No. 19-968

In The
Supreme Court of the United States

CHIKE UZUEGBUNAM, ET AL.,

*Petitioner*s,

v.

STANLEY C. PRECZEWSKI, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS

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CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to promoting religious freedom for people of all faiths. Given its educational mission, CatholicVote is concerned about the three-way circuit split regarding whether a nominal damages claim forestalls mootness. In the Eleventh Circuit, religious speakers, like the students in *Uzuegbunam v. Preczewski*, 781 F. App'x 824 (11th Cir. 2019), lack any effective way to vindicate their speech (or other constitutional) rights. Under the Eleventh Circuit's novel rule, public officials are free to enact broad speech codes that chill religious or other disfavored speech activity. If their restrictions are challenged, the officials simply can amend their policies prior to final judgment, mooting any claim for nominal damages, and, in the process, undermining "the importance to organized society that [comes from] these rights be[ing] scrupulously enforced." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). CatholicVote comes forward to urge this Court to resolve the varying interpretations of its controlling precedents and to do so in a way that provides for the uniform and "vigilant protection of constitutional freedoms [which] is nowhere more vital than in the community

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[1] As required by Rule 37.2(a), *amicus* provided counsel for each party with timely notice of its intent to file this amicus brief, and each party filed a blanket consent to the filing of amicus curiae briefs in this matter. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

REASONS FOR GRANTING THE WRIT

Supreme Court review is warranted in this case for at least two reasons. First, *Uzuegbunam* broadens an already entrenched circuit split between and among eight federal circuits regarding whether a claim of nominal damages for the violation of a fundamental right (such as freedom of speech) is sufficient to stave off mootness. In *Uzuegbunam*, the Eleventh Circuit forges a third path, becoming the first Circuit to hold that a standalone nominal damages claim is moot even when government officials enforced the contested regulation against the plaintiffs.

The sharp divisions among the circuit courts stem from differing—and inconsistent—interpretations of this Court's cases discussing nominal damages and mootness. A majority of the circuits to address the issue takes *Carey*, *Farrar v. Hobby*, 506 U.S. 103 (1992), and *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986), to establish that a nominal damages claim precludes mootness, which enables a plaintiff not only to "hold[the government] entity responsible for its actions and inactions, but also [to] encourage the [government] to reform the patterns and practices that led to constitutional violations." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 318 (3d Cir. 1999). The Fourth and Eighth Circuits narrow this rule, concluding that a nominal damages claim saves a case from mootness only if the government applied the challenged policy against the plaintiff. *See*

Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006). In contrast, the Eleventh Circuit distinguishes this Court's nominal damages cases and adopts the analysis in then-Judge McConnell's concurrence in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004) ("*UARC*"). Under this interpretation, the government's amendment of an unconstitutional regulation generally moots all prospective and retrospective relief (including nominal damages)—even where, as here, state officials applied the regulation to restrict constitutionally protected speech activity. *See Uzuegbunam*, 781 F. App'x at 830-31. Given the important role nominal damages play in protecting constitutional rights, these inconsistent interpretations warrant review. *See, e.g.*, *UARC*, 371 F.3d at 1271 (McConnell, J., concurring) (encouraging the Supreme Court to examine this issue); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 601-03 n.5 (2001) (resolving a 9-1 circuit split regarding the catalyst theory where "there is language in our cases supporting both petitioners and respondents").

Second, review is required to provide uniform protection for constitutional rights, especially those, like free speech, that frequently do not result in specific compensable injury when violated. The problem is heightened in the context of speech at public colleges and universities given that the State can (1) adopt broad speech codes that "chill" expression and, if challenged, (2) moot the constitutional claims simply by revising the challenged policy. Permitting such strategic changes to moot nominal damages claims, though, also chills

actions to enforce constitutional rights. *See*, *e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.").

Supreme Court review is needed, therefore, to resolve the circuit splits among nine circuits and to establish uniform protection for absolute rights (like free speech), which have such "importance to organized society" that they must "be scrupulously observed." *Carey*, 435 U.S. at 266.

I. Varied interpretations of this Court's nominal damages and mootness cases have created an entrenched three-way circuit split regarding whether nominal damages preserve an otherwise moot claim, resulting in inconsistent protection of constitutional rights across the country.

The three-way circuit split stems from confusion over this Court's discussions of nominal damages in *Carey*, *Farrar*, and *Stachura*. The differing interpretations, though, impose varying burdens on litigants, who allege a constitutional violation, and on courts, many of which must continue to hear (and resolve) cases that would otherwise be moot if not for the claim of nominal damages. If the majority is correct—that a nominal damages claim averts mootness—then plaintiffs can vindicate their "absolute" rights through a judgment that both protects the societal benefits about which *Carey* is so

concerned 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*, 506 U.S. at 113.

On the other hand, if the Eleventh Circuit and Judge McConnell are correct, federal courts in eight circuits are violating Article III of the Constitution by retaining jurisdiction over cases where an "award of nominal damages would serve no practical purpose, would have no effect on the legal rights of the parties, and would have no effect on the future." *UARC*, 371 F.3d at 1265 (McConnell, J., concurring). Courts in these jurisdictions are effectively issuing "impermissible advisory opinion[s] of the sort federal courts have consistently avoided." *Flanigan's Enters., Inc. of Georgia v. City of Sandy Springs*, 868 F.3d 1248, 1269 (11th Cir. 2017). Only this Court can determine which of these conflicting interpretations is correct.

A. Drawing on *Carey*, *Farrar*, and *Stachura*, the majority holds that nominal damages preclude mootness to protect absolute rights, thereby benefiting individual plaintiffs and society-at-large.

Although this Court has never expressly addressed the interplay between mootness and nominal damages, the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have adopted a bright line rule: a claim for nominal damages wards off mootness. The majority grounds this rule in *Carey*, arguing that *Carey* "necessarily implied that a case is not moot so long as the plaintiff seeks to vindicate his constitutional rights through a claim for nominal

damages." *Ward v. Santa Fe Indep. Sch. Dist.*, 35 F. App'x 386 at *1 (5th Cir. 2002). Yet many of these circuits do not explain how this rule follows from *Carey*'s discussion of nominal damages, leading Judge Smith on the Third Circuit to wonder whether "[i]t is just possible that 'the nominal damages solution to mootness' is nothing more than a self-perpetuating myth." *Freedom from Religion Foundation Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 487 (3d Cir. 2016) (Smith, J., concurring).

The few that do analyze the issue rely primarily on two statements in *Carey*. First, *Carey* recognized that "[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." 435 U.S. at 266. Under *Carey*, "a litigant is entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury." *Amato*, 170 F.3d at 317. As Judge Henry put the point in his concurrence in *UARC*, "[t]hat the Court held that 'the denial of procedural due process should be actionable for nominal damages without proof of actual injury,' only underscores the argument that the denial of a substantive constitutional right is indisputably actionable for nominal damages." 371 F.3d at 1272 (quoting *Carey*, 435 U.S. at 267).

Second, *Carey* confirmed that "the law recognizes the importance to organized society that those rights be scrupulously observed." 435 U.S. at 266. Nominal damages do not " 'measure' the constitutional injury" or assign an "abstract value" to

constitutional rights; rather, nominal damages preserve cases alleging a violation of such rights, benefitting both the plaintiff (by allowing her to vindicate her rights) and society as a whole: "Thus, 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*, 170 F.3d at 317; *see also City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) ("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.").

An award of nominal damages, therefore, confers benefits *ex post* and *ex ante*. Such an award (1) establishes that the government violated a plaintiff's constitutional rights, which, as *Farrar* explained, changes the legal relationship of the parties (*ex post*), while at the same time (2) discouraging governmental actors from adopting such unconstitutional policies in the future (*ex ante*). As the Second Circuit explained, "[a] judgment against a municipality not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue." *Amato*, 170 F.3d at 317-18. And this is true for breaches of procedural due process (as in *Carey*) as well as for violations of substantive constitutional rights. *See Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (holding that "even when a litigant fails to prove actual compensable injury, he is entitled to an award of nominal damages upon proof of violation of a substantive constitutional right").

The Fifth Circuit finds additional support for the majority rule in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997), the only Supreme Court case directly considering the intersection of nominal damages and mootness. *See Ward*, 35 F. App'x at *1. According to the Fifth Circuit, *Arizonans* establishes that a nominal damages claim generally precludes mootness. *See* 520 U.S. at 69 n.24 (discussing the "nominal damages solution to mootness"). In that case, nominal damages were not available but only because "a § 1983 claim does not lie against a State." *Id*. *See also Baca v. Colo. Dep't of State*, 935 F.3d 887, 923-24 (10th Cir. 2019) ("*Arizonans* does not teach that any claim for damages against a state pursuant to § 1983 is moot; it stands for the narrower proposition that a last-minute claim for legally unavailable relief cannot overcome certain mootness.").

Moreover, in his *UARC* concurrence, Judge Henry cited *Farrar* and *Buckhannon* as evidence that "the Supreme Court has stated, or at least come very close to stating, that nominal damages *do* prevent mootness." 371 F.3d at 1274; *Buckhannon*, 532 U.S. at 604-05 (explaining that to recover attorneys' fees a prevailing party must establish a "judicially sanctioned change" in the legal relationship of the parties and that "[w]e have held that even an award of nominal damages suffices under this test"); *Farrar*, 506 U.S. at 115 ("[A] nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his 'absolute' right to procedural due process through enforcement of a judgment against the defendant."). According to Judge Henry, if amending a challenged policy mooted a remaining claim for nominal

damages, a court could never award attorneys' fees. But given that such fees are possible under *Farrar* (subject to a court's discretion), nominal damages must avert mootness.

Accordingly, although the circuits comprising the majority invoke some different precedents, they all agree that nominal damages "are meant to guarantee that unconstitutional acts remain actionable rather than to 'measure' the constitutional injury in any meaningful sense." *Amato*, 170 F.3d at 319.

B. Interpreting the same Supreme Court cases, the Fourth and Eighth Circuits take nominal damages to avoid mootness only if the government actually enforces the regulation against the plaintiffs.

The Fourth and Eighth Circuits read *Carey*, *Farrar*, and *Stachura* more narrowly, allowing a nominal damages claim to survive a mootness challenge only if the government enforced the challenged policy against the plaintiff. *See*, *e.g.*, *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566, 571 (4th Cir. 2007) ("Chapin's assertion of a nominal damages claim alone is insufficient to preserve a live controversy, however, as the Ordinance was never enforced against it and it has not suffered any constitutional deprivation."). For these circuits, this limitation follows directly from *Farrar*, which held that *Carey* "obligates a court to award nominal damages when a plaintiff establishes the violation of his [constitutional rights] but cannot prove actual injury," 506 U.S. at 112, and *Stachura*, which concluded that "damages must

always be designed to compensate injuries caused by the [constitutional] deprivation." 477 U.S. at 309-10. Because damages (including nominal damages) are backwards looking, they are appropriate only when there was a prior constitutional violation. Absent a deprivation of a constitutional right, there is no ongoing controversy, and the case is moot.

Under this rule, a plaintiff "need not prove an actual, compensable injury in order to recover nominal damages" but "must nevertheless show that a constitutional deprivation occurred." *Chapin Furniture Outlet Inc.*, 252 F. App'x at 572; *Advantage Media, L.L.C.*, 456 F.3d at 803 ("Since Advantage might be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures, it has standing to assert these claims."). That a plaintiff might suffer a constitutional deprivation if the government enforced the policy against her does not avert mootness because "such damages are reserved for constitutional deprivations that have occurred, not those that are merely speculative." *Chapin Furniture Outlet, Inc.*, 252 F. App'x at 572; *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (dismissing a nominal damages claim as moot where the plaintiffs never protested in the city when the prior version of a speech ordinance was operative).

As a result, a litigant in the Fourth and Eighth Circuits may have more difficulty bringing a preenforcement challenge against an unconstitutional ordinance even though the existence of such an unenforced law may dissuade people from taking any action that might violate the

statute. If a plaintiff seeks prospective and retrospective relief, government officials can moot all of the claims by amending the policy. Consequently, the rule in the Fourth and Eighth Circuits threatens to undermine the *ex ante* benefits that the majority rule safeguards. *See*, *e.g.*, *Amato*, 170 F.3d at 317-18.

C. The Eleventh Circuit distinguishes this Court's nominal damages cases and contends that standalone nominal damages claims do not present a live case or controversy.

The Eleventh Circuit—along with Judges McConnell and Smith on the Tenth and Third Circuits, respectively—argues that the rules adopted in other circuits are "inconsistent with fundamental principles of justiciability." *UARC*, 371 F.3d at 1263 (McConnell, J., concurring). The Eleventh Circuit denies that *Carey*, *Farrar*, and *Stachura* say anything about whether a nominal damages claim precludes mootness. Instead, this Court's justiciability cases control the mootness question. If the government amends an unconstitutional policy, an award of nominal damages "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." *Flanigan's*, 856 F.3d at 1264. Having secured all the relief she requested (a change in the policy), the plaintiff no longer has a live case or controversy because a nominal damages award "would have no practical effect on the parties' rights or obligations." *Uzuegbunam*, 781 F. App'x at 831; *UARC*, 371 F.3d at 1267 (McConnell, J., concurring) ("Nominal damages … have only declaratory effect and do not

otherwise alter the legal rights or obligations of the parties."). Given that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them," *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam), deciding the nominal damages claim would provide an impermissible advisory opinion rather than resolve an extant controversy. *Flanigan's*, 868 F.3d at 1264, 1269-70; *Spencer v. Kemna,* 523 U.S. 1, 18 (1998) (instructing that federal courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong").

Where plaintiffs have received the desired change in the law, "the only redress [the court] can offer Appellants is judicial validation, through nominal damages, of an outcome that has already been determined." *Flanigan's*, 868 F.3d at 1268. Such "psychic satisfaction," though, is insufficient to forestall mootness because such an award has no "practical effect on the legal rights or responsibilities of the parties." *Id.* A nominal damages claim in such circumstances functions as a claim for declaratory relief, which is also mooted when the government amends the challenged policy. *Id.* at 1268-69; *UARC*, 371 F.3d at 1265 (McConnell, J., concurring) ("[N]ominal damages were originally sought as a means of obtaining declaratory relief before passage of declaratory judgment statutes.").

Given the "absence of any guidance from the Supreme Court," the Eleventh Circuit articulated its own rule. *Flanigan's*, 868 F.3d at 1267; *UARC*, 371 F.3d at 1266 (McConnell, J., concurring) ("The Supreme Court has never held that a claim for

nominal damages is sufficient to maintain the justiciability of a case that otherwise would be moot."). *Carey* does not govern because it involved claims for actual and nominal damages. On remand, if the plaintiffs were not entitled to actual damages, they still could recover nominal damages for the deprivation of their procedural due process rights. As a result, the case was not moot because "at no point was that nominal damages award the only remedy available to" the plaintiffs. *Flanigan's*, 868 F.3d at 1266. Because the compensatory damages claim preserved a live controversy, *Carey* "did not address mootness and nothing that it held, or even said, controls the mootness issue before us." *Id*.

Similarly, the Eleventh Circuit found no support for the majority's rule in *Stachura*, which remanded the case for a new trial on damages because the lower courts used the wrong standard for determining compensatory damages. Consequently, "[t]he Court's comment that nominal damages—and not some abstract value of the right—are the appropriate remedy for a constitutional violation with no attendant actual damages says nothing at all about whether nominal damages can save from mootness a case which is otherwise moot." *Id*. Furthermore, *Arizonans* never reached the critical issue here because the State was immune from damages under §1983. Although the Court noted that the "nominal damages solution to mootness" did not apply, 520 U.S. at 69 n.24, it never decided whether nominal damages could save an otherwise moot claim when they are available. *Flanigan's*, 868 F.3d at 1267; *UARC*, 371 F.3d at 1267 (McConnell, J., concurring).

The Eleventh Circuit's attempt to distance itself from this Court's precedents, though, creates tension with *Farrar* and *Carey*. Whereas *Flanigan's* contended that nominal damages have no practical effect on the parties' rights, 868 F.3d at 1268, *Farrar* stated that an award of nominal damages "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111-12. The two claims are directly at odds with each another. If *Flanigan's* is correct, then a plaintiff who secures a nominal damages award could not be a prevailing party because such an award has no practical effect. But *Farrar* instructs that a nominal damages award does precisely that. Similarly, *Flanigan's* stated that nominal damages "are not themselves an independent basis for jurisdiction," 868 F.3d at 1269, while *Carey* held "that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." 435 U.S. at 266. Such radically different views regarding nominal damages directly affect the federal courts' jurisdiction and the scope of constitutional protection afforded civil rights litigants.

D. The uncertainty surrounding the proper interpretation of *Carey* and *Farrar* has engendered confusion in other circuits as well.

Confronted with such varied interpretations of the "nominal damages solution to mootness," *Arizonans*, 520 U.S. at 1070 n.24, other lower courts have reached inconsistent outcomes. For example, although the Sixth Circuit joined the majority of

circuits with regard to mootness, it reached the opposite conclusion when considering whether a standalone claim for nominal damages is sufficient to confer standing. *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 611 (6th Cir. 2008). In *Morrison*, the Sixth Circuit applied the Eleventh Circuit's and Judge McConnell's position to the standing context. Thus, in the Sixth Circuit, a standalone nominal damages claim does not establish standing but precludes mootness, which is odd if mootness is "the doctrine of standing set in a time frame." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

Although the Third Circuit has not directly addressed the issue, Judge Smith's concurrence in *New Kensington* encourages the Third Circuit to accept Judge McConnell's view that nominal damages do not preclude mootness, thereby joining the Sixth Circuit in *Morrison* and the Eleventh Circuit in *Flanigan's*. According to Judge Smith, "[a]llowing the suit to proceed to determine 'the constitutionality of an abandoned policy—in the hope of awarding the plaintiff a single dollar—vindicates no interest and trivializes the important business of the federal courts.'" 832 F.3d at 484-85 (Smith, J., concurring) (quoting *Morrison*, 521 F.3d at 611).

Lacking guidance from the First Circuit, district courts in Massachusetts and Maine have reached opposite conclusions. *Compare Soto v. City of Cambridge*, 193 F. Supp.3d 61, 71 (D. Mass. 2016) (citing McConnell's concurrence to support the conclusion that a standalone nominal damages claim was moot) *with Fitzgerald v. City of Portland*, 2014

WL 5473026 at *5-6 (D. Me. 2014) (holding that a nominal damages claim was not moot based on *Carey* and *Farrar*). Moreover, recent district court decisions in the Seventh Circuit contradict that Circuit's position in *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008), which follows the majority rule. According to one district court in Indiana, the view that a nominal damages claim preserves a live case "has been rejected by multiple district courts in this circuit, and has received criticism elsewhere." *Freedom from Religion Found. v. Concord Cmty. Sch.*, 207 F. Supp.3d 862, 874 (N.D. Ind. 2016). *See Freedom from Religion Found., Inc. v. Franklin Cty., Ind.*, 133 F. Supp.3d 1154, 1160 (S.D. Ind. 2015) ("By allowing FFRF to proceed to determine the constitutionality of a policy that has been voluntarily amended to cease illegal conduct, in hope of receiving $1.00, vindicates no rights and is not a task of the federal courts."); *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp.2d 1019, 1033 (E.D. Wis. 2008) (same). As a result, this Court's guidance is needed to ensure uniformity throughout the circuit courts with regard to when and for which claims courts can award nominal damages without violating Article III of the Constitution.

II. The Eleventh Circuit's novel rule chills protected expression at public universities and precludes civil rights litigants from securing the individual and societal benefits identified in *Carey*.

In *Rivera*, this Court explained that "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in

monetary terms." 477 U.S. at 574. When dealing with violations of a constitutional right, such as freedom of speech, nominal damages play an important role, enabling a litigant to vindicate "deprivations of certain 'absolute' rights that are not shown to have caused actual injury." *Carey*, 435 U.S. at 266; *Stachura*, 477 U.S. at 308 n.11 ("[N]ominal damages … are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury.").

Under *Carey*, absolute rights are those having such "importance to organized society that" they must "be scrupulously observed" even "without proof of actual injury." *Id*. A judgment awarding nominal damages, therefore, protects the interests of individuals and society in at least two ways. First, an award of nominal damages "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111; *id*. at 113 (explaining that a nominal damages award "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"). Second, it benefits society-at-large by stopping the government's violation of fundamental rights (now and in the future). *See*, *e.g.*, *Rivera*, 477 U.S. at 574 ("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.").

First Amendment speech rights are fundamental in this way. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-71 (1942) ("Freedom of speech and

freedom of the press … are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.") (internal punctuation and citation omitted). The problem is that individuals who are denied such rights—*e.g.*, students subject to speech codes on public campuses—often do not suffer compensable harms; rather, the harm is the loss of the right to participate in the marketplace of ideas, which, in turn, limits the robust exchange of ideas on campus. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

For this reason, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487. Protecting the free flow of ideas on university campuses fosters the societal benefits championed in *Carey*:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us…. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritarian selection."

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (citation omitted).

Speech (and other constitutional) rights, therefore, advance important societal ends that require constitutional protection even though—and perhaps especially when—there is no individualized

monetary harm to the person whom the government censors. *See NAACP v. Button*, 371 U.S. 415, 433 (1963) ("These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."). For these reasons, it is a mistake to claim that an award of nominal damages has no "practical effect on the legal rights or responsibilities of the parties." *Id.* Quite the contrary, an award of nominal damages contributes to the development of the law while protecting the interests of the speaker, her intended audience, and ultimately our society.

In the Eleventh Circuit, though, government officials can violate the First Amendment rights of individuals (through written or unwritten policies) and then avoid an adverse judgment by amending such policies at any point before final judgment. Confronted with such speech prohibitions, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119 (citation omitted). As a result, "the censor's determination may in practice be final." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

This is particularly true at state-run colleges and universities where the government directly influences all aspects of a student's life—from housing and meals to curriculum requirements and

student conduct codes. Rather than challenge school officials (who may be asked to assist the student during her academic career), a student may determine that the safer route is to remain silent. This phenomenon is apparent in the present case. A student wishing to participate in the marketplace of ideas at Georgia Gwinnett College would learn that, even if she could litigate an action to judgment before graduating in four years (two at a community college), the school could moot claims for both prospective relief and nominal damages simply by amending its unconstitutional speech policy. Under such circumstances, many students are apt to do two things—"abstain from protected speech," *Hicks*, 539 U.S. at 119, and forego challenging the policies precluding such speech. Thus, the Eleventh Circuit's unique rule threatens to chill student speech, stifling the robust marketplace of ideas that is so important on college campuses. *See Healy v James*, 408 U.S. 169, 180-81 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

In this way, the dispute over whether a nominal damages claim staves off mootness directly affects the exercise of First Amendment rights on college campuses. Whereas the Eleventh Circuit's interpretation limits expression, the majority's rule promotes the same benefits as this Court's overbreadth doctrine by "reduc[ing] the[] social costs caused by the withholding of protected speech." *Hicks*, 539 U.S. at 119. Under the overbreadth doctrine, "[l]itigants … are permitted to challenge a statue not because their own rights of free

expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). By "preventing an invalid statute from inhibiting the speech of third parties who are not before the Court," the doctrine promotes a vibrant marketplace of ideas. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

Consequently, the government's ability to change a policy to avoid overbreadth would seem to track its ability to amend the same policy to moot a nominal damages claim. And while this Court has not considered the latter issue, it has addressed the former. In *Massachusetts v. Oakes*, this Court decided whether the government could avoid an overbreadth challenge by amending the unconstitutional law. Justice O'Connor, writing for a plurality of this Court, contended that "the special concern that animates the overbreadth doctrine is no longer present after the amendment or repeal of the challenged statute." 491 U.S. 576, 584 (1989). A majority of the Court, however, rejected that position, concluding that an overbreadth defense remains viable even if the offending statute is subsequently amended:

> The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post*, that is, after the offending statute is enacted, but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free,

> as Justice O'Connor's new doctrine would make it—that is, if *no* conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal—then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place. When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be "chilled" as a consequence of the rule Justice O'Connor would adopt.

Id. at 586 (Scalia, J., writing for himself and four other Justices on this point).

The circuit split regarding nominal damages reflects the fault lines that exist between Justices O'Connor and Scalia with respect to overbreadth. A claim for nominal damages safeguards constitutional rights, including First Amendment rights, from governmental intrusion *ex post* (after the government applies an unconstitutional restriction) and *ex ante* (while a university is deciding whether to adopt a speech code). The Eleventh Circuit's rule makes the promulgation of unconstitutional speech restrictions "cost free" to public universities, enabling school officials to pass broad speech restrictions that cover both "constitutionally proscribable" expression and fully protected speech "so long as the offending [policy] was narrowed before the final appeal." *Id.* As a result, state schools in the Eleventh Circuit "have significantly reduced incentive to stay within constitutional

bounds in the first place." *Id*. The majority rule, on the other hand, enables students to pursue nominal damages claims even after the government amends the unconstitutional policy, thereby "hold[ing] that entity responsible for its actions and inactions, [and] encourag[ing] the municipality to reform the patterns and practices that led to constitutional violations." *Amato*, 170 F.3d at 317-18; *Flanigan's*, 868 F.3d at 1275 (Wilson, J., dissenting) ("Declaring that their rights were violated is of legal significance. Plaintiffs could feel secure in their knowledge that their rights were violated and have protection from future infringement.").

Given the difficulties and risks facing students who challenge a school's policy, many such policies "are never challenged." *Oakes*, 491 U.S. at 586 (Scalia, J., concurring and dissenting in part). And given that those that are challenged may limit speech until the restrictions are ultimately amended, a "substantial amount of legitimate speech would be 'chilled' as a consequence of the rule" applied in the Eleventh Circuit. *Id*. The Eleventh Circuit's rule teaches students that the safest course is to avoid any expression that might violate the school's policy and provides no reason for school officials to limit their speech policies to established First Amendment norms given their ability to avoid any "cost" or adverse ruling by amending their policies prior to final judgment.

As a result, the overbreadth "concerns that justify a lessening of prudential limitations on standing," also warrant a similar reduction of prudential concerns regarding mootness. *Joseph H. Munson Co.*, 467 U.S. at 956; *Taxpayers for Vincent*, 466 U.S. at 799 n.17 (citation omitted) ("[T]he transcendent

value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity,'"). As with a speaker confronting an overbroad speech restriction, "there is a possibility that, rather than risk punishment for conduct in challenging the [speech restriction]," a student in the Eleventh Circuit "will refrain from engaging further in protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possibly may be outweighed by society's interest in having the statute challenged." *Joseph H. Munson Co.*, 467 U.S. at 956.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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