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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus is an incorporated group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. Representing members of the legal profession and as adherents of a minority religion, amicus has a unique interest in ensuring that the First Amendment protects the diversity of religious viewpoints and practices in the United States. To that end, amicus urges the Court to grant certiorari and protect the freedom of speech for all Americans, including college students and religious minorities.

SUMMARY OF ARGUMENT

Nominal damages allow plaintiffs to "vindicate deprivations of certain 'absolute' rights" that are "import[ant] to organized society." *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Among the most important of those rights is the freedom of speech enshrined in the First Amendment. And among the most important areas where freedom of speech requires protection is at colleges and universities, given their historic role as institutions designed to promote free and open discussion.

Contrary to these principles, the decision below effectively closed the courthouse doors on two college students whose freedom of speech was infringed by

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[1] Counsel of record for both parties received notice at least 10 days prior to the due date of amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person, other than amicus or their counsel, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

school officials. The college confined free speech to a designated "free speech zone" comprising a mere 0.0015% of the campus. Yet Petitioners were told that they could not exercise their speech rights *even in that limited space*. Petitioners sued, and Respondents, fearing that their speech restrictions would be found unconstitutional, changed their policies. The lower court then denied as moot both Petitioners' prospective injunctive claims *and* their nominal-damages claims for past injuries. That latter decision was an error—one with significant consequences for the free speech rights of religious minorities and other individuals on college campuses.

The lower court's decision is concerning in light of a troubling trend of speech restrictions at American colleges and universities. Rather than fostering free inquiry, American colleges and universities have sometimes attempted to narrowly define permissible speech on campus, using speech codes, free speech zones, and other coercive regulation. The Eleventh Circuit's approach to nominal damages leaves students especially vulnerable to unconstitutional speech restrictions, as it largely forecloses students from obtaining meaningful relief for past constitutional injuries.

This Court should reaffirm the important role claims for nominal damages play in vindicating basic constitutional rights. Nominal-damages claims hold government officials accountable for their unconstitutional conduct; officials cannot escape review by tactically changing their policies prospectively. Such claims also recognize that free speech restrictions and other deprivations of basic constitutional rights inflict real injuries, even if those injuries are not precisely quantifiable or financial in nature.

These principles are of particular importance to members of minority religions, who often find their constitutional rights burdened and may have difficulty vindicating those rights in the face of government efforts to moot their claims. A recent example is the certiorari petition presented to this Court in *Ben-Levi* v. *Brown*, where application of the voluntary cessation doctrine would have frustrated the petitioner's challenge to a prison policy that discriminated against Jewish prisoners. 136 S. Ct. 930, 935 n.7 (2016). The Eleventh Circuit's decision below throws up yet another obstacle to such claims, and fundamentally fails to appreciate the importance of nominal damages in protecting the freedom of religious minorities.

ARGUMENT

I. SPEECH ON UNIVERSITY CAMPUSES MUST BE PROTECTED WITH PARTICULAR VIGOR

This Court should grant certiorari to reaffirm that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy* v. *James*, 408 U.S. 169, 180 (1972). Rather, the precedents of this Court "leave no room for the view" that "First Amendment protections should apply with less force on college campuses than in the community at large." *Id.* The decision below has significant consequences for these basic constitutional principles, and opens the door to still-greater restrictions of students' free speech rights on college campuses.

Freedom of speech is particularly vulnerable on college campuses today, and recognizing Petitioners' ability to obtain relief is critical to defending free speech rights against further encroachments. Since the 1980s, many universities across the United States have

adopted "speech codes," or regulations on expression, that impermissibly prohibit or restrict speech. For example, a speech code at the University of Connecticut in the 1980s banned such things as "inappropriately directed laughter," "anonymous notes or phone calls," and "conspicuous exclusions from conversations and/or classroom discussions." Weinberg, *Treating the Symptom Instead of the Cause: Regulating Student Speech at the University of Connecticut*, 23 Conn. L. Rev. 743, 746 (1991). Speech restrictions continue to threaten freedom of speech on campuses today through vague and broad regulations. One public university, for instance, bans any posting of materials on campus that contain "vulgar" material, without explaining what is considered "vulgar." University of Texas at San Antonio, *Handbook of Operating Procedures* § 9.09(II)(2)(d), utsa.edu/hop/chapter9/9-9.html (last visited Mar. 2, 2020). Another directs students to "report to University staff any incidents of intolerance, hatred, injustice, or incivility," without defining or explaining these terms. *Sonoma State Univ. Statement on Civility and Tolerance*, sonoma.edu/about/diversity/civility-and-tolerance (last visited Mar. 2, 2020).

There has also been a proliferation of Orwellian "free speech zones," which are used to justify speech restrictions throughout the rest of campus. Unfortunately, the restrictive "free speech zones" at Georgia Gwinnett College (GGC), which comprised 0.0015% of campus and were only open about 10% of the week, Pet. App. 76a-78a, 138a, 146a, are not an outlier. One federal court recently struck down a free speech zone at the University of Cincinnati that comprised 0.01% of the campus. *See University of Cincinnati Chapter of Young Ams. for Liberty* v. *Williams*, 2012 WL 2160969 (S.D. Ohio June 12, 2012). And at Pierce College, a free

speech zone consisted of just .003% of the campus, comparable to the area that an iPhone would take up on a tennis court. *See* Howard, *No Place for Speech Zones: How Colleges Engage in Expressive Gerrymandering*, 35 Ga. St. U. L. Rev. 387, 387 (2019). By quarantining expression to prescribed areas, these zones infringe upon the First Amendment rights of everyone on campus. The consequence of prescribed free-speech zones is that speech elsewhere on campus is restricted, which serves to undermine the very purpose of a university. *See Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law* v. *Martinez*, 561 U.S. 661, 705 (2010) ("A vibrant dialogue is not possible if students wall themselves off from opposing points of view.") (Kennedy, J., concurring).

Religious speech—like that of Petitioners—is not exempt from the growing tendency of colleges and universities to regulate speech. As this Court has lamented, "[i]n Anglo-American history, … government suppression of speech has … commonly been directed precisely at religious speech." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995). One study estimates that 1 in 4 students experienced religious intolerance or discrimination on their college campuses. Broderick & Fosnacht, *Religious Intolerance on Campus: A Multi-Institutional Study* 4, (Nov. 2017), http://nsse.indiana.edu/pdf/presentations/2017/ASHE_2017_Broderick_Fosnacht.pdf. And such discrimination is distressingly common for religious minorities. *Id.* at 12. In particular, Jewish students have experienced significant Anti-Semitism on campus. *See, e.g.*, Shapiro, *Anti-Semitism at NYU*, Wall Street Journal (Apr. 21, 2019), https://www.wsj.com/articles/anti-semitism-at-nyu-11555873457; Frazin, *Columbia University student first to file anti-Semitism com-*

plaint under Trump order, The Hill (Dec. 26, 2019), https://thehill.com/homenews/administration/475980-columbia-university-student-first-to-file-anti-semitism-complaint.

The vindication of college students' First Amendment rights is also challenging in part because of the limited number of years they spend on campus. Even when clear violations occur, a claim for prospective equitable relief risks a mootness challenge when students graduate or leave school. Indeed, the lower court held that Petitioner Uzuegbunam's claims for declaratory and injunctive relief were mooted because he has graduated from GGC. Pet. App. 26a-27a. And the lower court is not alone in holding that graduation is a basis for mootness of certain forms of relief. *See, e.g.*, *Mellen* v. *Bunting*, 327 F.3d 355, 365 (4th Cir. 2003) (holding that graduation moots claims for declaratory or injunctive relief). Consequently, students are often unable to challenge an infringement on their constitutional rights during their time in college. Given these constraints, the protection of free speech on college campuses warrants particular solicitude with respect to doctrines, such as mootness, that may foreclose students from obtaining judicial relief for themselves or their peers.

II. Nominal Damages Serve To Vindicate Fundamental Constitutional Protections For Religious Minorities

Nominal damages hold government officials accountable when constitutional violations occur, because they allow vindication of certain "absolute" rights basic to society, even when violations do not result in quantifiable injury. Nominal-damages claims also serve to prevent government officials from strategically mooting valid constitutional claims, and thus

closing off a forum for relief to adherents of minority faiths and other individuals.

A. Nominal Damages Are A Vital Tool For The Vindication Of Absolute Rights When No Actual Damages Are Available

Nominal damages, as the name suggests, are damages in name only. They do not compensate the plaintiff for physical, mental, or financial injuries he has suffered, as compensatory damages do; nor do they punish a defendant's wrongdoing, as punitive damages do. Rather, nominal damages allow a court to acknowledge the legitimacy of claims and to recognize injuries that transcend dollars and cents. This Court clearly articulated the importance of nominal damages in *Carey* v. *Piphus*:

> Common-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. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed….

435 U.S. 247, 266 (1978). A right is absolute if the law "will not authorize the least violation of it," 1 Blackstone, *Commentaries on the Laws of England* 139 (Oxford Clarendon Press, 8th ed. 1778), regardless of the monetary impact of such a violation.

Constitutional torts are perhaps the most important cases in which nominal damages are sought. Violations of many constitutional rights, including First

Amendment violations like the ones at issue in this case, often occur without easily quantifiable physical or financial injuries. *See Flanigan's Enters., Inc. of Georgia* v. *City of Sandy Springs, Georgia*, 868 F.3d 1248, 1271 (11th Cir. 2017) (Wilson, J., dissenting) ("When constitutional rights are violated, it is difficult, if not impossible, to place a monetary value on the infringement. '[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.'" (citation omitted)).

Further, constitutional torts frequently affect a larger class of people than those who pursue a lawsuit. Nominal damages have the unique benefit of vindicating the rights not just of the plaintiff, but of every person who suffered a similar violation. A favorable ruling for Petitioners, for example, would benefit every student who was unjustly denied the right to speak at GGC, even those without the capacity to bring a lawsuit.

Without the tool of nominal damages to vindicate these rights, plaintiffs might well find themselves with no recourse to address a constitutional violation if the circumstances do not permit them to pursue an injunction. This would be untenable. Nominal damages ensure that the rights that form the very core of our constitutional system are not neutered.

The lower court erred when it stated that awarding nominal damages after Respondents had ceased their unconstitutional conduct "would serve no purpose other than to affix a judicial seal of approval to an outcome that has already been realized." Pet. App. 13a. This reasoning trivializes the significance of nominal-damages claims and, ultimately, of the rights they serve to vindicate.

B. The Lower Court's Decision Provides Insufficient Protection For Religious Minorities

This Court's intervention here is particularly warranted to protect the First Amendment rights of religious minorities. Governmental entities enjoy a troubling structural advantage in constitutional litigation, made worse by lower courts' application of the "voluntary cessation" exception to mootness. By affirming nominal damages claims, this Court would ensure a forum for adherents of minority faiths to seek redress for constitutional injuries.

As this Court has explained, the mootness doctrine flows from Article III's requirement of a "case or controversy." *Chafin* v. *Chafin*, 568 U.S. 165, 173 (2013). Generally, "a suit becomes moot[] 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* (quoting *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013)). One "exception" to this general principle is the doctrine of "voluntary cessation." "[V]oluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). But this exception does not apply where "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

In recent years, government litigants have exploited the voluntary cessation doctrine to strategically moot valid claims, including claims brought by religious minorities. *See* Davis & Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. Forum 325, 329-332 (2019) (describing patterns of "strategic mooting"). For instance, in response to a prisoner suit challenging the Commonwealth of Massachusetts's refusal to provide Jewish inmates with kosher meals, the state mooted the case by voluntarily providing the plaintiff with the requested meals, "avoid[ing] the prospect of a systemic change in policy." *Id.* at 330-331; *see also Guzzi* v. *Thompson*, 2008 WL 2059321 (1st Cir. May 14, 2008) (per curiam).

The facts of *Ben-Levi* v. *Brown*, a petition for certiorari this Court recently entertained, are also instructive. Mr. Ben-Levi was a Jewish prisoner who requested permission to study the Torah with fellow Jewish inmates. 136 S. Ct. 930, 930 (2016) (Alito, J., dissenting from denial of certiorari). The respondent prison authority denied his request on the basis of her understanding that the "'requirements, practices and tenets of Judaism'" required "either a minyan"—"a quorum of 10 adult Jews"—"or the presence of a qualified leader (such as a rabbi)," and Mr. Ben-Levi "could not assemble a quorum of 10 Jews," nor could the prison "find a rabbi or other qualified leader." *Id.* at 931. Mr. Ben-Levi sued under 42 U.S.C. § 1983, alleging violations of the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act. *Id.* at 931-932. The district court granted summary judgment for the respondent, and the Fourth Circuit affirmed. *Id.* at 932. Mr. Ben-Levi petitioned this Court for certiorari. In opposition to Mr. Ben-Levi's petition for certiorari, the

respondent asserted that the claims were moot because the prison had changed the policy at issue to permit "an inmate to lead a study group … if a 'community volunteer is not available[.]'" *Id.* at 935 n.7. But as Justice Alito noted in his dissent from denial of certiorari, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Id.* (quoting *Knox*, 567 U.S. at 307). Application of voluntary-cessation mootness in *Ben-Levi* would have entirely frustrated the petitioner's challenge to the prison's discriminatory policy.

The expansive application of the voluntary-cessation mootness poses particular difficulties to religious minorities. It forces litigants into a game of constitutional "whack-a-mole," bringing suits that induce the government to withdraw the challenged policy but leave it free after the case is dismissed to try again, or as in *Ben-Levi*, to substitute the challenged policy for one that also fails to address the essential constitutional defect. "[T]his ability to reinitiate challenged conduct creates … continuing harm" by leaving litigants' rights ultimately unsettled, Davis & Reaves, 129 Yale L.J. Forum at 340, but is generally not a cognizable basis to defeat mootness, *see Larsen* v. *U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) ("[T]he mere power to reenact a challenged [policy] is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists." (quoting *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997))).

Recognition from this Court that "nominal damages [are a] solution to mootness," *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 69 n.24 (1997), would

address this problem. It would ensure that plaintiffs like Petitioners—and the many religious minorities who depend on the federal courts to protect their fundamental rights—are able to secure redress on meritorious constitutional claims, without being thwarted by government officials' gamesmanship.

What is ultimately at stake here is the ability of religious adherents subject to discriminatory policies to get their day in court and be heard. Access to the courtroom is vital for religious minorities whose practices are often unknown or misunderstood by government officials, and allowing adherents to explain their religious obligations to a neutral arbiter is essential to the protection of their rights.

CONCLUSION

This Court should grant the petition and reverse.

Respectfully submitted.

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