No. 19-968

In the Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,
PETITIONERS,

v.

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

ON WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, AMERICANS FOR PROSPERITY FOUNDATION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AND INSTITUTE FOR JUSTICE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
MICHAEL J. MESTITZ
SURAJ KUMAR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

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INTEREST OF *AMICI CURIAE*[1]

Amici are civil-rights organizations that span the ideological spectrum.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil-rights laws. It is joined here by **the ACLU of Florida** and **the ACLU of Georgia.**

Americans for Prosperity Foundation (AFPF) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF is committed to ensuring the freedom of expression guaranteed by the First Amendment, particularly on college campuses where the marketplace of ideas is both nourished by and nourishes developing minds.

Americans United for the Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Americans United represents more than 125,000 members and supporters across the country.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Petitioners and respondents filed blanket consents to *amicus* briefs with the Clerk of Court.

The Institute for Justice is a nonprofit public interest law center committed to defending the essential foundations of a free society by securing greater protection for individual liberty.

Amici disagree about many issues, but share the belief—informed by their experiences—that nominal damages play a critical role in preserving plaintiffs' ability to vindicate their constitutional rights and to challenge unconstitutional government policies. This case involves petitioners seeking a ruling on the constitutionality of a university speech policy that the school applied to restrict their First Amendment rights, then changed mid-litigation. But the question presented implicates civil-rights litigants' ability to vindicate constitutional rights of every kind—the rights to speak, to worship, and to be free from compelled worship; rights to be free from unjust searches and excessive force; and rights to freedom of association and equal protection of the laws, among others.

Based on *amici*'s collective experience, a ruling that nominal-damages claims are insufficient to prevent a case from becoming moot will substantially undermine civil-rights plaintiffs' ability to protect their constitutional rights.

SUMMARY OF ARGUMENT

Like most Americans, Springfield, Illinois native Don Norton never expected to end up panhandling to get by—until he had few options left. A DUI conviction closed off conventional employment, and odd construction gigs failed to make ends meet. Patrick Yeagle, *Springfield panhandling ordinance ruled unconstitutional*, Ill. Times (Aug. 13, 2015). Norton certainly did not expect to become the face of a civil-rights lawsuit. Few aspire to

devote years to a slow, onerous slog through the court system that exposes their lives to media scrutiny.

Then Springfield enacted an ordinance banning panhandling. Norton thus ceased asking for help. But feeling coerced into silence and singled out for panhandling bothered him. He banded together with several similarly situated others and sued, arguing that the ordinance violated the First Amendment by impermissibly discriminating against speech based on its content. A district court enjoined the ordinance as unconstitutional. So Springfield changed the law, now banning panhandling within 5 feet of passers-by. Because that law still amounted to an effective ban, Norton again felt compelled to stop panhandling; the fines were too high for him to risk. So he sued again.

Springfield responded by repealing the amended ordinance, which Springfield claimed now mooted Norton's suit. 324 F. Supp. 3d 994, 998, 1000 (C.D. Ill. 2018). But the city's repeal did nothing to remedy the harm that Norton and others had already suffered by forgoing protected speech. That loss would be difficult to quantify for purposes of proving compensatory damages. But losing the ability to speak is undoubtedly a real, concrete harm all the same. Pleading nominal damages conveyed that Norton had suffered a real injury and that he wanted to vindicate that loss by having a court determine that Springfield had indeed violated his rights. After years of litigation, a district court agreed, holding that Springfield's amended ordinance had again violated Norton's First Amendment rights. *Id.* at 1004.

Similar dynamics play out in a wide range of civil-rights suits. When confronted with legal challenges to unconstitutional or illegal policies, governments often respond by changing those policies, and then contend that

the cases are moot. If that governmental action ended the case, plaintiffs would obtain incomplete relief. The government would stop violating their rights going forward. But courts would be unable to remedy the real but often difficult-to-quantify harms that plaintiffs already suffered. The same scenario would recur for litigants whose entitlement to prospective relief becomes moot for other reasons, like prisoners' completion of their sentences or students' graduations.

Plaintiffs' ability to plead nominal damages to account for the harms associated with past constitutional violations acknowledges that plaintiffs have suffered real injuries from alleged violations of fundamental rights, regardless of whether their injuries readily translate into dollar amounts. Nominal damages thus play a key role in vindicating rights and holding governments accountable for unconstitutional policies.

ARGUMENT

I. Nominal Damages Afford Retrospective Relief for Hard-to-Quantify Harms

1. Claims that the government has deprived plaintiffs of their constitutional rights involve quintessential injuries that satisfy Article III standing requirements. "[I]ntangible injuries can nevertheless be concrete." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Thus, this Court has held in myriad contexts that alleged constitutional violations constitute injuries-in-fact. *E.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) ("'[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage."); *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of [a] barrier, not

the ultimate inability to obtain [a] benefit."); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[E]ven if [respondents] did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) ("The parties here are school children and their parents, who are directly affected by the laws and practices against which their [Establishment Clause] complaints are directed," and "[t]hese interests surely suffice to give the parties standing to complain."). It is hard to imagine how the law could be otherwise. The premise of plaintiffs' suits is that the government has deprived someone of the basic rights that our political system guarantees. If that injury is not actual and concrete, nothing is.

Many constitutional violations are of paramount significance but difficult to reduce to dollars and cents. "Unlike most private tort litigants, a civil-rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality op.). Take the loss when the government forces individuals to engage in ten minutes of involuntary worship, or silences speech on a particular day, or engages in a fleeting but unconstitutional search. The constitutional violation is gravely important, but often the "plaintiff's economic injury [is] so minimal as to be essentially nominal." *Romanski v. Detroit Entm't, LLC*, 428 F.3d 629, 645 (6th Cir. 2005). Or the economic injury may be so difficult to value that supporting an award of compensatory damages through expert testimony or other competent evidence would be prohibitively expensive.

For centuries, nominal damages have supplied the answer to this valuation problem: by pleading a dollar or two, plaintiffs aver that they have experienced harms that are real, but difficult to value or prove in monetary terms. Petrs.' Br. 17. Thus, "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986); *see Carey*, 435 U.S. at 308 n.11 (1978) (same).

Nominal damages therefore perform a critical function. Plaintiffs who allege an actual harm in the form of a constitutional violation need not adduce the type of evidence of particular costs, expenses, or losses attributable to that violation, as would be the case for proving compensatory damages. Nominal damages substitute for compensatory damages, avoiding the need to calculate "damages based on some undefinable 'value' of infringed rights" by allowing plaintiffs to recover without particularized proof of pecuniary harm. *Stachura*, 477 U.S. at 308 n.11; *see Carey*, 435 U.S. at 251-52 (similar); Petrs.' Br. 18-19. Put another way, "[a]n award of nominal damages does not mean that there were not actual economic damages, just that the exact amount of damages attributable to the improper conduct was not proven." 25 C.J.S. Damages § 24 (2020).

For some plaintiffs, nominal damages may be the *only* form of monetary relief available. Prisoners cannot recover compensatory damages "for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e). Nominal damages are thus often the only monetary relief prisoners can seek to vindicate their constitutional rights.

Because nominal damage are designed to compensate for actual past harms, it follows that a case seeking nominal damages remains live even if the government changes the challenged policy going forward. To be sure, that change may moot *prospective* relief if the plaintiff will never again face the same unconstitutional policy, and the government is unlikely to resume its challenged practice. *E.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). But that change does not remedy the *past* violation that the plaintiff experienced.

That nominal-damages awards involve only small sums of money is irrelevant. A live Article III controversy requires only "a dollar or two." *Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 289 (2008); *see Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). That is because an award of damages, "whether compensatory or nominal," alters the legal relationship between the parties and "modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); Petrs.' Br. 22-23.

2. The rule that nominal damages allow plaintiffs to continue litigating past constitutional wrongs also makes eminent sense. "Nominal relief does not necessarily a nominal victory make." *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring). "While the monetary value of a nominal damage award must, by definition, be negligible, its value can be of great significance to the litigant and to society." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999). "Regardless of the form of relief he actually obtains, a successful civil-rights plaintiff often secures important social benefits that are not reflected in

nominal or relatively small damages awards." *Rivera*, 477 U.S. at 574 (plurality op.).

Many civil-rights litigants thus place great significance on even a nominal recovery. Take Dennis Ballen, who successfully sued the city of Redmond, Washington, after the city tried to apply its sign code to stop him from advertising his bagel business using sidewalk signs. Ballen argued that the sign ordinance—which arbitrarily privileged some types of speech over others—violated the First Amendment. The court agreed. Ballen undoubtedly suffered some economic harm from diminished traffic to his store due to his inability to advertise. But because his harm was difficult to value, he decided not to seek compensatory damages, and instead sought—and obtained—one dollar in nominal damages. *Ballen v. City of Redmond*, 466 F.3d 736, 741 (9th Cir. 2006). Ballen now prominently displays the dollar bill, framed, above his shop's counter. Or take Eon Shepherd, a prisoner who successfully recovered one dollar when guards unconstitutionally touched and tore at his dreadlocks, violating his Rastafarian beliefs and the Free Exercise Clause. Notwithstanding the small award, Shepherd was "really satisfied because I feel like I've been vindicated." *NY lawyer gets paid $1.50 for civil rights victory*, N.Y. Post (Dec. 3, 2011).

Further, by preventing governments from terminating civil-rights cases prematurely, nominal-damages claims produce rulings that mark the path for government actors, helping them avoid future violations. Petrs.' Br. 20. The availability of nominal damages "guarantee[s] that a defendant's breach" of a plaintiff's rights "will remain actionable regardless of [its] consequences in terms of compensable damages." *Amato*, 170 F.3d at 318. Otherwise, governments could freely implement illegal policies, as long as governments rescind those policies before

a ruling on the merits. The government may defend unconstitutional policies on the merits against pro se plaintiffs, where it is likely to win, but then relent and moot the litigation when it faces sophisticated counsel and is likely to lose. This risk is particularly acute in prison litigation, where the government has significant discretion over when and how it will modify its policies. *See* Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 123 Y.L.J. Forum 325, 329-30 (Nov. 26, 2019) (hereinafter, Davis & Reaves).

By preventing the government from changing challenged policies to moot cases, nominal-damages claims also mitigate the government's ability to game its way into maintaining qualified immunity. Petrs.' Br. 37-39. A rule requiring courts to dismiss nominal-damages claims as moot prevents the development of "clearly established" law that would allow plaintiffs to hold government officials accountable for violating constitutional rights. That is especially true because, to defeat qualified immunity, plaintiffs must identify either "controlling authority" or "a robust consensus of cases of persuasive authority" that "placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011). And those authorities must make clear that "the violative nature of *particular* conduct is clearly established . . . in light of the specific context of the case." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam). If government actors could unilaterally moot cases by amending official policies before a ruling on the merits, the government could perennially thwart the development of this "controlling authority."

Government officials, too, may benefit from adjudication of nominal-damages claims. In a case challenging

civil-forfeiture policies, state and county officials successfully argued that the case was not moot based on the plaintiffs' nominal-damages claims, and the court ultimately held that the officials were not subject to section 1983 liability. *Platt v. Moore*, 2018 WL 2058136, at *2 (D. Ariz. Mar. 15, 2018). Thus, a ruling on the merits of a nominal-damages claim can clarify the legality—as well as the illegality—of governmental action.

Finally, a civil-rights plaintiff who recovers nominal damages is a prevailing party under 42 U.S.C. § 1988 and may be entitled to an award of attorneys' fees. Of course, if the award is nominal, courts may consider the small amount of the award as "bear[ing] on the propriety of fees awarded under § 1988." *Farrar*, 506 U.S. at 114; *see, e.g.*, *Citizens for Free Speech, LLC v. Cty. of Alameda*, 2017 WL 912188, at *9-10 (N.D. Cal. Mar. 8, 2017) (awarding only 20% of requested fees in light of nominal-damages award); *Talley v. District of Columbia*, 433 F. Supp. 2d 5, 9-10 (D.D.C. 2006) (denying fee request in light of nominal nature of damages); Petrs.' Br. 48-49. But Congress provided for attorneys' fees precisely because the ability to obtain fees is often an important incentive for lawyers to take suits on behalf of plaintiffs who could not otherwise afford to vindicate their rights. And the availability of attorneys' fees may deter governmental actors from unconstitutional conduct in the first place.

3. The Eleventh Circuit's contrary rule improperly dismisses nominal damages as a legal nullity, and thus confuses whether a plaintiff has suffered a *remediable* harm with whether the plaintiff has suffered a readily quantifiable one. The Eleventh Circuit believed that because nominal damages are a "trivial sum," they must be "awarded for symbolic, rather than compensatory, purposes." *Flanigan's Enters. v. City of Sandy Springs*, 868

F.3d 1248, 1268 (11th Cir. 2017) (en banc). But the question is whether nominal damages are a remedy of any sort, not how precisely they actually compensate alleged harms.

The notion that damages must be readily calculable or must fully compensate plaintiffs for the harm they have suffered to satisfy Article III is plainly incorrect. In several statutory schemes, for example, statutory damages serve the same remedial purpose as nominal damages, giving plaintiffs "some recompense for injury due to [them], in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (statutory damages under Copyright Act of 1909). In other civil cases, "it is the function of liquidated damages to provide a measure of recovery" when the damages resulting from an injury "may be difficult or impossible to ascertain." *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54 (1956). No one would argue that a plaintiff's entitlement to only these forms of monetary relief, rather than full compensatory damages, renders a claim nonjusticiable. From the standpoint of Article III, there is no principled difference between liquidated, statutory, and nominal damages.

The Eleventh Circuit's approach also encourages absurd results. In *Freenor v. Mayor & Alderman of Savannah*, for example, Eleventh Circuit precedent foreclosed plaintiffs' argument that a nominal-damages claim saved their First Amendment challenge to a repealed tour-guide licensing ordinance. 2019 WL 9936663 (S.D. Ga. May 20, 2019). But two of the plaintiffs had also pleaded $10 in compensatory damages, reflecting the amount that they had paid for their tour-guide licenses under the old regime. The court expressed "concern" that "Plaintiffs' re-

quest for $10 in compensatory damages is simply an alternative way to plead nominal damages." *Id.* at *7. But because those two plaintiffs sought "retrospective compensatory damages in addition to the nominal damages pled by all Plaintiffs," the court deemed the case not moot. *Id.* at *7. All four plaintiffs, however, suffered the same constitutional harm—infringement of their right to speak to members of the public about the history of Savannah. By holding that two plaintiffs could obtain redress because they also paid $10 for licenses, but the other two plaintiffs could not because their only harm was having their speech chilled, the Eleventh Circuit missed the forest for the trees.

More broadly, the Eleventh Circuit's approach arbitrarily treats similarly situated plaintiffs differently depending on semantic differences in their pleadings. Petrs.' Br. 42-43. Some plaintiffs might characterize damages as "compensatory," which would allow them to avoid mootness under the Eleventh Circuit's rule. *E.g.*, *Nelson v. Miller*, 2011 WL 6400524, at *3 (S.D. Ill. Dec. 19, 2011) (characterizing as "actual damages" a $10 per day award to Catholic prisoner who received inadequate nutrition during Lent due to prison policy refusing meat-free meals). Others might include in their complaint only a general claim for relief, without distinguishing the nature of the damages they seek. Still others might plead a request for compensatory damages in their complaint, without any real intention to prove a precise measure. The underlying constitutional injury would be the same, as would the relief (some form of damages).

And in still other cases, courts may award nominal damages on finding a constitutional violation even if the plaintiffs did not specifically request them. *E.g.*, *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) ("an award of nominal damages is mandatory upon a finding of

a constitutional violation"); *Risdal v. Halford*, 209 F.3d 1071 (8th Cir. 2000) (plain error to give the jury discretion not to award nominal damages on a finding of a violation of free-speech rights). But these groups of plaintiffs could face wildly varying outcomes should governmental actors change the challenged policy in response to litigation. This Court should reject the Eleventh Circuit's unprincipled approach, which would unjustifiably compromise civil-rights plaintiffs' ability to vindicate their constitutional claims.

II. Cases Involving Nominal Damages are Ubiquitous, and Illustrate the Critical Role Such Damages Play in Vindicating Rights

Jettisoning the longstanding rule that nominal-damages claims allow plaintiffs to continue seeking redress for past constitutional violations even when governments repeal the challenged policy would also compromise plaintiffs' ability to vindicate all sorts of constitutional rights. The sheer volume of cases involving this fact pattern illustrates the point across myriad constitutional claims. Indeed, the Court faced this issue in the Second Amendment context just last Term.

The following cases illustrate how often plaintiffs' access to justice hinges on the availability of nominal damages. The postures of these cases differ; in some cases, courts assessed whether plaintiffs' nominal-damages claims could proceed at the pleadings stage; in others, courts resolved the cases on the merits. *Amici* may disagree as to whether particular cases involved meritorious claims. But *amici* all agree that the nominal-damages claims matter, that these claims are not mere artifices to produce advisory opinions, and that plaintiffs pursuing nominal damages deserve their day in court.

1. **Second Amendment.** In January 2019, the Court granted review of whether New York City's ordinance prohibiting residents from carrying firearms to out-of-city gun ranges, competitions, or second homes violated petitioners' Second Amendment rights. Shortly thereafter, New York City "quickly changed its ordinance," and New York State "enacted a law making the old New York City ordinance illegal." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527-28 (2020) (Alito, J., dissenting). While the law barred petitioners from transporting their arms in the past, they sought only prospective relief. The Court dismissed the case as moot because petitioners did not seek even nominal damages, which multiple members of the Court acknowledged would have kept petitioners' Second Amendment claims alive. *Id.* at 1526-27 (per curiam op.); *id* at 1540 (Alito, J., dissenting).

2. **Freedom of Speech.** First Amendment cases in which governmental actors unconstitutionally abridge plaintiffs' free-speech rights and then change the challenged policies or ordinances are legion. These cases involve plaintiffs along all points of the political spectrum.

Start with content-based speech restrictions, *i.e.*, speech restrictions that privilege certain views or subjects above others. State and local governments have targeted everything from panhandling to erecting yard signs supporting George W. Bush. Some universities have disfavored pro-life student groups' messages by forcing those groups alone to post signs in deserted areas; other universities have disrupted student groups' programming by citing fears of offending Christian students. Localities have tried to silence residents' attempts to place "For Sale" signs in their parked vehicles because of opposition to en-

couraging that kind of commercial activity. A pro-life protestor of Planned Parenthood, a prisoner trying to send his mother drawings featuring partially nude women and marijuana leaves, and a volunteer trying to register voters all alleged differential treatment at the hands of governmental actors solely because of the content of their speech. The plaintiffs in these cases hailed from all over the country and all walks of life, but all sued to vindicate the same principles: the government cannot favor particular speech, and when it does, real harm occurs.[2]

In all of those cases, the plaintiffs sued, seeking declaratory relief and nominal damages—at which point the various governmental actors modified or abandoned their policies and argued that the cases were therefore moot. And in each case, the plaintiffs' nominal-damages claims kept the suits alive to permit redress of the harms they had already suffered from restrictions on their speech. For those who prevailed, an award of nominal damages

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[2] *Norton v. City of Springfield*, 324 F. Supp. 3d 994, 1000 (C.D. Ill. 2018) (challenge to panhandling ordinance); *Fehribach v. City of Troy*, 412 F. Supp. 2d 639, 640, 641, 644 (E.D. Mich. 2006) (plaintiff with George W. Bush yard sign challenged city ordinance); *Project Vote/Voting for Am., Inc. v. Dickerson*, 444 F. App'x 660, 664 (4th Cir. 2011) (plaintiffs challenged transit agency's preclearance requirement for voter registration activities); *Trewhella v. City of Lake Geneva*, 249 F. Supp. 2d 1057, 1067 (E.D. Wis. 2003) (pro-life protesters challenged city restrictions on parades and assemblies); *Keup v. Hopkins*, 596 F.3d 899, 901 (8th Cir. 2010) (inmate prevented from sending drawings to his mother); *McLean v. City of Alexandria*, 106 F. Supp. 3d 736, 737 (E.D. Va. 2015) (truck owner challenged prohibition on "for sale" displays in parked cars); *Rock for Life-UMBC v. Hrabowski*, 594 F. Supp. 2d 598, 603, 607 (D. Md. 2009) (pro-life student groups challenged university restrictions on protest locations); *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1519 (10th Cir. 1992) (students challenged university ban on screening Martin Scorsese's *The Last Temptation of Christ*).

vindicated their rights. Further, even if "the . . . receipt of nominal damages did little for Plaintiffs personally, their victory undoubtedly signaled . . . the importance of ensuring that [governmental] regulations do not intrude upon our most basic constitutional and democratic rights." *Project Vote/Voting for Am., Inc. v. Dickerson*, 444 F. App'x 660, 664 (4th Cir. 2011) (per curiam).

Nominal damages are just as important in remedying the harms that plaintiffs suffer from unlawful prior restraints—whether those plaintiffs are strip-club owners challenging licensing requirements, animal-rights activists denied a timely decision on their permit for a planned protest, or university students and faculty required by university policy to pre-clear communications with prospective student-athletes. In one instance, an elementary school mandated that students submit for prior approval materials they wanted to distribute, including Christian students who sought to give out "pencils inscribed with 'Jesus is the reason for the season'" and "candy canes with cards describing their Christian origin."[3]

In all of those cases, when challenged, governmental actors tried to change their policies in order to moot the

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[3] *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 799-800 (7th Cir. 2016) (strip club owner challenging licensing scheme); *Clarkson v. Town of Florence*, 198 F. Supp. 2d 997, 1016 (E.D. Wis. 2002) (similar); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1250 (10th Cir. 2004) (animal-rights activists challenging permit ordinance); *Crue v. Aiken*, 370 F.3d 668, 674 (7th Cir. 2004) (university faculty seeking to share concerns about university mascot, "Chief Illiniwek"); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (Christian students barred from distributing pencils, candy canes, "tickets to a church's religious musical programs, and tickets to a dramatic Christian play"); *accord Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010) (anti-spending group seeking to hold political press conference in city hall).

litigation. Plaintiffs challenging such prior restraints suffer real but difficult-to-quantify harms, making compensatory damages an inapt remedy. As the Seventh Circuit explained, "this is exactly the situation for which nominal damages are designed." *Six Star Holdings, LLC v. City of Milwaukee,* 821 F.3d 795, 805 (7th Cir. 2016). Without nominal damages, plaintiffs would obtain no remedies for the difficult-to-value harms they already suffered, and governments could re-enact similar, unconstitutional policies with impunity.

3. **Free Exercise and Establishment Clauses.** Both religious and secular plaintiffs often challenge government policies under the First Amendment, bringing lawsuits alleging violations of the Free Exercise Clause, the Establishment Clause, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. In these contexts, too, governments often respond by amending their policies and arguing the challenges are moot. As in the free-speech context, nominal damages allow plaintiffs to remedy the intangible harms they already suffered—whether those harms involved being compelled to refrain from practicing their faiths, or being subjected to impermissible state support for religion.

For instance, prisons have refused to accommodate prisoners who seek kosher diets consistent with their religious beliefs. Another prison rejected an inmate's request for non-meat meals on Fridays and during Lent, prompting the inmate to abstain from eating the meat in his standard prison meals, and his weight "dropped as low as 119 pounds." When the prison attempted to moot the case three years into the litigation by offering the individual inmate a diet compatible with his faith, the Seventh Circuit refused to dismiss the case. Putting a price on

having to "forego adequate nutrition on Fridays and for the forty days of Lent in order to comply with his sincerely held religious beliefs" might be challenging—but there was still "a substantial burden on his religious exercise," and a damages claim for that retrospective harm kept the case alive.[4]

Similarly, in the Establishment Clause context, plaintiffs in Slidell, Louisiana, challenged a display in the foyer of the City Court that depicted "Jesus Christ presenting the New Testament of the Bible," with large wording underneath reading "To Know Peace, Obey These Laws." *Doe v. Par. of St. Tammany*, 2008 WL 1774165, at *1 (E.D. La. Apr. 16, 2008). Shortly thereafter, the government "changed the display" to contain "various historical lawgivers" alongside Jesus Christ, and argued that the suit was moot. *Id.* But by then, the plaintiffs had already suffered the harms associated with the unwanted religious display. Nominal damages again allowed plaintiffs to vindicate that difficult-to-value harm. *Id.* at *5.

4. **Fourth Amendment.** Likewise, when official search-and-seizure policies violate plaintiffs' Fourth Amendment rights, nominal damages prevent governments from mooting the claims by changing or repealing the challenged policies, and enable plaintiffs to seek redress for past harms. The city of Flint, Michigan, subjected rental properties to its Comprehensive Rental Inspection Code, which allowed city inspectors to enter rental units without permission and penalized property owners who refused inspections. Karter Landon, one

[4] *Nelson v. Miller*, 570 F.3d 868, 880, 882 (7th Cir. 2009) (Catholic inmate seeking non-meat meals on Fridays and during Lent); *see also Rich v. Fla. Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013) (prisoner seeking kosher diet); Davis & Reaves, *supra,* at 329 (collecting similar cases).

such property owner, sued and alleged that the Code unconstitutionally subjected him to warrantless searches under the threat of fines and other penalties if he did not consent. The City responded by amending its Code and argued that Landon's case was moot. The harm from an unconstitutional search does not lend itself to ready monetary valuations. But because Landon sought "nominal damages as a remedy for past wrongs," the district court allowed his claim to go forward. *Landon v. City of Flint*, 2017 WL 2806817, at *3, *6 (E.D. Mich. Apr. 21, 2017), *report and recommendation adopted*, 2017 WL 2798414 (E.D. Mich. June 27, 2017).

5. **Due Process Clause.** Allowing governments to moot cases despite nominal-damages claims would also prevent plaintiffs from remedying due-process harms that government policies inflicted. As with other constitutional claims, the government's violation of a citizen's procedural due-process rights involve real, past injuries that are difficult to quantify. After the City of Costa Mesa towed Sidney Soffer's car and he was "[u]nwilling or unable to pay the towing fee," he sued the city for failing to provide an adequate hearing to challenge the city's decision to tow his car. The city amended the relevant ordinance, but Soffer's due-process claim survived and ultimately succeeded. The court awarded nominal damages of one dollar "[b]ecause due process rights are 'absolute,'" and the prior ordinance violated his right to adequate procedural protections. *Soffer v. Costa Mesa*, 607 F. Supp. 975, 977 (C.D. Cal. 1985), *aff'd* 798 F.2d 361 (9th Cir. 1986).[5]

[5] Similarly, nominal damages allow inmates an opportunity to vindicate their procedural due-process rights in disciplinary proceedings, even when prisons seek to moot their claims by removing the infractions from the inmates' records. *Penwell v. Holtgeerts*, 295 F. App'x

III. Nominal Damages Allow Plaintiffs to Remedy Retrospective Harms in Cases That Become Moot on Other Grounds

Because nominal damages remedy retrospective but difficult-to-quantify harms, nominal-damages claims also preserve plaintiffs' ability to vindicate constitutional rights in cases where other intervening developments moot plaintiffs' claims for prospective relief.

Take cases that students bring to challenge school policies. Those policies often outlast individual students, who graduate by the time their cases work their way through the courts. Leaving the educational environment obviates any need for prospective relief. And the mootness exception for violations "capable of repetition but evading review" does not apply, because that doctrine requires "a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990).

But the students have nonetheless suffered wrongs in the past that remain unredressed. For instance, in *Griffith v. Butte School District No. 1*, the school barred valedictorian Renee Griffith from speaking at graduation because she refused to remove references to Jesus Christ from her graduation speech. 244 P.3d 321, 328 (Mont. 2010) (looking to federal law as instructive on mootness). Graduation freed her from that restriction, but did nothing to remedy the harm she suffered by having to forgo speech. *Id.* at 200. And in *Grimm v. Gloucester County School Board*, -- F.3d --, 2020 WL 5034430 (4th Cir. Aug. 26, 2020), Gavin Grimm challenged a school policy requiring students to use restrooms matching their "biological

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877, 878 (9th Cir. 2008); *Jones v. Clemente*, 2006 WL 782474, at *2 (D. Or. Mar. 27, 2006).

gender" under the Equal Protection Clause and Title IX, but graduated before the courts resolved his suit. Nominal damages again were the only way to recognize and remedy Grimm's harms. *Id.* at *11 & n.6. And in *Mellen v. Bunting*, a group of cadets brought an Establishment Clause challenge to the mandatory supper prayer at the Virginia Military Institute. 327 F.3d 355, 362-63 (4th Cir. 2003). Their graduation did not eliminate the harm they experienced from the "unconstitutional toll" the supper prayer placed "on the consciences of religious objectors." *Id.* at 371. In all these cases, pleading nominal damages allowed students to hold schools accountable for the harms that school policies imposed and laid down markers for schools about what the law requires.

Nominal damages play a similar role in cases involving pretrial detainees and prisoners. Their release or transfer to another facility generally moots their claims for prospective relief. Further, because of the limitations on compensatory damages claims in 42 U.S.C. § 1997e(e), nominal damages are often the only relief prisoners can seek to vindicate their constitutional rights.

Indeed, the availability of nominal damages often makes all the difference for prisoners to obtain some recognition that they suffered a constitutional wrong. In *Jessamy v. Ehren*, 153 F. Supp. 2d 398, 403 (S.D.N.Y. 2001), for example, pretrial detainees alleged that corrections officers "punched, kicked, stomped upon, dragged and otherwise physically abused" them. Prospective relief was no help; the prison had already released the detainees. Compensatory damages would have been hard to establish; while one of the plaintiffs alleged emotional distress, he stipulated that he would "offer no evidence of physical injury at trial." Pleading nominal damages thus

gave the detainees an opportunity to challenge the injuries they had already suffered, without having to translate that harm into dollars-and-cents figures for particular injuries. *Id.*; *accord Doe v. Delie*, 257 F.3d 309, 314 (3d Cir. 2001) (HIV-positive inmate's acquittal on retrial and release mooted claims for prospective relief in case alleging violations of right to medical privacy, but not nominal and punitive-damages claims for loss of privacy).

In sum, civil-rights plaintiffs in myriad constitutional contexts, and of all political persuasions and beliefs, share one common thread: they have suffered real harms that transcend easy price tags. Nominal damages are often the only avenue available to remedy that wrong. And as a form of retrospective relief, nominal damages allow these plaintiffs to proceed when governments change their policies going forward but have not redressed a past wrong, or when other intervening events make prospective relief unavailable but leave a past wrong unremedied. The Eleventh Circuit's outlier rule would upset the longstanding role that nominal damages have played in providing concrete redress for past constitutional injuries, and would enable governmental actors to evade accountability for their unconstitutional policies.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
MICHAEL J. MESTITZ
SURAJ KUMAR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

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