No. 19-968

In The
Supreme Court of the United States

CHIKE UZUEGBUNAM, ET AL.,

Petitioners,

v.

STANLEY C. PRECZEWSKI, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a potential award of nominal damages is redress that satisfies Article III and prevents mootness if intervening events have eliminated any threat of recurring or future injury to the plaintiff's legal rights or interests.

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INTRODUCTION

Petitioners brought this case when they were college students to challenge their school's freedom of speech and conduct policies. But before the district court reached the merits of their challenge, the college permanently revised the policies. Everyone agrees that those revised policies allowed petitioners to share their faith at any time and place on campus without limitation—just what they sought to achieve through their lawsuit. And everyone agrees that, as a result, their claims for injunctive and declaratory relief are moot.

Yet, four years later (and having graduated from the college), petitioners still want a federal court to decide this case. This request could be justified if they sought compensation for injuries caused by enforcement of the policies. But they neither alleged compensable injuries nor asked for compensation. Instead, they insist that a court must adjudicate whether their former college's long-abandoned policies were constitutional solely because they asked for nominal damages—a single, symbolic dollar.

The courts below rightly declined this request as beyond their jurisdiction. Article III empowers federal courts to decide cases and controversies with real stakes for the parties, not abstract disputes. A claim for nominal damages presents an Article III case only when the plaintiff seeks to establish legal rights and protect them from continuing or threatened injury—for example, to adjudicate rights in land or water, or even intellectual property, that could be diminished by

unredressed violations. (This was the remedy's traditional role at common law, before courts had declaratory judgments or even equitable relief at their disposal.) But when no further injury is threatened, nominal damages offer no relief. The symbolic dollar itself does not compensate past injuries because nominal damages, by definition, represent an award of no damages at all. And neither the judicial validation of the plaintiff's cause nor any public benefits that might be gained by such an award are sufficient reasons for a federal court to decide the merits of a case. So, if a plaintiff no longer suffers from a continued threat to his legal rights or interests, a claim for nominal damages no longer offers Article III redress, and "the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

Just so here. Since the college permanently revised the policies petitioners challenged, nominal damages would give them no more than the satisfaction of having a federal court say they are right. That is an "advisory opinion, disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). The courts below correctly recognized as much and properly dismissed this case as moot.

STATEMENT

1. Petitioners' first amended complaint alleges the following. One day in July 2016, Chike Uzuegbunam began handing out religious literature in a plaza outside the library of Georgia Gwinnett College, where he was then enrolled as a student. Pet. App. 90a. A campus police officer came by and asked him to stop, explaining that he would need to reserve one of the campus's two designated areas to distribute written materials. *Id.* at 92a-93a.

At that time, the college's speech policy identified two "free speech expression areas" for "speeches, gatherings, distribution of written materials, and marches." *Id.* at 146a. These areas were "generally available" to all individuals for several hours a day during the week. *Id.* Speech at "other areas and other times" could be authorized on request. *Id.* For this authorization, the college asked students to submit a request form—describing the planned speech and attaching any handouts—three business days before the planned activity. *Id.* at 147a.

Towards the end of August, Uzuegbunam reserved one of the campus speech areas, a patio outside the food court. *Id.* at 95a-96a. At the reserved time, he went to the patio and began to speak, accompanied by a friend (not the other petitioner in this case). *Id.* at 96a. After about 20 minutes, a campus police officer approached and asked him to stop. *Id.* at 97a. The officer told Uzuegbunam that the college had received complaints about his speaking and that he had reserved

the patio only for distributing literature and having conversations, not for "open-air speaking." *Id.* at 97a-99a. The officer also asserted that, based on the complaints, Uzuegbunam might be engaging in "disorderly conduct," a violation of the college's Student Code of Conduct. *Id.* at 99a-100a. After further conversation with the officer, Uzuegbunam stopped speaking and left the patio. *Id.* at 103a.

Since that time, Uzuegbunam has not tried to speak publicly or distribute religious literature on campus. *Id.* at 104a-105a. He graduated from Georgia Gwinnett College in August 2017. *Id*. at 26a. Another student, Joseph Bradford, had also wished to speak publicly and distribute religious literature on campus, but knowing how the officials "enforced" the policies against Uzuegbunam, he feared exposure to "enforcement and disciplinary actions," so he refrained. *Id.* at 86a. Bradford has now graduated, too.

2. Uzuegbunam and Bradford sued Georgia Gwinnett College officials in federal district court, claiming that the college's speech and conduct policies violated the First and Fourteenth Amendments both on the face of the policies and as applied to Uzuegbunam and Bradford. The operative complaint's prayer for relief asked for (1) several declaratory judgments that the policies and restriction of the plaintiffs' speech violated their rights under the First and Fourteenth Amendments; (2) preliminary and permanent injunctions prohibiting the college from enforcing the policies; (3) "nominal damages"; (4) costs and attorney's fees; and (5) "[a]ll other further relief to which

Plaintiffs may be entitled." *Id.* at 132a-33a. The defendant officials moved to dismiss the complaint for failure to state a claim.[1]

3. While the motion to dismiss was pending, the college revised the challenged policies. Pet. App. 5a. The new speech policy makes clear that students generally may speak publicly, distribute literature, or otherwise engage in expressive activities anywhere on campus without prior approval. J.A. 10. Planned expressive activities involving a group of more than 30 people require a reservation of one of two new designated public fora. *Id.* at 14-15. The college also removed the challenged portion of the Student Code of Conduct. *Id.* at 11.

4. After the policy revision, the district court dismissed the case as moot. Pet. App. 22a-46a. The claims for declaratory and injunctive relief were moot because (1) the officials proved that the college "unambiguously terminated the Prior Policies and there is no reasonable basis to expect that GGC will return to them," and (2) Uzuegbunam graduated. *Id.* at 44a. Petitioners had not sought compensatory damages. *Id.* at 41a-42a. And

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[1] Contrary to petitioners' suggestion, Pet. Br. 10-11, it is not respondents' position that Uzuegbunam's speech amounted to "fighting words." Although respondents raised that argument briefly in their initial motion to dismiss, Pet. App. 155a, they struck it from their motion to dismiss petitioners' amended complaint filed a few weeks later, *see* R. 18-1. Respondents thus disavowed that position years ago, it was never considered by any court below, and in all events, it is irrelevant to the jurisdictional question presented here.

the remaining nominal-damages claim was "insufficient to save this otherwise moot case." *Id.* at 42a.

5. The court of appeals affirmed. *Id.* at 1a-19a. The court rejected petitioners' argument that they had a live claim for compensatory damages because the prayer for relief "requested only nominal damages," and their factual allegations never identified "any actual injury" beyond "the abstract injury suffered as a result of the violation of their constitutional rights." *Id.* at 9a-10a. The court also agreed that the remaining nominal-damages claim did not save the case from mootness. *Id.* at 13a. The court explained that a nominal-damages claim could not preserve jurisdiction when an award of nominal damages "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." Pet. App. 13a (quoting *Flanigan's Enters., Inc. v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1264 (11th Cir. 2017) (en banc)). After the college revised the challenged policies, awarding nominal damages "would have no practical effect on the parties' rights or obligations," so the case was moot. *Id.* at 14a.

SUMMARY OF ARGUMENT

A claim for nominal damages does not satisfy Article III or prevent mootness if intervening events have eliminated any threat of recurring or future injury to the plaintiff's legal rights or interests.

A case becomes moot when intervening events prevent a court from granting any further practical relief that would redress a plaintiff's injury. Intervening events seldom moot claims for damages to compensate past injuries because the plaintiff could still be made whole. By contrast, claims for prospective relief can become moot because such claims seek to prevent continuing or threatened injuries, and intervening events—like permanent changes to defendants' conduct or policies—can end the threat of further injury. If that happens and those claims for prospective relief are the only ones left in a case, it must be dismissed as moot.

Claims for nominal damages do not prevent mootness when events end the threat of further injuries, because the only practical, personal relief offered by nominal damages is prospective. As traditionally understood, nominal damages are essentially a declaratory judgment about past conduct: an injured plaintiff could seek them to get a judicial declaration that a legal right was violated, which could protect interests in land, personal or intellectual property, reputation, and more from diminution or future infringement. But that award does not redress past injuries. The dollar (or less) awarded as nominal damages is not a small amount of compensatory damages—the prospect of which could resist mootness—but rather a legal symbol that the plaintiff gets zero compensation for a past injury. Nominal damages can also carry litigation costs and give the plaintiff the moral satisfaction of having a federal court validate his cause, but neither effect is tangible, personal redress of any injury—so neither

lets the claim satisfy Article III or avoid mootness. Finally, this Court's cases are not to the contrary. Neither *Carey v. Piphus*, *Memphis Community School District v. Stachura*, nor *Farrar v. Hobby* purported to address Article III jurisdiction. And the jurisdictional underpinning of a case in which nominal damages are given after the plaintiff proves a violation but fails to prove compensatory damages is the live claim for compensatory damages, not the symbolic dollar given to reflect an already-realized outcome.

Historical practice confirms that nominal damages are independent and meaningful redress only for continuing or threatened injuries, not past ones. Common-law courts universally allowed nominal damages to declare and protect rights from threatened diminution or loss before declaratory judgments or courts of equity offered similar relief. For a time, some courts would also justify awarding them to carry costs. But when nominal damages offered neither of those benefits, common-law courts either refused to allow them or, at most, treated them as "technical" awards without independent significance.

All of this confirms that a claim for nominal damages becomes moot when intervening events end any threat of future injury. That happened here when the college revised the policies petitioners challenged. As with declaratory relief, the lack of continuing, present adverse effects on petitioners' First Amendment rights mooted any claim for nominal damages. And because petitioners did not allege compensable past injuries, no

court can offer further effectual relief. The courts below properly dismissed this case as moot.

Finally, adopting petitioners' nominal-damages exception to Article III would be both unwise and unnecessary. Petitioners' expansive position would swallow the mootness doctrine for every cause of action that allows recovery of nominal damages, including 42 U.S.C. § 1983. And existing remedies are adequate to prevent and compensate injuries caused by the violation of constitutional rights.

ARGUMENT

I. A claim for nominal damages does not prevent mootness if intervening events have eliminated any threat of recurring or future injury to the plaintiff's legal rights or interests.

The "oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (citation omitted). This prohibition comes from Article III of the Constitution, which limits the power of federal courts to the adjudication of "Cases" and "Controversies," and it means that federal courts cannot "say what the law is" just because a party desires it. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Instead, they may exercise their power to declare the law "only in the last resort, and as a necessity in the

determination of real, earnest, and vital controversy between individuals." *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892).

Claims for nominal damages like the one in this case "come[] to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co.*, 523 U.S. at 101. A plaintiff retains the personal stake needed to prevent mootness only as long as the court can grant the plaintiff personal and tangible relief that is likely to redress his asserted injury. Under modern Article III jurisprudence and at common law, nominal damages offer this kind of redress only for continuing or threatened injuries to a plaintiff's legal rights or interests: they are a forward-looking, rights-protecting remedy, not compensation for past injuries. So when, as here, intervening events end any alleged continuing injury or threat to a plaintiff's legal rights, a claim for nominal damages becomes moot.

A. A case becomes moot if the court can no longer grant personal and tangible relief likely to redress the plaintiff's injury.

A lawsuit remains an Article III case or controversy only as long as the plaintiff and defendant each have a "personal stake in the outcome." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990) (citation omitted). This requirement persists throughout a lawsuit. *Id.* at 477. "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the

lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis*, 494 U.S. at 477-78). For plaintiffs, the necessary personal stake is shown by establishing the elements of standing: a "[1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

The last element, redressability, tests the plaintiff's personal stake by asking whether a court deciding his claim can offer any practical relief for his injury. Redressability has two related components.

First, it means a court must be able to give a remedy that offers the plaintiff a "real world" benefit. *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir. 1999) (quoting 13A Charles A. Wright et al., *Federal Practice & Procedure* § 3533.1, at 226 (2d ed. 1984)). The question is whether the plaintiff "personally would benefit in a tangible way from the court's intervention." *Steel Co.*, 523 U.S. at 104 n.5 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). That test rejects remedies like civil penalties payable only to the government, *Steel Co.*, 523 U.S. at 106, or a mere "judicial statement" without legal import for the plaintiff, *Hewitt v. Helms*, 482 U.S. 755, 761 (1987), as independent Article III redress, because any "psychic" or "moral satisfaction" they provide is not a practical

or tangible benefit, and their benefits to the public are not personal to the plaintiff. *Id.*; *Steel Co.*, 523 U.S. at 107.

Second, redressability means an available remedy must target and redress the plaintiff's asserted injury. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id*. The requested remedy need not promise complete relief. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). But it must offer the prospect of relief for the injury alleged, not satisfaction of "[a]n interest unrelated to injury in fact." *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000). In other words, the requested relief must show that the plaintiff has a "concrete private interest in the outcome of the suit," which "must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Id.*

Like the case-or-controversy requirement itself, redressability must persist until the court resolves the case. "[I]f an event occurs while a case is pending [review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party," the court must dismiss the case as moot. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). That rule applies to all claims, but it mostly concerns prospective relief. After all, if a plaintiff alleges a past injury and seeks compensation for it, events besides settlement are unlikely to prevent a

court from awarding damages that offer that compensatory redress. *See*, *e.g.*, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608-09 (2001). Claims for prospective relief, on the other hand, seek to prevent continuing or threatened injuries, which means they can be overtaken by events. When that happens—as when a challenged policy is revised in a way that its enforcement would no longer infringe the plaintiff's legal rights—claims for prospective relief are moot. *See Alvarez v. Smith*, 558 U.S. 87, 92-93 (2009) (explaining that the parties' controversy about "ownership or possession of the underlying property" was over, leaving only an "abstract dispute about the law" that the Court lacked jurisdiction to decide); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects."). And if that is the only relief sought, the whole case is moot.

B. Nominal damages can redress continuing or threatened injuries to legal rights or interests, but not past injuries.

Understanding the role of nominal damages in the Article III inquiry requires recognizing their unique nature as a remedy. Nominal damages are "damages in name only." Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages—Equity—Restitution* 225 (3d ed. 2018). Although the plaintiff may get a dollar, this "trifling" amount is "not compensation for loss or

injury." 25 C.J.S. Damages §§ 17, 22. Nominal damages are given when the plaintiff has established a violation of legal rights but cannot prove damages of *any* amount, by any measure. Dobbs, *supra*, at 225. Their remedial value rests instead in their "declaratory effect." *Pagan v. Vill. of Glendale, Ohio*, 559 F.3d 477, 478 n.1 (6th Cir. 2009) (citation omitted); *Cummings v. Connell*, 402 F.3d 936, 945 (9th Cir. 2005) ("Recovery of nominal damages is important not for the amount of the award, but for the fact of the award.").

Thus, nominal damages only sometimes provide redress that satisfies Article III. They can be effective prospective relief when the judicial declaration they represent establishes the plaintiff's rights or protects against continuing or threatened injury. But contrary to petitioners' view, the award does not offer compensation or any other redress for *past* injuries that would resist mootness when the threat of future injuries dissipates in a given case.

1. Start with common ground. No one seriously disputes that nominal damages can play a remedial role much like the modern declaratory judgment. At common law, their "most obvious purpose was to obtain a form of declaratory relief in a legal system with no general declaratory judgment act." Douglas Laycock & Richard L. Hasen, *Modern American Remedies* 636 (5th ed. 2019); Dobbs, *supra*, at 226 ("Lawyers might have asserted a claim for nominal damages to get the issue before the court in the days before declaratory

judgments were recognized."). As with a declaratory-judgment suit, an injured plaintiff could seek nominal damages to get a "judicial declaration" of legal rights. Charles T. McCormick, *Handbook on the Law of Damages* § 20, at 85 (1935); *see also* Dobbs, *supra*, at 226 (claims for nominal damages "might be brought as declaratory judgment suits are brought, to determine a right"). That award could establish and protect rights in land or water, personal or intellectual property, contracts, and more. *See* Restatement (Second) of Torts § 907 (1979); 1 John D. Mayne, et al., *Wood's Mayne on Damages* 7-8 (3d English & 1st Amer. ed. 1880); Francis Hilliard, *Law of Remedies for Torts* 554 (1873) (noting that suits for nominal damages are available "where the unlawful act might have an effect upon the right of a party," including in property disputes, actions for slander, and suits for trespass).

This rights-establishing effect of nominal damages will be enough to count them as Article III redress as long as the legal right the plaintiff seeks to adjudicate remains in jeopardy as a result of the alleged violation. Take trespass. Even if a trespasser just steps onto the plaintiff's land, doing no physical damage, the act could threaten the plaintiff's property rights by bringing a boundary into dispute or creating a prescriptive right. *See*, *e.g.*, *Blanchard v. Baker*, 8 Me. 253, 268 (1832) (explaining that a suit for nominal damages could be brought because "[i]f an unlawful diversion is suffered for twenty years, it ripens into a right, which cannot be controverted") (citing *Hobson v. Todd*, 100 Eng. Rep. 900 (1790)). Nominal damages could redress

these continuing injuries to the plaintiff's rights because the authoritative judicial determination reflected in such an award would not only settle any boundary dispute but also "prevent the creation of a prescriptive right to use or cross the land." Restatement (Second) of Torts § 907; *see also Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1264 (10th Cir. 2004) (McConnell, J., concurring).

And nominal damages can offer similar protection for other kinds of rights. In trademark cases, awarding nominal damages can prevent dilution or loss of the trademark. *See*, *e.g.*, *7-Eleven, Inc. v. McEvoy*, 300 F. Supp. 2d 352, 356 (D. Md. 2004); 6 Callmann on Unfair Competition, *Trademarks and Monopolies* § 22:19 (4th ed. 2003). In defamation cases, nominal damages can give the plaintiff a "judicial declaration that the publication was indeed false," which protects his reputational interest going forward. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 376 (1974) (White, J., dissenting). And in contract cases, "giving nominal damages . . . may settle the question of title or determine rights of the greatest importance" to the contracting parties. 2 Theodore Sedgwick, *Treatise on the Measure of Damages* 138 (8th ed. 1891). Although it is "rarely necessary" to use nominal damages for these purposes now that declaratory judgments are available, Laycock, *supra*, at 636, the remedy still satisfies Article III when it serves them. *See Utah Animal Rights Coal.*, 371 F.3d at 1266.

2. Beyond establishing and protecting legal rights, nominal damages have ancillary effects. An

award of nominal damages involves the transfer of a trivial sum of money from the defendant to the plaintiff. Nominal damages have also served as a "peg" on which the court can hang both costs and attorney's fees. And of course, like any judgment in the plaintiff's favor, nominal damages offer judicial validation of the plaintiff's cause. But contrary to petitioners' claims, Pet. Br. 16-20, 22-23, none of these other effects of nominal damages offer plaintiffs personal or tangible relief that redresses a past injury.

a. An award of nominal damages sends a "trivial sum[ ]" to the plaintiff—today, usually a dollar. Dobbs, *supra*, at 225; 25 C.J.S. Damages § 22. But the dollar itself, unlike a dollar in real damages, does not redress a past injury.

Dollars awarded as traditional money damages satisfy Article III because they play a classic remedial role. When a plaintiff suffers an injury caused by a violation of his legal rights in the past, the law generally tries to redress that injury by compensating the plaintiff for the injury suffered—making the plaintiff whole. Laycock, *supra*, at 15; Restatement (Second) of Torts § 902 (1979). And often the plaintiff's injury is lost money, or a plaintiff does not want or cannot get back the specific thing lost—damaged goods, infringed intellectual-property rights, and emotional distress are good examples. In those cases, dollars redress the past injury by substituting for the plaintiff's original entitlement and compensating for its loss or infringement, as valued by the factfinder. *See*, *e.g.*, Laycock, *supra*, at 5. In short, a claim for traditional money damages

is Article III redress because those dollars represent the prospect of substitutionary, compensatory relief for the plaintiff's past injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 211 n.5 (2000) (Scalia, J., dissenting). And such a claim resists mootness because the prospect for relief of the past injury "subsists whether future harm is threatened or not." *Id.*

The dollar awarded as nominal damages is different. That dollar is "not [given] as an equivalent for the wrong," *Dissette v. Dost*, 280 F. 455, 457 (D.C. Cir. 1922), and it is "not compensation for loss or injury," *Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983); *see also* Restatement (Second) of Torts § 907 (1979); 25 C.J.S. Damages § 17. These aims cannot possibly be served by the nominal-damages dollar—not even a little. Although that dollar is technically "a sum of money that can be spoken of," legally it is only a symbol with "no existence in point of quantity." J. G. Sutherland, *Treatise on the Law of Damages* 9 (1882); *see also Michael v. Curtis*, 22 A. 949, 951 (Conn. 1891) ("Nominal damages . . . exist only in name, and not in amount."); *Redding*, 717 F.2d at 1119 ("Nominal damages do not measure anything."). The law zeroes out the nominal-damages dollar in this way because it is awarded to reflect that, although the plaintiff has established a violation of legal rights, it could not be established that *any* amount of money could substitute for or compensate the plaintiff's injury. Dobbs, *supra*, at 225. And that means a dollar awarded as nominal damages is "not damages small in amount," *Dissette*, 280 F. at 457;

see also Moore v. Duke, 80 A. 194, 197 (Vt. 1911), which would satisfy Article III by compensating for a small past injury, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973); *see* Pet. Br. 21, 43 (relying on *SCRAP*). Instead, the dollar says the plaintiff gets *zero* dollars to compensate for the loss. *See*, *e.g.*, *Moore v. Liszewski*, 838 F.3d 877, 879 (7th Cir. 2016) (Posner, J.) ("A jury verdict awarding nominal damages is not a small rather than a large damages award; functionally it is no damages award at all."); *Stanton v. New York & E. Ry. Co.*, 22 A. 300, 303 (Conn. 1890) ("Nominal damages mean no damages at all."); *Michael*, 22 A. at 951 ("Nominal damages mean no damages."). Because the nominal-damages dollar itself offers zero legally recognized relief for a past injury, it cannot satisfy Article III in that fashion.

The legal zeroing-out of the nominal-damages dollar makes it fundamentally distinct for Article III purposes from any other kinds of damages, which generally resist mootness. The United States cites statutory and punitive damages as analogues, *see* U.S. Br. 19-21, but those remedies are different in kind. Statutory damages, for example, could be set at an amount that does not fully compensate a given plaintiff's injury, but they also do not signify *nothing* in damages. Congress often sets statutory damages either to ensure some compensation for injuries that might be hard to measure or to augment actual damages proven by the plaintiff for some extracompensatory purpose. *See*

Douglas v. Cunningham, 294 U.S. 207, 209 (1935) (explaining that statutory damages under the Copyright Act of 1909 "give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits"); *Genesco Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 851 (2d Cir. 1987) (availability of treble damages under 18 U.S.C. § 1964(c) "is primarily a compensatory and secondarily a deterrent measure"). Either way, the dollars awarded as statutory damages offer at least partial redress of a plaintiff's past injury, which is good enough for Article III. *See Church of Scientology*, 506 U.S. at 13.

The same can be said for dollars given as punitive damages. Although punitive damages are awarded mainly to punish and deter, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996), the dollars are mostly paid to the plaintiff, often in great quantity, and certainly not as a legal symbol for zero dollars. That gives the plaintiff both a practical benefit and possible redress for a past injury, *cf. Steel Co.*, 523 U.S. at 106 ("[T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent."). So punitive damages, too, have bases for satisfying Article III that are not present in the symbolic nominal-damages dollar.

b. Nominal damages are also a "peg" on which a court can hang costs for the plaintiff, including attorney's fees. 25 C.J.S. Damages § 17; *see Farrar v. Hobby*, 506 U.S. 103, 112 (1992). This benefit can be both

significant and personal to the plaintiff, but this Court has rightly dismissed it as independent Article III redress: "[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself." *Steel Co.*, 523 U.S. at 107. The prospect of obtaining costs or attorney's fees is therefore "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis*, 494 U.S. at 480.

c. That leaves vindication. Nominal damages have often been described as a means of "vindicating" violations of legal rights when a plaintiff could not prove actual harm. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986); *Carey v. Piphus*, 435 U.S. 247, 266 (1978). But the word "vindication" is not a talisman that, having been attached to nominal damages, qualifies them as Article III redress in every case. *See generally* Pet. Br. (describing nominal damages for past injuries as "vindication" 21 times). Whatever that description means, it does not identify any new or independent practical benefit of nominal damages that redresses a past injury and allows a federal court to decide a case.

One meaning of "vindication" is the one already discussed above: establishing and protecting the plaintiff's legal rights from recurring or threatened injury. William B. Hale, *Handbook on the Law of Damages* 29 (1896). But that sense of vindication is not redress for a past injury: the declaratory effect of nominal

damages satisfies Article III and prevents mootness only so long as the plaintiff suffers from some present or threatened injury to his rights that could be prevented by the declaration. *Utah Animal Rights Coal.*, 371 F.3d at 1266 (explaining that, as with a claim for a declaratory judgment, a claim for nominal damages awarded for "past conduct that will not recur is not justiciable").

Aside from their rights-protecting function, nominal damages offer another kind of "vindication": "judicial validation" of the plaintiff's cause. *Flanigan's*, 868 F.3d at 1268. But that is not Article III redress. Every plaintiff "wants a federal court to say he is right," *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 175 (2016) (Roberts, C.J., dissenting), but the resulting "psychic satisfaction" is not enough by itself to transform an advisory opinion into a justiciable case, *Steel Co.*, 523 U.S. at 107.

Petitioners argue that "[n]ominal damages do far more than ensure a plaintiff's happiness." Pet. Br. 20. They explain that the monetary value of nominal damages "must, by definition, be negligible," but they have "great significance to the litigant and to society" because they can "hold[ ] a government 'entity responsible for its actions'" and "encourage the government to reform." *Id.* (quoting *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 317-18 (2d Cir. 1999)). But even putting aside that petitioners' position sweeps beyond lawsuits against governments, the benefits they identify have no Article III import. What petitioners describe is the "vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of

the law," not a personal, tangible benefit that relieves any injury. *Steel Co.*, 523 U.S. at 106. And any generalized deterrent effect is neither personal to the plaintiff nor relief for a past injury. *Id.* at 106-07. So these benefits, however meaningful, "cannot bootstrap a plaintiff into federal court." *Id.* at 107.

3. Petitioners rely on this Court's cases addressing nominal damages in the context of claims brought under § 1983. But none of these cases suggests that nominal damages offer independent, Article III redress of purely past injuries that resists mootness.

a. Two of these cases, *Carey* and *Stachura*, continued a line of this Court's decisions rejecting so-called "presumed damages" for constitutional violations. Dobbs, *supra*, at 640 n.2 (collecting cases). Presumed damages were the common law's answer to the difficulty of measuring damages for intangible harms. When plaintiffs proved legal claims understood to cause harm to "dignitary" interests—including libel, invasion of privacy, misuse of judicial process, malicious prosecution, assault, battery, and false imprisonment—common-law courts would allow awards of substantial damages to redress "dignitary harms," without requiring proof of actual harm. Dobbs, *supra*, at 654-60; *see also Carey*, 435 U.S. at 262. Although similar intangible harm could inhere in the violation of constitutional rights, this Court rejected the presumed-damages approach for those violations. Instead, the Court held in *Carey* and reaffirmed in *Stachura* that "*no* compensatory damages could be awarded for violation of [constitutional] right[s] absent proof of

actual injury." *Stachura*, 477 U.S. at 308 (citing *Carey*, 435 U.S. at 264).

That holding prompted the Court to discuss nominal damages. In *Carey*, the Court noted that whether or not the respondents could prove compensatory damages (they could try on remand), they had still established a violation of their right to procedural due process, and that entitled them to recover at least *nominal* damages. 435 U.S. at 266. And in *Stachura*, the Court said the same thing about other constitutional violations. 477 U.S. at 308-09 & n.11.

But the Court's brief discussion of nominal damages in these cases does not contradict the understanding of nominal damages as fundamentally prospective redress. The Court identified two benefits of such an award: it could "vindicate[] deprivations of certain 'absolute' rights," and it could convey "the importance to organized society that procedural due process be observed." *Id.* As already explained, however, neither of these benefits offer personal, tangible relief for a plaintiff's past injury. *See* pp. 21-23, *supra*. Indeed, when common-law courts described nominal damages as "vindicating" rights, they used it in the sense of establishing and protecting rights going forward, not compensating past injuries caused by violations of those rights. *See*, *e.g.*, *Hecht v. Harrison*, 40 P. 306, 309-10 (Wyo. 1895) (explaining that nominal damages are awarded when "an important right is to be vindicated," but affirming the denial of nominal damages because the plaintiff's future rights were not threatened); *Green v. Weaver*, 63 Ga. 302, 305 (1879) (holding, in a

property rights case, that the plaintiff could recover nominal damages "to vindicate his right" to a certain water level).

Nor did the Court's statement that the constitutional violations in those cases "should be actionable for nominal damages without proof of actual injury" transform that remedy into independent Article III redress for past injuries. 435 U.S. at 266. To begin with, Article III jurisdiction was neither presented nor addressed as an issue in *Carey* or *Stachura.* These cases addressed whether a plaintiff needed to prove actual injury beyond the violation of a constitutional right to recover substantial damages under § 1983, *Stachura*, 477 U.S. at 308, not whether a court would have Article III jurisdiction to award nominal damages in every constitutional case, *see Flanigan's*, 868 F.3d at 1266.

At most, those cases convey an implicit expectation that federal courts could award nominal damages when a plaintiff proves a constitutional violation but not actual damages. That expectation largely bears out for two reasons, but neither is that nominal damages redress past injuries. First, as discussed above, courts can award nominal damages without proof of actual injury to redress continuing or threatened injuries to a plaintiff's rights. *See* pp. 14-16, *supra.*

Second, courts can award nominal damages without proof of actual injury at the end of a case in which a plaintiff brings a claim for compensatory damages. But the potential for nominal damages in such a case is not an independent jurisdictional basis for deciding

it in the first place. Instead, the jurisdictional hook in these cases is the plaintiff's live claim for compensatory damages. *See Utah Animal Rights Coal.*, 371 F.3d at 1264 n.2. Even the "possibility" of awarding compensatory damages preserves jurisdiction to decide the merits of the case. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978). If, given that possibility, the court decides that the plaintiff's rights have been violated, but it then determines that he failed to prove his claim for compensatory damages, a court may award nominal damages to represent that outcome. *Utah Animal Rights Coal.*, 371 F.3d at 1264 n.2; *Flanigan's*, 868 F.3d at 1270 n.23. In this role, nominal damages are merely a duplicative symbol marking "an outcome that has already been realized"—a merits win, but $0 damages—not independent relief of any injury. *Id.* at 1264. Because this symbolic gesture is bound up with the live claim for compensatory damages and not independent redress for any injury, courts do not need independent Article III jurisdiction to offer it (contrary to the federal government's assertion, *see* U.S. Br. 23). But for the same reasons, the availability of this symbolic award in a compensatory-damages case does not justify adjudicating the merits of a case when *only* nominal damages are sought. *See Steel Co.,* 523 U.S. at 103 n.5 (Article III redressability requires that the plaintiff "personally would benefit in a tangible way from the court's intervention." (quoting *Warth*, 422 U.S. at 508)).

b. The third case, *Farrar v. Hobby*, also fails to corroborate petitioners' claim that nominal damages

redress purely past injuries, *see* Pet. Br. 22-23. *Farrar* held that "a plaintiff who wins nominal damages is a prevailing party under § 1988," making him eligible for attorney's fees. 506 U.S. at 112. This holding accords with common-law courts, which generally agreed that nominal damages carried costs. *See* pp. 32-34, *infra*. But common-law courts ultimately rejected the notion that this interest in costs alone could sustain jurisdiction, *id.*, and so has this Court. *See Steel Co.*, 523 U.S. at 107.

Nor does *Farrar*'s reasoning indicate that nominal damages redress past injuries. *Farrar* reasoned that a plaintiff who wins nominal damages is a "prevailing party" in part because "[a] judgment for damages . . . 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." 506 U.S. at 113. So the basis for the Court's conclusion that the plaintiffs had prevailed was that they received an enforceable judgment in their favor representing the adjudicated violation of their constitutional rights, not that the dollar redressed their past injuries. *Id.* at 111-12. That satisfied the test for determining "prevailing party" status, which asks whether the case resulted in a "material alteration of the legal relationship of the parties." *Id.* at 111. But it does not resolve one way or the other whether the nominal damages provided personal and tangible redress *for the plaintiffs' injuries*, *see Steel Co.*, 523 U.S. at 107. Nor did it suggest that the award otherwise counted as independent Article III redress, particularly since the Court had jurisdiction to

adjudicate plaintiffs' claims based on their live claim for compensatory damages, irrespective of any nominal-damages claim. And *Farrar* did not purport to change the traditional understanding that the nominal-damages dollar represents *zero* compensation for a plaintiff's past injury, *see* pp. 17-19, *supra*. So it does not follow from *Farrar* that the nominal-damages dollar is effective Article III redress of a past injury.

C. Historical practice confirms that nominal damages serve as meaningful redress only for continuing or threatened injuries to a plaintiff's legal rights or interests.

Historical practice informs the scope of Article III's grant of judicial power because that grant extends to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Vermont Agency of Nat. Res.*, 529 U.S. at 774 (quoting *Steel Co.*, 523 U.S. at 102). Here, the historical practices of common-law courts confirm that claims for nominal damages satisfy Article III only when they offer relief for continuing and threatened injuries to a plaintiff's legal rights and interests.

1. At common law, nominal damages were "declaratory relief at law." Laycock, *supra*, at 636; *see also* Hale, *supra*, at 29 ("The principal purpose of allowing nominal damages is the establishment of rights."). Before the merger of law and equity, common-law courts "awarded only damages." Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of*

Rights in the Federal Courts, 38 Hastings L.J. 665, 668 (1987). That rule "severely limited the capacity of the common-law courts to vindicate rights," since damages could "provide compensation" but could not easily "prevent wrongs." *Id.* at 667-68. But nominal damages offered a clever workaround. When plaintiffs had suffered only a "technical" or *de minimis* injury but still needed a judgment to prevent continuing harm to their legal rights—proprietary, contractual, or personal—nominal damages allowed the common-law court to establish the plaintiff's rights using the only arrow in its remedial quiver. Laycock, *supra*, at 636 ("The common law courts would not declare such matters directly, but the suit for nominal damages allowed them to do so indirectly."); *Blackburn v. Alabama Great S. R. Co.*, 143 Ala. 346, 349 (1905) (explaining that "the practice in suits at law" is to award nominal damages "not as compensation for the injury, but merely in recognition of plaintiff's right and its technical infraction by defendant"). Of course, in most kinds of actions, courts of law had firm rules against awarding real money without proof of actual damages. *See*, *e.g.*, *Seymour v. McCormick*, 57 U.S. 480, 490 (1853). So the courts limited these "damages" by law "to such a small amount (e.g. a farthing) as to show that they are not intended as any equivalent or satisfaction to the party recovering them," *see* 1 Joseph A. Joyce & Howard C. Joyce, *Treatise on Damages Covering the Entire Law of Damages Both Generally and Specifically* 6 n.12 (1903) (quoting Sweet's Dict. of Eng. L. 240 (ed. 1882)), but only a "token or symbol" for the underlying declaration of rights, Howard L. Oleck, *Cases on Damages* 27

(1962). So conceived, nominal damages allowed courts of law to give an effective form of declaratory relief long before the development of courts of equity and (much later) declaratory-judgment statutes. *See* Laycock, *supra*, at 636; Dobbs, *supra*, at 226.

This declaratory role was the only universally consistent justification given for awarding nominal damages at common law. That role was routinely cited by historical scholars and common-law courts to justify deciding cases without real money at stake. Nominal damages were "effective" remedies because they could, for instance, "declar[e] the existence or nonexistence of a right," Hale, *supra*, at 29, "establish[] the fact of the plaintiff's title," Sedgwick, *supra*, at 137, "try[] the extent of the defendant's right," *Dixon v. Clow*, 24 Wend. 188, 191 (N.Y. Sup. Ct. 1840), prevent past "encroachments" from "ripen[ing] into a legal right" adverse to the plaintiff, *Hathorne v. Stinson*, 12 Me. 183, 188 (1835), and protect "the credit of the plaintiff," *Marzetti v. Williams*, 109 Eng. Rep. 842, 844 (1830), or his reputational interests, *see Leppley v. Smith*, 91 Pa. Super. 117, 121 (1927) (awarding nominal damages for slander "to vindicate the plaintiff, that is, to justify his suit and free him of all suspicion of wrong").

Even when not made explicit, this rights-protecting, declaratory function was the common thread connecting the kinds of actions that could be maintained for nominal damages alone. These included actions for trespass to land, *see*, *e.g.*, *Carey v. Robbins*, 2 Del. Cas. 24, 26 (1808); determining riparian rights, *see*, *e.g.*, *Wood v. Waud*, 154 Eng. Rep. 1047, 1057 (1849); rights

in common, *see*, *e.g.*, *Hobson*, 100 Eng. Rep. 900; infringement of intellectual property, *see*, *e.g.*, *Blofeld v. Payne*, 110 Eng. Rep. 509 (1833); breach of contract, *see*, *e.g.*, *Everson v. Powers*, 89 N.Y. 527, 530 (1882); and slander, *see*, *e.g.*, *Leppley*, 91 Pa. Super. at 120. Each of these kinds of actions involved "specialized or absolute rights" that could be diminished or threatened in the future if violations were not addressed, and the declaration of rights reflected in an award of nominal damages offered protection against those threatened injuries. *See* Hale, *supra*, at 29; *Paul v. Slason*, 22 Vt. 231, 238 (1850) (explaining that nominal damages were justified in cases involving "unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the *right* of the party and be evidence in favor of the wrong doer, if his right ever came in question . . . because otherwise the party might lose his right"); Sedgwick, *supra*, at 138.

The rights-protecting role of nominal damages was central to the remedy. Indeed, both English and American courts at times described it as part of the "salutary" or "governing" principle that guided whether actions for only nominal damages could be maintained at all. *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 274 (1839) (salutary principle); *Mellor v. Spateman*, 85 Eng. Rep. 495, 498 (1668) (governing principle). For these courts, if a plaintiff's future rights were not in peril, nominal-damages claims were not actionable. *See*, *e.g.*, *Paul*, 22 Vt. at 238 ("English courts have recently gone far towards breaking up the whole system of giving verdicts, when no actual injury has

been done, unless there be some *right* in question, which it was important to the plaintiff to establish."); *Spencer v. Davis*, 298 S.W. 443, 447 (Tex. Civ. App. 1927) ("No one would contend that the district court has jurisdiction of an action where the prayer is for only nominal damages, and that is the effect of plaintiff's petition here."); *Reid v. Johnson*, 31 N.E. 1107, 1108 (Ind. 1892) ("When the averments of a pleading are such as to authorize the recovery of nominal damages, and no more, and do not in any way involve the establishment or vindication of any substantial right, it is not available error to sustain a demurrer to it."); *Williams v. Mostyn*, 150 Eng. Rep. 1379, 1382 (1838) (reversing a verdict for nominal damages because a creditor cannot sue a sheriff for allowing a debtor in custody to briefly escape when there was "no impediment to the exercise of [the creditor's] right"); *Young v. Spencer*, 109 Eng. Rep. 405, 408 (1829) (remanding landlord's action for nominal damages against a lessee for installing a new door to determine whether it had injured the landlord's reversionary right, because "[i]t seems to be clearly established . . . that if any thing be done to destroy the evidence of title, an action is maintainable"); *Planck v. Anderson*, 101 Eng. Rep. 21 (1792) (reversing a verdict for nominal damages brought against a sheriff for allowing a debtor to escape because the creditor "was not delayed or prejudiced").

2. Besides awarding nominal damages as proto-declaratory relief, common-law courts would sometimes separately justify them as a vehicle for costs.

See, *e.g.*, Hale, *supra*, at 30. In these instances, nominal damages were a "rescue operation": they ensured that a plaintiff who proved a legal violation but failed to prove actual damages would not also have to pay the defendant's litigation costs. Dobbs, *supra*, at 226-27; *see also Bemus v. Beekman*, 3 Wend. 667, 670 (N.Y. 1829).

This cost-carrying function, however, was not viewed with the same universal importance as the declaratory role. If a nominal-damages award could offer a plaintiff no more than entitlement to costs, common-law courts disagreed on whether the action could be maintained. *Compare* Hale, *supra*, at 30 ("Where plaintiff is entitled to nominal damages, but judgment is given for defendant, it will be reversed, if nominal damages will entitle plaintiff to costs; otherwise not, for the error is harmless."); *Kenyon v. W. Union Tel. Co.*, 100 Cal. 454, 458-49 (1893) (same); *with Monger v. Pavey*, 98 N.E. 625, 626 (Ind. 1912) (collecting sources for the principle that "[it] is well settled that an appeal will not be entertained simply to determine who shall pay the costs in the trial court"); *Willson v. McEvoy*, 25 Cal. 169, 174 (1864), *overruled on other grounds, Reachi v. Nat'l Auto. Cas. Ins. Co. of Los Angeles*, 37 Cal. 2d 808 (1951) (declining to remand for entry of nominal damages, even though the plaintiff "would have been relieved of the payment of costs," because "*de minimis non curat lex*"). And this cost-carrying justification for nominal damages lost favor over time, at least as an independent basis for adjudicating a case. *See State v. Boyd*, 87 N.E. 140, 140 (Ind. 1909) (collecting cases

holding that "jurisdiction will not be retained to determine merely an incidental question of costs"); *State, to Use of Goddard v. Rayburn*, 22 Mo. App. 303, 306 (1886) (explaining that "modern judicial opinion is becoming dissatisfied" with the rule that judgments would be reversed so plaintiffs could obtain nominal damages and so recover costs). Compared to their declaratory role, the cost-carrying role of nominal damages was ancillary.

3. If nominal damages could not declare rights or carry costs in a given case at common law, they were not treated as meaningful independent redress. Again, in those cases, many courts refused to award nominal damages at all. *See* pp. 31-32, *supra*.

Some courts allowed nominal damages when they would not plainly serve as prospective relief. But importantly, even those courts did not treat nominal damages as independent redress of a past injury in those cases. When a plaintiff had proved a legal violation and sought but failed to prove actual damages, those courts allowed a "mere technical right to recover" nominal damages. *Hudspeth v. Allen*, 26 Ind. 165, 167 (1866); *see Jennings v. Loring*, 5 Ind. 250, 251 (1854) ("Jennings was entitled, perhaps, to nominal damages, but to nothing more[,] . . . leaving only a naked technical right to recover."). This version of the award was considered so inconsequential that, when trial courts failed to award them in accordance with this technical right, appellate courts called it "harmless error" and refused to grant new trials as a "general rule." *Hecht*, 40 P. at 309-10 (harmless error); *Plumleigh v.*

Dawson, 6 Ill. 544, 552 (1844) (general rule); *see also Bustamente v. Stewart*, 55 Cal. 115, 116 (1880) (acknowledging that plaintiffs might have been entitled to nominal damages, but "invoking the maxim '*De minimis non curat lex*' "); *Jones v. King*, 33 Wis. 422, 426 (1873) (affirming the denial of a new trial even though the plaintiff should have received nominal damages); *Craig v. Chambers*, 17 Ohio St. 253, 256-57 (1867) (same), *abrogated on other grounds by Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St. 2d 242, 250 (1971); *Cady v. Fairchild*, 18 Johns. 129, 129-30 (N.Y. 1820) (same); *Fleming v. Gilbert*, 3 Johns. 528, 532 (N.Y. Sup. Ct. 1808) (same); *Brantingham v. Fay*, 1 Johns. Cas. 255, 263-64 (N.Y. Sup. Ct. 1800) (same). This was in stark contrast to the rule for actual damages, *see*, *e.g.*, *Henderson v. Lyles*, 20 S.C.L. (2 Hill) 504, 505 (1834) (collecting cases granting new trials when courts erred by not awarding compensatory damages), confirming that even these courts did not view these "technical" awards as meaningful redress.

Finally, the universal exception to this rule against prolonging actions based on "technical" nominal damages showed that their prospective, rights-protecting effect was their true remedial purpose. A new trial would *always* be granted when awarding nominal damages would establish or protect threatened rights. *See*, *e.g.*, *Hecht*, 40 P. at 309-10; *Ely v. Parsons*, 10 A. 499, 505 (Conn. 1886); *Kenyon*, 100 Cal. at 458-59.[2] Divorced from their prospective remedial benefits,

[2] Some courts recognized a similar exception for when nominal damages would carry costs. *See, e.g.*, *id.*

nominal damages were viewed as a "mere technical right" to be given short shrift, not meaningful relief that served as a basis for maintaining an action.

4. Petitioners and many of their amici cite common-law cases to support their argument that claims for nominal damages should *always* be independently justiciable as redress for purely past injuries. But their cited cases offer little to support that sweeping claim, which contradicts the weight of the common law.

Every one of petitioners' common-law cases, Pet. Br. 17, 39, was actionable because nominal damages offered prospective redress. Nominal damages virtually always offer the prospect of meaningful redress in actions for trespass to land, *Hulle v. Orynge*, Y.B. Mich. 6 Ed. 4, f. 7, pl. 18 (1466), or to determine riparian rights, *see Whipple v. Cumberland Mfg. Co*., 29 F. Cas. 934, 936 (C.C.D. Me. 1843); *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 509-11 (C.C.D. Me. 1838); *Robinson v. Lord Byron*, 30 Eng. Rep. 3, 3 (1788). Land and water rights can be diminished or threatened by unredressed violations, so these nominal-damages claims were independently actionable because the declaration of rights reflected in an award of nominal damages could have prevented those injuries. *See* pp. 14-16, 28-32, *supra*.

Petitioners also note that common-law courts allowed plaintiffs to waive compensatory damages and seek only nominal damages. *See* Pet. Br. 42 (citing *Daniels v. Bates*, 2 Greene 151, 152 (Iowa 1849)). But those cases, too, were actionable because an award of nominal damages could redress a continuing or

threatened injury, not because they compensated for past injuries. *See*, *e.g.*, *High v. Johnson*, 28 Wis. 72, 80 (1871) (action seeking return of horses); *Daniels*, 2 Greene at 152 (property rights); *Boon v. Juliet*, 2 Ill. 258, 259 (1836) (awarding one cent in "action . . . instituted to ascertain the right of [slave] children . . . to freedom").

Most of the common-law cases cited by the United States and other amici were likewise actionable because they addressed threats to land or water rights or similar "absolute" or "permanent" rights that could be redressed by the prospective, declaratory role of nominal damages. *See* U.S. Br. 10-11 (citing cases about riparian rights, mining rights, trespass, and breach of contract); Relig. Freedom Inst. Br. 17-19 (citing cases about trespass, riparian rights, and landlord-tenant disputes); Jewish Coal. for Relig. Liberty Br. 18 (citing cases about libel and trespass); Nat'l Right to Work Br. 12 & nn.19, 31-32 (citing cases about riparian rights, trespass, patent infringement, and the right to travel without paying tolls); Conf. of Catholic Bishops Br. 11 (citing cases about breach of contract and riparian rights); Young Americans for Liberty Br. 4-6 (citing cases about riparian rights, trespass, and patent infringement).

A few cases do not fit into that category, but neither do they establish that nominal damages were independently justiciable redress for past injuries. In several cases, the court adjudicated a live claim for compensatory damages and allowed nominal damages to be given to signify that the plaintiff proved a legal

violation but not actual damages. These courts generally described that award as the consequence of a failure to prove any damages, not as compensation for a plaintiff's past injury. *See Dow v. Humbert*, 91 U.S. 294, 302 (1875); *W. Union Tel. Co. v. Glenn*, 68 S.E. 881, 881 (Ga. 1910); *Bagby v. Harris*, 9 Ala. 173, 177 (1846); *Abel v. Bennet*, 1 Root 127, 128 (Conn. Super. Ct. 1789).

Some of amici's cases addressed *presumed* damages: substantial damages awarded for certain unproven dignitary harms, *see* p. 23, *supra*. *I de S et ux. v. W de S*, Y.B. Lib. Ass. folio 99, placitum 60 (Assizes 1348), is one example: the defendant there "aimed at [the plaintiff] with [a] hatchet, but did not hit her." This "technical assault without physical harm" traditionally supported "general or presumed damages in substantial or more-than-nominal amounts," Dobbs, *supra*, at 654-55, and indeed, that case has been described as addressing recovery of these compensatory damages "for a wrongful invasion of one's right to emotional tranquility," *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 136-37 (1983) (Holmes, J., dissenting). Similarly, the famous case of *Ashby v. White*, 92 Eng. Rep. 126 (1703), ultimately announced a rule of presumed damages to compensate the injury caused by the violation of the plaintiff's right to vote—and indeed, the plaintiff there received a more-than-nominal five pounds. *See Stachura*, 477 U.S. at 311 n.14.

Finally, some common-law courts awarding nominal damages expressed the old truism that "wherever there is a wrong, there is a remedy to redress it." *Webb*, 29 F. Cas. at 507. But this statement does not reflect a

common-law rule that nominal damages must always be independently justiciable or show that they necessarily compensated past injuries. For starters, this principle is neither absolute nor jurisdictional. *See*, *e.g.*, *Marbury*, 5 U.S. at 147 (citing 3 William Blackstone, *Commentaries on the Laws of England* 109 (1st ed. 1769) (stating "that every right, when withheld, must have a remedy, and every injury its proper redress," but holding that the Court lacked jurisdiction to issue a writ of mandamus)). Indeed, the case to which many have traced this statement, *Ashby v. White*, ultimately contradicts the notion that every violation of rights required a remedy. *See* Ted Sampsell-Jones, *The Myth of Ashby v. White*, 8 U. St. Thomas L.J. 40, 47-48 (2010) (explaining that the House of Lords' ultimate decision rested on the "firm conclusion that malice was essential to the action," meaning that "accidental or good faith denials of a right to vote would *not* result in a legally enforceable remedy." (emphasis added)). And even Justice Story, a vocal proponent of the principle, conceded that common-law cases both "old" and "modern" (as of 1838) were in conflict about it. *Webb*, 29 F. Cas. at 508.

But in any event, this broad principle invariably shows up in nominal-damages cases as dicta. The operative justification for adjudicating claims for nominal damages in these cases was that they could protect the plaintiff's legal rights going forward, not that they had to be awarded to ensure the plaintiff a remedy. *Webb*, for example, held that nominal damages could be awarded to determine the plaintiff's riparian rights,

and the applicable justification was the need to protect the plaintiff's legal rights going forward: "[A] fortiori, . . . this doctrine applies, whenever the act done is of such a nature, as that by its repetition or continuance it may become the foundation or evidence of an adverse right." *Id.* at 509. Other cases, too, were clear applications of the prospective role of nominal damages. *See Indep. Wireless Tel. Co. v. Radio Corp. of Am.*, 269 U.S. 459, 472 (1926) (patent infringement); *Whipple*, 29 F. Cas. at 936 (riparian rights); *Parker v. Griswold*, 17 Conn. 288, 303-04 (1846) (same); *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (patent infringement). However broad the commentary of these few cases in the abstract, they returned to concrete prospective redress as the touchstone that justified awarding nominal damages.

*   *   *

The Article III takeaways from the common-law treatment of nominal damages are plain. The common law offers universal support for treating claims for nominal damages as independently justiciable, prospective relief. It offers less support for separately justifying nominal damages as a vehicle for costs (and anyways, modern Article III jurisprudence rejects this as an independent basis for adjudicating a claim). And the common law contradicts the idea that nominal damages were meaningful, independent redress for purely past injuries.

D. When, as here, intervening events end any alleged continuing injury or threat to a plaintiff's legal rights, a claim for nominal damages becomes moot.

It should be clear by this point that the only practical relief nominal damages offer is prospective. That means a claim for nominal damages resists mootness only if the declaration of rights they represent could relieve a continuing or threatened injury to the plaintiff's legal rights or interests. *See Steel Co.*, 523 U.S. at 106-07; *O'Shea*, 414 U.S. at 495-96. If the plaintiff has not alleged a continuing injury, or if intervening events have permanently prevented the threatened infringement, a claim for nominal damages is moot. *See Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 484 (3d Cir. 2016) (Smith, J., concurring) ("[N]ominal damages do not serve to redress past injury."); *Utah Animal Rights Coal.*, 371 F.3d at 1265.

Declaratory judgments are the analogue. *See Flanigan's*, 868 F.3d at 1268; *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008); *Utah Animal Rights Coal.*, 371 F.3d at 1265. As with nominal damages, a plaintiff may seek a declaratory judgment about the legality of past conduct, but a court lacks the power to issue such a judgment unless it would adjudicate a "present right." *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937)). In other words, unless the past conduct has "continuing, present adverse effects" on the plaintiff's legal rights or interests that

the declaratory judgment could relieve, *O'Shea*, 414 U.S. at 496, a declaration that the past conduct violated the law is just an "advisory opinion," *Aetna Life Ins. Co.*, 300 U.S. at 242; *see also Preiser v. Newkirk*, 422 U.S. 395, 402 (1975); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Because nominal damages are declaratory judgments by another name, *see* pp. 14-16, *supra*, the same rule applies. *See Utah Animal Rights Coal.*, 371 F.3d at 1266.[3]

That rule is easy to apply here. No one disputes at this point that the alleged injuries to petitioners' rights are well and truly in the past. Uzuegbunam alleged that campus police officers asked him to stop engaging in open-air evangelism and distributing religious literature on his college campus in the summer of 2016, and Bradford alleged that knowing about Uzuegbunam's experience chilled him from engaging in similar expression. Pet. App. 59a-60a, 86a. These alleged injuries to petitioners' First Amendment rights are neither continuing nor likely to recur because the college permanently and unambiguously revised the speech and

[3] Nominal damages and declaratory judgments are not identical in all respects, *see* Pet. Br. 30-31; U.S. Br. 24-27. For one thing, given their provenance, *see* pp. 28-30, *supra,* nominal damages are legal, not equitable, relief. This means nominal damages can warrant different treatment than declaratory judgments in some contexts, including the application of governmental immunities. *See Hopkins v. Saunders*, 199 F.3d 968, 977 (8th Cir. 1999) (qualified and sovereign immunity apply to claims for nominal damages because they are "inherently a legal remedy"). But Article III only cares whether, as a practical matter, the relief redresses the plaintiff's injury. *See Steel Co.*, 523 U.S. at 103 n.5. This distinction makes no difference to that inquiry.

conduct policies that allegedly prevented petitioners from sharing their faith in the manner they wished. *See* Pet. App. 44a. Without a credible threat of recurrence, petitioners' alleged injuries are fully in the past, where prospective relief cannot reach. *Alvarez*, 558 U.S. at 93; *O'Shea*, 414 U.S. at 495-96. So petitioners' claim for nominal damages is moot, just like their claims for injunctive and declaratory relief, *see* Pet. App. 27a-40a. And absent a live claim for compensatory damages, which petitioners have conceded is not present, Pet. Cert. Reply Br. 9, this case is moot.

II. Creating a nominal-damages exception to Article III for constitutional violations is both unwise and unnecessary.

Petitioners imagine nominal damages as redress for purely past constitutional violations that do not cause "quantifiable or compensable harm." *See*, *e.g.*, Pet. Br. 16-20, 37. Adopting their suspect interpretation of that remedy would change the landscape of constitutional litigation for the worse, and for no good reason, as established Article III remedies suffice to prevent and compensate injuries caused by the violation of constitutional rights.

A. Allowing nominal damages to "redress" purely past injuries would all but eliminate the mootness doctrine.

Petitioners' expansive view of nominal damages would swallow the mootness doctrine. Under their

view, a plaintiff need not allege or establish either that the defendant's violation of the plaintiff's rights caused any actual injury, or that the defendant's conduct will recur. Instead, a bare allegation that the plaintiff's constitutional rights were violated would sustain a nominal-damages claim. And as petitioners and many circuits see it, allegations that the exercise of a constitutional right was "chilled" would be enough—even absent actual enforcement—because that counts as a past injury that nominal damages could compensate. *See* Pet. Br. 32, 47 n.5; Pet. 11-17 (citing circuits holding that nominal-damages claims prevent mootness regardless of whether the defendants had enforced the challenged law or policy against the plaintiffs). If that position is correct, "[i]t is hard to conceive of a case in which a plaintiff would be unable to append a claim for nominal damages, and thus insulate the case from the possibility of mootness." *Utah Animal Rights Coal.*, 371 F.3d at 1266.

Petitioners have no real answer to this startling consequence of their position. They point out that nominal damages would not prevent mootness in a smattering of actions in which they are unavailable, Pet. Br. 45-47, but these are the rare exceptions, and of course, nominal damages are available under § 1983. *Carey*, 435 U.S. at 266. And petitioners note that "nominal damages claims are unavailable when a plaintiff has suffered no injury," Pet. Br. 46, but that just describes a lack of standing to bring *any* claim at the outset, not

a class of cases in which nominal damages could not prevent mootness. The en banc Eleventh Circuit had it right: petitioners' position would "drastically reduce, if not outright eliminate, the viability of the mootness doctrine." *Flanigan's*, 868 F.3d at 1270.

It should go without saying that killing off the mootness doctrine is a bad idea. By rejecting federal jurisdiction when a court can no longer grant any effectual relief to the parties, that doctrine not only serves the "separation and equilibration of powers," *Steel Co.*, 523 U.S. at 101, but also protects "the scarce resources of the federal courts," *Friends of the Earth, Inc.*, 528 U.S. at 120. Petitioners' rule, by contrast, would encourage and prolong litigation. Plaintiffs would have added reason to litigate standalone nominal-damages claims as often and for as long as possible to increase the chances of obtaining attorney's fees. And defendants would lose a substantial incentive to change their conduct or policies to better protect constitutional rights. Such out-of-court resolutions should be encouraged because they further "the policies and objectives of § 1988" by offering plaintiffs relief "without the burdens, stress, and time of litigation." *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985). But if policy changes could no longer resolve the litigation, "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct." *Buckhannon*, 532 U.S. at 608. The natural result would be "more cases [going] to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants." *Evans v. Jeff D.*, 475 U.S. 717, 736-37 (1986).

B. Existing remedies prevent and compensate injuries caused by constitutional violations.

Petitioners argue that limiting nominal damages to their traditional prospective role will "leave victims of unconstitutional government conduct without a remedy in far too many cases" because "constitutional violations often do not cause easily quantifiable or compensable harm." Pet. Br. 37. Wrong and wrong again. The existing remedial landscape offers a broad range of redress for constitutional violations.

1. The kinds of constitutional violations petitioners and their amici worry about can often be adjudicated through claims for prospective relief. When enforcement of (for example) campus speech policies, prison health and grooming regulations, or zoning laws infringe protected expression without causing tangible harm, but might happen again, plaintiffs can vindicate their rights through claims for prospective relief like injunctions and declaratory judgments. *See*, *e.g.*, *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013) (reversing denial of summary judgment because the plaintiff inmate had been denied kosher meals in the past and Florida's new policy could be reinstituted); *Bowman v. White*, 444 F.3d 967, 974, 981-82 (8th Cir. 2006) (finding that the plaintiff was entitled to partial injunctive relief against a campus speech policy in a suit in which his damages claims were dismissed); *Kapps v. Wing*, 404 F.3d 105, 122-23 (2d Cir. 2005) (affirming award of injunctive relief based on

the "ample evidence" of "prior violations" of due process); *W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F. Supp. 538, 547 (D.D.C. 1994) (enjoining a D.C. zoning regulation after the city ordered a church to stop feeding the homeless on its premises). Adjudicating these claims can achieve both a judicial determination that the enforcement of the law or policy at issue violated their rights as well as forward-looking protection against continuing or repeated violations.

Petitioners and their amici discount these remedies because governments can "strategically moot" them by repealing the challenged policies, thus depriving plaintiffs of judicial affirmation. *See*, *e.g.*, Pet. Br. 41-43; CAIR Br. 15-17; Becket Fund Br. 8-14; Inst. for Free Speech Br. 14-16. But the existing mootness doctrine already polices so-called strategic mooting without stretching Article III's boundaries. Courts scrutinize mootness claims to expose attempts by defendants to manipulate jurisdiction or insulate laws and policies from review. *See Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982). "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox*, 567 U.S. at 307. To overcome this rule, defendants who contend that a case is moot bear the "heavy burden of persuading the court that the

challenged conduct cannot reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 170. And when laws or policies are changed, courts require a defendant to prove directly that the revision was *not* an attempt to evade review, but resulted from "substantial deliberation" and was "unambiguous," "permanent," and "complete." *Flanigan's*, 868 F.3d at 1257; *see also Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979).

Some amici argue that courts have not always held defendants to this heavy burden in practice. *See, e.g.*, Becket Fund Br. 8-14; FIRE Br. 24-28; CAIR Br. 15-17. But the answer to that problem (if it is one) is to reaffirm and enforce this existing doctrine, not to reimagine a centuries-old remedy as a universal mootness-avoidance tool. For example, respondents were held to that burden here and proved that petitioners and other students would not be subject to the challenged policies again. *See* Pet. App. 27a-40a. This doctrine was also applied to prevent mootness in some of the very cases amici cite as evidence that always-justiciable nominal damages are needed. *See* Becket Fund Br. 21 (citing *Rich*, 716 F.3d at 532 (holding that the plaintiff's RLUIPA claim was not moot because the defendant had changed the policy at the eleventh hour) and *Moussazadeh v. Texas Dep't of Criminal Justice*, 364 F. App'x 110 (5th Cir. 2010) (holding that changed circumstances revived a similar claim)). The mootness doctrine can take care of itself without making nominal damages something they are not.

2. If, on the other hand, a constitutional violation is really a one-off—for instance, excessive force brought to bear in an arrest, Pet. Br. 37—the remedy for this purely past injury is compensation. *See*, *e.g.*, *Hygh v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992) (affirming a $216,000 compensatory damages award for excessive use of force by police). Compensatory damages are available for all kinds of injuries caused by constitutional violations: tangible harms like economic losses and physical injury, as well as intangible harms like "impairment of reputation . . . , personal humiliation, and mental anguish and suffering." *Stachura*, 477 U.S. at 307 (quoting *Gertz*, 418 U.S. at 350). And this Court has already concluded that compensatory damages are the appropriate and sufficient remedy for past constitutional violations adjudicated under § 1983. *See id.* at 310 ("Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations.").

Petitioners' concerns about the viability of claims for compensatory damages, Pet. Br. 37, are groundless. The difficulty of proving intangible harms caused by constitutional violations is not ordinarily a barrier to jurisdiction. As long as a plaintiff's allegations supporting compensatory damages (of any character and amount) are "at all plausible," adjudication of his constitutional claim is assured. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). And strategic mooting is not a threat, since prospective policy changes do not prevent a court from compensating past injuries. *Buckhannon*, 532 U.S. at 608-09.

So it should come as no surprise that plaintiffs routinely allege compensatory damages in every kind of constitutional case petitioners or their amici cite as one in which moot-proof nominal damages are needed. From restrictions on speech, *see Rock for Life-UMBC v. Hrabowski*, 594 F. Supp. 2d 598, 607 (D. Md. 2009), or religious exercise, *Heard v. Finco*, 930 F.3d 772, 775 (6th Cir. 2019) (upholding compensatory damages awarded for "spiritual injuries" after officials violated inmates' First and Eighth Amendment rights during Ramadan), to Fourth Amendment claims, *Ellison v. Balinski*, 625 F.3d 953, 959-60 (6th Cir. 2010) (upholding damages for mental anguish and reputational harm caused by unreasonable search), inmate claims, *Andreola v. Wisconsin*, 171 F. App'x 514, 515 (7th Cir. 2006) (reaching the merits of claim about kosher meals rather than dismissing as moot because the inmate alleged compensatory damages), and zoning cases, *Praise Christian Ctr. v. City of Huntington Beach*, 352 F. App'x 196, 198 (9th Cir. 2009) (holding that an RLUIPA claim was not moot because the church sought actual damages for discriminatory fire code enforcement), plaintiffs have little trouble articulating plausible bases for damages that allow their claims to be decided. *See also* Resp. Br. in Opp. 9-12. Indeed, although petitioners here have now disclaimed compensable injury, Pet. Cert. Reply Br. 9-10, they identified that possibility at an earlier stage. *See* Pet. App. 10a (responding to petitioners' argument that they incurred travel expenses and reputational harm).

If these cases could mostly be adjudicated anyway, does it matter whether they are resolved through claims for compensatory damages instead of nominal damages? The United States suggests that the practical impact of allowing independent nominal-damages claims is limited in part for that reason, U.S. Br. 28-29, and petitioners see it as a difference in "mere labels," Pet. Br. 42, which litigants could make up through careful pleading.

These contentions miss the mark. First off, whatever practical advantages their positions might offer, they cannot justify disregarding the fundamental nature of the traditional nominal-damages remedy. That would set a dangerous precedent for Article III doctrine, which is supposed to define the power of federal courts by hewing to historical practice. *See Vermont Agency of Nat. Res.*, 529 U.S. at 774; *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2145 (2020) (Thomas, J., dissenting). Moreover, when it comes to Article III, the ends cannot justify the means. This Court has "always insisted on strict compliance" with jurisdictional principles to address the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). That means requiring plaintiffs to allege and establish harms that a court can redress with the remedies it has the power to give and resisting the "natural urge" to gloss over jurisdictional technicalities—however important the rights at stake. *Id.* at 820. Federal courts cannot ignore Article III requirements when they seem unnecessary or impractical, because they are a "limitation on judicial power, not

merely a factor to be balanced." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). So, when a claim for nominal damages could not redress any of the plaintiff's injuries, federal courts have no business deciding it, even if a claim with a different "label" might have survived.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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