NO. 19-968

IN THE
Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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Respondents concede that the "circuits disagree on whether a standalone claim for nominal damages provides a federal court jurisdiction to decide an otherwise moot case." Br. in Opp'n ("Opp.") 5. Yet Respondents object that the circuit split is not deep enough, *id.* at 7–8, 13–18, the issue presented is unlikely to recur, *id.* at 9–13, the petition is a poor vehicle, *id.* at 19–20, and the ruling below is correct and easily reconciled with this Court's precedents, *id.* at 21–27. They are wrong in every respect.

As to the split, three members of this Court reiterated last week how "widely recognized" it is "that a claim for nominal damages precludes mootness." *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, __ S. Ct. __, 2020 WL 1978708, at *9 (Apr. 27, 2020) (per curiam) (Alito, J., dissenting) (citing cases from the Second, Fourth, Fifth, Ninth, and Tenth Circuits). The circuit split is mature and deep.

The issue presented also recurs often, especially in free-speech and free-exercise contexts. As the advocacy groups who regularly litigate such cases attest, "First Amendment infringements rarely cause actual damages and frequently stem from easily-mootable policies." Br. of the Am. Humanist Ass'n 11. Zoning board decisions and prison regulations often harm religious minorities in ways that are intangible. Br. of The Islam & Religious Freedom Action Team 6–11. And so too on college campuses: "restrictions on student speech typically do not inflict financial injuries, such that compensatory damages are rarely available." Br. of Found. for Individual Rights in Educ. 7.

This case is an ideal vehicle for resolving the conflict. Pet. 28–31. Chike and Joseph have not appealed the Eleventh Circuit's ruling that they failed to adequately allege compensatory damages, and that claim cannot be resurrected. The only question presented is clean: whether standalone nominal-damages claims prevent a case from becoming moot. And Chike and Joseph preserved not only the general issue but their specific argument: in their first brief after the Eleventh Circuit broke new ground and Respondents belatedly moved to dismiss the case as moot, Chike and Joseph argued that because Respondents violated their constitutional rights, nominal damages are a proper remedy, and the case is not moot. Pls.' Resp. in Opp. to Defs.' Suppl. Br. in Supp. of their Mot. to Dismiss for Mootness at 5–6, No. 1:16-cv-04658 (N.D. Ga. May 1, 2018), ECF No. 40.

Respondents say the Eleventh Circuit rule is correct and compatible with *Carey* v. *Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986). Pet. 22–28. But as the *New York State Rifle* dissent noted, the Eleventh Circuit's mootness rule "is difficult to reconcile with" those precedents. 2020 WL 1978708, at *9 n.6.

Finally, this case is a better vehicle than was *Davenport* v. *City of Sandy Springs*, 138 S. Ct. 1326 (2018). Contra Opp. 7–8. In that case, the Eleventh Circuit had held that nominal damages do not save a case from mootness where the challenged law had never been applied to violate constitutional rights. Here, the Eleventh Circuit affirmed dismissal after Respondents repeatedly violated Chike's and Joseph's constitutional rights. And while *Davenport* involved a unique context—sex-toy sales—the campus-speech context is ubiquitous. Certiorari is warranted.

ARGUMENT

I. The acknowledged circuit split warrants review.

Respondents concede "the circuits are split over the question presented." Opp. 6. But Respondents insist the conflict "does not presently demand review." *Ibid.* According to Respondents, the *Davenport* petition raised "the same question" and identified "the same conflict," *id.* at 6–7, as the petition here. So the Court should deny this petition too. *Id.* at 8.

But *Davenport* did not present the same question. That case involved a city ordinance prohibiting the sale of sexual devices. After filing, the city repealed its ordinance, mooting claims for equitable relief. That prompted the Eleventh Circuit to hold the entire case moot, even though the petitioners had also claimed nominal damages. *Flanigan's Enterprises, Inc.* v. *City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017). Critically, the City had never enforced the law; no constitutional rights had been violated. Indeed, the Eleventh Circuit suggested that courts have "Article III powers to award nominal damages" in cases where "a constitutional violation occurred." *Id.* at 1270 n.23.

This case presents that question. Respondents applied their policies and silenced Chike twice. And both Chike and Joseph were chilled. This is not an "academic" dispute, Opp. 12, but one where two students were harmed. So when the Eleventh Circuit held that their nominal-damages claim could not vindicate those constitutional violations absent a "request for compensatory damages," App.15a, the court went further than *Flanigan's*.

As the petition explains, it is the present ruling—not the ruling in *Flanigan's* (which came to this Court in *Davenport*)—that leads to the three-way circuit split. Pet. 10–22. And it is the present ruling—not the ruling in *Flanigan's*—that frames the specific issue presented here: "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." Pet. i (emphasis added).

Respondents say that *Flanigan's* "turned not on the lack of enforcement, but rather on the lack of any remaining redress to provide after the repeal of the challenged ordinance." Opp. 8. But *Flanigan's* emphasized that the City never "attempted to enforce the sanctions attending the Ordinance," the case involved "the repeal of an otherwise unenforced code provision," and the City "expressly, repeatedly, and publicly disavowed any intent to reenact a provision that it never enforced in the first place." 868 F.3d at 1262–63.

In fact, the only injury the *Flanigan's* petitioners asserted "was *the existence* of a constitutionally impermissible prohibition on their ability to sell (and therefore to buy or use) the banned sexual devices." *Id.* at 1265 (emphasis added). The *Flanigan's* court did not have before it a nominal-damages claim based on the government's application of a policy that violated someone's rights. *Id.* at 1270 n.23. So when Respondents say that the "decision below is thus a straightforward application of *Flanigan's*," Opp. 8, they mean "a straightforward application of *Flanigan's* if *Flannigan's* had involved a law the government enforced to violate someone's constitutional rights."

This case also involves circumstances that are more ubiquitous than those in *Flanigan's*. Whereas *Flanigan's* involved the rather unique situation of the First Amendment's application to sex-toy sales, this case involves religious speech on a public-college campus. That is why so many and such diverse *amici* support this Court's review. *E.g.*, Br. of Am. Humanist Ass'n 1–2 ("While the AHA and [Petitioners' counsel] stand on opposite sides of the ideological spectrum . . ., [they] unite in their esteem for First Amendment liberties and their conviction that such rights are meaningless if they cannot be vindicated."); Br. of Islam & Religious Freedom Action Team 2–3 (expressing concern that the lower courts' rulings here "will disproportionately affect members of minority faiths"); Br. for Jewish Coal. for Religious Liberty 3 (the principles at stake here "are of particular importance to members of minority religions, who often find their constitutional rights burdened and may have difficulty vindicating those rights in the face of government efforts to moot their claims"); Br. of CatholicVote.org Educ. Fund 20 ("the dispute over whether a nominal damages claim staves off mootness directly affects the exercise of First Amendment rights on college campuses"); Br. of Young Ams. for Liberty, Inc. 1 ("Free speech is essential in university environments, and individuals must be allowed to redress past violations of their constitutional rights."); Br. for Ams. for Prosperity Found. 2 ("Nominal damages validate infringement of priceless constitutional rights . . . ."); Br. of Found. for Moral Law 2 ("this case is important because of the rights that nominal damages represent," particularly in a religious-liberty context).

Leaving *Davenport* aside, Respondents pivot and say the circuit split is more like "3–1" than "6–2–1." Opp. 13. Either way, the petition warrants review. But Respondents are wrong about the split.

As the *New York State Rifle* dissent suggested, the Eleventh Circuit's rule—even the broader version discussed in *Flanigan's*—is at least in conflict with the Second, Fourth, Fifth, Ninth, and Tenth Circuits, all of which have "recognized that a claim for nominal damages precludes mootness." 2020 WL 1978708, at *9 (Alito, J., dissenting) (citing *Amato* v. *City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999) (Sand, J., joined by Sotomayor, J.); *Henson* v. *Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983); *Morgan* v. *Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 n.32 (5th Cir. 2009), *Bernhardt* v. *County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); and *Comm. for First Amend.* v. *Campbell*, 962 F.2d 1517, 1526–27 (10th Cir. 1992)).

Respondents give credit only to the Fifth, Ninth, and Tenth Circuits. Opp. 13. They say the sole Second Circuit opinion "with a square holding on the question," *Kerrigan* v. *Boucher*, 450 F.2d 487, 488–90 (2d Cir. 1971), sides with the Eleventh Circuit. Opp. 16. If true, that still exacerbates the split. In any event, the more recent *Amato* decision expressly held that a plaintiff alleging a constitutional violation "should not lose his right to proceed . . . because only nominal damages are at stake." 170 F.3d at 319. And the opinion analyzed *Carey* and *Stachura*, among others. *Id.* at 316–21. The Second Circuit belongs in the camp opposite the Eleventh Circuit. Pet. 11; *N.Y. State Rifle*, 2020 WL 1978708, at *9 (Alito, J., dissenting).

Respondents spurn the Fourth Circuit because its decisions on the issue have been "summary" and "questioned" by other decisions. Opp. 16–17 (citing, *e.g.*, *Chapin Furniture Outlet Inc.* v. *Town of Chapin*, 252 F. App'x 566, 571 (4th Cir. 2007) (per curiam)). But the Fourth Circuit's *Henson* opinion relied on *Carey* to hold explicitly that a constitutional violation "creates an independent right to seek, at a minimum, nominal damages." 719 F.2d at 72 n.5. And *Chapin* affirmed *Henson's* validity unless a challenged law was "never enforced" and the plaintiff did not "suffer[ ] any constitutional deprivation," 252 F. App'x at 571, all as the petition explained. Pet. 19. The Fourth Circuit belongs in the middle camp.

Respondents claim the Sixth Circuit "also leaves its answer unsettled." Opp. 17. That may be true regarding nominal damages in the context of the higher standard for standing. See Pet. 13. But in the court's most recent pronouncement, it stated plainly that "plaintiffs' claims remain viable to the extent that they seek nominal damages as a remedy for past wrongs." *Miller* v. *City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010). The Sixth Circuit is in the majority camp but could use this Court's clarification.

Respondents say the Seventh Circuit has not decided the question. Opp. 15–16. But in *Crue* v. *Aiken*, 370 F.3d 668, 674 (7th Cir. 2004), the Court held that "[w]hen a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive." *Id.* at 677. Respondents imply the *Crue* court was referring to compensatory damages, noting the "$1,000" amount. Opp. 15. The opinion clarifies it was a "nominal damages" award. 370 F.3d at 677.

That leaves the Eighth Circuit. Respondents point to *Phelps-Roper* v. *City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012) (en banc), as holding "that a 'request for nominal damages' did not save claims against superseded ordinances from mootness." Opp. 18. At best, this would deepen the conflict by aligning the Eighth Circuit with the Eleventh. But as the petition explained, *Phelps-Roper* involved a funeral-protest law that the City of Manchester never enforced. Pet. 20. Respondents say that the opinion failed to mention non-enforcement. Opp. 18. But the opinion highlighted that the plaintiffs had "never gone to Manchester to picket at a funeral or burial." 697 F.3d at 684. And even then, that fact only prevented the plaintiffs from challenging two repealed versions of the law. It did *not* moot their claim against the current version because they were objectively reasonable in feeling "chill[ed]" by it. *Id.* at 687. At worst, the Eighth Circuit is in the Fourth Circuit's camp. It could also be considered in the majority camp. Opp. 18 (conceding that "the Eighth Circuit has held that claims for nominal damages prevent mootness" and citing *Advantage Media, L.L.C.* v. *City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006), a decision *Flanigan's* recognized as conflicting with the Eleventh Circuit, 868 F.3d at 1265 n.17).

In sum, this is not a "shallow circuit split." Contra Opp. 18. It is at least a 6–2–1 conflict with two more circuits, the Third and the D.C., suggesting they might be in the middle camp. See Opp. 14–15. And Respondents' confusion over where several circuits land shows the need for immediate review, particularly when Chike's and Joseph's free-speech rights have been violated, and eight circuits would allow Chike's and Joseph's claims to go forward.

II. The issue presented recurs regularly.

After first positing that this Court "recently denied a petition that presented the same question" as this one, Respondents say the conflict here "concerns a narrow question that is unlikely to recur frequently." Opp. 5–6. Overlooking the irony, Respondents argue that the issue presented is not often recurring because it involves the "rare" situation in which a plaintiff proceeds with "only a naked claim for nominal damages after claims for prospective relief become moot." Opp. 9. Respondents believe that "bare violations of certain constitutional rights like the freedom of speech or religion . . . tend to cause, or at least generate plausible claims for, actual damages." *Ibid.*

But the experience of *amici* who often litigate these types of cases is to the contrary. *E.g.*, Br. of Found. for Individual Rights in Educ. 7–8, 12–21 ("Public colleges and universities routinely infringe students' first amendment rights" but "compensatory damages are rarely available."); Br. of Am. Humanist Ass'n 11 (similar); Br. for Jewish Coal. for Religious Liberty 3–6, 10 (similar). And the plethora of circuit cases proves as much.

III. Respondents' vehicle objections are unfounded.

Respondents raise two vehicle objections. First, Respondents point to a "vigorous" dispute over whether the operative complaint alleged actual damages. Opp. 19. But the lower courts said it did not, and because Chike and Joseph do not appeal that holding, that disposition controls.

While courts must always consider subject-matter-jurisdiction *objections* that parties waive, see Opp. 19 (citing *Gonzalez* v. *Thaler*, 565 U.S. 134, 141 (2012)), they do not decide *claims* plaintiffs have not pursued. The lower-court dispute over whether Chike and Joseph properly pled compensatory damages is not a barrier to deciding the question presented; it is their decision not to appeal that ruling which makes this case a clean vehicle.

Second, Respondents are wrong about "argument" preservation. Parties preserve issues; "parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Respondents concede that Petitioners preserved the overarching issue "that their claims for nominal damages are not moot." Opp. 20. So Chike and Joseph can raise different arguments in support of that issue on appeal. And in any event, Chike and Joseph *did* argue the enforcement point below. Pls.' Resp. in Opp. to Defs.' Suppl. Br. in Supp. of their Mot. to Dismiss for Mootness at 5–6, No. 1:16-cv-04658 (N.D. Ga. May 1, 2018), ECF No. 40; Br. of Pls.-Appellants at 23–25, No. 18-1276-AA (11th Cir. Aug. 6, 2018). This is a proper vehicle to resolve the circuits' conflict.

IV. The Eleventh Circuit's decision clashes with this Court's nominal-damages precedents.

Respondents spend the rest of their opposition brief arguing that review is not warranted because the Eleventh Circuit was correct. Opp. 21–27. That is not a reason to deny review but to grant it. After all, if Respondents are correct, eight circuits are erroneously issuing merits rulings in moot cases.

Respondents are also wrong. As the *New York State Rifle* dissent recognized, the Eleventh Circuit's "holding is difficult to reconcile with *Carey* and *Stachura*'s endorsement of nominal damages as an appropriate constitutional remedy." 2020 WL 1978708, at *9 n.6 (Alito, J., dissenting); accord Pet. 22–28. It is also hard to reconcile with *Farrar* v. *Hobby*, 506 U.S. 103 (1992). Pet. 24–25. That is because nominal damages are more than a "judicial seal of approval." App.13a. Such damages change the legal relationship between the parties. *Farrar*, 506 U.S. at 111–12. So reversing the Eleventh Circuit "would not bring about a sea-change but merely an important course correction aligning the Eleventh Circuit with its sister circuits, history, and this Court's precedent." Br. of Islam & Religious Freedom Action Team 15–18.

Conversely, allowing the Eleventh Circuit's rule to stand will lead to many more First Amendment violations. Br. for Ams. for Prosperity Found. 14. It will exacerbate the problems caused by qualified immunity. *Id.* at 18–21; Br. of Am. Humanist Ass'n 14–16. It will lead to governmental bodies reinstituting unconstitutional policies after revoking them to end litigation. Br. of Found. for Individual Rights in Educ. 17–21. It will allow Respondents to get away with characterizing peaceful religious evangelism as "fighting words." Br. of Found. for Moral Law 2. And it will excuse Respondents from any responsibility for having adopted and applied unconstitutional policies, where the United States has acknowledged that Chike and Joseph "have stated claims for violations of the First and Fourteenth Amendments." United States' Statement of Interest at 9, No. 1:16-cv-04658 (N.D. Ga. Sept. 26, 2017), ECF No. 37.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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MAY 2020