.* 32a n.19. *Accord UARC*, 371 F.3d at 1268-69 (McConnell, J., concurring) (noting that "square[]" holdings of the Sixth, Ninth, and Tenth Circuits foreclosed rule). And as the sharply-divided en banc decision below attests, the terms of disagreement are stark and well-defined. Indeed, *the City* admits as much when it announces it has found ways to distinguish cases in "five of the nine circuits cited by petitioners," BIO 33, thereby conceding the conflict between the Eleventh Circuit and (at least) four others.

2. Even as a damage-control exercise, the City's "no circuit split" demonstration depends on clumsy sleight-of-hand. The BIO first announces its own "*specific* question presented," *id.* 21, one limited to nominal damages claims arising from "never-enforced" laws, *id.* 19, so that decisions from other circuits may be distinguished as "enforcement" cases. It then presents situations where all circuits would sustain jurisdiction—*e.g.*, when nominal and compensatory damages are sought together—as proof that they apply a single, uniform rule. Neither move succeeds.

a. The Eleventh Circuit's decision attaches no significance whatsoever to whether a nominal damages claim arose out of "enforcement" activity.[4] Indeed, the reasons the court gave—that a one dollar award is not "effectual relief," for instance—would

[4]The lack of enforcement was addressed only in deciding that the claims for *prospective* relief were moot. Pet. App. 23a.

apply equally to a nominal damages claim by a student suspended from school pursuant to a no-protest policy. And Judge McConnell surely would be surprised to learn that the panel opinion he criticized as fundamentally wrong in *UARC* was really a correct "enforcement" case after all, *see* BIO 21.

Worse still, the other-circuit decisions the City would herd under the "enforced against the plaintiffs" banner do not cooperate. The opinions cited attached no more weight to "enforcement" than did the Eleventh Circuit here. In fact, the voters in *Van Wie v. Pataki*, 267 F.3d 109 (2d Cir. 2001), did not allege that election officials "took action against them," BIO 22. Nor does it appear that prison officials in *Kuperman v. Wrenn*, 645 F.3d 69 (1st Cir. 2011), enforced their policy against the plaintiff, by forcibly shaving his beard or disciplining him for growing it. Those plaintiffs—like petitioners—complied with restrictions they maintained were unlawful.

b. The City's attempt to usher decisions off-stage on the ground that they included other damages claims, BIO 23, is unavailing. That the Eleventh Circuit would not have dismissed in *Bernhardt v. County of Los Angeles*, 279 F.3d 862 (9th Cir. 2002), does not establish that it applies the same rule as the Ninth, given there are other cases—including *this case*—where the courts' rules yield opposite results. Indeed, *Bernhardt* relied solely on the nominal damages claim in sustaining jurisdiction. *See id.* at 871 (holding that plaintiff's "possible entitlement to nominal damages creates a continuing live controversy"); *accord, e.g.*, *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 429 & n.4 (4th Cir. 2007) (upholding jurisdiction because the

plaintiff had alleged a "personal injury" that would be "redressable by nominal damages").

Of course, the City's recognition that a compensatory damages claim (even one as "speculative," 279 F.3d at 870, as the one in *Bernhardt*) would confer jurisdiction under the Eleventh Circuit rule confirms what its brief strains to deny: that the decision imposed a de facto requirement to litigate unwanted damages claims.[5]

4. Finally, the need for the Court's intervention is genuine. Because the competing rules influence the behavior and litigation choices of injured parties and governmental actors alike, there are high costs to letting uncertainty persist. And as the petition explains, the issue arises regularly; the conflict involves fundamental questions about Article III and the meaning of this Court's precedents that no other actor can resolve; and it will not dissolve on its own. Pet. 26-28.

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[5]Respondent's scouring of the decisional landscape is unreliable, but not entirely wrong. There does appear to be some tension between the Eighth Circuit's treatment of mootness in *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc), and prior circuit precedent, which the opinion's brief discussion did not address. And the Sixth Circuit panel in *Morrison v. Board of Education of Boyd County*, 521 F.3d 602 (6th Cir. 2008), divided openly as to whether the majority's standing conclusion, which echoed the Eleventh Circuit's reasoning here, was foreclosed by longstanding precedent. But internal inconsistency in those two circuits is hardly ground for withholding review, given the multitude of circuits squarely opposed to the Eleventh Circuit's rule.

III. The Eleventh Circuit's decision is wrong.

The City devotes much of the BIO to arguing that the Eleventh Circuit's decision is faithful to this Court's precedent (or at worst a "mistaken[] appli[cation]" of governing law, BIO 19) and workable (or at least "not . . . unworkable," *id.* 32). At best, these are reasons to *grant* review and settle the conflict in the Eleventh Circuit's favor. But they lack merit.

1. As petitioners have already explained, the Court's decisions in *Carey v. Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), effectively foreclose the Eleventh Circuit's rule. Those decisions make clear that nominal damages claims for deprivations of constitutional rights are "actionable" without regard to compensable harm. *Carey*, 435 U.S. at 266.

It is, to be sure, logically possible for federal claims to be actionable but non-justiciable in federal court. But that would be a startling conclusion to reach with respect to *these* claims. The Court's landmark decision in *Monroe v. Pape*, 365 U.S. 167 (1961), relied on Senator Thurman's statement to describe Section 1983's ambit: A constitutional "deprivation may be of the slightest conceivable character," he explained, for "merely nominal damages; and yet by this section *jurisdiction of that civil action* is given to the Federal courts." *Id.* at 180 (emphasis added) (quoting Cong. Globe, 42d Cong., 1st Sess. App. 216 (1871)).

The City also ignores the reason the Court gave for holding these nominal damages claims actionable: Claims alleging deprivations of constitutional rights are modern analogs to actions vindicating "absolute" rights that courts have for centuries adjudicated

without requiring proof of harm. *See* Pet. 18. As Justice Thomas recently explained, citing *Carey*, this Court's "contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (Thomas, J., concurring).

2. The City's drumbeat assertion that nominal damages claims provide merely "psychic satisfaction," BIO 8, 10, 14, 16, 32, is equally misguided. The Court used that epithet in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998), in dismissing a suit that bore no resemblance to the "cases and controversies" courts have traditionally entertained. The suit sought to enforce a broad public right and requested relief payable not to the plaintiff, but to the public fisc. *See id.* at 105. The Court's holding in *Farrar v. Hobby*, 506 U.S. 103 (1992), that a plaintiff who obtains nominal damages is a prevailing party for attorney's fee purposes, *id.* at 105, relied on precisely that distinction: "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit," *id.* at 113.

3. Other fundamental jurisdictional principles—not least the obligation to respect plaintiff autonomy, and indeed, the prohibition on advisory opinions—also condemn the Eleventh Circuit rule. *See* Pet. 14, 19-21.

As the petition explains, the inescapable implication of the rule is that parties who would otherwise forego compensatory damages claims will now be forced to seek them. That is already happening. In *Freenor v. Mayor and Aldermen of the City of Savannah*, CV414-247, ECF No. 63 (S.D. Ga. Sept. 20,

2017), the court allowed the plaintiffs to add a claim for a refund of a ten-dollar licensing fee to "save their Complaint from mootness." *Id.* at 1. And in *Reilly v. Sherriff of Leon County*, No. 4:14-cv-397 RH/CAS ECF No. 110 (N.D. Fla. Sept. 17, 2017), the plaintiff unsuccessfully sought to add emotional distress damages resulting from limitations on correspondence with his incarcerated child. *Id.* at 1.[6]

An advisory opinion is hardly averted by requiring a litigant to seek ten dollars rather than one. If anything, Article III limitations are in greater jeopardy when courts adjudicate claims in which parties have no sincere interest. And it is more doubtful still that the litigants in *Reilly* would have been made more "whole," BIO 16, had they pursued emotional distress damages; they explained that they initially sought only nominal damages because the expense of proving compensable harm would have eclipsed any recovery. Pl.'s Mot. to Amend Compl., *Reilly*, No. 4:14-cv-397 RH/CAS ECF No. 110, at 7.

As the petition explains and amici reinforce, these considerations have special force in this setting. *See* Pet. 21-22; DKT Amicus Br. 7-11; Restoring Religious Freedom Project Amicus Br. 6-16. In important constitutional cases, damages often will be difficult to prove. But "[n]ominal relief does not necessarily a

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[6]Actual experience has been no kinder to the City's assurance that the Eleventh Circuit "did not create an unworkable rule," BIO 32. The first published opinion applying the rule lamented the difficulty of "mak[ing] meaning" of "[w]hatever the holding [in this case] may be," *Am. Atheists, Inc. v. Levy County*, No. 1:15CV113-MW/GRJ, 2017 WL 6003077, at *4 n.4 (N.D. Fla. Dec. 3, 2017).

nominal victory make." *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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