

No. 19-968

IN THE
Supreme Court of the United States

CHIKE UZUEGBUNAM, ET AL.,
Petitioners,

v.

STANLEY C. PRECZEWSKI, ET AL.,
Respondents.

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

**BRIEF OF *AMICUS CURIAE*
YOUNG AMERICANS FOR LIBERTY, INC.
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Young Americans for Liberty, Inc., founded in 2009, is a national nonprofit youth organization that advocates for the protection of constitutional rights and the advancement of liberty on university campuses and in American politics. Many of Young Americans for Liberty's members are students enrolled in universities throughout the United States, and its members frequently engage in activities protected by the First Amendment.

Amicus's direct interest here stems from its deep commitment to protecting the freedom of speech, a critical safeguard of political liberty. Free speech is essential in university environments, and individuals must be allowed to redress past violations of their constitutional rights.

¹ All parties received notice and have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As the overwhelming majority of circuits have recognized, a nominal-damages claim for retrospective relief cannot become moot due to a prospective change in law or policy. Yet that is precisely what the Eleventh Circuit held below. The Eleventh Circuit also refused to reconsider its outlier position through en banc review. So this Court's review is needed to resolve this entrenched circuit split on an important issue of constitutional remedies.

Nominal damages provide retrospective relief for a plaintiff whose constitutional rights have been infringed, even though the plaintiff did not or cannot prove the precise *extent* of their injury. Individuals suffer a concrete injury when constitutional rights, such as those under the First Amendment, are infringed. And this Court has repeatedly explained, in the context of Article III standing, that the size of a plaintiff's injury is irrelevant for determining whether a case remains justiciable. Similarly, nominal damages are available for a plaintiff who proves a constitutional infringement on the freedom of speech, even if the plaintiff does not or cannot prove the precise extent of that injury.

A nominal-damages claim therefore cannot become moot just because a law or policy is changed going forward. A prospective change in law or policy cannot possibly remedy a past constitutional violation. Mootness occurs only when a court cannot possibly grant any effectual relief, yet an award of nominal damages changes the legal relationship between the parties—it orders the defendant to pay the plaintiff money because the defendant violated the plaintiff's constitutional rights. Even if the award is just \$1, that remedy is still redressing the plaintiff's past concrete injury.

The Eleventh Circuit’s decision below is contrary to the decisions of every other circuit that has addressed this issue. This Court should grant review on this important recurring issue to ensure that proper remedies are available to redress violations of constitutional rights.

ARGUMENT

I. NOMINAL DAMAGES ARE RETROSPECTIVE RELIEF FOR A PLAINTIFF WHOSE CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BUT DID NOT OR CANNOT PROVE THE EXTENT OF THE INJURY

Nominal damages are a form of retrospective, monetary relief redressing past constitutional violations. Individuals suffer a concrete injury when constitutional rights, such as those under the First Amendment, are infringed. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete” for Article III standing, including “free speech” and “free exercise”). And this Court has made clear multiple times while discussing Article III standing, the *extent* of a plaintiff’s injury has no bearing on whether that lawsuit can proceed. Likewise, nominal damages are available to remedy past constitutional concrete injuries even if plaintiffs do not or cannot prove the precise extent of their injuries.

A. The deprivation of certain constitutional rights necessarily injures individuals. The freedom of speech is a prominent example.² Individuals who were blocked from

² The Court, of course, has recognized various other contexts where the deprivation of constitutional rights necessarily injures individuals. See, e.g., *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (equal protection); *Carey v. Phiphus*, 435 U.S. 247, 266–267 (1978) (procedural due process).

speaking at a certain time and place—or in a certain manner—could have engaged in further speech at a time in the past of their choosing. See, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

Here, for example, petitioner undoubtedly alleged a concrete injury when he was blocked from speaking at the time and place, and in the manner, that he preferred. See, *e.g.*, *Spokeo*, 136 S. Ct. at 1549. Petitioner sought to speak publicly about his faith on a public university campus. Pet. 3-4. He was first prohibited from speaking outside a specific speech zone designated by the university. Pet. 4. When he moved to that highly-limited speech zone of about 0.0015% of the campus, university officials again prohibited petitioner from speaking based on the university’s policy as it relates to content. *Ibid.*

Even if this injury was not particularly large or significant, it is a concrete injury nonetheless. The existence of a concrete injury does not depend on the extent of the injury. As this Court has repeatedly explained, the extent of an injury does not affect the justiciability of a lawsuit seeking to redress that concrete interest. *E.g.*, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)) (standing even if “concrete interest” is “small”); *Knox v. Serv. Employees Int’l Union, Local 1000*, 567 U.S. 298, 307-308 (2012) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)) (same).

B. Relatedly, nominal damages are a remedy awarded when a plaintiff proves constitutional rights were deprived—but did not or cannot prove the precise *extent* of that concrete injury. See, *e.g.*, *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (nominal damages available even where

plaintiff “cannot prove actual injury”); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (making “clear that nominal damages, * * * are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury”); *Hughes v. Rowe*, 449 U.S. 5, 13 n.12 (1980) (nominal damages available even where plaintiff “cannot prove actual injury”); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (“[W]e believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury”).

Nominal damages are a form of retrospective, monetary relief. See, *e.g.*, Restatement (Second) of Torts § 907 (1979) (defining nominal damages, in the tort context, as “a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages”). Specifically, a court enters a remedial order requiring a defendant to pay a plaintiff a small amount of money because the defendant violated the plaintiff’s constitutional rights.

With compensatory damages, in contrast, the plaintiff proves the extent of his injury in monetary terms, thus justifying a larger monetary award from the defendant. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“Compensatory damages ‘are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.’”) (quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)).

Unlike compensatory damages, nominal damages are available even if the extent of a compensable injury cannot be shown, as “the law recognizes the importance to organized society that those rights be scrupulously observed.” *Carey*, 435 U.S. at 266. In other words, “[a] plaintiff may

demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages.” *Farrar*, 506 U.S. at 113.

So where a plaintiff cannot show the precise extent of an injury stemming from a past infringement of constitutional rights, nominal damages still allow the plaintiff to vindicate and redress these rights through the courts. See James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1606-1607 (2011) (nominal damages may “provide the only possible remedy” when there has been “a one-off event that affected [the plaintiff] in the past and will not (under modern standing and ripeness decisions) support a claim for injunctive or declaratory relief”).

Nominal damages thus alter the legal relationship between the parties. The court below erred in stating nominal damages are merely a “judicial seal of approval.” Pet. App. 13a. As this Court has explained, “[a] judgment for damages in any amount, whether compensatory or nominal, 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. Consequently, “a plaintiff receive[s] at least some relief on the merits of his claim” by obtaining “nominal damages.” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603-604 (2001).

II. A NOMINAL-DAMAGES CLAIM FOR RETROSPECTIVE RELIEF CANNOT BECOME MOOT DUE TO A PROSPECTIVE CHANGE IN LAW OR POLICY

A prospective change in policy does not necessarily remedy a past constitutional violation. When a policy is changed prospectively, that cannot moot a claim for retrospective relief like nominal damages. See, e.g., 13C Charles Alan Wright & Arthur R. Miller, *Remedial Capacity In Changed Circumstances: Monetary Relief*, Fed. Prac. & Proc. Juris. § 3533.3 (3d ed. 2019) (“A valid claim for nominal damages should avoid mootness.”) (collecting cases).

When a defendant changes how they will enforce a policy in the future, that may not fully redress a plaintiff’s constitutional injury for how that policy was enforced in the past. As this Court has stated, mootness in general is “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Friends of the Earth, Inc. v. Laidlaw Emtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-190 (2000). And a plaintiff may retain an unredressed injury when a policy—unconstitutionally enforced against it in the past—is just changed going forward.

Nothing about nominal damages changes this analysis. “A plaintiff who shows past injury sufficient to support standing but who cannot measure damages for the injury may be able to support standing by claiming nominal damages alone.” 13A Charles Alan Wright & Arthur R. Miller, *Remedial Benefit and Implied Causes of Action*, Fed. Prac. & Proc. Juris. § 3531.6 (3d ed. 2019). Whether a plaintiff continues to have standing is not affected by the *amount* of money sought as a remedy. A case “becomes

moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Chafin*, 568 U.S. at 172 (quoting *Knox*, 567 U.S. at 307). The requested relief need not be sizeable, “[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Campbell-Ewald*, 136 S. Ct. at 669 (quoting *Chafin*, 568 U.S. at 172).

The court below erred in holding a nominal-damages claim can only be sustained where there is a live “request for compensatory damages.” Pet. App. 15a. That conclusion directly contradicts this Court’s precedent. See, e.g., *Farrar*, 506 U.S. at 112-113; *Memphis Cmty.*, 477 U.S. at 308 n.11.

The court below fundamentally misunderstood the remedial attributes of nominal damages. It believed a judgment in this lawsuit would amount to merely an “impermissible advisory opinion” regarding the regulation of speech in universities. Pet. App. 14a. But Article III’s prohibition on advisory opinions applies only when federal courts would “decide questions that cannot affect the rights of litigants in the case before them.” *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Here, an award of nominal damages would change the legal relationship between the parties, requiring defendant to make a (small) monetary payment to plaintiff—following a judgment that defendant violated plaintiff’s constitutional rights. See *Farrar*, 506 U.S. at 113.

Nor would federal courts opine “upon a hypothetical state of facts” when presented with a live claim for nominal damages to redress a past constitutional violation. *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990). Here, for example, petitioners alleged specific facts about how their constitutional rights were violated by respondents in the

past. Petitioner first was prohibited from publicly speaking about his faith outside the small speech zones. Pet. 3-4. After reserving one of these speech zones, petitioner was again prohibited from speaking pursuant to the university policy after someone complained. Pet. 4.

Similarly, the court below erroneously thought a remedy for a significant sum of money was the only thing that could have a “practical effect” of keeping this claim alive. Pet. App. 13a-14a; see *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia*, 868 F.3d 1248, 1270 (11th Cir. 2017) (“There, as here, the parties’ right to a single dollar in nominal damages is not the type of ‘practical effect’ that should, standing alone, support Article III jurisdiction.”). This, too, contradicts this Court’s precedent, which establishes that the quantum of damages has no bearing on whether a plaintiff has standing or can assert a claim for nominal damages. *E.g.*, *Campbell-Ewald*, 136 S. Ct. at 669; *Farrar*, 506 U.S. at 113.

At base, the fact that petitioners did not or cannot prove the precise extent of their injury does not mean their claims for past constitutional injuries have been redressed. Petitioners therefore continue to have Article III standing, and “the case is not moot.” *Chafin*, 568 U.S. at 172.

III. THIS COURT'S REVIEW IS NEEDED TO CORRECT THE ELEVENTH CIRCUIT'S OUTLIER, ENTRENCHED HOLDING ON THIS IMPORTANT QUESTION OF CONSTITUTIONAL REMEDIES.

The Eleventh Circuit is the only circuit to hold that a pending nominal-damages claim cannot prevent mootness. See Pet. 10-20, 22. The Eleventh Circuit has further refused to reconsider its outlier position through en banc review. Pet. App. 47a-49a. All other circuits that have addressed this question have determined that a case is not moot where a pending nominal-damages claim seeks to redress a past constitutional violation. Only this Court can resolve this entrenched circuit split.

If this case had arisen in any of the numerous other circuits that have addressed this issue, petitioners' suit would not have been dismissed as moot. As petitioners have noted, the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have held that a case is not moot when a nominal-damages claim is pending—even if the challenged policy has been changed prospectively. See Pet. 10-17 (collecting cases). Similarly, the Fourth and Eighth Circuits also hold such claims are not moot—unless the challenged policy was never enforced in the past against the plaintiff. See Pet. 17-20 (collecting cases). The Fourth and Eighth Circuits' limited exception comports with this Court's precedent, as a plaintiff who did not suffer a constitutional violation in the past would not need *retrospective* relief (like nominal damages) to redress a past injury. Petitioners here allege the challenged policy was enforced against them in the past, Pet. 3-4, so their suit would still be viable in the Fourth and Eighth Circuits.

The Eleventh Circuit's outlier, entrenched ruling is incorrect. And only this Court can resolve this important, recurring question of constitutional remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

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