

No. 19-968

In The
Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,

Petitioners,

v.

STANLEY C. PRECZEWSKI, JANN L. JOSEPH,
LOIS C. RICHARDSON, JIM B. FATZINGER,
TOMAS JIMINEZ, AILEEN C. DOWELL, GENE RUFFIN,
CATHERINE JANNICK DOWNEY, TERRANCE
SCHNEIDER, COREY HUGHES, REBECCA A. LAWLER,
AND SHENNA PERRY,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF OF AMICUS CURIAE
AMERICAN HUMANIST ASSOCIATION
IN SUPPORT OF PETITIONERS**

MONICA L. MILLER
Counsel of Record
AMERICAN HUMANIST ASSOCIATION
1821 Jefferson Place N.W.
Washington, D.C. 20036
202-238-9088
mmiller@americanhumanist.org

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF THE ARGUMENT.....	2
INTRODUCTION.....	3
ARGUMENT.....	4
I. Affirming will portend an exponential deterioration of the constitutional liberties most vital to our democracy.....	4
A. Orderly society requires proper vindication of constitutional rights lest they exist in vain.....	4
B. Nominal damages are necessary for proper vindication of the Constitution and the First Amendment specifically....	6
C. Religious liberty is endangered without the remedy of standalone nominal damages.....	8
II. Treating nominal damages as equitable for mootness but legal for qualified immunity creates a “heads I win, tails you lose” government shield against victims of constitutional violations.....	9
CONCLUSION.....	13

TABLE OF AUTHORITIES

	Page
CASES	
<i>Am. Legion v. Am. Humanist Ass’n</i> , 139 S. Ct. 2067 (2019).....	1, 8
<i>Carey v. Phipus</i> , 435 U.S. 247 (1978).....	6
<i>Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty., Fla.</i> , 842 F.3d 1324 (11th Cir. 2016).....	7
<i>City of Riverside v. Rivera</i> , 477 U.S. 561 (1986).....	7, 8
<i>Cummins v. Campbell</i> , 44 F.3d 847 (10th Cir. 1994).....	10
<i>De Lima v. Bidwell</i> , 182 U.S. 1 (1901).....	5
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	6
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962).....	8
<i>Farrar v. Hobby</i> , 506 U.S. 103 (1992).....	6
<i>First Nat’l Bank v. Bellotti</i> , 435 U.S. 765 (1978).....	7
<i>Flanigan’s Enters., Inc. v. City of Sandy Springs</i> , 868 F.3d (11th Cir. 2017) (en banc).....	<i>passim</i>
<i>Fox v. Bd. of Trs. of State Univ. of N. Y.</i> , 42 F.3d 135 (2d Cir. 1994).....	10
<i>Harper v. Poway Unified Sch. Dist.</i> , 318 F. App’x 540 (9th Cir. 2009).....	10
<i>Hicks v. Feeney</i> , 850 F.2d 152 (3d Cir. 1988).....	10
<i>Hopkins v. Saunders</i> , 199 F.3d 968 (8th Cir. 1999).....	10

TABLE OF AUTHORITIES—Continued

	Page
<i>KH Outdoor, LLC v. City of Trussville</i> , 465 F.3d 1256 (11th Cir. 2006).....	8
<i>Kendall v. United States</i> , 37 U.S. 524 (1838)	5
<i>Lee v. Weisman</i> , 505 U.S. 577, 112 S. Ct. 2649 (1992).....	9
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803).....	4, 5, 13
<i>McCreary County v. American Civil Liberties Union of Ky.</i> , 545 U.S. 844 (2005).....	8, 9
<i>Mellen v. Bunting</i> , 327 F.3d 355 (4th Cir. 2003)	10
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	7
<i>Palko v. State of Connecticut</i> , 302 U.S. 319 (1937).....	7
<i>Popham v. Kennesaw</i> , 820 F.2d 1570 (11th Cir. 1987).....	6
<i>Rheuark v. Shaw</i> , 628 F.2d 297 (5th Cir. 1980)	10
<i>Rowan v. Harris</i> , 316 Fed. Appx. 836 (11th Cir. 2008).....	10
<i>Sch. Dist. of Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963)	7
<i>Schneider v. State</i> , 308 U.S. 147 (1939).....	7
<i>Slicker v. Jackson</i> , 215 F.3d 1225 (11th Cir. 2000)	11
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	7
<i>Trump v. Hawaii</i> , 138 S. Ct. 2392 (2018).....	3

TABLE OF AUTHORITIES—Continued

	Page
<i>Uzuegbunam v. Preczewski</i> , 791 F. Appx. 824 (11th Cir. 2019).....	3
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005)	9
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	8
 CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. I	<i>passim</i>
 OTHER AUTHORITIES	
1 WILLIAM BLACKSTONE, COMMENTARIES	5
Dan Nowicki and Yvonne Wingett Sanchez, The Republic, <i>azcentral.com</i> , Aug. 22, 2017, https://www.azcentral.com/story/news/politics/ arizona/2017/08/22/president-donald-trump- visits-phoenix/575207001/	11
Doug Criss, <i>5 things for August 23: Trump, US Navy, execution stay, Afghanistan, eclipse in- juries</i> , CNN, Aug. 23, 2017, https://www.cnn.com/ 2017/08/23/us/five-things-august-23-trnd/index. html	12
JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ch. II, § 10 (1689).....	5
Memorial and Remonstrance Against Religious Assessments, II Writings of Madison 183	2

TABLE OF AUTHORITIES—Continued

	Page
Simon Romero, <i>Police Use Tear Gas on Crowds After Trump Rally</i> , N.Y. Times, Aug. 22, 2017, https://www.nytimes.com/2017/08/22/us/trumps-rally-in-arizona-what-you-need-to-know.htm	11

INTEREST OF AMICUS CURIAE¹

The American Humanist Association (hereinafter “AHA”) is a nonprofit organization based in Washington, D.C., with over 242 local chapters and affiliates in 46 states and the District of Columbia. Founded in 1941, the AHA is the nation’s oldest and largest humanist organization. Humanism is a progressive lifestance that affirms—without theism—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity.

The mission of the AHA’s legal center is to protect the separation of church and state. The AHA has litigated dozens of First Amendment cases nationwide, including in this Court. *See Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019). While the AHA and the Alliance Defending Freedom (hereinafter “ADF”) stand on opposite sides of the ideological spectrum,² they unite in their esteem for First Amendment liberties and their conviction that such rights are meaningless if they cannot be vindicated.



¹ The parties have consented to the submission of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus or their counsel made a monetary contribution to the preparation or submission of this brief.

² *See* Brief of Major Gen. Patrick Brady et al., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (No. 17-1717) (ADF’s brief).

SUMMARY OF THE ARGUMENT

On the chopping block is a time-honored remedy essential to vindicating the most important rights in our country. Religious freedom—the cornerstone of our democracy—could become an empty promise without nominal damages. Religion Clause violations rarely produce actual damages and often stem from easily-mootable laws. Taking away from citizens the only remedy available in many such cases jeopardizes the rule of law itself.

James Madison taught us that it “is proper to take alarm at the *first experiment* on our liberties.”³ A Circuit Court decision that nullifies a constitutional enforcement tool and gives the government a “free pass at violating your constitutional rights,” *Flanigan’s Enters., Inc. v. City of Sandy Springs*, 868 F.3d (11th Cir. 2017) (en banc) (Wilson, J., dissenting), only *invites* experimentation on our liberties and countenances further constitutional violations.

What then will be the impact of a *Supreme Court* ruling that countenances *federal* experimentation on our liberties? In today’s political climate—fueled by a global pandemic and the death of at least 200,000 Americans, an economic recession, widespread racial injustices, record-setting fires, and now the heart-breaking passing of iconic Associate Justice Ruth Bader Ginsburg—the message sent by such a Supreme

³ Memorial and Remonstrance Against Religious Assessments, II Writings of Madison 183, at 185-186 (emphasis added).

Court ruling will cause more damage to our country than the ruling itself.

If this Court affirms, the Supreme Court will be telling Congress, the Executive Branch, every state, and every municipality in our nation *that it is proper to experiment on our liberties by passing laws that violate the First Amendment*. Worse, this Court will be sanctioning the *enforcement* of those laws against citizens. And perhaps worst of all, this Court will be telling Americans that the government can trample on their fundamental rights without a remedy. Our nation is only so resilient.

“It is an urgent necessity that officials adhere to these constitutional guarantees An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).



INTRODUCTION

The Eleventh Circuit abolished the only legal remedy available to citizens to vindicate a non-recurring constitutional violation without actual damages, i.e., typical First Amendment violations. See *Uzuegbunam v. Preczewski*, 781 Fed. Appx. 824 (11th Cir. 2019), *en banc denied*, 2019 U.S. App. LEXIS 26788 (11th Cir. Sept. 4, 2019); *Flanigan’s Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) (*en banc*).

Flanigan's held that the repeal of a challenged ordinance *moots* a standalone or remaining claim for nominal damages. Hence, “the government gets one free pass at violating your constitutional rights.” 868 F.3d at 1275 (Wilson, J., dissenting). This anti-constitutional “free pass” was at least limited in three key respects: (1) it only applied to ordinances repealed *before enforcement*;⁴ (2) it was confined to the Eleventh Circuit; and (3) it only gave one “free pass” for the given activity. *Uzuegbunam*, however, holds that nominal damages are moot even when the challenged law was enforced against the plaintiff. 781 Fed. Appx. at 830-32.

ARGUMENT

I. Affirming will portend an exponential deterioration of the constitutional liberties most vital to our democracy.

A. Orderly society requires proper vindication of constitutional rights lest they exist in vain.

The “very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). *Ubi jus, ibi*

⁴ See *Flanigan's*, 868 F.3d at 1270 n.23 (“Our holding today . . . does not imply that a case in which nominal damages are the only available remedy is always or necessarily moot.”).

remedium. It is an “indisputable rule, that where there is a legal right, there is also a legal remedy.” *Id.*

Blackstone warned that without a “method of recovering and asserting . . . rights,” rights would exist in vain.⁵ Thus, “[i]f there be an admitted wrong, the courts will look far to supply an adequate remedy.” *De Lima v. Bidwell*, 182 U.S. 1, 176-77 (1901).

For it is a “monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.” *Kendall v. United States*, 37 U.S. 524, 624 (1838). First Amendment rights are inalienable. No citizen who suffered a First Amendment violation should have the courthouse door slammed on her for want of a legal remedy. That would be a “monstrous absurdity”! *Id.* “It cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

And yet, we are here in 2020’s blaze, with a Court of Appeals’ decision that leaves Americans without a remedy for clear and undeniable violations of their constitutional rights. This ruling is so monstrously absurd that religious rivals are fighting *on the same side* to have it reversed.

⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *56. *See also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ch. II, § 10 (1689) (“[H]e who hath received any damage, has . . . a particular right to seek reparation.”)

B. Nominal damages are necessary for proper vindication of the Constitution and the First Amendment specifically.

This Court should not abolish the only remedy available to victims of constitutional violations that already occurred, will not recur, and yield no actual damages. As the Eleventh Circuit acknowledged, nominal damages are often “the only appropriate remedy to be awarded to a victorious plaintiff.” *Flanigan’s*, 868 F.3d at 1264.

To maintain civil liberty, this Court “obligates a court to award nominal damages when a plaintiff establishes the violation of [a fundamental right].” *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). By “making the deprivation of such rights actionable for nominal damages . . . the law recognizes the importance to organized society that those rights be scrupulously observed.” *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

“When courts affirm the constitutional rights of citizens, public officials are deterred from violating other citizens’ rights in the future.” *Popham v. Kennessaw*, 820 F.2d 1570, 1580 (11th Cir. 1987). The converse is of course also true.

This Court cannot, consistent with the Constitution, give the government a “free pass” to violate the First Amendment. A First Amendment violation “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And there is “no defense” for “relatively minor encroachments on the First

Amendment.” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224-25 (1963).

To the citizen who already suffered a violation, it matters not whether equitable remedies are available for recurring violations. That is why the Eleventh Circuit, up until now, agreed with everyone else that “nominal damages are not moot[able]” and remain “the appropriate means of ‘vindicating’ rights” even “when injunctive or declaratory relief is unavailable.” *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty., Fla.*, 842 F.3d 1324, 1330-31 (11th Cir. 2016) (citations omitted).

Few rights are more important than those enshrined in our First Amendment. They are “the foundation of free government by free men.” *Schneider v. State*, 308 U.S. 147, 161 (1939). “Freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom.” *Palko v. State of Connecticut*, 302 U.S. 319, 326-27 (1937) (Cardozo, J.). “These freedoms are delicate and vulnerable.” *NAACP v. Button*, 371 U.S. 415, 433 (1963).⁶

“The First Amendment, in particular, serves significant societal interests.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 775-76 (1978). A plaintiff who obtains relief in a constitutional case “does so not for himself alone but also as a ‘private attorney general.’” *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). “Unlike

⁶ *Accord Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (referring to “the great, the indispensable democratic freedoms secured by the First Amendment”).

most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights.” *Id.* at 574. The Eleventh Circuit agreed that an “award of nominal damages is *particularly appropriate in a First Amendment*” case because it vindicates the rights of “‘other members of society.’” *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1261 (11th Cir. 2006) (citation omitted; emphasis added) (overbreadth case).

C. Religious liberty is endangered without the remedy of standalone nominal damages.

A plaintiff who obtains relief in a Religion Clause case vindicates societal interests of the highest order. *See Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (recognizing “the fundamental place held by the Establishment Clause in our constitutional scheme”). The Establishment Clause uniquely:

guards against the “anguish, hardship and bitter strife,” that can occur when “the government weighs in on one side of religious debate.” And while the “union of government and religion tends to destroy government and to degrade religion,” separating the two preserves the legitimacy of each.

Am. Humanist Ass’n, 139 S. Ct. 2067, 2105 (2019) (Ginsburg, J., dissenting) (internal citations omitted) (quoting *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 876 (2005); *Engel v. Vitale*, 370 U.S. 421, 429 (1962)).

Due to their easily-mootable and non-monetary quality, Religion Clause violations are frequently vindicated through nominal damages. And even with nominal damages, the Religion Clauses are underenforced: “Suing a State over religion puts nothing in a plaintiff’s pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent.” *Van Orden v. Perry*, 545 U.S. 677, 747 (2005) (Souter, J., dissenting, joined by Stevens and Ginsburg J.J.).

If citizens cannot vindicate their Free Exercise and Establishment Clause rights, they will exist in vain. “The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written.” *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992). “At a time when we see around the world the violent consequences of the assumption of religious authority by government,” the Court must ask, “[w]hy would we trade a system that has served us so well for one that has served others so poorly?” *McCreary*, 545 U.S. at 882 (O’Connor, J., concurring).

II. Treating nominal damages as equitable for mootness but legal for qualified immunity creates a “heads I win, tails you lose” government shield against victims of constitutional violations.

Affirming will transform nominal damages into a unique form of relief that has all the downsides (from

the citizen perspective) of both legal and equitable relief. Specifically, nominal damages would be equitable for mootness purposes and legal for qualified immunity purposes.⁷

Flanigan's gives governments at least one free pass at violating a citizen's constitutional rights. But because equitable claims are so easily mooted, and, if this Court affirms, nominal damages are mooted with them, the law never gets clarified. Qualified immunity then gives government officials at least *one additional* free pass at violating the Constitution and the First Amendment in particular.

It is difficult to comprehend what the Eleventh Circuit was thinking. Before 2017, it “held unambiguously that a plaintiff whose constitutional rights are violated is entitled to nominal damages even if he

⁷ See *Rowan v. Harris*, 316 Fed. Appx. 836, 838 (11th Cir. 2008) (affirming qualified immunity for nominal damages); *Harper v. Poway Unified Sch. Dist.*, 318 F. App'x 540, 541-42 (9th Cir. 2009) (“[W]e are asked to award nominal damages on the basis of a school policy that is no longer in existence, [and] we decline to reach the difficult substantive constitutional question at issue. Instead, we . . . conclude that the individual defendants are entitled to qualified immunity.”); *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (denying nominal damages after finding defendants entitled to qualified immunity); *Hopkins v. Saunders*, 199 F.3d 968, 977-78 (8th Cir. 1999) (holding that nominal damages claims are subject to qualified immunity); *Cummins v. Campbell*, 44 F.3d 847, 849 (10th Cir. 1994); *Fox v. Bd. of Trs. of State Univ. of N. Y.*, 42 F.3d 135, 141 (2d Cir. 1994); *Hicks v. Feeney*, 850 F.2d 152, 155 n.4 (3d Cir. 1988); *Rheurark v. Shaw*, 628 F.2d 297, 299 (5th Cir. 1980).

suffered no compensable injury.” *Slicker v. Jackson*, 215 F.3d 1225, 1231-32 (11th Cir. 2000).

The very month it decided *Flanigan’s* (August 2017), Trump accused journalists of “trying to take away our history and our heritage” by favoring calls to remove Confederate statues and said his border wall would go up “even if we have to close down our government.”⁸ A CNN article gives us a little snapshot of what else the Executive Branch was up to that week, as excerpted below (bullets added):

- “First, the nation saw Teleprompter Trump soberly announce a new strategy on Afghanistan.
- Next up: Freewheelin’ Trump, during a rally Tuesday night in Arizona, and so . . . much . . . happened. Where should we begin?
- With the fact that the President said he’ll probably go ahead and pull the US out of NAFTA (the first round of negotiations with Mexico and Canada are underway).
- Or with his strong hint that he’ll pardon controversial ex-Sheriff Joe Arpaio.

⁸ Simon Romero, *Police Use Tear Gas on Crowds After Trump Rally*, N.Y. Times, Aug. 22, 2017, <https://www.nytimes.com/2017/08/22/us/trumps-rally-in-arizona-what-you-need-to-know.htm>.

Dan Nowicki and Yvonne Wingett Sanchez, *The Republic*, azcentral.com, Aug. 22, 2017, <https://www.azcentral.com/story/news/politics/arizona/2017/08/22/president-donald-trump-visits-phoenix/575207001/>.

- There also was his threat to shut down the government over funding for his promised border wall.
- Plus, a 30-minute tirade against the media.
- And his mention of Senate Majority Leader Mitch McConnell, whom he hasn't spoken to in almost two weeks, and the last time they talked, well, it didn't go well.
- But that wasn't all. The President defended his controversial remarks about the deadly violence in Charlottesville without mentioning his infamous 'many sides' lines. Trump's base loved every bit of it, but the whole thing left James Clapper, ex-director of national intelligence, openly questioning Trump's fitness for office."

Doug Criss, *5 things for August 23: Trump, US Navy, execution stay, Afghanistan, eclipse injuries*, CNN, Aug. 23, 2017, <https://www.cnn.com/2017/08/23/us/five-things-august-23-trnd/index.html>.

Now is not the time to embolden the government to experiment on our liberties. Now is not the time to tell citizens their First Amendment rights do not matter. Now is the time to instill confidence in an anxious America and celebrate a constitutional heritage strong enough to unite the likes of the AHA and ADF.



CONCLUSION

“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

This Court should reverse the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MONICA L. MILLER

Counsel of Record

AMERICAN HUMANIST ASSOCIATION

1821 Jefferson Place N.W.

Washington, D.C. 20036

202-238-9088

mmiller@americanhumanist.org

Counsel for Amicus Curiae