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 Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN HUMANIST ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Eight circuits hold that nominal-damages claims challenging the past enforcement of unconstitutional laws or policies present justiciable controversies. Two circuits have an exception if the policies have not been applied against the plaintiff. Only the Eleventh Circuit—which admits that all "the circuit courts that have reached this issue have taken a position contrary" to its own—declares nominal-damages claims moot, closing the courthouse to plaintiffs whose constitutional rights have been violated. *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1267 n.19 (11th Cir. 2017) (en banc).

Six circuits hold that a government's policy change does not moot nominal-damages claims. Two follow the same rule unless the government has never enforced its policy against the plaintiff. The Eleventh Circuit alone holds that, unless they caused damages, government officials are never liable when they change an unconstitutional policy after being sued. The question presented is:

Does a government's post-filing change in an unconstitutional policy moot nominal-damages claims that vindicate the government's past violation of a plaintiff's First Amendment right?

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INTERESTS OF *AMICUS CURIAE*[1]

The American Humanist Association ("AHA") is a national nonprofit membership organization based in Washington, D.C., with over 242 local chapters and affiliates in 46 states and the District of Columbia. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity.

The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the separation of church and state. To that end, the AHA has litigated dozens of First Amendment cases nationwide, including in the U.S. Supreme Court. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

Of note, Petitioners' counsel in the present case, Alliance Defending Freedom ("ADF"), filed an *amicus* brief *opposing* the AHA in *American Legion*.[2] While the AHA and ADF stand on opposite sides of the ideological spectrum and disagree on the proper interpretation

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[1] The parties have consented to the submission of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief. All parties were timely notified of the submission of this brief.

[2] Brief of Major Gen. Patrick Brady and Veterans Groups Erecting and Maintaining War Mem'ls as Amici Curiae in Support of Petitioners, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (No. 17-1717).

of the Establishment Clause, the AHA and ADF unite in their esteem for First Amendment liberties and their conviction that such rights are meaningless if they cannot be vindicated.

SUMMARY OF THE ARGUMENT

Certiorari is necessary because the Eleventh Circuit's ruling: (1) perpetuates and deepens a longstanding Circuit split about whether nominal damages can ever be treated as equitable relief; (2) directly conflicts with this Court's cases holding that nominal damages save a case from mootness; and (3) threatens the rule of law by allowing government officials to violate the Constitution with impunity while leaving victims of proven constitutional violations remediless.

ARGUMENT

I. Certiorari is vital to resolve a deep three-way Circuit split that, if left unresolved, will chill First Amendment freedoms and leave governments free to violate the Constitution without consequences.

A. The Circuits are divided on whether victims of past constitutional violations can recover nominal damages as their sole remedy.

This Court's intervention is imperative to resolve a three-way Circuit-split regarding whether

standalone nominal-damages claims preserve an ongoing controversy once later events moot claims for prospective relief. *See* Pet. at 10. Leaving this issue to further percolate in the lower courts will have predictable, serious consequences to the rule of law. *See infra* at II.

The Eleventh Circuit's two recent decisions holding that standalone nominal-damages claims cannot survive mootness, *Uzuegbunam v. Preczewski*, 781 Fed. Appx. 824 (11th Cir. 2019), *en banc denied*, 2019 U.S. App. LEXIS 26788 (11th Cir. Sept. 4, 2019), and *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) (en banc), brazenly flout the decisions of this Court and other Circuits. *See* Pet. at 10-25.

In *Flanigan's*, the *en banc* Eleventh Circuit ruled that the government's repeal of an ordinance not yet enforced mooted plaintiffs' claims for nominal damages. 868 F.3d at 1263-70. The majority opinion readily acknowledged that "a majority of our sister circuits to reach this question have resolved it differently than we do today." *Id.* 1265. *See also id*. at 1265 n.17 & 1267 n.19. A five-judge dissent reiterated the same, citing contrary decisions from the Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits. *Id*. at 1271-75 (Wilson, J., dissenting).[3]

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[3] *See also Bayer v. Neiman Marcus Grp*., 861 F.3d 853, 868 n.4 (9th Cir. 2017) ("A majority of the circuits acknowledge that a live claim for nominal damages ordinarily saves a case from

This Court declined to review *Flanigan's*,[4] ostensibly because *Flanigan's* applied to only a narrow category of cases involving challenges to ordinances that were repealed before enforcement against the plaintiff. *See Flanigan's*, 868 F.3d at 1270 n.23 ("Our holding today . . . does not imply that a case in which nominal damages are the only available remedy is always or necessarily moot. . . . Today's holding does not, of course, alter this long-standing view.").

But the decision pending before the Court today is extreme. The Eleventh Circuit now holds that a victim of a past constitutional violation is remediless even when the challenged policy has been enforced against the plaintiff before its repeal. *Uzuegbunam*, 781 Fed. Appx. at 830-32.

As noted by Petitioners, the decision below transformed what had been a 6-3 circuit split into a 6-2-1 split with the Eleventh Circuit standing alone. Pet. at 10.

> Six circuits—the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits—hold that nominal-damages claims preserve a controversy. Two more, the Fourth and Eighth, agree but also recognize a limited exception: when the government changes an unconstitutional policy before enforcing it against the plaintiffs. The Eleventh Circuit alone holds that

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dismissal on mootness grounds.") (citing cases from the Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits).

[4] *Davenport v. City of Sandy Springs*, 200 L. Ed. 2d 513, ___ S. Ct. ___, 2018 U.S. LEXIS 1960 (Mar. 26, 2018).

> plaintiffs can never pursue a standalone nominal-damages claim, even when an unconstitutional policy has been enforced against them.

Pet. at 9.

This Circuit split is as palpable as it is disturbing. Five judges on the Eleventh Circuit agreed that the majority ignored the "practical effect" that nominal damages have "on the parties' rights [and] obligations." 868 F.3d at 1274-75 (Wilson, J., dissenting). "Under the majority opinion, . . . the government gets one free pass at violating your constitutional rights." *Id.* at 1275. The Eleventh Circuit's decision, as the Petitioners summarized: "allows government officials to evade accountability for their misconduct and closes federal courts to many citizens who seek to vindicate their priceless constitutional rights." Pet. at 22.

B. The Circuits have long been divided on whether nominal damages are legal or equitable.

This case is also an ideal vehicle for resolving the longstanding circuit conflict over whether nominal damages can ever be deemed equitable relief beyond the mootness context. *See Martin v. Nannie & the Newborns*, No. 94-6365, 1995 U.S. App. LEXIS 10585, at *5 (10th Cir. May 11, 1995) (observing the longstanding "split among the courts as to whether nominal

damages may be awarded under Title VII [as equitable relief]").[5]

The Ninth Circuit recently allowed nominal damages under the Americans with Disabilities Act of 1990 as a form of equitable relief. *See Bayer v. Neiman Marcus Grp., Inc*., 861 F.3d 853, 874 (9th Cir. 2017). Before Title VII was amended to allow monetary relief, the Eighth Circuit had likewise allowed nominal damages as a form of equitable relief. *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) (per curiam) (holding that a plaintiff could recover nominal damages under Title VII as equitable relief).[6] Other Circuits, including the First, Fourth, and Fifth, assumed nominal damages could be awarded as equitable relief as well. *See Katz v. Dole*, 709 F.2d 251, 253 n.1 (4th Cir. 1983); *T & S Serv. Assocs. v. Crenson*, 666 F.2d 722, 728 n.8 (1st Cir. 1981); *Joshi v. Fl. St. Univ*., 646 F.2d 981, 991 n.33 (5th Cir. 1981);[7] *see also United States v. Marolf*, 173 F.3d 1213, 1219-20 n.5 (9th Cir. 1999).

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[5] After 1991, Congress amended Title VII to allow monetary relief. *See* Donald T. Kramer, *Availability of Nominal Damages in Action Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.)*, 143 A.L.R. Fed. 269 (Originally published in 1998).

[6] *But see Hopkins v. Saunders*, 199 F.3d 968, 978 (8th Cir. 1999) ("We have implied a contrary view of nominal damages in the context of a Title VII action. . . . [W]e see no reason to expand *Dean's* implicit view of nominal damages beyond the context of Title VII").

[7] *But see Landgraf v. USI Film Products*, 968 F.2d 427, 431 (5th Cir. 1992), *aff'd in part*, 511 U.S. 244 (1994) ("We conclude that the *Bohen* court's rejection of nominal damages as a Title VII remedy is the correct interpretation of the statutory scheme")

The rulings of these Circuits (the First, Fourth, Fifth, Eighth, Ninth, and now Eleventh) conflict with the rulings of other Circuits (including the Second, Seventh, and Tenth) that remain steadfast in holding nominal damages are not equitable in any context. *E.g.*, *Sprint Nextel Corp. v. Middle Man, Inc.*, 822 F.3d 524, 529 (10th Cir. 2016) ("By definition, an award of nominal damages involves a remedy that is 'legal,' not 'equitable.' "); *Griffith v. Colo., Div. of Youth Servs.*, 17 F.3d 1323, 1327 (10th Cir. 1994) ("We are persuaded that the district court was correct in ruling that nominal damages are compensatory in nature and since Title VII provides for equitable, not legal relief, nominal damages must not be awarded under Title VII."); *Prince v. Suffolk Cty. Dep't of Health Servs.*, 99-7442, 2000 U.S. App. LEXIS 901, at *5 n.2 (2d Cir. Jan. 25, 2000); *Gray v. Cty. of Dane*, 854 F.2d 179, 181 (7th Cir. 1988) ("This court has held that 'other equitable relief' does not include . . . nominal damages").

There is no prospect of the conflict resolving without this Court's intervention. Declining to intervene will only contribute to the erosion of our constitutional freedoms, *infra*.

(citing *Bohen v. City of E. Chicago, Ind.*, 799 F.2d 1180, 1184 (7th Cir. 1986)).

II. The Eleventh Circuit's decision threatens the integrity of constitutional protections.

A. Orderly society requires proper vindication of constitutional rights.

A society of ordered liberty demands that governments be held accountable for violating citizens' constitutional rights.

Ubi jus, ibi remedium—where there's a right, there's a remedy. A legal right is meaningless if there is no mechanism by which that right can be vindicated.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court recognized that the "very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." That holding rested on William Blackstone's assertion that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy," and that "every right, when withheld, must have a remedy, and every injury its proper redress." *Id*. (quoting Blackstone's Commentaries).[8]

Blackstone had announced that without a "method of recovering and asserting . . . rights, when wrongly withheld or invaded," rights would exist in vain. 1 WILLIAM BLACKSTONE, COMMENTARIES *56.

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[8] *See also Hayes v. Mich. C. R. Co*., 111 U.S. 228, 240 (1884) ("[E]ach person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery."); *De Lima v. Bidwell*, 182 U.S. 1, 176-177 (1901) ("If there be an admitted wrong, the courts will look far to supply an adequate remedy.").

"This," he says, "is what we mean properly, when we speak of the protection of the law." *Id.*

John Locke similarly asserted that whenever a transgression of the law occurs, "there is commonly *injury* done to some person or other, and some other man receives damage by his transgression. . . ." In such a case, "he who hath received any damage, has . . . a particular right to seek reparation." JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ch. II, § 10 (1689).

In *Kendall v. United States*, 37 U.S. 524, 624 (1838), the Court emphasized that adherence to this doctrine is necessary for our democracy:

> [T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.[9]

B. First Amendment rights are perhaps the worthiest of vindication and yet the Eleventh Circuit's ruling leaves many First Amendment victims remediless.

Few rights are more vital to our democracy than those enshrined in our First Amendment. Indeed, the liberties safeguarded by the First Amendment "lies at

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[9] *Accord Tex. & P. R. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916) (unanimously applying the corollary maxim, "*Ubi jus ibi remedium*").

the foundation of free government by free men." *Schneider v. State*, 308 U.S. 147, 161 (1939).[10] Thus, the "importance of preventing the restriction of enjoyment of these [First Amendment] liberties" cannot be overstated. *Id.*

The primacy of the First Amendment to our republic has long been acknowledged by this Court. Justice Cardozo wrote:

> [F]reedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.

Palko v. State of Connecticut, 302 U.S. 319, 326-27 (1937). Several years later, Justice Rutledge reiterated the

> duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the *preferred place* given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. *That priority gives these liberties a sanctity and a sanction not*

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[10] *See also Miss. Women's Med. Clinic v. McMillan*, 866 F.2d 788, 797 (5th Cir. 1989) ("The First Amendment retains a primacy in our jurisprudence because it represents the foundation of a democracy—informed public discourse.").

> *permitting dubious intrusions.* And it is the character of the right, not of the limitation, which determines what standard governs the choice.

Thomas v. Collins, 323 U.S. 516, 529-30 (1945) (citations omitted, emphasis added).

The next year, this Court again stressed in *Marsh v. Alabama*, 326 U.S. 501, 509-10 (1946):

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.

See also Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (recognizing "the fundamental place held by the Establishment Clause in our constitutional scheme") (citations omitted); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("These freedoms are delicate and vulnerable, as well as *supremely precious* in our society.") (emphasis added).

C. Nominal-damage awards are necessary to ensure scrupulous observance of the Constitution.

Because First Amendment infringements rarely cause actual damages and frequently stem from easily-mootable policies, nominal damages are often the only mechanism by which First Amendment freedoms are

vindicated and government violators are held accountable.[11]

By "making the deprivation of such rights actionable for nominal damages . . . the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Thus, nominal-damage awards are necessary to ensure "'scrupulous observance' of the Constitution." *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1242 (10th Cir. 2010) (citing *Carey*, 435 U.S. 247).

When nominal damages are denied to a First Amendment victim, society suffers. "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." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). "The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 775-76 (1978).

"Perhaps even more important to society, however, is the ability to hold a municipality accountable."

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[11] *E.g.*, *Hunter v. Corr. Corp. of Am.*, 2017 U.S. Dist. LEXIS 199955, at *16 (S.D. Ga. Dec. 5, 2017) ("the Court finds Defendants . . . violated Plaintiff's rights under the Establishment Clause and awards Plaintiff $1.00 in nominal damages. . . . Plaintiff's claims for injunctive relief are moot."); *Sears v. Thomas*, 2017 U.S. Dist. LEXIS 186498, at *6 (S.D. Fla. Nov. 8, 2017) (holding that "Plaintiff's free exercise claim for nominal damages may proceed" alone).

Amato v. City of Saratoga Springs, 170 F.3d 311, 317-18 (2d Cir. 1999). Nominal-damage awards "encourage the municipality to reform the patterns and practices." *Id.* "When courts affirm the constitutional rights of citizens, public officials are deterred from violating other citizens' rights in the future." *Popham v. Kennesaw*, 820 F.2d 1570, 1580 (11th Cir. 1987).

It follows that when, as here, an entire Circuit shuts the door to victims who have suffered a First Amendment violation on account of mootness, it invites and countenances government infringements. But as Justice Kennedy warned in *Trump v. Hawaii*: "It is an urgent necessity that officials adhere to these constitutional guarantees. . . . An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts." 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).

Sensibly then, this Court's precedent "obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right]." *Farrar v. Hobby*, 506 U.S. 103, 112-13 (1992) (affirming award of only nominal damages). The Eleventh Circuit's decisions are "difficult, if not impossible, to square with" *Farrar. Flanigan's*, 868 F.3d at 1274 n.4 (Wilson, J., dissenting).

While such a glaring conflict with this Court's precedent should be reason alone to grant certiorari, the fact that the Eleventh Circuit's decisions threaten the "foundation of free government by free men,"

Schneider, 308 U.S. at 161, by allowing governments to violate constitutional rights with impunity makes certiorari "an urgent necessity." *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring).

D. The Eleventh Circuit's treatment of nominal damages as equitable for mootness purposes but legal for qualified immunity purposes creates a "heads I win, tails you lose" government shield against victims of proven constitutional violations.

Prior to *Flanigan*'s, the Eleventh Circuit properly treated nominal damages as legal rather than equitable relief. *E.g.*, *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty., Fla.*, 842 F.3d 1324, 1330-31 (11th Cir. 2016) ("[Plaintiffs'] demands for nominal damages are not moot. . . . [E]ven [if] injunctive or declaratory relief is unavailable."); *McKinnon v. Talladega Cty., Ala.*, 745 F.2d 1360, 1362 (11th Cir. 1984) ("Unlike declaratory and injunctive relief, which are prospective remedies, awards for monetary damages compensate the claimant for alleged past wrongs.") (citation omitted). Indeed, consistent with the majority of the Circuits, the Eleventh Circuit "held *unambiguously* that a plaintiff whose constitutional rights are violated is *entitled* to nominal damages even if he suffered no compensable injury." *Slicker v. Jackson*, 215 F.3d 1225, 1231-32 (11th Cir. 2000) (emphasis added).

The Eleventh Circuit has now decided that nominal damages are a unique form of relief that has all the

downsides of legal and equitable relief. Specifically, the Eleventh Circuit now considers nominal damages equitable relief for mootness purposes (*Flanigan's* and *Uzuegbunam*), and legal for qualified immunity purposes. *See Rowan v. Harris*, 316 Fed. Appx. 836, 838 (11th Cir. 2008) (affirming qualified immunity against nominal damages).[12]

The Eleventh Circuit's decision in *Flanigan's* gives governments at least one free pass at violating a citizen's constitutional rights. But because equitable claims are so easily mooted, and now under *Uzuegbunam* nominal-damages claims are mooted with them, the law never gets clarified. Qualified immunity then gives government officials within the Eleventh

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[12] Other circuits have also recognized the legal nature of nominal damages by finding them to be barred by qualified immunity. *See*, *e.g.*, *Harper v. Poway Unified Sch. Dist.*, 318 Fed. Appx. 540, 541-42 (9th Cir. 2009) ("[W]e are asked to award nominal damages on the basis of a school policy that is no longer in existence, [and] we decline to reach the difficult substantive constitutional question at issue. Instead, we . . . conclude that the individual defendants are entitled to qualified immunity."); *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (denying nominal damages after finding defendants entitled to qualified immunity); *Hopkins v. Saunders*, 199 F.3d 968, 977-978 (8th Cir. 1999) (holding that nominal damages claims are subject to qualified immunity); *Burns v. Pa. Dep't of Corr.*, 2009 U.S. Dist. LEXIS 45357 n.3 (E.D. Pa. May 27, 2009) ("Qualified immunity also bars nominal damages"), *aff'd*, 642 F.3d 163, 182 (3d Cir. 2011); *Cummins v. Campbell*, 44 F.3d 847, 849 (10th Cir. 1994); *Fox v. Bd. of Trs. of State Univ. of N. Y.*, 42 F.3d 135, 141 (2d Cir. 1994); *Hicks v. Feeney*, 850 F.2d 152, 155 n.4 (3d Cir. 1988); *Rheuark v. Shaw*, 628 F.2d 297, 299 (5th Cir. 1980).

Circuit at least one additional free pass at violating the Constitution and the First Amendment in particular.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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