No. 19-968

IN THE

Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,
Petitioners,

v.

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

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

BRIEF OF *AMICUS CURIAE* THE ISLAM & RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.

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INTRODUCTION

Chike Uzuegbunam and Joseph Bradford's experience of being prevented from carrying out their faith is one shared by people from a wide variety of religions and backgrounds. So too is what happened when they tried to vindicate their constitutional rights in court: the government reversed course. Of course, Chike and Joseph wanted their public college to change its ways, but they wanted something else too—for a court to recognize that their constitutional rights had been violated. But the Eleventh Circuit decided that after the school withdrew its policy, Chike and Joseph's claims no longer mattered since they did not suffer quantifiable financial harm beyond the injury of having their rights infringed.

That is wrong. Our constitutional freedoms are priceless, and the government should not be able to violate them without consequence simply by changing its ways before litigation concludes. And there are many stories of governmental discrimination like Chike and Joseph's. They involve the freedom of religion, freedom of speech, due process, and the right to bear arms, to name a few. The ability to vindicate these constitutional rights is fundamental to a society built on the rule of law.

Consistent with history, precedent, and the overwhelming majority of lower courts, this Court should now make clear that a post-filing change in policy does not moot a nominal-damages claim for a past, completed violation of constitutional rights. Doing so will ensure that the courthouse doors are uniformly open to vindicate these

priceless constitutional freedoms, whether or not those harmed by discrimination have also suffered quantifiable financial injury.

INTEREST OF *AMICUS CURIAE*[1]

The Religious Freedom Institute's Islam and Religious Freedom Action Team ("IRF") amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. IRF engages in research, education, and advocacy on core issues like freedom of religion, and the freedom to live out one's faith, including in the workplace and at school. IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both in places where Muslims are a majority and where they are a minority, and partnering with the Institute's other teams in advocacy.

IRF has significant interest here as an organization that seeks to protect and foster religious freedom. IRF is concerned that, if this Court adopts the rule of the court below, plaintiffs who allege violations of their constitutional rights to free speech and free exercise of religion will be stopped from vindicating those rights, as

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[1] All parties have filed blanket consents to the filing of *amicus curiae* briefs. This brief was not authored in whole or in part by counsel for any party. A party or a party's counsel did not contribute money that was intended to fund preparing or submitting this brief. No person, other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

those violations often cause only non-tangible—but very real—harm. IRF is also concerned, as an organization that seeks to foster the inclusion of Muslims in religious freedom work, that a rule like that adopted by the lower court will disproportionately affect members of minority faiths. IRF offers its perspective on the far-reaching consequences of a rule that prevents adjudication of certain constitutional violations and urges this Court to ensure all Americans have an equal ability to vindicate their constitutional rights.

SUMMARY OF ARGUMENT

Constitutional violations do not always cause quantifiable financial harm. No calculable injury occurs when the government stops someone from speaking on matters of personal significance or forces him to violate his religious beliefs. But the harm caused is real, even if it cannot be quantified. Thus, this Court has said that nominal damages are the appropriate remedy for such incalculable injuries.

By holding that a claim for nominal damages alone is never enough to sustain a case seeking to remediate constitutional deprivations, the Eleventh Circuit's decision ignores these harms and the role that nominal damages play in vindicating them. As Petitioners' show, this is a problem in the public school context. But it is also a problem for members of minority faiths in other contexts as well, including with respect to zoning and prison regulations. The ability of individuals to vindicate their constitutional rights should not depend upon whether in

addition to having his rights violated, the plaintiffs also suffered quantifiable harm.

History and this Court's precedent support overturning the decision below. As the Petition explains, this Court has already recognized that nominal damages, standing alone, are a meaningful remedy for constitutional violations. The historical understanding of a "case or controversy" is consistent with this understanding of nominal damages, as does this Court's standing jurisprudence and Congress's intent in enacting section 1983 to provide a cause of action for constitutional violations. It follows straightforwardly from these principles that, contrary to the Eleventh Circuit's conclusion, a claim alleging a constitutional violation does not become moot merely because it seeks only nominal damages.

ARGUMENT

I. Redress for Constitutional Deprivations Should Not Depend on Whether the Harm Suffered Is Quantifiable.

A. Constitutional violations are not always quantifiable.

Infringement of constitutional rights results in real harm even if such harm is unquantifiable. As relevant to Petitioners, in the context of public schools that harm often takes the form of prohibitions on speaking about social, political, or religious topics. For example, students have been prevented from distributing religious materials, including pencils inscribed with religious messages and

candy canes with cards explaining the religious origin of the treat. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 743 (5th Cir. 2009). In another case, a school restricted the ability of a student newspaper to endorse candidates for student government. *Husain v. Springer*, 494 F.3d 108, 115–118 (2d Cir. 2007).

There are new examples seemingly every day. Earlier this year, the New York Times reported that Iowa State University banned a well-established tradition of students writing political messages in sidewalk chalk on the campus. The school limited "chalking" to recognized student groups and only to advertising including: "the group's name, a title for the event (up to seven words), a place and a time." Any message that does not comply is washed away.[2]

Last fall, Michael Brown, a student at Jones College in Mississippi, filed a suit alleging that he had been prevented from talking about politics on campus. One day he held up a sign designed to poll his fellow students on the legalization of marijuana. The campus police chief took Brown to his office and told him that according to campus policy, Brown needed to request administrative approval and wait a minimum of three days before holding any gathering on campus.[3]

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[2] Anemona Hartocollis, *Why This Iowa Campus Is Erasing Political Chalk Talk*, NY TIMES (Jan. 31, 2020), https://www.nytimes.com/2020/01/30/us/iowa-caucus-chalking.html.

[3] Jimmie E. Gates, *He wasn't smoking weed, just talking about it. Now, college is facing suit over free speech*, MISSISSIPPI CLARION LEDGER (Sept. 4, 2019), https:// www.clarionledger.com/story/news/politics/201

A few years ago, a tenth-grade student was suspended from his Delaware public high school for wearing a kufi[4] to school. The school threated future punitive action if the student returned to school wearing a kufi without a letter of approval from a Muslim leader.[5]

In September 2019, at Georgia Tech, the university's policies allowed the student government to effectively block a student group—Students for Life—from bringing Alveda King, Dr. Martin Luther King, Jr.'s niece, to campus to speak about her experience in the civil rights movement. Because the university had no policy requiring viewpoint-neutral distribution of funds for student speakers, the student government was able to block funding for the speech on grounds that the speech would be "inherently religious."[6]

9/09/04/free-speech-former-student-sues-jones-college-ms-free-speech-violated-poll-on-pot-legalization/216 5016001/.

[4] A kufi is a short, rounded cap worn for religious purposes by some Muslim men and boys.

[5] Morgan R. Keller, *ACLU-DE Protects Students' Rights to Religious Freedom*, ACLU-DE.org (January 9, 2018), https://www.aclu-de.org/en/news/aclu-de-protects-students-rights-religious-freedom.

[6] The parties agreed to settle the case but only after Georgia Tech revised its policies. Maureen Downey, *Lawsuit: Anti-abortion group at Georgia Tech denied funding to host MLK niece*, THE ATLANTA JOURNAL-CONSTITUTION (Apr. 1, 2020), https://www.ajc.com/news/education/lawsuit-anti-abortion-group-georgia-tech-denied-funding-host-mlk-niece/XJQUtPrY4JDqqE0IzYmVbJ/; Eric Stirgus, *Georgia Tech settles lawsuit with pro-life student group*, THE ATLANTA JOURNAL-CONSTITUTION (Sept. 10, 2020), https://www.ajc.com/education/georgia-tech-settles-lawsuit-with-pro-life-student-group/JORF7UDQXZCW5PFJAWQBNRC23M/.

As this Court has recognized, the rights to speak freely and practice one's religion have enormous value to individuals and to society. But like other constitutional rights, its deprivation, standing alone, cannot be measured in simple economic terms. In *Memphis Cmty. Sch. Dist. v. Stachura*, jurors were asked to do just that: to put money value on a teacher's right to free speech based on "the particular right's 'importance . . . in our system of government,' its role in American history, and its 'significance . . . in the context of the activities' in which [the plaintiff] was engaged." 477 U.S. 299, 308 (1986). This Court found such an approach unworkable and impermissible, holding that "the abstract value of a constitutional right may not form the basis for § 1983 damages." *Ibid.*

Instead, nominal damages "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Stachura*, 477 U.S. at 308 n.11. It is impossible to place "some undefinable 'value' [on] infringed rights." *Ibid.* But "[b]y making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law [is able to] recognize[] the importance to organized society that those rights be scrupulously observed." *Ibid.*

B. Minority faiths frequently experience unquantifiable burdens on religious exercise in the zoning and prison contexts.

Of course, schools are not the only context in which the harm from government action can result in unquantifiable financial injury; the same can be said about local zoning board decisions or prison regulations, circumstances where members of minority faiths see a disproportionate amount of government discrimination. In a 2016 report on the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Department of Justice observed that "minority groups have faced a disproportionate level of discrimination in zoning matters." U.S. Dep't of Justice, *Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010–2016*, 4 (July 2016). Likewise, "RLUIPA claims in institutional settings are most often raised by people who practice minority faiths." *Id.* at 11. RLUIPA claims do not necessarily rise to the level of a constitutional violation, but the numbers clearly suggest a greater burden on the religious freedoms of minority faiths when it comes to zoning and prison practices. The statistics are stark: Jews, Muslims, Buddhists, and Hindus made up 4.2% of the U.S. population in 2015 but represented over 55% of DOJ investigations opened between 2010 and 2016 under RLUIPA. *Id.* at 5–6.

As in schools, the harm in these contexts can be intangible. There is injury from the mere fact that the government has prevented the exercise or living of one's faith. Whether or not there is calculable financial injury to

support a claim for compensatory damages, the harm is very real.

In the zoning context, the harm often arises from the denial of permission to build or expand a place of worship. Although the costs of preparing a zoning application or securing land that one can no longer use may be quantifiable, the intangible burden on the exercise of one's faith is itself also an injury. That was the experience of the Garden State Islamic Center in the city of Vineland, New Jersey[7]; of Valley Chabad, an Orthodox Jewish congregation in a New Jersey suburb of Manhattan[8]; and of the Islamic Society of Basking Ridge in New Jersey.[9] In the last case, the Society faced substantial and overt anti-Muslim bias in opposition to build a new mosque. In rejecting the Society's proposal, the local planning board heard testimony that the Society's members were a "different kind of population instead of the normal Judeo-Christian population" and anti-mosque fliers were distributed at the meeting.

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[7] Charles Toutant, *Vineland Mosque Can Proceed With Religious Bias Claim Against City, Judge Rules*, NEW JERSEY LAW JOURNAL (Dec. 13, 2018), https://www.law.com/njlawjournal/2018/12/13/vineland-mosque-can-proceed-with-religious-bias-claim-against-city-judge-rules/.

[8] Joseph Ax, *Trump's Justice Department backs Orthodox Jews in zoning battle*, REUTERS (June 15, 2018), https://www.reuters.com/article/usa-justice-sessions-religion/trumps-justice-department-backs-orthodox-jews-in-zoning-battle-idUK L1N1TH0GM.

[9] Emma Green, *A New Jersey Mosque Wins in a Religious-Discrimination Lawsuit—Over Parking Lots*, THE ATLANTIC (May 30, 2017), https://www.theatlantic.com/politics/archive/2017/05/bernards-township-mosque-case-settled/528492/.

In prisons, the harm frequently comes from grooming requirements. In *Holt v. Hobbs*, 135 S. Ct. 853 (2015), this Court considered a prisoner's challenge to the Arkansas Department of Corrections grooming policy that prohibited inmates from wearing "facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip." *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015). The Department's policy made no exception for religious objections. *Ibid.* Holt, a devout Muslim who wanted to grow a 1/2-inch beard in accordance with his religious beliefs, sued under RLUIPA. *Id.* at 861. By requiring him to trim his beard, the Department's policy forced Holt to "engage in conduct that seriously violate[d] [his] religious beliefs" or face "serious disciplinary action." *Id.* at 862 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014)). Holt did not allege financial injury but indisputably suffered harm from being forced to violate his religious beliefs or face disciplinary action.

A similar prison policy prevented Albert Kuperman from growing a beard—a practice important to his Orthodox Jewish faith—while serving his sentence in a New Hampshire state prison. *Kuperman v. Wrenn*, 645 F.3d 69, 71 (1st Cir. 2011). Like Holt, Kuperman did not allege financial injury when he sued the prison officials, seeking injunctive relief as well as nominal and punitive damages. *Id.* at 73.

Others have suffered from the failure of prisons to accommodate religious dietary practices. Three Muslim men in a California jail claimed that jail officials denied and often declined to consider inmate requests for halal

diets. Am. Compl. at 7–11, *Taylor v. Villanueva*, No. 2:19-cv-04398 (C.D. Cal. Aug. 26, 2019). In accordance with their religion, the inmates must refrain from eating pork products and may eat only meat that is halal, that is, prepared in accordance with Islamic law. *Id.* at 7 & n.1. In some instances, the officials allegedly subjected Muslim inmates to religious tests before approving them to receive a halal diet. *Id.* at 12, 14–15. Even after being approved for a halal diet, one inmate allegedly continued not to receive halal meals and "los[t] weight" as a result of refusing to violate his religious beliefs by consuming non-halal food. *Id.* at 8.

John Mosier, an Orthodox Jewish inmate in Oklahoma, was refused kosher meals while serving his sentence. *Mosier v. Alexander*, No. CIV-05-1068-R, 2006 WL 3228703, at *4 (W.D. Okla. Nov. 7, 2006). Jail officials then reversed course and provided kosher meals for six weeks before transferring Mosier to a different facility. *Ibid.* Mosier later filed suit, claiming a violation of his right to free exercise of religion and seeking an injunction and nominal damages. *Id.* at *5. Mosier was transferred again before his claim could be fully litigated, mooting his claim for injunctive relief. But the court concluded that his nominal damages claim could continue. *Ibid.*

Similar examples arise in other contexts as well. Weeks ago, three women sued Delaware for preventing them from wear a hijab while working at a state-run detention

center.[10] Until it changed its policy, the Air Force prevented Lt. Maysaa Ouza from wearing her hijab during basic training for the JAG Corps.[11] A Sikh man won a lawsuit against the military in 2015 for a similar policy that prevented him from following Sikh grooming traditions.[12]

These cases illustrate the types of real but intangible harms suffered by religious minorities that, when resulting from the violation of a constitutional right, should be capable of vindication through nominal damages. This is particularly important in prison cases for at least two overlapping reasons. To begin with, this Court has limited the relief available to prisoners under RLUIPA to non-monetary remedies, making it easier for prisons to moot RLUIPA claims by simply changing their practices or transferring prisoners. *Sossamon v. Texas*, 563 U.S. 277, 280 (2011). A constitutional claim for money damages may be the only way for a prisoner to vindicate his or her religious freedoms. On top of that, the Prison Litigation Reform Act ("PLRA") provides that compensatory damages are not available for emotional harm absent physical

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[10] Xerxes Wilson, *Women sue Delaware over workplace hijab prohibition; federal lawsuit claims discrimination*, USA TODAY (Aug. 14, 2020), https://www.usatoday.com/story/news/nation/2020/08/14/barred-wearing-hijabs-former-delaware-workers-sue-state/3373522001/.

[11] Heather L. Weaver, ACLU Client Makes History As First Air Force JAG Corps Officer to Wear Hijab, American Civil Liberties Union (May 16, 2018), https://www.aclu.org/blog/religious-liberty/free-exercise-religion/aclu-client-makes-history-first-air-force-jag-corps.

[12] Associated Press, *Sikh student sues US army over rules that 'violate his religious beliefs'*, THE GUARDIAN (Nov. 14, 2014), https://bit.ly/3kn5Vgc.

injury, 42 U.S.C. § 1997e(e), meaning that nominal damages may often be the only money damages available.

C. The ability to vindicate a constitutional deprivation should not depend upon whether the harm suffered is quantifiable.

Only the Eleventh Circuit ignores the reality, as established above, that sometimes there is not quantifiable harm to support compensatory damages. It is the only federal appellate court that has held a claim for nominal damages alone is never enough to sustain a case seeking to vindicate constitutional deprivation; the plaintiff must also alleged compensatory damages. In contrast, six circuits already recognize that a claim for nominal damages preserves a case if the unconstitutional policy has been changed or revoked. And two other circuits follow this rule provided that the policy has actually been enforced against the plaintiff. This Court should similarly hold that a nominal damages claim alone is sufficient to prevent a constitutional case from becoming moot.

The ability of individuals to vindicate their constitutional rights should not depend upon whether in addition to having his rights violated, the plaintiffs also suffered quantifiable harm. For starters, the distinction makes no sense. Under the Eleventh Circuit's rule, a student group barred from distributing purchased pencils bearing a religious message could maintain its claim even if the school changed course, but it could not if it had merely sought to talk to fellow students about religion. A student prevented from speaking on campus would be able

to maintain her suit after a policy change if she had paid to rent event space but would not if the space had been provided for free.

Such a rule also runs contrary to the societal interest in deterring violations of constitutional rights and ensuring compensation for past violations. It is important to "organized society that [constitutional] rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). A rule mooting constitutional claims that lack all but nominal damages undermines that interest by allowing the government to violate constitutional rights with impunity so long as it changes the offending conduct before litigation concludes. Put bluntly, "the government gets one free pass at violating your constitutional rights." *Flanigan's Enters. v. City of Sandy Springs*, 868 F.3d 1248, 1275 (11th Cir. 2017) (en banc) (Wilson, J., dissenting).

The mootness exception for conduct capable of repetition yet evading review does not provide an effective workaround to the Eleventh Circuit's roadblock. Courts will sometimes allow an otherwise moot case to proceed if "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subject[] to the same action again.'" *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). The exception may save some cases from mootness under the Eleventh Circuit's rule. But consider the education and prison contexts, in which students graduate and prisoners are transferred or released. These situations may not

satisfy the capable of repetition prong. See, *e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 318–19 (1974) (concluding that a student's challenge to a law school admissions program was not capable of repetition, yet evading review once the student entered his third year and would not be subject to the admissions process again); *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2002) (concluding that a prisoner's transfer to a different prison defeated his argument that his claim was capable of repetition yet evading review).

Further, this mootness exception is a prudential doctrine that leaves to the court's discretion difficult determinations about the likely duration of litigation, the likely duration of the plaintiff's harm, and the likelihood that harm will recur. A rule that nominal damages save a constitutional claim from mootness will provide certainty to litigants, is straightforward for courts to administer, and recognizes the importance of vindicating constitutional rights. "[T]he most workable option is a bright line rule allowing nominal damages to save constitutional claims from mootness." *Flanigan's*, 868 F.3d at 1271 (Wilson, J., dissenting).

Reversing the Eleventh Circuit will also ensure greater percolation on other important issues that might one day reach this Court. As this Court well knows, issues of mootness often arise where government policies are in question, and mid-litigation policy changes can jeopardize the consideration of issues of national importance. See, *e.g.*, *New York Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1526–27 (2020) (per curiam) (vacating on mootness grounds and remanding for consideration of whether

petitioners may add a claim for damages). And these issues span a number of important areas of constitutional law. See, *e.g.*, *New York Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1526–27 (2020) (per curiam) (Second Amendment); *Carey v. Piphus*, 435 U.S. 247 (1978) (procedural due process); *Baca v. Colo. Dep't of State*, 935 F.3d 887 (10th Cir. 2019) (voting rights); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004) (free speech); *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339 (6th Cir. 1992) (procedural due process). By adopting the rule that nominal damages save constitutional claims from mootness, this Court can ensure the robust consideration of issues from which this Court so often benefits.

II. History and this Court's Precedent Compel the Rule That a Claim for Nominal Damages Can Preserve a Case Seeking to Vindicate Constitutional Rights.

A bright-line rule that nominal damages save constitutional claims from mootness follows both from history and this Court's precedent. As explained above and in Petitioners' brief, this Court has already recognized that nominal damages, standing alone, are a meaningful remedy for a constitutional violation. In *Stachura*, this Court reaffirmed what it established in *Carey*, that nominal damages are the appropriate remedy when a plaintiff's constitutional rights are violated but she suffers no monetary loss. 477 U.S. at 308 & n.11. And in *Farrar,* this Court recognized the importance of nominal damages when it held that a section 1983 plaintiff who wins a

nominal damages award is a prevailing party for purposes of awarding attorney's fees under section 1988. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). A judgment of damages in any amount, this Court explained, "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." *Id.* at 113.

History and the modern-day understanding of the constitution's case or controversy requirement are consistent with this precedent on nominal damages. Historically, the violation of a private right was sufficient to establish a case or controversy even if no actual injury resulted from the violation. Courts "presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights violated." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring). A property owner thus needed only to show that another person placed a foot on his property in order to establish a traditional case or controversy. See *Entick v. Carrington*, 2 Wils. K. B. 275, 291, 95 Eng. Rep. 807, 817 (1765). And an action would lie for the speaking of slanderous words even "though a man does not lose a penny" as a result. *Ashby v. White*, 92 Eng. Rep. 126, 136–37 (1702) (Holt, C.J., dissenting), *rev'd*, 91 Eng. Rep. 665. That conclusion rests on the principle that "a damage is not merely pecuniary, but an injury imports a damage." *Id.* at 137. The "general and indisputable rule" underlying these cases is that "where there is a legal right, there is also a legal remedy." William Blackstone, Tracts, Chiefly Relating to the

Antiquities and Laws of England 15 (3d ed., Oxford, Claredon Press 1771).

Under English common law, the appropriate remedy was to award a nominal sum of money designed to vindicate the victim's rights. See *Robinson v. Lord Byron*, 2 Cox 5, 30 Eng. Rep. 3, 3 (1788) (awarding nominal damages where plaintiff's riparian rights had been invaded but no damage was proven); *Greene v. Cole*, 2 WMS Saunders 252, 85 Eng. Rep. 1037 (1670) (awarding nominal damages where a tenant installed a new door in a rented house and doing so did not "weaken[] or injure[]" the house). The nominal damages awarded in those cases were not intended to address any tangible injury, but an intangible one—to make the plaintiff whole by vindication. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 284 (2008).

Early American courts adopted these principles as well. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[W]here there is a legal right, there is also a legal remedy . . . whenever that right is invaded." (quoting 3 WILLIAM Blackstone Commentaries *23)); see also *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322) (explaining that "if no other damage is established, the party injured is entitled to a verdict for nominal damages"); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 n.3 (1971) (Harlan, J., concurring) (explaining that "jurisprudential thought" at the time of the Framers "appeared to link 'rights' and 'remedies' in a 1:1 correlation").

Tort law treatises soon recognized these principles as widely-accepted. The first American treatise on tort law explained that "legal damage" involved a "wrong or violation of a private right" for which "*damage will be presumed*." 1 Francis Hilliard, The Law of Torts or Private Wrongs 85, 87 (2d ed. 1861). As another early treatise put it, a tort requires the concurrence of both "actual or legal damage to the plaintiff, and a wrongful act committed by the defendant." C. G. Addison, Wrongs and Their Remedies: Being a Treatise on the Law of Torts 1-2 (2d ed. 1864) (emphasis added).

These principles have carried through to this Court's modern standing jurisprudence, which establishes that an injury in fact need not result in tangible, quantifiable harm to present a case or controversy. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). This Court has affirmed time and again that "concrete" harm may be "intangible." *Spokeo*, 136 S. Ct. at 1549; see also *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 786 (1982) ("[S]tanding may be predicated on noneconomic injury."). Intangible harm cases are legion, particularly in the context of First Amendment rights. See, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (free exercise); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969)

(adjudicating suit seeking nominal damages for past free speech injury).

Finally, a rule permitting nominal damages to vindicate a constitutional deprivation is consistent with this Court's understanding of Congress's intent in enacting Section 1983. By its terms, the statute provides a federal right of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. With it, Congress intended to "create[] a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), for violation of constitutional rights. And tort law "has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." *Spokeo*, 136 S. Ct. at 1549 (citing Restatement (First) of Torts §§ 569, 570 (1938)). Thus, Congress envisioned that constitutional injury, like injury resulting from trespass or other torts, could give rise to claims of nominal damages, even absent a claim for compensatory damages. Restatement (First) of Torts § 907.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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