

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CHIKE UZUEGBUNAM, ET AL.,)
 Petitioners,)
 v.) No. 19-968
STANLEY C. PRECZEWSKI, ET AL.,)
 Respondents.)
- - - - -

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9
10 Washington, D.C.
11 Tuesday, January 12, 2021

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

16
17 APPEARANCES:

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23 supporting the Petitioners.
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25 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-968, Uzuegbunam
5 versus Preczewski.

6 Ms. Waggoner.

7 ORAL ARGUMENT OF KRISTEN K. WAGGONER

8 ON BEHALF OF THE PETITIONERS

9 MS. WAGGONER: Thank you, Mr. Chief
10 Justice. May it please the Court:

11 When Georgia Gwinnett officials
12 stopped Chike Uzuegbunam and Joseph Bradford
13 from sharing their faith, the officials caused
14 concrete injuries. Chike and Joseph lost
15 forever the chance to get those days back and
16 speak their message to their peers.

17 No policy change can ever restore that
18 lost opportunity. And as this Court said in
19 Carey, Stachura, and Farrar, the appropriate
20 remedy to redress those past times is nominal
21 damages. Nominal damages awards satisfy Article
22 III. Farrar explains that nominal damages
23 provide relief on the merits, vindicate the
24 plaintiff through an enforceable judgment, and
25 modify the defendant's behavior for the

1 plaintiff's benefit by forcing the defendant to
2 pay the plaintiff money, the classic Article III
3 remedy for past injury. A one hundred dollar
4 award satisfies Article III because it puts
5 money in a plaintiff's pocket, no matter how it
6 is labeled: compensatory, statutory,
7 liquidated, or nominal.

8 The Eleventh Circuit's outlier rule is
9 a radical departure. For centuries, English and
10 American courts have awarded nominal damages
11 when no future threat exists, even after a
12 plaintiff waives compensatory damages. Every
13 circuit to address the issue does the same, even
14 the Eleventh, until this recent decision.

15 This Court should retain the
16 long-standing rule. It has not resulted in a
17 glut of cases, and the alternative makes a mess
18 of this Court's clear Article III jurisprudence.

19 Nominal damages provide a remedy in
20 many contexts, redressing injuries that
21 transcend price tags, from unconstitutional
22 searches and seizures to free exercise and due
23 process violations, to censorship and compulsion
24 of speech.

25 These constitutional rights are

1 invaluable, even when they don't result in
2 quantifiable harm. Yet, the officials urge you
3 to treat them as worthless. This Court should
4 decline that invitation and reverse.

5 I look forward to your questions.

6 CHIEF JUSTICE ROBERTS: Counsel, I
7 want to understand the scope of your argument
8 first. Say you go into court and say your
9 rights have been violated. The judge asks: How
10 have you been damaged by that? Do you have any
11 compensable injury? You say no. And he asks,
12 is there any -- is that violation going to have
13 any effect on you in the future? And you say
14 no, it's not going to be repeated. And he says:
15 Well, then you don't have standing, I've got to
16 throw the case out. And you say: Oh, well,
17 throw -- throw in a buck.

18 And then the judge is supposed to say:
19 Yeah, well, everything's fine now? Doesn't that
20 -- doesn't that make a mockery of our Article
21 III requirements?

22 MS. WAGGONER: No. Your Article III
23 requirements require redress, and this Court has
24 defined that as a personal tangible benefit.
25 The amount of a label is not necessarily

1 significant.

2 What is significant is that the past
3 injury is afforded some sort of redress.

4 Whether that --

5 CHIEF JUSTICE ROBERTS: Well, but --

6 MS. WAGGONER: -- results --

7 CHIEF JUSTICE ROBERTS: -- the only
8 redress -- the only redress you're asking for is
9 a declaration that you're right. You want the
10 court to say, you know, you're right. And the
11 dollar is simply -- is a symbol to represent
12 that determination.

13 MS. WAGGONER: There is a declaration
14 that every judgment award would provide,
15 regardless of whether it's compensatory or
16 statutory or liquidated. But, in addition to
17 the declaration, there does need to be redress
18 for the past injury.

19 Declare -- declaratory judgments do
20 nothing for past injuries. They only redress
21 future --

22 CHIEF JUSTICE ROBERTS: Well, but I --
23 at page 18 and 19 of the Respondents' brief,
24 they go through all the authorities and say that
25 it's not that that dollar is a small amount of

1 compensatory damages; it is in name only. It is
2 not damages at all.

3 MS. WAGGONER: That's not what this
4 Court's cases have said or the common law. And
5 the significance of redressing the right, the
6 fact that a past injury has occurred, money
7 changes hands, as this Court said in *Farrar*, it
8 modifies the defendant's behavior in a way that
9 benefits the plaintiff. And providing money
10 damages of any amount is significant in that it
11 provides redress for the parties and an
12 enforceable judgment on the merits.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas.

16 JUSTICE THOMAS: Thank you, Mr. Chief
17 Justice.

18 I'd like to turn to something slightly
19 different, counsel. In -- in *Flanigan*, the
20 Eleventh Circuit precedent that -- that -- that
21 the court followed, the court of appeals, the --
22 there was no enforcement of the -- of -- of the
23 -- the ordinance involved.

24 Does that make a difference here?

25 MS. WAGGONER: I think it makes this

1 case even stronger than the Flanigan's ruling.
2 And I think that is a basis of distinction,
3 although even Flanigan's departs sharply from
4 the majority of circuits.

5 In terms of this case, this case,
6 there is a past chill with Joseph Bradford's
7 injury, and, certainly, silencing Chike twice in
8 a public place where he had a right to speak is
9 an injury all by itself.

10 JUSTICE THOMAS: So we have said --
11 and this is somewhat a different version or
12 similar to the Chief Justice's concern -- we've
13 said that -- that an injury has to be real and
14 substantial.

15 But, if you're only asking for a -- a
16 dollar or nominal damages, doesn't that seem to
17 undermine the real and substantial requirement?

18 MS. WAGGONER: I don't think so.
19 Congress has held that under Section 1983 the
20 vindication of civil rights is so significant
21 that it did away with the amount in controversy.

22 And this Court has held that
23 vindicating constitutional rights is of the
24 highest importance and that it is an injury in
25 and of itself to have the government engage in

1 misconduct and not redress that injury, no
2 matter how insignificant the damage award might
3 be.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: Good morning. Well,
8 as -- as you are aware, Congress passes lots of
9 statutes and they have tens of thousands of
10 words, and people frequently think that one new
11 set of words is -- is unconstitutional at least
12 as enforced. We're not supposed to give
13 advisory opinions.

14 But, if somebody comes in in the con
15 -- course of conduct under the statute or what
16 they're going to follow, why -- why -- is not
17 going to be done anymore.

18 It's the same question as the Chief's:
19 Why -- why isn't that just an advisory opinion?

20 And you can say, well, he's hurt. All
21 right. Is Bradford hurt? I see the first part,
22 the first plaintiff. What about Bradford?

23 MS. WAGGONER: Bradford is hurt. And
24 in terms of the Court filtering out cases that
25 are frivolous or where there is an advisory

1 opinion --

2 JUSTICE BREYER: No, no, not -- not
3 frivolous. How -- if Bradford is hurt, who
4 wouldn't be?

5 That is, give me an example of a case
6 where he says this is unconstitutional. They
7 think it could be applied to me. I think it's
8 -- I think it is unconstitutional. And I'm hurt
9 because I -- I -- I -- I'm a school teacher and
10 this sets up situations in the school which are
11 unconstitutional, and they're not going to be
12 done anymore.

13 How does he have a concrete injury?
14 Where is his concrete injury?

15 MS. WAGGONER: The concrete injury
16 comes when there's a past chill and there's a
17 specific intent that is demonstrated in the
18 pleadings that meets the standard in this
19 Court's holding in SBA List.

20 For a 12(b) motion, which this case is
21 on, the general allegations are sufficient to
22 establish the facts in the case, although at a
23 later stage of summary judgment could be --
24 could be considered by the Court, but Joseph had
25 a specific intent here and Chike certainly does.

1 JUSTICE BREYER: Bradford, why, why?

2 MS. WAGGONER: He had a specific
3 intent to engage in the speech and to share his
4 faith on the campus. He was made aware of how
5 the -- how the school threatened Chike with
6 discipline, and his speech was chilled because
7 he didn't want to receive expulsion or
8 suspension or some other form of discipline by
9 engaging in these conversations.

10 CHIEF JUSTICE ROBERTS: Justice Alito.

11 JUSTICE ALITO: You have said that
12 nominal damages serve to vindicate a past
13 violation of a constitutional right. And it
14 would be helpful to me if you could perhaps
15 explain more specifically what you mean by the
16 vindication of a constitutional right that was
17 violated.

18 Do you mean simply a statement that
19 there was a violation, which sounds a lot like
20 an advisory opinion, or do you mean the award of
21 some damages for a real concrete violation that
22 can't be easily monetized?

23 So, if a person is told you cannot
24 speak about a certain subject, and that's a
25 violation of a constitutional right, there may

1 not be any way to monetize the -- the violation
2 -- the harm that is awarded to the person, but
3 is the theory that nominal damages assign a
4 certain monetary value to this harm that can't
5 easily be quantified in monetary terms?

6 MS. WAGGONER: That's precisely the
7 theory. And it's the holding that the Court
8 reached in Carey and Stachurin the lower courts
9 have followed. It's that nominal damages
10 vindicate the constitutional violations by
11 entering the judgment, by requiring the payment
12 when other damages are not quantifiable.

13 It's similar to statutory or
14 liquidated damages, where there isn't
15 necessarily quantifiable damages in those
16 instances, but there's no question it meets
17 Article III.

18 JUSTICE ALITO: Well, then the
19 challenge for you is to show that early English
20 and American nominal damages cases were based on
21 that theory.

22 Now Respondents say that they fall
23 roughly into two categories: cases where
24 nominal damages served as prospective relief
25 from ongoing or future harms and cases where

1 they were merely a consolation prize for failing
2 to prove compensatory damages.

3 Very briefly, what would be your best
4 case or your best cases to show that that's an
5 -- an incorrect understanding of the common law
6 situation?

7 MS. WAGGONER: There are hundreds of
8 cases that demonstrate that, including Christian
9 versus Hooper, delayed writ executions, Burns
10 versus Elrod, which involve false imprisonment.
11 Multiple cases involving mistreated staff, like
12 Thompson versus New Orleans, as well as
13 Dougherty versus Munson, which involved a legal
14 warrant.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Counsel, the
19 government, at page 30 of its brief, says that
20 if a defendant moved for entry of judgment on a
21 plaintiff's nominal damages claim, a district
22 court -- and I'm quoting -- quoting them --
23 should enter judgment on the basis of the
24 defendant's concession alone, without
25 adjudicating the merits of the

1 constitutional claim.

2 Your reply brief didn't address that
3 argument by the government directly. Do you
4 think that's possible? And, if it's not, why
5 not?

6 MS. WAGGONER: I -- I believe that
7 your question related to whether entry of
8 judgment would be on the merits?

9 JUSTICE SOTOMAYOR: Well, that's the
10 question. If no, how about if the defendant
11 deposits a dollar in an account payable to your
12 clients, and the district court enters judgment
13 on that basis? Would your claim then be moot?
14 That was what the government was arguing.

15 MS. WAGGONER: I believe that's an
16 open question in this Court following
17 Campbell-Ewald. Certainly, an offer in and of
18 itself wouldn't be sufficient, but whether a
19 tender would be sufficient is something this
20 Court hasn't decided.

21 JUSTICE SOTOMAYOR: Well, if that --

22 MS. WAGGONER: If --

23 JUSTICE SOTOMAYOR: -- if it's a
24 tender, do you -- what would require that tender
25 to be more than the compensable damage of one

1 dollar? Would you require an admission of
2 liability as well? And what in our case law
3 would require that?

4 MS. WAGGONER: Certainly, a full
5 tender of the relief that the plaintiff
6 requested would involve an enforce -- a judgment
7 that would be entered on behalf of the
8 plaintiff, as well as the damages, reasonable
9 attorney's fees and costs.

10 What the form of that judgment might
11 look like seems to be in the judge's discretion.
12 Neither party, I think, would have a right to
13 insist on a disclaimer of an admission of
14 liability. But that would be up to the district
15 court's discretion. But I do think that's an
16 issue this Court should have briefing on to
17 sharpen the issues in those instances.

18 JUSTICE SOTOMAYOR: Finally, counsel,
19 on the Bradford claim, there was never
20 enforcement against him, so what was the injury?
21 If the government doesn't know that he wants to
22 speak and denies that opportunity, what's the
23 injury?

24 MS. WAGGONER: The injury --

25 JUSTICE SOTOMAYOR: It may not be that

1 his case is -- is -- is moot, but it may be that
2 he hasn't suffered a First Amendment injury.

3 MS. WAGGONER: That may well be. I
4 think his injury was that his speech was
5 chilled, and he would satisfy this Court's test
6 in SBA List, but that isn't the issue that this
7 Court would need to decide today. I think that
8 proves the point that injury-in-fact essentially
9 ferrets out cases that may be advisory in nature
10 or where a concrete and particularized harm
11 hasn't been proven.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Ms. Waggoner, are --
14 are you that saying nominal damages are a form
15 of compensatory damages, or are you saying
16 something else?

17 MS. WAGGONER: No, they're not a form
18 of compensatory damages, although I don't think
19 that undermines the argument. I think that they
20 are compensation in the sense that they are
21 providing money to reflect the fact that damage
22 has been done.

23 But the amount of money pales in
24 comparison to the harm. It's not that the
25 dollar means so little; it's that the violation

1 means so much. That's why we award the damages
2 in those instances.

3 JUSTICE KAGAN: And -- and -- well, I
4 -- I guess, when you say that, how is it
5 different from compensatory damages?

6 MS. WAGGONER: Well, compensatory
7 damages have to be proven with specificity at
8 trial. They have to result in quantifiable
9 harm.

10 The value of free speech or the loss
11 of procedural due process is nearly impossible
12 to measure, as this Court has held. And there
13 are many reasons why plaintiffs may not want to
14 assert compensatory damages. And those are very
15 valid reasons. And at the common law, you could
16 even waive compensatory damages and seek
17 nominal.

18 JUSTICE KAGAN: I guess I always
19 thought that -- that our Article III
20 requirements meant that people can't bring a
21 suit for pure vindication alone, for just
22 saying, you know what, I was right, you were
23 wrong, for the psychic satisfaction that it
24 gives to hear a court say that.

25 And I guess I wonder, if this is not,

1 by your own admission, compensatory damages, how
2 is it that we're not in that world, where the --
3 where the suit really is one for, you know, just
4 a -- a -- a declaration that somebody else
5 committed a wrong?

6 MS. WAGGONER: Well, it is
7 compensatory in that it's requiring a defendant
8 to play -- to pay a plaintiff money. And that's
9 currency. Chike can go out and buy a package of
10 tracts for 1.10 or 20 dollars. Certainly, in
11 that sense, it is.

12 But I think the overall purpose is
13 that because we can't measure how harmful a
14 violation of speech is or how harmful an
15 unreasonable search and seizure is, we want to
16 ensure that some redress is provided in that to
17 the plaintiff for the past injury, and damages
18 do that.

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch.

22 JUSTICE GORSUCH: Good morning,
23 counsel. Your friends on the other side suggest
24 that very little would be lost if -- if we
25 required more than nominal damages for standing.

1 They point out that your client initially had a
2 compensatory damages claim as part of this
3 lawsuit.

4 Why aren't they right? Perhaps your
5 client has scruples against seeking more than a
6 dollar and others might as well, but why should
7 the law care about that?

8 MS. WAGGONER: For several reasons.
9 First of all, there are many plaintiffs who
10 would be victims of government misconduct that
11 may not be able to demonstrate compensable
12 damages.

13 In Chike's case, our argument was that
14 he could because he drove to campus. But think
15 of a student who didn't drive to campus and who
16 couldn't quantify that harm.

17 JUSTICE GORSUCH: Well, presumably,
18 they'd have bus fare or they could -- they could
19 ask for the time that it took them to walk and
20 some sort of compensation for that. It doesn't
21 -- we have very imaginative lawyers. One thing
22 the country doesn't lack for is imaginative
23 lawyers with -- with imaginative damages
24 theories.

25 MS. WAGGONER: Well, I would think

1 that would be of some concern to the Court, that
2 we would be creating a rule urging plaintiffs
3 and their counsel to make up damages that they
4 neither want nor need nor think they should
5 qualify for when the government's rationale for
6 changing this rule is that they believe it would
7 be too costly, when really it will lead to
8 protracted litigation.

9 In unreasonable search-and-seizure
10 cases, for example, a knock and announce,
11 Justice Breyer recognized in Hudson that those
12 are all nominal damages cases because it's so
13 difficult to prove one-off violations in
14 quantifiable ways.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Thank you, Chief
19 Justice.

20 Good morning, Ms. Waggoner. I want to
21 pick up on Justice Sotomayor's questions and try
22 to figure out what's really at stake on this
23 issue.

24 Judge Jacobs in the Second Circuit
25 opinion in Amato and Judge Henry in the Tenth

1 Circuit opinion in Utah Animal Rights, their
2 separate opinions, both suggested, as the
3 government does here, that there's not much at
4 stake because a defendant can always surrender
5 to the judgment on the nominal damages claims
6 when no other claims remain, and the district
7 court simply enters judgment without
8 adjudicating the merits.

9 Justice Sotomayor asked you this, but
10 I want to probe deeper on the answer. Isn't
11 that exactly right?

12 MS. WAGGONER: I don't think that
13 there's -- I don't think that it's right in the
14 sense that there isn't much at stake for someone
15 like Chike, who is silenced on his campus, or
16 someone subject to an unlawful announce -- knock
17 and announce or a graduation speaker --

18 JUSTICE KAVANAUGH: No, my question --

19 MS. WAGGONER: -- who can't --

20 JUSTICE KAVANAUGH: -- my question is
21 really, aren't Judge Jacobs and Judge Henry and
22 the Solicitor General here correct that the
23 defendant can surrender the judgment on a
24 nominal damages claim when no other claims
25 remain, and the district court enters judgment

1 without adjudicating the merits? Isn't that
2 correct?

3 MS. WAGGONER: I think that that's an
4 open question before this Court, and how it
5 would apply in a nominal damages situation would
6 be something that the Court would want to
7 consider. But, certainly, if the Court --

8 JUSTICE KAVANAUGH: Okay. And then --

9 MS. WAGGONER: -- held that that was
10 full redress, then -- then that -- that would be
11 acceptable, but full redress would need to be
12 provided. And Georgia's offered --

13 JUSTICE KAVANAUGH: And then --

14 MS. WAGGONER: -- absolutely nothing.

15 JUSTICE KAVANAUGH: -- and then, in
16 that instance, what -- what's the attorney's
17 fees situation? Because that may be what's
18 really at stake here. What -- what's the
19 attorney's fee situation, in your view, with a
20 nominal -- successful nominal damages claim?

21 MS. WAGGONER: I think the Court has
22 discretion to determine what the attorney's fees
23 are. Under Farrar, the Court said that they
24 would be a prevailing party. But most courts at
25 the lower levels have applied the Justice

1 O'Connor factors to look at various aspects of
2 the case, what was asked for and the
3 significance of the issue that was decided.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett.

6 JUSTICE BARRETT: Counsel, I want to
7 go back to Justice Kagan's question. When she
8 asked you if nominal damages were a form of
9 compensatory damages, you said no. And, I mean,
10 I -- I understand that they are not compensatory
11 damages, you know, that they -- they are
12 distinct categories and you can't prove them
13 with specificity, can't prove nominal damages, I
14 mean.

15 But I would have thought that your
16 argument depended on nominal damages being
17 retrospective. I -- I took your argument to be
18 that they were compensation for a hard-to-
19 quantify or impossible-to-quantify harm.

20 So can you explain a little bit more
21 why you are not describing to Justice Kagan that
22 nominal damages are backward-looking relief?

23 MS. WAGGONER: All damages are
24 backward-looking relief. And I -- I think, in
25 terms of the compensatory nature of the damages,

1 they're compensatory in that they're redressing
2 a harm that has occurred. They're the same
3 pedigree as compensatory damages, as well as
4 statutory or liquidated damages.

5 JUSTICE BARRETT: So it is your
6 position that they are compensating for a -- an
7 unquantifiable harm?

8 MS. WAGGONER: Absolutely. As this
9 Court articulated in Carey and Stachura, it's
10 just that it's not a quantifiable harm. And so
11 that's the distinction I was making.

12 JUSTICE BARRETT: Okay. Now I want to
13 go back to your colloquy with Justice Breyer,
14 and he was talking to you about Bradford's claim
15 and asking why that wouldn't be moot.

16 Can you identify any situation in
17 which a case would be moot if the plaintiff also
18 sought nominal damages? Putting aside
19 Bradford's particular one, is there any case
20 that would be moot if nominal damages were
21 attached?

22 MS. WAGGONER: No. This Court has
23 held that damages can't be mooted, but
24 prospective relief can be mooted. But that
25 doesn't mean that everyone who asserts a nominal

1 damages claim would prevail. There are many
2 reasons why nominal --

3 JUSTICE BARRETT: But -- but why not?

4 MS. WAGGONER: -- damages can't be
5 looking forward.

6 JUSTICE BARRETT: Why not? Because
7 you can always come up -- I mean, you were
8 coming up with reasons why Bradford might have
9 suffered some -- some damage. It's then hard to
10 conceive of any -- any suit that sought
11 prospective relief like a declaratory judgment
12 or injunctive relief that had a tag-along claim
13 for nominal damages that could survive. Sorry,
14 I mean that would be mooted.

15 MS. WAGGONER: Well, that's true if --
16 if there's a past injury, first of all. And not
17 everyone who seeks prospective relief even has a
18 past injury.

19 It also assumes that there's a cause
20 of action and a defendant amenable to those
21 things. So, while damages can't be mooted since
22 you may --

23 JUSTICE BARRETT: Thank you, counsel.
24 My time is up.

25 CHIEF JUSTICE ROBERTS: A minute to

1 wrap up, counsel.

2 MS. WAGGONER: Thank you, Your Honor.

3 In terms of the courts being flooded,
4 this Court -- in terms of the true concern about
5 being -- courts being flooded with frivolous
6 claims for relief, protracted litigation, or
7 avoiding a drain on government resources, the
8 long-standing rule is the rule that best
9 resolves those concerns. Injury-in-fact ensures
10 that cases and controversies involving concrete
11 harms, and they're not made up, they're --
12 excuse me, and they're not made-up claims.

13 There's no one that contests the
14 injury in this case. And the majority rules,
15 consistent with Carey and Stachura, it hasn't
16 led to a flood of claims but instead provides
17 remedies for victims who were subject to
18 discriminatory stop and frisk or prisoners who
19 can't have kosher -- need kosher meals.

20 And the Prison Litigation Reform Act
21 doesn't even allow compensation. In those
22 situations, nominal damages is the only
23 resolution. And it fosters a quicker and fairer
24 resolution because the government can't roll the
25 dice and then say never mind at the end of the

1 case when the -- when the odds switch.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Mooppan.

5 ORAL ARGUMENT OF HASHIM M. HOOPPAN
6 FOR THE UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING THE PETITIONERS

8 MR. MOOPPAN: Mr. Chief Justice, and
9 may it please the Court:

10 Petitioners suffered an unquestionable
11 Article III injury when Respondents censored
12 their speech, and Petitioners seek the
13 paradigmatic type of Article III redress for
14 that past injury, a tangible award of money.

15 That the amount of money is nominal is
16 immaterial to whether an Article III case or
17 controversy exists.

18 Recognizing that the deprivation of a
19 personal right is generally not harmless, common
20 law courts have long awarded nominal damages as
21 partial redress, and Congress incorporated that
22 practice in Section 1983.

23 Respondents' position would not just
24 break from history and tradition but create
25 confusion in the law. Like nominal damages,

1 many other forms of monetary relief are not tied
2 to either evidence of quantifiable harm or
3 likelihood of future violation, such as
4 punitive, treble, and statutory damages.

5 This Court should reaffirm that such
6 monetary relief for past injuries is proper
7 Article III redress.

8 I welcome this Court's questions.

9 CHIEF JUSTICE ROBERTS: Counsel, it --
10 it seems to me that one of the difficulties with
11 your case is that it melds the inquiries into
12 standing and the merits. We have always been
13 adamant about the necessity of addressing
14 standing or, you know, the flip side of it,
15 responding to mootness concerns before reaching
16 the merits.

17 But, if you have -- you have a case
18 where there's no compensable damages, there's no
19 concern about future injury, no -- no
20 repetition, and all the bits on -- on the books
21 assume nominal damages as, you know, in name
22 only, is a ruling on the merits, then the
23 standing inquiry and the merits inquiry are
24 precisely the same.

25 Why is that not right?

1 MR. MOOPPAN: I don't think that's
2 right for the reason this Court gave in Spokeo.
3 The question for standing is whether there is an
4 injury in fact.

5 Now, in this case, that's quite easy
6 because being -- having your speech suppressed
7 or being subject to a threat of suppression of
8 speech is a paradigmatic injury.

9 CHIEF JUSTICE ROBERTS: No, no, no.
10 That -- that's exactly my point. That is the --
11 simply the Court saying that you're right, you
12 know, you immediately discuss the -- the -- the
13 merits. Having your speech suppressed is an
14 injury.

15 What we always do is look for -- for
16 standing first. Okay. You say something bad
17 has happened to you. How have you been injured?
18 What gives you the right to come into federal
19 court? I don't think you can answer your injury
20 question without saying this is the resolution
21 of the merits. And that violates the principle
22 that standing and the absence of mootness are
23 issues that have to be addressed before the
24 merits.

25 MR. MOOPPAN: No, I don't think so,

1 Your Honor, because it might be that the
2 suppression of speech is permissible under the
3 First Amendment. But the point is that the
4 plaintiff wasn't able to speak. They were not
5 able to engage in certain speech. That is an
6 injury in fact.

7 Now, whether the --

8 CHIEF JUSTICE ROBERTS: That's a
9 violation of rights. The injury is always been
10 understood to be something separate from
11 prevailing on the merits.

12 MR. MOOPPAN: So I don't think that's
13 consistent with the common law, Your Honor,
14 which Article III is derived from. Take, for
15 example, trespass. Merely breaking the close of
16 someone's property, setting one foot on --

17 CHIEF JUSTICE ROBERTS: Well, that --
18 that --

19 MR. MOOPPAN: -- someone else's --

20 CHIEF JUSTICE ROBERTS: -- that has
21 future effects since it establishes the boundary
22 of the property.

23 But anyway, Justice Thomas.

24 JUSTICE THOMAS: Thank you, Mr. Chief
25 Justice.

1 Counsel, I'd like to follow up on the
2 point that Justice Kavanaugh was addressing.
3 You suggest that the defendants in these nominal
4 damages cases should just basically surrender
5 and accept the judgment. But wouldn't that open
6 them up to attorney's fees?

7 MR. MOOPPAN: So, under this Court's
8 decision in *Farrar*, they -- the plaintiff would
9 be a prevailing party. But then, under the
10 second step of this Court's analysis in *Farrar*,
11 whether the -- the amount of fees that would be
12 reasonable in a -- in a nominal damages only
13 case would potentially be quite minimal.

14 JUSTICE THOMAS: And, again, just
15 piggybacking a bit on what the Chief Justice was
16 raising, the -- if you -- if there was a case
17 for nominal damages that was similar to this,
18 but -- one of the plaintiffs here, but there was
19 no enforcement as we had in the *Flanigan* case,
20 would there be standing to pursue nominal
21 damages then?

22 MR. MOOPPAN: I think it would turn on
23 whether there was a credible threat of
24 enforcement. This Court has recognized that
25 there's an injury in fact when there's a

1 credible threat of enforcement.

2 So, to answer both your question and
3 Justice Breyer's question from earlier, if you
4 think of a case like Poe versus Ullman, where
5 you had a law on the books that had never been
6 enforced for decades, there, there might not be
7 Article III standing to get into court in the
8 first place.

9 But, if you have a credible threat of
10 injury that would let you bring a suit,
11 prospective suit for injunctive relief, you can
12 likewise get -- bring a retrospective suit for
13 damages, whether those damages be compensatory
14 or nominal.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer.

18 JUSTICE BREYER: Thank you.

19 I'd like -- I'd like you to think of
20 two opposite situations. One, Black Acre. I
21 own Black Acre and you come in and have picnic
22 all the time. Now you won't do it anymore, but
23 I bring a lawsuit for trespass. I can't measure
24 the damages. And nominal damages always have
25 been given there.

1 The opposite situation, what we have
2 are 400 million laws, actions, policies, and
3 let's take the subset where we don't know
4 whether it violates the Constitution or not. We
5 don't know. Border case.

6 In those circumstances, if you bring
7 the courts into every single case, they would
8 spend an awful lot of time adjudicating those
9 cases, though nobody is really hurt, when there
10 are lots of people who are really hurt who need
11 their time and effort. Okay?

12 So we have to draw a line. And the
13 Eleventh Circuit's line, not perfect, but a
14 line, is allow it if you also could plead a
15 claim for compensatory damages, which I think
16 they did here. I don't know why nobody said
17 that. But -- but, nonetheless, that's their
18 line.

19 Now, if you don't like that line, you
20 tell me what's a better line.

21 MR. MOOPPAN: So I think the better
22 line is your example of Black Acre. Just like
23 in property cases, you could bring a trespass
24 suit even if the trespass question was a very
25 difficult one.

1 JUSTICE BREYER: I'm going to cut you
2 off because, in trespass, you could bring a
3 claim for compensatory damages. Just very hard
4 to prove.

5 MR. MOOPPAN: But you never did. As
6 Justice --

7 JUSTICE BREYER: Well, but you could.

8 MR. MOOPPAN: -- as Justice Story
9 explained in his Webb decision, you don't need
10 to bring a nominal -- a compensatory damages
11 suit to bring a trespass suit. And it doesn't
12 matter how complicated the property law
13 questions posed by the trespass suit are. The
14 -- the -- the alleged violation of property
15 rights was enough to let you into court and
16 bring a nominal damages suit.

17 To answer the flip side of your
18 concern, again, the defendant, if it doesn't
19 want to pay the dollar -- again, doesn't want to
20 adjudicate the suit, can just pay the dollar.

21 So there's no reason why this --

22 JUSTICE BREYER: And he pays a dollar,
23 and nobody has to adjudicate whether it is or is
24 not unconstitutional?

25 MR. MOOPPAN: No, because the courts

1 resolve constitutional questions not in and of
2 themselves but as a means to resolving a
3 controversy between the parties.

4 So, if the plaintiff says he's
5 entitled to a dollar and the defendant says,
6 great, I'm willing to pay a dollar, there's --
7 that's the end of the case.

8 JUSTICE BREYER: I see. So --

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE BREYER: -- the only cases
11 that we really have left are we have two
12 die-hards and they really won't give in and
13 they're fighting over a dollar.

14 MR. MOOPPAN: That's exactly right,
15 just like if you have two neighbors who insisted
16 on fighting over a trespass suit over a dollar.

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 MR. MOOPPAN: That doesn't happen in
19 -- in the real world very often.

20 CHIEF JUSTICE ROBERTS: Justice Alito.

21 MR. MOOPPAN: Sorry.

22 JUSTICE ALITO: Counsel, could you say
23 something about Mr. Bradford's claim? The
24 policy was never actually enforced against him.
25 So in what sense did he suffer a past injury?

1 MR. MOOPPAN: So, in the sense of SBA
2 List and the Virginia Booksellers, he clearly
3 faced a credible threat of enforcement given
4 that the policy was actively enforced against
5 others at the time and he knew it.

6 As a result, he -- he chilled his own
7 speech. But that's not self-censorship in the
8 way of Clapper because there was a credible
9 threat of enforcement. So that is a concrete
10 harm that's fairly traceable to the government's
11 policy.

12 It would be a different situation if
13 the government didn't have a policy or if the
14 government didn't enforce their policy. Then
15 his failure to speak would be attributable to
16 his own actions.

17 But, in a case where the government
18 had a policy that they were robustly, actively
19 enforcing at the time, his self-censorship is
20 attributable to their conduct, and that's why he
21 had an injury that's fairly traceable.

22 And I don't think anyone would dispute
23 that if he had brought a suit for injunctive
24 relief; in fact, no one did dispute it.

25 JUSTICE ALITO: Is his situation

1 different from that of any other student? Could
2 every -- could every student come forward and
3 say, I -- I might have liked to engage in speech
4 that is prohibited by this policy, and,
5 therefore, I should get nominal damages?

6 MR. MOOPPAN: I -- I think they would
7 have to say I would have. I don't think it
8 would be necessarily I might have, but if they
9 came in and said I intended to engage in speech,
10 but I refrained from doing so because I was
11 threatened with severe campus discipline, if I
12 did so under the policy, yes, I think every one
13 of those people has suffered an injury-in-fact
14 that's traceable to the government's policy.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Counsel, it -- it
19 seems to defy our case law that says a
20 generalized grievance that everyone is subject
21 to, every student, seems the quintessential lack
22 of standing question, that why should every
23 citizen who believes a law is unconstitutional
24 come into court and challenge it?

25 And that what -- that's what it

1 appears Mr. Bradford is doing. Does he have any
2 burdens on this issue? Does he have to prove
3 what plans he actually made, when he developed
4 this plan, et cetera? I -- I'm a little lost as
5 to how someone can just walk into court and say
6 that chilled me from speaking, and that would be
7 enough.

8 MR. MOOPPAN: So I guess two points,
9 Your Honor. The first is it's not a generalized
10 grievance precisely because he has to make the
11 sort of allegations you just talked about. So,
12 if someone was on a college campus and never had
13 any intention engaging in any of this speech,
14 that person could --

15 JUSTICE SOTOMAYOR: How do you prove
16 -- how do you a prove a negative? Meaning I --
17 generally, you look at a what a person does, not
18 what they say they wanted to do.

19 MR. MOOPPAN: Well, so no, and it
20 would be --

21 JUSTICE SOTOMAYOR: How do you read a
22 mind -- a person's mind?

23 MR. MOOPPAN: Well, so the plaintiff
24 would have to allege it. He would -- he would
25 have to declare it and testify to it. You could

1 cross-examine him as to his sincerity. But,
2 yes, ultimately, the question is, was he
3 intending to do something and was he chilled
4 from doing it because the government had a
5 policy that prohibited it?

6 And, again, the plaintiffs -- the
7 Respondents in this case haven't disputed that
8 he had standing to sue if they hadn't restricted
9 -- eliminated their policy. No one is disputing
10 that he had an injury-in-fact that would have
11 let him bring a prospective suit. That is based
12 on the same exact injury-in-fact that supports
13 his retrospective claim for damages.

14 JUSTICE SOTOMAYOR: But would -- is
15 that an injury-in-fact that's compensable, even
16 with nominal damages?

17 MR. MOOPPAN: Yes, Your Honor.

18 JUSTICE SOTOMAYOR: Meaning if he
19 never took a step to effectuate what he wanted
20 to do, and unlike his colleague, who actually
21 was in the midst of speaking and was stopped, so
22 that could be -- I see easily how that's an
23 injury. But I'm not quite sure that it can be
24 an injury-in-fact when you don't take actual
25 concrete steps to do something and just merely

1 say I had a desire.

2 MR. MOOPPAN: Well, his concrete step
3 is he refrained from taking action. He intended
4 to engage in speech and didn't do so because the
5 government threatened him with sanctions. I
6 think --

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

8 JUSTICE KAGAN: General Mooppan, you
9 have a lot of history on your side, but I think
10 I want to give you a theory about why that
11 history is not very relevant.

12 I think that these cases that you have
13 fall into three groups. The one are they are
14 declaratory judgment actions in a world before
15 declaratory judgment actions. In other words,
16 they're ways to try to determine legal rights
17 going forward before the declaratory judgment
18 form existed.

19 The second group of cases are cases in
20 which there's injury that's hard to monetize,
21 and -- and these cases are asking for something
22 to recompense that injury. But the reason why
23 those cases aren't very relevant anymore is
24 that, in our world, we monetize those claims all
25 the time. We now live in a world, unlike the

1 historical world, in which we acknowledge claims
2 for emotional distress, claims for dignitary
3 harms of all kinds, which makes the nominal
4 damages claim unnecessary.

5 The third group of cases is a case in
6 which what the plaintiff really wants is
7 vindication. It's a statement that I'm right,
8 the defendant is wrong. And as to those cases,
9 modern Article III jurisprudence says that, you
10 know, you don't -- that's not a case or
11 controversy.

12 So, given all that, what role is there
13 anymore for nominal -- nominal damages claims?

14 MR. MOOPPAN: Your Honor, I -- I don't
15 think that that's an accurate characterization
16 of the common law, and I'd like to make two
17 points about that.

18 So the first is I would point this
19 Court, again, to Justice Story's opinion in
20 Webb, where his primary reason that he gave for
21 why nominal damages were appropriate is that he
22 viewed it as essential in the common law that
23 every injury imports damage in the nature of it.
24 And if no other damage is established, the party
25 injured is entitled to a verdict for nominal

1 damages.

2 That is essentially a recognition of a
3 form of liquidated compensatory harm of at least
4 a dollar because the violation of a right isn't
5 harmless. And if it's not harmless, it's
6 entitled to at least a dollar.

7 He then went on to say, a fortiori, if
8 there's a risk of future harm, that would
9 support nominal damages. But I think the
10 critical point to recognize is the likelihood of
11 a future trespass or a future assault or a
12 future mistrain. None of that future likelihood
13 would become close to meeting the Article III
14 requirements we have today of likelihood of
15 future injury.

16 JUSTICE KAGAN: Thank you --

17 CHIEF JUSTICE ROBERTS: Justice --

18 JUSTICE KAGAN: -- General Mooppan.

19 CHIEF JUSTICE ROBERTS: -- Justice
20 Gorsuch.

21 JUSTICE GORSUCH: Counsel, you said
22 you had two points in response to Justice Kagan.
23 Before proceeding, I just want to make sure you
24 got both of them out there.

25 MR. MOOPPAN: Yeah. So the last point

1 I was going to make is about a bucket of cases
2 that the Respondents cite in their brief that I
3 think actually cuts the exact opposite way.
4 There are a -- a series of cases they -- they
5 cite at pages 34 to 35 of their brief where
6 common law courts, appellate courts, said it was
7 harmless error to not have awarded nominal
8 damages precisely because there wasn't a
9 likelihood of future harm.

10 The Respondents emphasize harmless,
11 but the real key is that error. The appellate
12 courts there recognized it was error not to
13 award nominal damages even though there was no
14 likelihood of future harm.

15 So I think that very clearly
16 demonstrates that the common law courts were not
17 viewing nominal damages as some sort of
18 proto-declaratory judgment. They recognized it
19 for exactly what Justice Story said it was. It
20 was a recognition that every injury imports
21 damage in the nature of it.

22 JUSTICE GORSUCH: Just to make sure I
23 understand at least part of that response,
24 Justice Kagan posited -- I believe it was her
25 second bucket of cases in which today we're able

1 to and do monetize what maybe had been before
2 hard-to-monetize claims, emotional distress and
3 things like that.

4 Is -- is -- is the essence of your
5 response, yes, maybe we do and we have great
6 lawyers and economists who can do that today,
7 but one need not do that for Article III
8 purposes because, historically, it was not done?

9 MR. MOOPPAN: That's right. Common
10 law courts -- and Congress ratified that through
11 Section 1983 -- were entitled to decide that you
12 at least get a dollar.

13 Now, if you have clever lawyers and
14 you can do the sort of thing that Justice Kagan
15 identified, then you can get more. You can get
16 quantified -- you can get compensatory damages
17 for quantifiable, specific evidence of harm.

18 JUSTICE GORSUCH: But perhaps one
19 shouldn't be penalized for lacking a clever
20 lawyer.

21 MR. MOOPPAN: That's right. Or
22 another way of thinking about it is Congress is
23 entitled to determine that the deprivation of a
24 constitutional right isn't harmless, and if it's
25 not harmless, then you're entitled to at least a

1 dollar.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you.

6 And good morning, counsel. Picking up
7 on Justice Thomas's question and the last part
8 of Justice Breyer's question, I'm trying to,
9 again, figure out what's really at stake here.

10 This is not about the one dollar, I
11 wouldn't think. The concern about litigation
12 being prolonged or an advisory opinion, you say
13 that can be answered, as I understand it,
14 because the defendant can always just surrender
15 to the judgment and the district court would
16 enter judgment without adjudicating the merits,
17 is that correct?

18 MR. MOOPPAN: That's correct.

19 JUSTICE KAVANAUGH: Okay. So that
20 leaves me with the strong suspicion that
21 attorney's fees is what's driving all this on
22 both sides because, under Buckhannon, correct me
23 if I'm wrong, if you sue for injunctive relief,
24 the defendant changes the policy, as happened
25 here, you get no attorney's fees, correct?

1 MR. MOOPPAN: Yes, that's correct.

2 JUSTICE KAVANAUGH: Okay. But, if you
3 have nominal damages, you can get attorney's
4 fees potentially, correct?

5 MR. MOOPPAN: Right, under Farrar.

6 JUSTICE KAVANAUGH: Right. So what
7 seems to be driving this is that the reason the
8 plaintiffs want nominal damages, plaintiffs
9 generally want nominal damages to be available,
10 is attorney's fees, and the reason defendants do
11 not want them to be available is they don't want
12 to pay attorney's fees, correct?

13 MR. MOOPPAN: At least partly. I
14 think at least some respondents -- or defendants
15 might also want -- might not want to pay the
16 dollar because they don't want to admit any sort
17 of wrongdoing --

18 JUSTICE KAVANAUGH: Right.

19 MR. MOOPPAN: -- even in the passive
20 sense of paying a dollar without saying that
21 they were wrong on the merits.

22 JUSTICE KAVANAUGH: Got it. Okay.

23 And then Judge Jacobs and Judge Henry,
24 though, say -- and I think this cuts in favor of
25 your ultimate position here -- but they say the

1 attorney's fees can be -- a concern of allowing
2 nominal damages can be handled and already have
3 been handled under Farrar by saying you don't
4 get much in the way of attorney's fees when you
5 get nominal damages.

6 Is that how you see it?

7 MR. MOOPPAN: I think that's right. I
8 think, under Farrar, it's a reasonableness
9 inquiry, and I think there are two main things
10 you would look at. I think you would look at
11 what the plaintiffs sought. Did they seek 17
12 million dollars and only get one, or did they
13 seek one dollar from the outset and only get it?

14 And then the other thing I think you
15 --

16 JUSTICE KAVANAUGH: What if they --

17 MR. MOOPPAN: -- would look at --

18 JUSTICE KAVANAUGH: -- what if they
19 sought injunctive relief and nominal damages and
20 the party, the defendant, changed its policy so
21 no injunctive relief, but they still get the
22 nominal damages? How do you think attorney's
23 fees works there?

24 MR. MOOPPAN: I think it would depend
25 on when it happened. I think that if the

1 defendant changed their policy years into the
2 litigation, I think there would be a much
3 stronger case for the plaintiffs saying -- being
4 able to say that they litigated the case,
5 ultimately did get some relief that makes them
6 really --

7 JUSTICE KAVANAUGH: That sounds like
8 an end run around Buckhannon, what you just
9 said, but maybe I'm wrong about that.

10 MR. MOOPPAN: Look, I think it partly
11 depends on -- it's a question about
12 reasonableness. Farrar tells us that the dollar
13 isn't an end run around Buckhannon, you are the
14 prevailing party, and then the question is who
15 acted reasonably. I think it --

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett.

18 JUSTICE BARRETT: Mr. Mooppan, last
19 term, in New York State Rifle and Pistol
20 Association, we held the case, the Second
21 Amendment challenge, moot because the City of
22 New York changed its policy.

23 Was that then really just kind of a
24 technicality? If the pistol association had
25 sought nominal damages, would that case have had

1 to come out the other way under your theory?

2 MR. MOOPPAN: Yes. I think, if they
3 had always had a live nominal damages claim in a
4 case like that, once you were already at the
5 appellate court, the court -- the award would
6 have been a live claim and they wouldn't have
7 been able to just say, oh, we'll pay the dollar.

8 Under this Court's decision in Young,
9 which we cite in our brief, an appellate court's
10 ability to just accept a concession like that is
11 different from a district court.

12 JUSTICE BARRETT: Okay. Well, then
13 let me circle back to some of the questions that
14 various of my colleagues were pressing Ms.
15 Waggoner on. You had Justice Breyer, and then I
16 asked this question. We're trying to get Ms.
17 Waggoner to identify any case that would ever be
18 moot under your theory so long as nominal
19 damages were sought.

20 What -- another way of getting at that
21 point is, no, the majority of circuits do accept
22 your theory and say that there -- that nominal
23 damages can keep a case live or, put
24 differently, that seeking nominal damages, a
25 plaintiff would have standing to seek nominal

1 damages alone.

2 So, in that majority of circuits that
3 follow the rule that you want us to adopt, do
4 cases moot out?

5 MR. MOOPPAN: They do. But I think
6 the primary reason they do is there are a set of
7 cases where nominal damages just aren't
8 available, the most obvious for us being the
9 federal government isn't subject to nominal
10 damages, and lots of other statutes besides 1983
11 don't authorize nominal damages.

12 But, if nominal damages are otherwise
13 legally available, then it would be difficult
14 for a suit to moot out if nominal damages were
15 sought. But, with the one caveat that, as a
16 practical matter, lots of people aren't going to
17 keep litigating a case just over nominal
18 damages, especially given Farrar's rule about
19 the reasonableness of attorney's fees.

20 So, as a practical matter, a lot of
21 these cases will moot out, even if, as a legal
22 matter, they don't.

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Mooppan.

25 MR. MOOPPAN: So I'd just -- I'd just

1 like to make one last point, which I think is a
2 pretty important one, which is there are lots of
3 types of monetary relief that are neither
4 dealing with future harm nor based on
5 quantifiable evidence of past harm: punitive
6 damages, statutory damages, treble damages. All
7 of those would seem to violate under -- Article
8 III under Respondents' theory, but all of those
9 are unquestionably permissible.

10 I think the solution that -- for why
11 all of those are permissible shows why nominal
12 damages are permissible too. It is that
13 monetary relief has traditionally been
14 recognized as a proper form of redress for past
15 injury-in-fact, and that simple rule is
16 sufficient to rule for the Petitioners here.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 General Pinson.

20 ORAL ARGUMENT OF ANDREW A. PINSON
21 ON BEHALF OF THE RESPONDENTS

22 MR. PINSON: Thank you, Mr. Chief
23 Justice, and may it please the Court:

24 At bottom, the question whether
25 nominal damages resists mootness in a case like

1 this one reduces to the question whether nominal
2 damages redress past injuries.

3 When there's no longer any threat that
4 a plaintiff's injury will recur in the future, a
5 case is safe from mootness only if the court
6 could still give the plaintiff something that
7 redresses what's now a purely past injury.

8 But nominal damages do not fit that
9 bill. Generally, past injuries are redressed
10 through compensation. But both modern and
11 historical authorities agree that nominal
12 damages aren't compensation.

13 Unlike other kinds of damages, the law
14 affirmatively strips nominal damages of that
15 role. They're an indeterminate and trivial sum
16 precisely because they're given as a symbol
17 that, although the plaintiff proved a legal
18 violation, they're entitled to exactly zero
19 compensation for it.

20 That means nominal damages can't serve
21 as independent redress for purely past injuries.

22 And the body of common law bears that
23 out. It's full of cases awarding nominal
24 damages when giving them to establish or protect
25 the plaintiff's legal rights going forward or

1 when they're a symbolic gesture given after a
2 plaintiff failed to prove compensable injury for
3 a legal violation.

4 But Petitioners haven't cited a single
5 common law case that decided the merits of a
6 legal claim where a plaintiff had sought only
7 nominal damages and awarding them couldn't
8 affect the plaintiff's ongoing legal rights or
9 interests.

10 Without a working theory for how
11 nominal damages can actually redress past
12 injuries or historical evidence for that claim,
13 the conclusion has to be that they aren't
14 retrospective relief that saves the case from
15 mootness when there's no longer a threat of
16 continuing injury.

17 I welcome this Court's questions.

18 CHIEF JUSTICE ROBERTS: Counsel, is
19 your position that nominal damages are never
20 sufficient on their own to establish standing or
21 prevent mootness? In other words, there's --

22 MR. PINSON: That's not --

23 CHIEF JUSTICE ROBERTS: -- present,
24 from sort of under our modern jurisprudence,
25 that there should be no such thing as nominal

1 damages?

2 MR. PINSON: That's not our position,
3 and that's because, at common law, nominal
4 damages were available in the same role as -- as
5 what you would normally see a declaratory
6 judgment claim brought today when it concerns
7 the legality of past conduct.

8 So our -- our test would be whether
9 the nominal damages could redress a continuing,
10 present, adverse effect on a plaintiff's legal
11 rights or interests. So they can't --

12 CHIEF JUSTICE ROBERTS: Well, then --

13 MR. PINSON: -- refer to anything.

14 CHIEF JUSTICE ROBERTS: Yeah. Well,
15 then today you're saying that, or under today's
16 legal regime, that if you ask for nominal
17 damages, you're really just asking for a
18 declaratory judgment. And if there's some
19 reason a declaratory judgment is not available,
20 then the nominal damages are not sufficient. In
21 other words, it's just using the wrong label for
22 the type of action you're bringing.

23 MR. PINSON: It -- it -- I could
24 envision a case where nominal damages might have
25 a separate role because they aren't

1 discretionary like equitable remedies, but,
2 generally, that's -- that's correct, Your Honor.

3 CHIEF JUSTICE ROBERTS: Joseph Story's
4 name has been bandied about a little bit. What
5 -- what is your answer to his position?

6 MR. PINSON: Sure. And it's this --
7 this Webb case that my colleagues on the other
8 side have referred to, and there's -- there's
9 two points there.

10 One is that the -- the general notion
11 that you hear of every injury importing a
12 damage, what that meant at the common law was
13 that the Petitioners or the plaintiffs had a
14 damages claim and so they would bring that
15 damages claim, and you see that in all of
16 Petitioners' cases. And if they weren't able to
17 prove it, then nominal damages could be given to
18 reflect that outcome.

19 But I think the more important thing
20 about Webb is, in that case, that -- that's a
21 riparian rights case. That is the paradigmatic
22 kind of case where nominal damages could be
23 sought on their own because they offered some
24 sort of prospective relief. In those cases,
25 they allowed plaintiffs to fend off creation of

1 prescriptive rights or show boundaries or
2 establish riparian rights.

3 CHIEF JUSTICE ROBERTS: What if
4 Congress passed a law and they wanted private --
5 encouraged private enforcement, so they said
6 that, if you -- you prevail, you get statutory
7 damages of one dollar? Is that a suit that can
8 be brought?

9 MR. PINSON: So, Mr. Chief Justice, I
10 think that's a difficult question. Normally,
11 statutory damages, we would say, served this
12 role that -- that Petitioners want nominal
13 damages to serve. They're a compensation for
14 sometimes harms that are hard to quantify.

15 But, if it's only a dollar, I think it
16 likely depends on the injury being redressed,
17 because the whole reason that common law courts
18 would allow giving him a nominal dollar is
19 because it was a trivial sum, which meant that
20 it could serve as that symbol.

21 So, arguably, Congress, when they do
22 that, if all they're doing is giving that same
23 trivial sum and it's really a vehicle for
24 advisory opinions, I think the Court would have
25 to look carefully at that.

1 CHIEF JUSTICE ROBERTS: Well, I mean,
2 is your answer the same with the -- an
3 allegation that, you know, for the gas that it
4 took to drive the three blocks to -- to the --
5 to the campus or something like that, would you
6 say that's just too small?

7 MR. PINSON: No. That -- a different
8 answer there because that's -- compensatory
9 damages, whatever the amount, are recognized as
10 relief of a past injury. That was true at
11 common law, even when the amount of damages were
12 small, and it's true today in this Court's
13 decisions like SCRAP.

14 I think it's only in -- in the
15 circumstances where the -- the damages being
16 given are the specific nominal damages remedy or
17 something that's -- that's sort of trying to do
18 that by some other means that -- that you run
19 into the problem of not having any sort of
20 compensation for a past harm.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas.

23 JUSTICE THOMAS: Thank you, Mr. Chief
24 Justice.

25 General Pinson, are there cases in

1 which the Court has awarded nominal damages
2 because of failure of proof of actual damages?

3 MR. PINSON: Cases -- cases of this
4 Court, I think, at least the Court said in cases
5 like Carey and Stachura, that at the end of the
6 case, that -- that nominal damages could be
7 awarded and then Farrar did the same thing.

8 JUSTICE THOMAS: So why would -- why
9 would there be standing in a case like that?

10 MR. PINSON: You have standing in a
11 case like that because a compensatory damages
12 claim allowed the court to decide the case. And
13 -- and I -- I understand the -- the potential
14 resistance to that, right, that you need
15 standing for a separate -- for each separate
16 claim of relief.

17 The answer is that, at the common law,
18 these claims were not pled in the alternative.
19 The -- the claim that allowed Petitioner -- that
20 allowed the plaintiffs to seek relief was a
21 damages claim. If they stated a legal injury,
22 they got -- it imported the damage and they got
23 that claim. That would allow the court to
24 adjudicate the merits.

25 And then the nominal damages awarded

1 if they weren't able to prove substantial
2 damages was just a symbolic gesture. It
3 reflected the outcome and allowed the court to
4 give costs. But -- but courts said over and
5 over that it wasn't actually compensating
6 anything.

7 JUSTICE THOMAS: Well, that seems to
8 be at war with the -- with the existence of
9 standing, though; don't you think?

10 MR. PINSON: It -- it is -- again, if
11 you -- if you treat that as a separate claim for
12 relief, that's an understandable response. And
13 -- and all I can say is that at the common law,
14 those courts didn't treat it like that. And
15 they didn't treat it as -- as giving any
16 separate relief. They treated it as an outcome
17 or a symbol for that outcome. So -- so it's --
18 it's bound up with that damages claim in a way
19 that allowed the courts to give it.

20 JUSTICE THOMAS: In -- in this case at
21 the Eleventh Circuit, the -- the court of
22 appeals seemed to dispose of this simply with --
23 with -- with Flanigan, by citing Flanigan's.

24 And I don't quite understand why that
25 case should cover this case where there was

1 actual enforcement here but no enforcement in
2 Flanigan's.

3 MR. PINSON: So Flanigan's -- you're
4 correct that in Flanigan's there was no actual
5 enforcement. Our position is that enforcement
6 or not does not matter because even if there was
7 enforcement and what the plaintiffs are seeking
8 is redress for a past injury, nominal damages
9 aren't the answer to that.

10 So you could view the decision below
11 as a slight extension of Flanigan's if you -- if
12 you view Flanigan's as turning on the lack of
13 enforcement. But in our view, the -- our
14 position doesn't change and we would say that --
15 that neither case presented a justiciable
16 controversy.

17 JUSTICE THOMAS: Did the court of
18 appeals say that, make the same point that
19 you're making?

20 MR. PINSON: Well, both in Flanigan's
21 and the court of appeals applying Flanigan's
22 below make the point that nominal damages do not
23 redress past harm. That's -- that's -- that's
24 the basis for Flanigan's and it's the basis for
25 the decisions that Flanigan's relied on, like

1 Judge McConnell's important concurrence in Utah
2 Animal Rights Coalition.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.

6 JUSTICE BREYER: Thank you.

7 What about when they do redress past
8 harm? Jones owns Blackacre. Smith, his hostile
9 neighbor, regularly picnics on Blackacre, and
10 then he dies or some unfortunate thing. He's
11 never going to do it again. Well, what's the
12 damage? I mean, all he did was picnic. Pretty
13 hard to measure. And so nominal damages.

14 Or a college says: You can't pray
15 here, young student. And imagine that policy is
16 unconstitutional. And suppose he was stopped
17 from praying. What's the damage?

18 Can you say there was no damage?
19 There was. But what is it? How do you measure
20 it? I don't know.

21 And the same with speech. He wanted
22 to speak there. He was constitutional --
23 unconstitutionally forbidden to do it. Well, he
24 was about to give his speech. What's the
25 damage?

1 Now, don't nominal damages have a
2 place right there where there is damage but it's
3 just impossible to measure?

4 MR. PINSON: Justice Breyer, they do
5 not. Certainly, that's Petitioners' position.
6 They want nominal damages to redress harms that
7 are difficult or impossible to quantify.

8 But that's just not what nominal
9 damages did at the common law. There were other
10 solutions that the common law had for that
11 problem. One was presumed damages, which were
12 compensatory damages given even if plaintiffs
13 weren't able to prove a certain --

14 JUSTICE BREYER: Right. I accept what
15 you say there. It wasn't the theory of common
16 law, hypothetically, but isn't it a fairly good
17 line to draw to keep the -- to keep the cases
18 out of a court where all you have is a
19 theoretical argument that this is
20 unconstitutional and it will never hurt you --

21 MR. PINSON: Well --

22 JUSTICE BREYER: -- from those cases
23 where there is unconstitutionality and genuine
24 harm but difficult to measure?

25 MR. PINSON: Justice Breyer, I -- I

1 don't think it's a -- a line that this Court is
2 allowed to draw because it draws -- well, it --
3 Article III draws from the common law, and the
4 common law said that nominal damages don't serve
5 that role.

6 But, in addition, there -- there are
7 other solutions to that concern. First, of
8 course --

9 JUSTICE BREYER: Well -- go ahead,
10 please.

11 MR. PINSON: First, of course, that --
12 those kinds of harms often result in more
13 established kinds of compensable injury, whether
14 it's intangible injuries, like emotional
15 distress, or tangible ones.

16 In addition, in -- in some kinds of
17 cases, Petitioners can seek compensation
18 precisely for lost opportunities to exercise
19 constitutional rights.

20 The voting rights context is an
21 important one. And that's one that the Court
22 noted in *Stachura*, where plaintiffs can actually
23 seek compensatory damages for those lost
24 opportunities, separate and apart from the
25 abstract value from the right itself.

1 And -- and then, of course, beyond
2 that, petitioners in these kinds of cases often
3 -- the object of the suit is not the small or
4 difficult-to-measure past harm. What they want
5 is a change in the law or policy. And, of
6 course, prospective relief is available for
7 that.

8 And -- and then, finally, it's always
9 on the table for Congress to offer a kind of
10 statutory damages of a non-trivial amount to --
11 if -- if it turns out that there's a class of
12 cases where those kinds of harms aren't and need
13 to be compensated.

14 JUSTICE BREYER: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Alito.

16 JUSTICE ALITO: Let -- let me pick up
17 exactly where you left off. So let's say
18 Congress amends 1983. It says whenever a
19 violation of the First Amendment is proven, a
20 past violation, plaintiffs shall be awarded
21 statutory damages of one dollar.

22 You would say there is no -- there is
23 no standing there because that's -- that sum is
24 too low; is that right?

25 MR. PINSON: Justice Alito, again, I

1 think that's a difficult question. And I think
2 it's difficult because you have two different
3 common law analogues that you have to try to
4 square.

5 The first analogue is that at the
6 common law too, you had statutory damages and
7 those plaintiffs could -- could seek statutory
8 damages alone and they had standing to do that.
9 Those were compensation, often for kinds of
10 harms that either were very easy to assign a
11 value to or very hard.

12 But then you also had nominal damages.
13 And the reason nominal damages worked in their
14 symbolic role at common law is because they were
15 trivial.

16 So when Congress assigns that trivial
17 amount to, quote/unquote, "statutory" damages, I
18 think you have to look hard at it to know
19 whether it's actually something giving
20 compensation or not.

21 In the case of --

22 JUSTICE ALITO: So your -- your
23 answer -- to cut to the chase, your answer is
24 that statutory -- that when there is
25 injury-in-fact and there must be injury-in-fact,

1 statutory damages cannot be awarded unless they
2 can reasonably be regarded as a quantification,
3 a monetization of the amount of the harm; is
4 that it?

5 MR. PINSON: Justice Alito, I don't
6 think they have to precisely quantify the harm.
7 And, in fact, the statutory --

8 JUSTICE ALITO: Well, what if it's ten
9 dollars? What if it's not one dollar; what if
10 it's ten?

11 MR. PINSON: I -- I think it's a hard
12 line-drawing problem, and -- and --

13 JUSTICE ALITO: Well, that's why I'm
14 asking the question, because I need help with
15 this hard line-drawing problem.

16 MR. PINSON: Right. And -- and
17 Justice Alito, again, what I'd say is I -- I
18 think if -- if you can reasonably say that
19 that's compensation, even if it's partial
20 compensation or compensation for
21 difficult-to-prove injuries, then -- then that
22 provides Article III redress.

23 And I - and I -- I think that that
24 should be the presumption. I think it's only
25 when you get down to that very small level,

1 maybe a dollar or below because that's -- that's
2 where we -- we assign nominal damages today,
3 that you get into the -- the problem with
4 Congress possibly trying an end-around this
5 Court's standing doctrine.

6 JUSTICE ALITO: All right. Another --
7 another question. Is it necessary for a
8 plaintiff to have standing with respect to every
9 form of relief that the plaintiff seeks in a
10 complaint?

11 MR. PINSON: It is. That's -- that's
12 the Court's rule in -- in Town of Chester and
13 other cases and --

14 JUSTICE ALITO: So if we agree with
15 you here, I don't quite see how nominal damages
16 could ever be awarded.

17 MR. PINSON: Justice Alito, I think --
18 I think there are two ways. First, their --
19 their principal purpose at common law, of
20 course, was nominal damages awarded to establish
21 a right, so they would still serve that role
22 here.

23 But what I gather you're getting at is
24 -- is the -- the sort of secondary role where
25 you have a compensatory damages claim that fails

1 before the end of the case.

2 And the answer there is, one, that's
3 what common law courts did. We see that over
4 and over that they didn't treat nominal damages
5 as a separate claim of relief but just
6 reflecting the outcome.

7 And then, second, I -- I think it gets
8 to what we're really -- what we're really
9 getting at by asking this question. We know
10 that common law courts did that. The Plaintiffs
11 say that it shows, therefore, that they
12 compensated past harm.

13 But the common law courts say that
14 they didn't do that.

15 JUSTICE ALITO: Well, you rely very
16 heavily -- you are relying very heavily on -- on
17 the common law.

18 Do you want us just to apply the
19 common law rule and, if so, weren't nominal
20 damages available at common law?

21 MR. PINSON: Nominal damages were
22 available at common law, but they -- they
23 weren't independently justiciable redress for
24 past harms.

25 For all of the cases that Petitioners

1 cite and that the governments cites and that we
2 cite, there are no common law cases out there
3 where plaintiffs were bringing nominal-damages
4 claims alone without any prospect of -- of
5 future redress.

6 All of those cases, Petitioners -- the
7 plaintiffs had brought actual damages claims and
8 then they failed for lack of proof.

9 JUSTICE ALITO: All right. Thank you.
10 My time -- I think my time is up. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

13 JUSTICE SOTOMAYOR: Counsel, in
14 addition to the questions that Justice Alito
15 had, it seems that your argument doesn't make
16 any sense of other of our precedents where we've
17 held -- and you don't dispute in your briefing
18 or here -- that the award of punitive damages
19 can qualify you to have standing.

20 But we very clearly have stated that
21 punitive damages are not to compensate the
22 injured party but, rather, to punish the tort
23 feator and deter him and others from similar
24 extreme conduct.

25 If a case has been mooted because an

1 act is not capable of repetition, there's no
2 need to impose punitive damages no matter how
3 reprehensible the conduct may be.

4 So I don't know how you can concede
5 that punitive damages give you standing under
6 your theory of the case.

7 MR. PINSON: Justice Sotomayor, I -- I
8 think the difference between punitive damages
9 and nominal damages and -- and, frankly, between
10 other kinds of monetary relief and nominal
11 damages -- is only nominal damages are -- are
12 conceived of as a symbol for zero compensation.

13 Punitive damages, although their
14 purpose is to deter and to punish, they can --
15 they -- they don't have that sort of legal
16 roadblock that prevents them from being any kind
17 of relief for past harms.

18 And, in fact, Professor Dobbs and --
19 and other remedy scholars explain that they do
20 provide some incidental compensation, although
21 the law authorizes them for other purposes.

22 And I think one -- one example from
23 this Court's cases, Steel Company, notes that
24 the civil penalties that were awarded in that
25 case, if they were awarded to the plaintiff,

1 even though they were punitive, would provide a
2 sort of compensation or redress to the plaintiff
3 themselves, even though that's not their
4 purpose.

5 So I think those -- those are just
6 distinct from nominal damages.

7 JUSTICE SOTOMAYOR: But my problem,
8 counsel, is that then you're talking about
9 quantifying an amount of damage, the ex-ante.

10 You are basically saying one dollar is
11 not enough, when we have said, even for
12 compensatory damages, that no matter how small
13 your injury, and even if a jury gives you one
14 dollar, that that would be enough as
15 compensatory damages, not nominal damages. You
16 have proven an injury.

17 And nominal damages are directed to be
18 paid to the plaintiff. He or she may not think
19 they got too much.

20 I certainly presided over many cases
21 in which the jury's award was infinitesimally
22 small compared to the claimed injuries, but you
23 can feel compensated. I don't understand why
24 one dollar is not viewed as a form of
25 alternative compensation.

1 MR. PINSON: Justice Sotomayor, the
2 reason that the dollar of compensatory damages
3 is compensation for a past injury is because we
4 have accepted that, which is really a legal
5 fiction, that it offers -- that it offers the
6 plaintiff some substitution area relief for
7 whatever their loss was, whether it's tangible
8 or intangible.

9 The problem is that, again, nominal
10 damages at common law weren't conceived of in
11 that way. A chorus of commentators and cases
12 say that they aren't compensation, that they're
13 symbolic only. McCormick on Damages said they
14 are in no sense compensation.

15 English cases like Beaumont versus
16 Greathead say that they have no existence in
17 point of quantity. And then -- and then a whole
18 --

19 JUSTICE SOTOMAYOR: But, can we --
20 counsel, we go back to the -- to the starting
21 point of my question.

22 Neither are punitive damages. They
23 are not viewed as compensation. But what they
24 are is a measure of recovery, whether we call it
25 compensation, punitive damages, statutory

1 damages.

2 These are monies that are paid to the
3 plaintiff, whether it's one cent or 100 million
4 dollars. It's still money that the plaintiff is
5 entitled to receive.

6 MR. PINSON: But, Justice Sotomayor,
7 if -- if nominal damages are not compensation,
8 it's not clear to me what else that dollar could
9 be doing to redress the plaintiff. Again, the
10 reason that dollars redress past harms is
11 because they are compensation.

12 But when they're not, and -- and the
13 common law says that nominal damages are not,
14 then you need an alternative explanation for
15 what they are doing to specifically redress the
16 plaintiff's injury.

17 And -- and we don't see that from --
18 from the Petitioner or from anywhere else.

19 CHIEF JUSTICE ROBERTS: Justice Kagan.

20 JUSTICE KAGAN: General, you said
21 several times that nominal damages are just
22 symbolic. And what -- what are they symbolic
23 of?

24 MR. PINSON: They are symbolic of the
25 fact that a plaintiff has proved a legal

1 violation but is entitled to zero compensation
2 for it.

3 JUSTICE KAGAN: I mean, that makes it
4 sound like it's a dismissal of the plaintiff's
5 claim almost, you know, like the libel suit
6 where, well, technically you committed libel,
7 but you really don't have any damages because
8 you're, you know, such a terrible person to
9 begin with. But that's not mostly what we're
10 dealing with here.

11 I mean, I -- I would have thought that
12 most of these suits that we're talking about are
13 suits where the dollar is actually symbolic of
14 -- of -- of your winning, a vindication, not of
15 nothingness.

16 MR. PINSON: Justice Kagan, it is --
17 it is symbolic of the fact that the Plaintiff
18 proved a legal violation. One of the practical
19 reasons common law courts gave nominal damages
20 was -- was so that they could say -- they could
21 count that a victory in the sense that they
22 could carry costs.

23 The -- the problem is that it was also
24 symbolic of the fact that the Plaintiff either
25 didn't have a compensable injury or wasn't able

1 to prove it in any amount. And --

2 JUSTICE KAGAN: Let me give you -- let
3 me give you a case. I don't know what -- what
4 case -- who this cuts in favor of, you or the
5 Petitioners, but I thought I would ask it
6 because it's the most famous nominal damages
7 case I know of in recent time, which is the
8 Taylor Swift sexual assault case.

9 Do you know that one?

10 MR. PINSON: Vaguely, Your Honor.

11 JUSTICE KAGAN: Yeah, you know, it was
12 a few years ago, and she brought a suit against
13 a radio host for sexually assaulting her. And
14 she said I'm not really interested in your
15 money. I just want a dollar. And that dollar
16 is going to represent something both to me and
17 to the world of women who have experienced what
18 I've experienced.

19 And that's what happened. The jury
20 gave her a dollar. And -- and it was -- it was
21 unquestionable physical harm, but she just asked
22 for this one dollar to say that she had been
23 harmed. Why -- why -- why not?

24 MR. PINSON: A couple things, Justice
25 Kagan. First of all, that sounds like

1 compensatory damages. She may have only asked
2 for a dollar of it, but she alleged clear
3 compensable injuries and so the jury could award
4 that dollar in response.

5 JUSTICE KAGAN: I thought you might
6 say that, but then why isn't that the same as
7 this? The Petitioner here said he was harmed.
8 He wasn't able to speak when he should have been
9 able to speak.

10 And, you know, whether it's hard to
11 monetize or it's not hard to monetize, he is
12 just asking for a dollar to redress that harm.

13 MR. PINSON: If -- if the dollar,
14 Justice Kagan, isn't actually compensating that
15 harm, and -- and, again, it's unique to nominal
16 damages that these harms --

17 JUSTICE KAGAN: But these are just
18 words. In the same way that Taylor Swift's harm
19 compensated her, so too here. I mean, they
20 don't really compensate anybody, but it's all
21 the place of wants for -- for an acknowledged
22 harm.

23 MR. PINSON: Two things. One is there
24 -- there is a difference in the law between
25 small damages and no damages. The common law

1 cases say that -- that nominal damages are no
2 damages, not --

3 JUSTICE KAGAN: Nobody thinks that
4 being sexual assaulted is really only worth a
5 dollar. Nobody thinks that. It's worth a lot
6 more than that.

7 But that's all she wanted. She wanted
8 to prove a point.

9 MR. PINSON: And -- and -- and she had
10 the ability to seek compensatory damages for
11 that. The proving the point, however, is -- is
12 not something that federal courts exist to do.

13 However important that dollar is to
14 Taylor Swift or -- or anyone else in
15 constitutional claims or otherwise --

16 JUSTICE KAGAN: Well, could she or
17 couldn't she? Could she bring that suit or
18 couldn't she bring that suit?

19 MR. PINSON: For nominal damages
20 alone, outside of some prospect of recurrence,
21 which I -- I would hope would not be the case,
22 then, no, that -- that claim is moot. It -- the
23 -- she needs to allege a compensable injury and
24 ask for compensation for that. That's just
25 fundamentally different from what nominal

1 damages were.

2 JUSTICE KAGAN: Thank you, General.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Good morning,
6 counsel. I'd like to kind of pick up there just
7 so -- just so we start on an agreed slate.

8 It isn't the amount that's the
9 problem. One dollar isn't the problem. So, if
10 the plaintiff here had introduced a -- a bus
11 receipt for its fare of less than a dollar and
12 demonstrated that was tied to his injury, that
13 would count. And if Ms. Swift had come in with
14 some sort of receipt of some kind, that would
15 support her one-dollar claim, right?

16 MR. PINSON: Right.

17 JUSTICE GORSUCH: Okay. So it all
18 turns on the label of compensation, and -- and
19 courts are going to have to figure that out. Is
20 that fair?

21 MR. PINSON: I think that's fair,
22 although I --

23 JUSTICE GORSUCH: Okay.

24 MR. PINSON: -- I mean, I would say
25 there are plenty of kinds of compensation. The

1 only thing that --

2 JUSTICE GORSUCH: Sure.

3 MR. PINSON: -- doesn't work is
4 nominal damages.

5 JUSTICE GORSUCH: Sure, I understand.
6 I got that point. So I think the result is a
7 rule that disadvantages perhaps two classes of
8 persons particularly.

9 First may be those like Ms. Swift who
10 have some scruple or reason not to seek more,
11 who could. And we have a lot of -- of amici
12 briefs from religious groups that indicate, for
13 example, that they have religious scruples
14 against seeking damages for some injuries
15 they've suffered. So they'd lose out, people
16 like Ms. Swift and groups like that.

17 And then it seems to me the second
18 group that -- that -- that loses out are
19 individuals whose claims are not sufficiently
20 great to attract the attention of clever lawyers
21 and economists to come up with damages theories.
22 Emotional harm and distress is a particular
23 example. Areas where it's difficult to quantify
24 damages and expensive to do so require a large
25 enough damage to justify the effort. So we

1 disadvantage persons like that.

2 It seems to me that's -- those are the
3 kind of classes of persons exactly for whom
4 nominal damages were designed in the first
5 place. And can you -- can you respond to that
6 concern?

7 MR. PINSON: Justice Gorsuch, I -- I
8 guess, first, I would say -- I'll start with the
9 end. I'm not sure that's what nominal damages
10 were designed for in the first place.

11 JUSTICE GORSUCH: Well, I -- I -- I --
12 I -- fair. But perhaps they were designed, in
13 part, to ensure that someone who had suffered a
14 legal wrong does not lose out simply because of
15 a failure of proof about damages. And I think
16 that's often going to happen in that second
17 class of cases I talked about where the damages
18 are not great enough to warrant the work.

19 So what do you say about that?

20 MR. PINSON: Again, Justice Gorsuch,
21 and I -- I guess going back to my colloquy with
22 Justice Breyer, I -- I think there are lots of
23 ways that those plaintiffs could still seek
24 compensatory damages, and -- and maybe it's a
25 little bit of extra work, but I'm -- I'm not

1 sure it's -- it's a great deal. It -- it just
2 requires us to think about the established kinds
3 of damages that you can get as a result of
4 violations of those particular legal rights.

5 Adding an emotional distress claim, if
6 a plaintiff, you know, has an objective -- a
7 reasonable basis, in fact, for that claim, is
8 not, I think, a -- so heavy a lift that you're
9 going to cut out plaintiffs from court.

10 The -- the other thing I'd say is that
11 I'm not sure why nominal damages is a
12 satisfactory solution if that's the concern.
13 After all, it is a trivial sum. And -- and if
14 what the plaintiffs are after is not the dollar
15 but having the court tell them that their rights
16 have been violated, again, that -- that's not
17 what federal courts --

18 JUSTICE GORSUCH: All right. I --

19 MR. PINSON: -- take this to do.

20 JUSTICE GORSUCH: I -- thank you. One
21 -- one last question I'd like to squeeze in
22 quickly. You'd agree that in -- in those cases
23 where we have the bus receipt showing 25 cents,
24 less than a dollar, the attorney's fees problem
25 recurs; you're going to have attorney's fees in

1 those cases. So that can't be a good reason not
2 to allow the fees, right?

3 MR. PINSON: I agree that attorney's
4 fees would be available if compensatory damages
5 are awarded. Sure.

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Thank you.

10 And good morning, Mr. Pinson. Picking
11 up on things that Justice Alito and Justice
12 Sotomayor said, it seems that there are a number
13 of things working against you here:
14 potentially, the history, the common law cases;
15 the precedent of this Court that seems to have
16 recognized in certain situations nominal
17 damages, cases like Carey that we'd have to deal
18 with; the line-drawing problem that Justice
19 Alito raised; in other words, how do we
20 distinguish potential statutes Congress might
21 enact that awarded a dollar or -- or that kind
22 of statutory damages. And Justice Sotomayor
23 asked about various forms of damages too. So
24 we'd have line drawing.

25 And then one thing I wanted to ask you

1 about, this seems to be working fine in all the
2 other circuits that allow nominal damages. At
3 least I'm not aware that there's huge problems.
4 Is that incorrect? Just I realize that's not a
5 legal point, more a practical point, but can you
6 respond to that?

7 MR. PINSON: Justice Kavanaugh, I -- I
8 would point you at least to the states' amicus
9 brief at 14 through 18. I -- I can't say that
10 there are -- are sort of floodgates opened of
11 nominal damages claims in those circuits, but
12 you do have cases where governments, even those
13 sort of acting in good faith to make policy
14 changes, have still sort of faced the problems
15 of litigating suits for long periods of time and
16 getting hit with large damages awards despite
17 sort of quick resolutions of any prospective
18 relief claim.

19 JUSTICE KAVANAUGH: Well, let me --
20 let me ask you about that. And you, obviously,
21 have answers to everything I just mentioned on
22 the law, but some of the practical problems
23 you've raised, and one of them right there, the
24 extended or wasteful litigation. Can't a
25 defendant avoid that by paying the one dollar?

1 The district court or the trial court enters
2 judgment. That's not a judgment on the merits.
3 It has no preclusive effect.

4 What's the -- what's the problem with
5 that approach?

6 MR. PINSON: Justice Kavanaugh, it --
7 it's not so clear to me that that judgment
8 wouldn't have not only preclusive effect but --
9 but other effects. At -- at least one Second
10 Circuit case, Radha, at 909 F.3d 534, and -- and
11 I guess a couple of others have noted that a
12 default judgment -- Wright and Miller says
13 this -- is actually treated as a conclusive and
14 final adjudication of the issues necessary to
15 justify the relief awarded.

16 So I -- I think a preclusive effect is
17 a real concern. But even beyond that, we often
18 have individual public servants who are -- who
19 have been sued in these cases. I think it's
20 probably not fair to them for governments to
21 force them to accept, particularly if there's a
22 liability judgment on the line, to accept that
23 kind of liability against them in their
24 individual capacities just to avoid prolonged
25 litigation. And then -- and then there are --

1 there are other various harms to governments as
2 well from just accepting judgments.

3 It might be a different case if we
4 could literally just deposit the dollar and the
5 case becomes moot, but I'm not sure of a
6 procedural mechanism for doing that.

7 JUSTICE KAVANAUGH: Okay. And then,
8 on the attorney's fees question that's been
9 raised, those -- if those were fully available,
10 then that would provide, obviously, an incentive
11 for some plaintiffs to continue litigating even
12 if there was no other injunctive or compensatory
13 relief at stake.

14 But my understanding of the case law,
15 Farrar, and it seems to be how it's applied in
16 most lower courts, is that plaintiffs do not
17 receive much in the way of attorney's fees when
18 they only receive nominal damages, and,
19 therefore, the incentive to litigate wastefully
20 is not as present. It's not zero, I would
21 acknowledge, but it's not as present.

22 Can you respond to that?

23 MR. PINSON: Yes. So I do think that
24 the better reading of Farrar is that generally
25 you shouldn't get any attorney's fees for a

1 nominal damages award. But -- but that isn't
2 necessarily borne out in practice.

3 We see from the -- again, the states'
4 amicus brief at -- at 20 lists several
5 six-figure attorney's fees awards from nominal
6 damages cases, and I think those are sort of
7 just examples of cases. There are -- there are
8 quite a few more out there.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett.

12 JUSTICE BARRETT: Counsel, I
13 understood in your briefing you to make two
14 points about why nominal damages are
15 insufficient under Article III, one being
16 they're the prospective, not retrospective,
17 point, these are really declaratory judgments,
18 and then the other focusing on the amount and
19 saying the very trivial amount shows that these
20 really can't be compensatory.

21 But it seems to me that, in your
22 responses to Justice Alito's questions, Justice
23 Kagan's questions, Justice Gorsuch's questions,
24 you've kind of gone back and forth on the
25 triviality of the money point.

1 So, you know, you suggested to Justice
2 Alito that at some point it's so little money
3 that really should be taken into account. But,
4 of course, our precedents say that, you know,
5 even -- even a small amount is enough.

6 And so in the Taylor Swift example or
7 in Justice Gorsuch's bus fare example, I -- I
8 heard you, at least I took you to concede, that
9 even a very trivial amount would constitute a
10 compensatory injury under Article III.

11 So is that part of your argument still
12 with respect to nominal damages? Are you -- are
13 you still hanging your hat on the amount, the
14 one dollar being too little, and just
15 exclusively focusing on the -- focusing on the
16 prospective nature?

17 MR. PINSON: The -- the -- the trivial
18 nature of the award, Justice Barrett, matters
19 only because that -- that was the way that the
20 common law set nominal damages as a symbol.

21 And so my response to Justice Alito
22 reflected that, that what Congress is really
23 doing is -- is setting a trivial amount so that
24 it serves as a symbol but doesn't offer any
25 compensation that would be different.

1 But our -- our primary argument is --
2 is simply that nominal damages in their nature
3 do not serve as any compensation regardless of
4 whether that court decides in a given case to
5 give us the dollar or not.

6 JUSTICE BARRETT: So what does the
7 money have to -- so what does the money have to
8 do with it? Are we trying to figure out, you
9 know, Justice Kagan's question suggested that
10 really what Taylor Swift wanted was, you know,
11 vindication of -- of the -- the moral right, the
12 legal right, that sexual assault is
13 reprehensible and wrong.

14 Are we looking at the motivation for
15 the suit, so could nominal damages actually be
16 compensatory for one person but not for another?

17 MR. PINSON: No, no. I -- I don't
18 think that's right, Justice Barrett. The -- the
19 nominal damages dollar isn't -- isn't
20 compensation in any sense.

21 The -- the difference, I guess, is --
22 is that, again, in those cases where vindication
23 is sought, that's just not enough, right? So it
24 doesn't matter what their motivation is.
25 Vindication under Steel Company and -- and other

1 cases is -- is not Article III redress because
2 it doesn't address any injury. And that --

3 JUSTICE BARRETT: So what's the -- oh,
4 go ahead. I'm sorry.

5 MR. PINSON: I was just going to say
6 and that -- and so those are the two aspects,
7 those are really the two big things that nominal
8 damages do. There's the dollar and there's the
9 vindication.

10 The dollar, common law cases say,
11 doesn't compensate, and vindication isn't enough
12 by itself.

13 JUSTICE BARRETT: So what is the
14 effect of your argument on the very, very many
15 consumer protection statutes we have, like the
16 Telephone Consumer Protection Act or the Fair
17 Debt Collection Practices Act, you know, I -- I
18 think in those cases, statutory damages, we
19 might think of them, you know, let's say it's
20 \$100 but you also get attorneys' fees, as about
21 vindicating, you know, a right and having a
22 deterrent effect on, you know, the -- the
23 industry.

24 If Congress reduced that amount of
25 statutory damages down to a dollar, I mean, I

1 don't see why it's any different. So would this
2 call into question whether those causes of
3 action really are unconstitutional under Article
4 III in many cases? I mean, you know, under the
5 Telephone Consumer Protection Act, you get a
6 couple annoying texts, you know, that's --
7 that's pretty slight.

8 Is a statutory damage, you know, if
9 you seek statutory damages, are you seeking
10 anything other than to -- to vindicate? Is that
11 compensatory?

12 MR. PINSON: Justice Barrett, I -- I
13 think it is. And -- and the last example you
14 gave I think is a -- a helpful one. But if the
15 injury at issue is a slight injury, then a
16 slight amount of damages would still be viewed
17 as, or -- or we should presume that it's still
18 compensatory damages, when -- when it's given as
19 statutory damages. So I -- I don't think there
20 is any problem with --

21 JUSTICE BARRETT: But the Petitioners
22 here haven't suffered such a slight injury?

23 MR. PINSON: Well, I -- I -- I
24 wouldn't say that it's a -- a slight injury. I
25 think the problem for Petitioners is that --

1 that the injury they've alleged is not one
2 susceptible to proof. And -- and, again, I
3 don't --

4 JUSTICE BARRETT: So you concede the
5 damages for receiving a couple annoying texts
6 but not for having your First Amendment rights
7 violated?

8 MR. PINSON: You can't seek nominal
9 damages for the -- the bare violation of First
10 Amendment rights. You can seek compensatory
11 damages.

12 JUSTICE BARRETT: Thank you, counsel.

13 CHIEF JUSTICE ROBERTS: A minute to
14 wrap up, counsel.

15 MR. PINSON: I'll end with -- with two
16 quick points. First, I want to stress that the
17 way that this case was resolved is a good thing.
18 Litigation prompted college officials to review
19 their policies, and just ten weeks later to
20 revise them in a way that maximizes and
21 respected First Amendment rights on campus, not
22 just for Petitioners but for all students.

23 And it even led to an enduring
24 state-wide policy change for every public
25 college in Georgia. That kind of early

1 out-of-court resolution should be encouraged.
2 And keeping nominal damages in their limited
3 historical role does that, while still allowing
4 existing mootness doctrine to guard against bad
5 faith or strategic moving.

6 And then, second, whatever the policy
7 implications, this case comes down to what kinds
8 of cases Article III allows federal courts to
9 resolve.

10 Article III takes it's court -- cues
11 from common law practice. And the common law
12 made clear over and over that it's just wrong to
13 think of nominal damages as a -- a small amount
14 of compensation.

15 That means nominal damages can't save
16 the case from mootness when changed
17 circumstances relieve any threat of future
18 injuries.

19 This Court should affirm the judgment
20 below. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Waggoner.

24
25

1 REBUTTAL ARGUMENT OF KRISTEN K. WAGGONER

2 ON BEHALF OF THE PETITIONERS

3 MS. WAGGONER: Thank you, Mr. Chief
4 Justice. Four points in response.

5 First to return to first principle.
6 Partial redress is still redress. This Court
7 has held that rule over and over again. When
8 money changes hands that is a tangible benefit
9 for Article III purposes.

10 Several Justices have raised questions
11 as to what the purpose of nominal damages are.
12 Symbolic has come to mind. Yes, they're
13 symbolic in the sense that there is an intrinsic
14 value to the lost constitutional right that far
15 exceeds the one, ten, or 100 dollars that is
16 afforded in response for that.

17 Second, vindication. And vindication
18 does occur through a nominal damages award just
19 as with any other award.

20 Third, compensation. Yes, it provides
21 compensation in an amount that recognizes the
22 damages done. And that, too, serves a valid
23 purpose under Article III.

24 My second point is that, as Justice
25 Alito mentioned with my friend, statutory

1 damages -- statutory damages should satisfy
2 Article III. And my friend on the other side
3 suggests that they do.

4 The reason that they do is for the
5 reasons I just mentioned. And there's no
6 principled basis to deny nominal damages claims
7 here.

8 The common law has a number of cases
9 where there is no compensatory claims asserted
10 and there is no prospective relief at issue, yet
11 the Court still awarded nominal damages.
12 Doherty, Moon, Thompson, even Ashby recognizes
13 that a cuff on the ear is sufficient for nominal
14 damages. That's on pages 8 through 10, all of
15 those cases, of our reply brief.

16 There is so many carve-outs under my
17 friend's rule that it proves the rule and the
18 practical effect boxes out especially civil
19 rights victims.

20 The rule works. It's a long-standing
21 rule that's been in place for hundreds of years.
22 And it hasn't resulted in protracted litigation.
23 And there is no incentive for plaintiffs or
24 their attorneys to file standalone damages with
25 Farrar in place in terms of the fees. But a

1 word about the fees.

2 Section 1988 and 1983 and this Court
3 have held that it's critical to not only the
4 plaintiffs that are losing their civil rights
5 and injured in these actions, but it's critical
6 to our nation and it's a noble purpose to
7 vindicate those constitutional rights.

8 A change of the rule here leaves
9 victims that have serious constitutional
10 injuries unredressed out in the cold.

11 It also forces victims to reveal
12 intrusive information, as in Flanigan's, or
13 about their mental health records, or churches
14 who have scruples about asserting compensatory
15 damages to -- to prove those damages and,
16 instead of limiting the litigation, it actually
17 expands it, complicates it, and actually causes
18 more liability for the government.

19 In closing, in 2013, Georgia Gwinnett
20 officials knew that this rule was
21 unconstitutional. They received a letter
22 telling Chike that he was silent not only
23 violated his rights but it results in the
24 government walking away from past harms that
25 they caused.

1 This is a solution that is in search
2 of a problem, but a reversal actually creates
3 the problem. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.

6 (Whereupon, at 11:32 a.m., the case
7 was submitted.)

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