No. 19-968

IN THE

Supreme Court of the United States

CHIKE UZUEGBUNAM, ET AL.,
Petitioners,

V.

STANLEY C. PRECZEWSKI., ET AL.,
Respondents.

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

BRIEF OF COUNCIL ON AMERICAN-ISLAMIC RELATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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A. The Council on American-Islamic Relations

Founded in 1994, the Council on American-Islamic Relations has a mission to enhance understanding of Islam, protect civil rights, promote justice, and empower Muslim Americans. As part of that mission, CAIR represents Muslim-Americans when government actors deprive them of the free exercise of their faith.

Often when CAIR defends these constitutional rights, government actors defend by alleging mootness. The fleeting nature of First Amendment violations makes this a real possibility in many cases. As a result, vindicating constitutional rights all too often becomes a cat and mouse game of procedural tag, and the deeper, more serious issue of our constitutionally guaranteed freedoms takes a back seat to arcane pleading matters. Even worse, it invites those government actors to violate those same rights again whenever convenient because there is no judgment or settlement in place.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel funded its preparation or submission. Both parties have filed blanket consents.

CAIR's ability to protect constitutional rights often turns on the ability to allege and maintain claims for nominal damages in such situations.

SUMMARY OF ARGUMENT

Many constitutional violations often turn on discrete, specific incidents that result in little to no out-of-pocket damages. While true of many rights guaranteed in the Constitution, this is especially true of First Amendment issues. The fact that many different events – including the mundane passing of time – can lead to cases being moot for injunctive purposes, compounds this problem. This creates a procedural framework for government actors to violate our constitutional freedoms without any recourse being available to the people these mandates protect.

The Eleventh Circuit's ruling in this case is a perfect example of just this problem. Essentially, the Respondent waited the Petitioner out. By waiting until he graduated, the Respondent was able to moot arguments for injunctive relief. The court then passed on the deeper constitutional issues by deciding that nominal damages do not confer standing.

ARGUMENT

I. Nominal damages are critical for preserving and protecting constitutional rights

The Eleventh Circuit's ruling that nominal damages do not provide standing runs counter to both Supreme Court precedent and hundreds of years of common law tradition.

In *Marbury v. Madison*, this Court stated "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. 137, 163 (1803) (citation omitted). "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

This tradition of guaranteeing standing to enforce constitutional rights included the availability of nominal damages when necessary. The purpose of nominal damages was not to compensate for any kind of actual loss. Rather, it was to vindicate the victim's rights.

So, for instance, future Chief Justice Joseph Story specifically endorsed nominal damages as an avenue

to maintain suit where actual damages cannot be proven:

> Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.

Webb v. Portland Manuf'g Co., 29 F. Cas. 506, 508 (C.C.D. Me. 1838)

This and other early American courts recognized a fundamental truth that our modern doctrines too often miss: a right that cannot be vindicated is not a right. It is instead "a monstrous absurdity in a well organized government." *Kendall v. United States*, 37 U.S. 524, 624 (1838).

The nature of many constitutional violations reveals the wisdom of these early courts. Many constitutional violations, and First Amendment violations in particular, are fleeting by nature and do not result in actual damages.

The development of this Court's mootness doctrine only makes the importance of nominal damages more clear. A case cannot proceed without the possibility of either injunctive (or declarative relief) or damages. But the mootness doctrine has significantly curtailed the possibility of injunctive or declaratory relief in a number of regularly-occurring situations. Losing the possibility of nominal damages to move a case forward would render a host of constitutional claims impossible to challenge in common situations.

This case presents a classic example of how government actors use mootness to close off claims for injunctive relief. In order to moot Uzuegbunam and Bradford's claims for injunctive relief, Respondents did two things: it revised the policy that gave rise to Uzuegbunam's claim and then waited until Uzuegbunam graduated to file a second motion to dismiss. *Uzuegbunam v. Preczewski*, 781 Fed. Appx. 824, 827 (11th Cir. 2019). Importantly, note, even had college officials not voluntarily ceased their unconstitutional policy, graduation would still moot the students' claims under Eleventh Circuit precedent. The pace of judicial review is deliberate. Absent nominal damages, that deliberateness quickly turns to unavailability.

The school setting is not the only major area where mootness combining with lack of nominal damages would prevent the airing of Constitutional violations. This problem has become even more serious with regards to inmates and pre-trial detainees.

Take the Ninth Circuit. The Ninth Circuit has held that, in most instances, once an inmate is released from prison any claims for injunctive relief are automatically mooted. The reasoning being that "[a]ny declaratory or injunctive relief ordered in the inmate's favor in such situations would have no practical impact on the inmate's rights and would not redress in any way the injury he originally asserted." *Alvarez v. Hill*, 667 F.3d 1061, 1064 (9th Cir. 2012).

Understanding the problem with this, the Ninth Circuit applied the capable-of-repetition exception to mootness even when the party itself was not capable of suffering the same harm again, so long as others would in certain narrow circumstances. *United States v. Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007). Specifically, those circumstances were when policy "will be brought against someone," and then "similarly escape review." *Id.* This allowed Ninth Circuit courts to address "ongoing, pervasive and systemic problem[s]" they otherwise would not able to reach. *Oregon Advocacy Ctr. V. Mink*, 322 F.3d 1101, 1117 (9th Cir. 2003). Individual cases are then treated as "analogous to those found in class action cases where, because of the

inherently transitory nature of the claims, the trial court does not have enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id.*

But the Ninth Circuit's solution has been potentially undermined by the Supreme Court's decision in *U.S. v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018). In that case, this Court criticized the concept of a "functional class action," *id.,* and suggested that criminal defendants cannot raise otherwise-moot claims of third parties under the capable of repetition exception to mootness. While the Supreme Court clarified that "those who wish to challenge" the fleeting policy in that case have "several possible options," *id.* At 1542, the Court did not list them. The Washington Department of Corrections is currently challenging whether *Howard* and *Oregon Advocacy* remain good law after *Sanchez-Gomez*. *See Roberts v. Sinclair*, No. 19-35846, Dkt. 21 (9th Cir. June 19, 2020).

If the Washington Department of Corrections is correct, then perhaps the only way for inherently-transitional victims such as pretrial detainees and prisoners to defend their constitutional rights may be by class action. But this is cold comfort for a number of reasons.

First, class actions are only available where the party can prove Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements. *Wal-Mart Stores, Inc. V. Dukes*, 564 U.S. 338, 349 (2011). As a threshold matter, the plaintiff in such a case generally has to show that at least forty people were injured. *See e.g., Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 357 (3d Cir. 2013). On its face that is going to be inapplicable to situations where only a few are impacted, creating a particularly serious problem for persons in prisons and jails who belong to minority religions.

But, even assuming that there are enough impacted individuals, there are yet more hurdles to overcome. The simplest one for a savvy defendant is adequacy.

While adequacy's precise requirements have minor variances in different circuits, the most basic requirements are that they "have common interests with unnamed members of the class" and they must "vigorously prosecute the interests of the class through qualified counsel." *In re American Medical Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996).

The Ninth Circuit's rule is that the claims for injunctive relief are not mooted only when the class has been certified before the inmate's release. *Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995). But class

certifications are not final orders; they are interlocutory orders that the trial court can revisit at any time. *Wang v. Chinese Daily News*, 737 F.3d 538, 546 (9th Cir. 2013) ("Rule 23 provides district courts with broad authority at various stages in the litigation to revisit class certification determinations and to redefine or decertify classes as appropriate").

Even a rookie class action defense attorney would know to file a motion to decertify the class once the inmate was released. After all, under the same logic that would otherwise moot the claim, the named representative is no longer impacted. If the named representative no longer has "common interests" with unnamed class members, then they can be rendered inadequate, and the case decertified. This allows a defendant to achieve through Rule 23's procedural machinations what mootness otherwise might not.

But even assuming numerosity, commonality, typicality, and adequacy can be met, Rule 23(b) provides even more hurdles. There are three class action types under 23(b): Rule 23(b)(1)'s "limited fund" class that include such things as "claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale," and other situations where claimants are seeking shares of one pool of money. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999). It is hard to imagine a case where inmates or pre-trial detainees could ever use this.

More commonly used are Rule 23(b)(2) and Rule 23(b)(3) – sometimes called the "injunction class" and "damages class" respectively. Either of these classes could run into serious procedural pitfalls. The Rule 23(b)(2) class is one that seeks solely an injunction, so attacking the released inmate's adequacy is quite easy, as described above.

The Rule 23(b)(3) class also seeks damages, so it is possible that the named representative could survive a challenge to adequacy by claiming a personal monetary stake. But this would also invite, at the very least, a partial challenge to adequacy as it relates to certain types of relief. The complexity of that kind of challenge will not fit in this brief but, suffice it to say, it would be a major point of contention, and kill a number of trees.

The simpler challenge to the Rule 23(b)(3) class would be to attack predominance. *Dukes*, 564 U.S. at 362 (noting that questions of "law or fact common to class members" must predominate "over any questions affecting only individual members").

Because classes only work in cases where there are enough impacted individuals, we have to assume that what is being challenged in our hypothetical is a policy of some nature. The first defense is easy enough: was everyone actually impacted by it? Second, and more

daunting, does the government actor have individualized damages defenses that it can use? Cases involving inmates and pre-trial detainees can raise a maelstrom of individualized defenses to challenged conduct. And in many cases, such as religious liberty cases, only nominal damages are often available. *See* 42 U.S.C. § 1997e(e); *see also Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (collecting cases).

Of course all of this glosses over the practical complications. First and foremost, the class action mootness exception only applies to cases that have been certified. This means that the entire certification process (which can be quite lengthy and expensive) has to be completed before the exception can apply.

Class actions are inherently time consuming, complicated, and require sophisticated (see: also expensive) counsel to prosecute and defend. And as Justice Ginsburg pointed out during oral arguments in *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018), the federal defender may not bring a class action. Transcript of Oral Argument at 14. The government responded that "[t]here's no suggestion that they wouldn't be able to get pro bono counsel if what they're challenging is a district-wide policy."

Assuming pro bono class counsel to be readily available is quite the assumption indeed. Class actions are terribly draining for plaintiff's counsel, and

carry tremendous risk. You need a large war chest, experienced counsel, available time, and a high risk tolerance. Doing one for free is a "big ask," so to speak.

The purpose here is not to claim that class actions have no role in vindicating constitutional rights. To the contrary, they play a critical role. But they are vulnerable to a number of collateral attacks that an individual claim is not. And leaving class actions as the only possible mechanism to avoid mootness in these situations will lead to inexperienced counsel attempting to shoehorn claims into Rule 23.

There are also claims that can be mooted by the passage of time while an inmate is in prison. For example, in *Roberts v. Sinclair*, 2019 WL 4246981, 2019 U.S. Dist. LEXIS 152312 (W.D. Wa. Sept. 6, 2019), several plaintiffs brought a challenge to the Department of Corrections Ramadan Meal Policy. *Id.* At *3-5. Because of how the program functioned regarding sign up times, who to deliver forms to, etc., prison officials did not provide Ramadan meals to many Muslims who observed the religious occasion in 2018.

The court avoiding adjudicating the merits of the inmates' claims, finding them moot. Three of the plaintiffs had been released from prison; no class had been certified. *Id.* at *23. Regarding the remaining plaintiffs, the court ruled that because prison officialshad added the Muslim inmates to the Ramadan meal

program for 2019, their claims based on 2018 were moot. *Id.* At *24.

This theory of mootness creates a situation where the Ramadan policy becomes unchallengeable. An individual who prison officials left out of the Ramadan program will probably be able to get in the following year. And as Ramadan only lasts 30 days, so too would any claim.

the whole landscape changes when plaintiffs cannot maintain standing vis-à-vis damages, even if those damages are nominal. Individual plaintiffs can then no longer challenge policies and practices that violate our constitutional rights without government ensnaring them in a rat's nest of procedural wrangling and technical quibbles.

II. The Eleventh Circuit's ruling is a formula for government abuse

Uzuegbunam's holding creates a broad opening for government abuses because constitutional violations often result in little to no discernible out of pocket damages. *Cherri v. Mueller*, 951 F. Supp. 2d 918 (E.D. Mich. 2013) is instructive on this point.

Cherri concerned American Muslims living in Michigan who occasionally crossed the border into Canada. *Id.* At 924. On multiple occasions FBI and

Customs and Border Patrol agents subjected to invasive questioning about their religious beliefs when entering the United States including:

> Which mosque do you go to?
>
> How many times a day do you pray?
>
> Who is your religious leader?
>
> Do you perform your morning prayer at the mosque?
>
> *Id.* At 924.

Individuals other than the plaintiffs provided more examples of this kind of questioning at other ports of entry, including:

> Why do you go to the mosque?
>
> Are you an Imam at the mosque?
>
> Are your family members strictly religious?
>
> When did you become a Muslim?
>
> When did you convert?
>
> Are you Shi'a or Sunni?
>
> Do you pray five times a day, in the mosque?
>
> Are there any extremists or terrorists at the mosque?

> Do you know any extremists?
>
> Do you consider yourself a religious person?
>
> Does anybody at the mosque talk about going back to the motherland?
>
> Do you give donations?
>
> Don't you have to pay a certain amount of your money religiously?
>
> Which Muslim charities have you donated to?

Id. At 926

Now, because *Cherri* was brought against the federal government, there is no damages claim there. But most constitutional challenges are against state and municipal governments. And the government in *Cherri* did not seek to dismiss on grounds of voluntary cessation – rather, it sought dismissal on justiciability grounds. The government also denied any questioning policy existed. *Id.* At 927-931.

But let us assume that, instead, a state or municipal government acknowledged a policy existed, but that the case was moot. Maybe it was moot because the government was changing the policy. Or maybe it was moot because, absent specific international travel plans, there was no expectation of reoccurrence. *See El Ali v. Barr*, 18-cv-02415, 2020 WL 4051866, at *23

(D. Md. July 20, 2020) (rejecting such arguments when government has "a historic pattern of such violations during similar travel"). If successful that would leave the Plaintiffs only with a damages claim. Being detained at the border and grilled about one's religion violates our rights as Americans, but what hard damages can one show? If the government promised to end the practice it could seek to dismiss purely on those grounds.

Even worse, *Uzuegbunam* contains a particularly pernicious poison pill via *Flanigan's Enters. V. City of Sandy Springs*, 868 F.3d 1248, 1256 (11th Cir. 2017). The *Flanigans* court acknowledged this Court's mandate that a party claiming voluntary cessation has a "heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again." *Id.*

But the court then goes on to state "governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Id.* at 1256.

Why?

This Court just had to enforce a nearly 200 year old treaty with the Creek and Cherokee nations that the government has ignored for the better part of a century. This Court observed that "while there can be no

question that Congress established a reservation for the Creek Nation, it's equally clear that Congress has since broken more than a few of its promises to the Tribe." *Mcgirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Allowing government officials to moot lawsuits because they swear they "won't do it again" decimates the protections our laws afford everyone equally. If they really mean what they say, then they should enter into a settlement and consent decree, not seek a dismissal.

CONCLUSION

Nominal damages is an important kind of legal remedy that provides us the ability to vindicate our rights when violations do not result in readily ascertainable damages. This was true at English common law, true when the ink dried on the Constitution, and true now.

The Eleventh Circuit's ruling in this case should be overturned. This Court should rule that nominal damages provide standing to pursue vindication of our constitutional rights.

Respectfully submitted,

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