No. 19-968

In The
Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,

Petitioners,

v.

STANLEY C. PRECZEWSKI, *et al.*,

Respondents.

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

BRIEF OF CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Christian Legal Society (CLS) is an association of attorneys, law students, and law professors with approximately 90 student chapters on law school campuses nationwide. For over four decades, through its Center for Law and Religious Freedom, CLS has worked to ensure that religious student groups are allowed to meet on their public secondary school and university campuses despite government officials' attempts to exclude them because of their religious speech and beliefs. CLS has long believed that our civil society prospers only when the First Amendment rights of all Americans are protected, no matter how unpopular their speech and beliefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Eleventh Circuit's erroneous ruling, religious students like Petitioners have no judicial remedy for a completed deprivation of their constitutional rights unless they can tie it to some future relief or some form of additional harm. However, Petitioners have "unquestionably" alleged a constitutional injury. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Where plaintiffs seek relief for a past constitutional violation,

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Blanket consent letters are on file with the Clerk.

government officials should not be able to unilaterally avoid accountability for their *past* unconstitutional acts by rendering *future* relief moot.

The facts before the Court do not warrant any of the concerns that the Eleventh Circuit expressed in *Flanigan's Enterprises, Inc. v. City of Sandy Springs*. 868 F.3d 1248 (11th Cir. 2017) (en banc). Because Petitioners seek to vindicate a completed constitutional injury, judgment in this case would not "constitute an impermissible advisory opinion of the sort federal courts have consistently avoided." *Id*. at 1269. Because a judgment in favor of Petitioners would clearly establish constitutional law such that Respondents would face personal liability if they were to repeat the violation, this case is one where "nominal damages would have a practical effect on the parties' rights or obligations . . . [and] the exercise of jurisdiction is plainly proper." *Id*. at 1263-64. The exercise of jurisdiction in cases such as this is not only proper, but also beneficial. Cases such as this develop a body of clearly established law and avoid constitutional stagnation while also allowing courts to exercise their discretion in cases where qualified immunity is at issue.

If nominal damages cannot vindicate past constitutional violations in the absence of some form of future relief or additional harm, religious students in particular will be left to the mercy of government officials. Congress has acknowledged a long history of discrimination against religious students in public schools. Yet religious students whose constitutional rights are violated will frequently find that any claims

for prospective relief become moot before their case reaches a final adjudication, often due to graduation. Tying the remedy for a past constitutional violation to the availability of prospective relief means that such violations will often go unaddressed, in sharp contrast to this Court's admonition that "rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

The Court should therefore decline to allow state officials to unilaterally eliminate judicial review for past constitutional violations by taking actions to moot future relief and instead hold that a claim for nominal damages is justiciable to vindicate a past violation of constitutional rights.

ARGUMENT

I. Nominal Damages Provide Important Relief for Plaintiffs Who Have Suffered Constitutional Injury.

Two observations by the Eleventh Circuit counsel the Court to rule that Petitioners' claim for nominal damages should be allowed to proceed toward disposition on the merits. First, the Eleventh Circuit agreed that Petitioners, two religious students, alleged "injury suffered as the result of the violation of their constitutional rights." *Uzuegbunam v. Preczewski*, 781 Fed. App'x 824, 829 (11th Cir. 2019). Second, the Eleventh Circuit noted that "the exercise of jurisdiction is plainly proper [where] . . . nominal damages would

have a practical effect on the parties' rights or obligations." *Id.* at 830 (quoting *Flanigan's*, 868 F.3d at 1263).

These two factors undercut the two arguments commonly waged against reliance on nominal damages for justiciability. First, the fact that there is a completed constitutional injury eliminates concerns that nominal damages cases may lead to an advisory opinion. Second, resolution of this matter would have significant and practical effects on the parties by setting a constitutional baseline by which the parties' future actions will be judged, particularly regarding claims of qualified immunity.

Nonetheless, the Eleventh Circuit held that Petitioners' case cannot proceed on a claim for nominal damages. First, the court below erred by determining that Petitioners' claim for nominal damages provides no remedy absent "a well-pled request for compensatory damages." *Id*. at 831. Second, the Eleventh Circuit further erred when it determined that a judgment in this case would have no practical effect. At minimum, a judgment for Petitioners would likely subject Respondents to personal liability for a repeat violation.

A. Nominal Damages Provide a Remedy for Completed Constitutional Injuries When No Additional Damages are Incurred.

Petitioners have alleged a completed constitutional injury. Petitioner Uzuegbunam "was stopped by a member of Campus Police who explained [he] was

not allowed to distribute religious literature (or any literature) at that location." *Id*. at 826. Later, after Petitioner "reserved one of the designated speech zones[,] . . . a member of Campus Police approached him and asked him to stop, explaining . . . that he was in violation of GGC's 'Student Code of Conduct.'" *Id*.

These pleadings are sufficient to show injury. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. Although the Eleventh Circuit considered such injury to be "abstract," *Uzuegbunam*, 781 Fed. App'x at 829, this Court has held that a denial of constitutional rights "should be actionable for nominal damages without proof of actual injury," because "the law recognizes the importance to organized society that [absolute] rights be scrupulously observed." *Carey*, 435 U.S. at 266.

The Eleventh Circuit has expressed concern that an award of nominal damages would equate to an advisory opinion. See *Flanigan's*, 868 F.3d at 1269 (stating that a decision for nominal damages "would surely constitute an impermissible advisory opinion of the sort federal courts have consistently avoided"). However, the fact that Petitioners have alleged concrete constitutional injury separates this matter from other cases in which the injury is merely prospective. Where there is a completed constitutional injury, nominal damages can serve as a remedy for the loss of constitutional rights, even barring other injury. This Court has acknowledged that "nominal damages . . . are the appropriate means of 'vindicating' rights whose

deprivation has not caused actual, provable injury." *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986). Because here, nominal damages serve to remedy a past constitutional injury, there is no basis for concern that Petitioners' claims for nominal damages would lead to an advisory opinion. The presence of injury distinguishes this case from others where courts have rejected the justiciability of a nominal damages claim where plaintiffs brought constitutional challenges prior to any concrete deprivation of constitutional rights. See, e.g., *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 684, 687 (8th Cir. 2012) (holding that plaintiffs' nominal damages claim did not confer standing to challenge a repealed law never enforced against plaintiffs); *Morrison v. Bd. of Educ.*, 521 F.3d 602, 608, 610-611 (6th Cir. 2008) (holding nominal damages not sufficient to sustain challenge to prior unenforced speech policy).

This Court recognized such a distinction in *Farrar v. Hobby*. 506 U.S. 103 (1992). In *Farrar*, the Court held that a plaintiff was a "prevailing party" under 42 U.S.C. § 1988, when a jury found a past violation of a civil right. *Id*. at 107, 112. However, the Court noted that a plaintiff's successful challenge to a vague statute would not render him a "prevailing party" where there was no evidence that the statute had ever been enforced against the plaintiff. *Id*. at 113 (citing *Texas State Teachers Assn. v. Garland Indep. Sch. Dist*., 489 U.S. 782, 792 (1989)). The first plaintiff is a prevailing party because the recognition of the past violation and award of nominal damages "materially alter[ed] the

legal relationship between the parties." *Id*. at 111. In the second, there was no vindication of plaintiffs' rights because there was no constitutional injury to vindicate. This similarly distinguishes an award of nominal damages from a declaratory judgment. See *Flanigan's*, 868 F.3d at 1268 ("[T]he granting of nominal damages . . . may be closely analogized to that of declaratory judgments."). This case undeniably involves a past, completed constitutional injury for which nominal damages are an appropriate remedy.

B. An Award of Nominal Damages Has the Practical Effect of Changing How Future Constitutional Violations Are Judged.

To the extent that there is any daylight between "practical[ly] [a]ffect[ing]," *Flanigan's*, 868 F.3d at 1263, and "materially alter[ing]," *Farrar*, 506 U.S. at 111, the relationship of the parties, a judgment of nominal damages in a case asserting constitutional violations has the additional practical effect of materially altering the baseline by which state officials' future actions will be judged, particularly with respect to qualified immunity.

This Court has frequently recognized that a case is not moot where a judgment may have some collateral effect on the rights or obligations of a party. See Ronald D. Rotunda and John E. Nowak, *Collateral Consequences and Civil Cases*, 1 Treatise on Const. L. § 2.13(c)(vii)(4) (2020) ("Collateral consequences may also prevent a case from being moot, even though some

of the original relief requested may be moot."). This Court and other courts have applied the collateral consequences doctrine in cases where a judgment may affect the baseline by which future events are judged. For example, this Court held that a challenge to a voting "plan [that] 'will never again be used for any purpose'" was not moot because it would "serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327-28 (2000); see also, e.g., *Nader v. Butz*, 474 F.2d 426, 428-29 (D.C. Cir. 1972) (holding case not moot where defunct milk price supports may have an effect on future price supports). Similarly, a Fourth Amendment challenge was not moot despite all charges against the plaintiff being dismissed and not "deemed a conviction for . . . [any] purpose" because "a nonpublic record of the charges" could be used by courts "in determining the merits of subsequent proceedings." *Minnesota v. Dickerson*, 508 U.S. 366, 371 n.2 (1993).

Here, an award of nominal damages sets a new baseline for Respondents and other state officials because a determination that Respondents violated Petitioners' First Amendment rights will be used to evaluate whether law is "clearly established" for purposes of qualified immunity proceedings. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

known.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

The possibility of subjecting officials to future liability is not merely speculative. A court recently held that university administrators at the University of Iowa violated clearly established law after repeated infractions against religious groups on campus. *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 992 (S.D. Iowa 2019), *appeal filed*, No. 19-3389 (8th Cir., Nov. 5, 2019) (noting that the religious students' rights were clearly established by the court's "January 2018 order in the *BLinC Case*.").[2] Under the Eleventh Circuit's rule, university officials in similar circumstances could avoid such liability simply by mooting prospective relief.

This development of clearly established law refutes the argument that a dispute over nominal damages has no practical effect on the obligations of the parties. The development of "clearly established law" for purposes of qualified immunity does not have a mere trivial or immaterial effect on the parties. This Court once *required* that courts determine whether an allegation asserts violations of constitutional rights "to prevent constitutional stagnation." *Pearson*, 555 U.S. at 232 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Though the Court eliminated the requirement in *Pearson*, it acknowledged that "we continue to recognize

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[2] Referencing *Business Leaders in Christ v. Univ. of Iowa*, No. 3:17-cv-00080, 2018 WL 4701879 (S.D. Iowa Jan. 23, 2018).

that [determining whether a constitutional right has been violated] is often beneficial." *Id*. at 236.

Under *Pearson*, courts regularly determine that a constitutional right is not "clearly established" and then end the inquiry, without looking into whether the alleged actions would violate a constitutional right. Indeed, such diverse jurists as Judge Stephen Reinhardt and Judge Don Willett have noted that constitutional questions often go unanswered in qualified immunity cases. See Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1250 (2015) ("At a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices, this trend toward granting immunity while failing to articulate constitutional rights will surely have far-reaching, negative repercussions."); see also *Zadeh v. Robinson*, 928 F.3d 457, 479-80 (2019) (Willett, J., concurring in part) ("Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability."). A recent empirical study noted:

> the concern about post-*Pearson* stagnation appears well founded: all of the post-*Pearson* studies—ours and the Jones-Rauch and Rolfs

> studies—found that circuit courts found constitutional violations of rights that were not clearly established in 3.6%, 7.9%, and 2.5%, respectively, of the total claims reviewed, whereas the three pre-*Pearson* studies found rates ranging from 6.5% to 13.9% during the *Saucier* mandatory sequencing regime. Our findings suggest something has changed.

Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37-38 (2015).

By allowing plaintiffs to pursue nominal damages claims for constitutional injuries, the Court mitigates *Pearson*'s constitutional stagnation problem by allowing plaintiffs to vindicate their constitutional rights while still giving judges the discretion that *Pearson* advocates in appropriate cases. Yet, regardless of the policy considerations, there is no question that such decisions have practical effects as to the legal relationship of the parties.

Here, Petitioners seek nominal damages to be made whole for a past constitutional violation, and a judgment in their favor will unquestionably have a legal effect on Respondents should such violations occur again in the future. For these reasons, the Court should hold in favor of Petitioners.

II. The Eleventh Circuit's Holding Would Unduly Impair Constitutional Protections for Religious Students.

As this case demonstrates, discrimination against religious students is not a speculative problem. Nor is it a new one. Thirty-six years ago, Congress passed the Equal Access Act. 20 U.S.C. §§ 4071-74. As this Court has observed, the Equal Access Act was "intended to address perceived widespread discrimination against religious speech in public schools." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 239 (1990). Discrimination against religious student groups on public university campuses also occurs. See *Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995); *cf. Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (discriminatory denial of religious community group's access to elementary school facilities); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (discriminatory denial of religious community group's access to high school auditorium in evenings).

The problem of discriminatory treatment of religious students on public university campuses is ongoing. Last year, the Equal Campus Access Act of 2019 was introduced in the Senate to address ongoing discrimination against religious students in higher education. S. 1168, 116th Cong. (2019). In 2017, the House Education and Labor Committee included protection for religious student groups on public college campuses in its proposed reauthorization of the Higher Education

Act. PROSPER Act, H.R. 4508, § 116, 115th Cong. (2017).

On September 23, 2020, the United States Department of Education adopted two rules that make it a material condition of Department grants that a public college shall not deny a religious student organization "any right, benefit, or privilege that is otherwise afforded to other student organizations . . . because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs." 34 C.F.R. §§ 75.500(d) & 76.500(d); 85 Fed. Reg. 59916, 59979-80 (Sept. 23, 2020). Another rule also makes it a material condition of Department grants for a public college to comply with the First Amendment, although the Department "will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court" that the First Amendment was violated. 34 C.F.R. §§ 75.500(b)(1) & 76.500(b)(1); 85 Fed. Reg. at 59978-80. The latter rule is likely to further incentivize public colleges to avoid full adjudication of students' First Amendment claims in court.

Since 2011, 14 state legislatures have recognized the need to protect religious student groups' right to meet as recognized student groups on public college campuses and have enacted laws to provide protection. Those states are the following: Arizona (2011), Ohio (2011), Idaho (2013), Tennessee (2013), Oklahoma (2014), North Carolina (2014), Virginia (2016), Kansas (2016),

Kentucky (2017), Louisiana (2018), Arkansas (2019), Iowa (2019), South Dakota (2019), and Alabama (2020).[3]

Moreover, a recent survey of university speech codes found that nearly nine out of ten public universities have policies that either severely restrict speech or could be easily applied to do so.[4]

Allowing school administrators, like Respondents, to unilaterally shield themselves from judicial review by altering their policies after committing a constitutional violation and the initiation of litigation would have particularly harmful effects on religious students like Petitioners, who already face numerous obstacles to judicial remedies, including a strong likelihood that their claims for prospective relief will become moot before being fully adjudicated.

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[3] Five states have protected only religious students; six have protected religious and political, or belief-based, student groups; and three have protected all student groups. Ala. Code 1975 § 16-68-3(a)(8) (all student groups); Ariz. Rev. Stat. § 15-1863 (religious and political student groups); Ark. Code Ann. § 6-60-1006 (all); Idaho Code § 33-107D (religious); Iowa Code § 261H.3(3) (all); Kan. Stat. Ann. §§ 60-5311-5313 (religious); Ky. Rev. Stat. Ann. § 164.348(2)(h) (religious and political); La. Stat. Ann.-Rev. Stat. § 17:3399.33 (belief-based); N.C. Gen. Stat. Ann. § 116-40.12 (religious and political); Ohio Rev. Code § 3345.023 (religious); Okla. St. Ann. § 70-2119.1 (religious); S.D. Ch. § 13-53-52 (ideological, political, and religious); Tenn. Code Ann. § 49-7-156 (religious); Va. Code Ann. § 23.1-400 (religious and political).

[4] See Found. For Individual Rights in Educ., Spotlight on Speech Codes 2020: The State of Free Speech on Our Nation's Campuses 6 (Dec. 4, 2019), *available at* https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/12/04102305/FIRE-Spotlight-On-Speech-Codes-2020.pdf.

A. Religious Students Often Graduate Before Their Claims for Prospective Relief Can Be Fully Adjudicated.

This suit was filed more than four years ago. Even without policy changes by Respondents, prospective relief would likely be mooted by Petitioner Uzuegbunam's graduation.[5] This highlights a major obstacle that religious students face when seeking to vindicate their constitutional rights: they often graduate before a case can be fully adjudicated, meaning that anything more than temporary injunctive relief is a pipe dream.

As with the issue of religious discrimination against students, the problem of students' claims for prospective relief becoming moot is not new. In 1975, this Court ruled sua sponte that a First Amendment suit brought by high school students in Indianapolis was made moot by the graduation of all plaintiffs. *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975). In that case, the students prevailed both before the district court and on appeal, but were denied relief for no other reason than they aged out. *Id*.

This case and *Jacobs* are just two of many in which claims for prospective relief were not fully adjudicated prior to plaintiffs' graduation. Given that high school and university students are often within a few years—or only a few months—of graduation, the loss of prospective relief due to graduation is a recurring issue. See, e.g., *Harper v. Poway*, 318 F. App'x 540 (9th

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[5] Petitioner Bradford has since left Georgia Gwinnett College for reasons other than graduation.

Cir. 2009); *Lane v. Simon*, 495 F.3d 1182 (10th Cir. 2007); *Jones v. Indiana High Sch. Athletic Ass'n*, 16 F.3d 785 (7th Cir. 1994); *Murphy v. Ft. Worth Indep. Sch. Dist.*, 334 F.3d 470 (5th Cir. 2003). However, students who graduate cannot benefit from the "capable of repetition, yet evading review" exception to mootness, because that exception only applies where the *same* plaintiff may be subject to the challenged regulations. See *DeFunis v. Odegaard*, 416 U.S. 312, 318-19 (1974) (noting that graduating student's claims for prospective relief were not "capable of repetition, yet evading review" because "the question is certainly not 'capable of repetition' so far as he is concerned").

If this Court were to hold that a claim for nominal damages for a past constitutional violation is an insufficient basis for judicial intervention, religious students would have practically no recourse for constitutional violations where there are no damages apart from the deprivation of constitutional rights. Having no claim for compensatory damages, such students would, in effect, only have prospective relief and nominal damages that are unlikely to ever be fully adjudicated. Such state of affairs falls far short of "recogniz[ing] the importance to organized society that those rights be scrupulously observed." *Carey*, 435 U.S. at 266.

This problem is compounded by the disparate resources between students and their schools. Many students lack the resources or support to bring such a suit. See Brief for Student Press Law Center et al. as *Amici Curiae* Supporting Respondents, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (No. 86-836), 1987

WL 864179, at 18 n.9 ("Only the handful of students with the necessary financial resources, peer and parent support and sheer courage end up fighting unconstitutional censorship in court."). In contrast, school districts, regardless of the merits of the students' case, will often be able to stave off final resolution of a matter until the students have graduated and have no recourse. In such a scenario, even public interest groups that can mitigate the difference in resources may be discouraged from getting involved in matters where final resolution prior to graduation is unlikely. This issue is particularly acute for high school students, who lack capacity to bring a lawsuit on their own until they are eighteen and often within a year of graduation. See Fed. R. Civ. P. 17.

In contrast, if this Court were to hold that students could maintain their claims for nominal damages even where prospective relief has become moot, schools would have little incentive to draw out court proceedings and there would be some hope for religious students to vindicate their rights and the rights of students after them.

B. Religious Students' Claims for Damages Also Face Significant Obstacles.

If nominal damages become moot along with prospective relief, then students of faith can only expect some potential judicial relief in cases where they can assert compensatory damages. However, students may face numerous hurdles to such claims that would put

any vindication of their constitutional rights beyond reach.

First, in the absence of some additional factor, such as harassment or intimidation, it may be difficult for a student to prove damages emanating from a speech restriction beyond the fact of the constitutional violation. Students like petitioners, who were unconstitutionally prevented from evangelizing, are unlikely to have economic damages or suffer physical harm. This Court seemingly recognized such difficulties when it observed that the "purpose of [42 U.S.C.] § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey*, 435 U.S. at 258. The vindication of constitutional principles should not be dependent on the establishment of an economic or physical harm.

Second, even in cases that present claims for compensatory damages, the narrow grounds on which any constitutional claim could survive to final resolution exacerbates the constitutional stagnation issue discussed *supra* at pp. 9-11. Prospective relief claims play an important part in clearly establishing law because they are not subject to claims of immunity.

If nominal damages are insufficient to prevent mootness after a school's constitutional violation, many students will have no judicial remedy for a constitutional violation unless they can prove that an injury, above and beyond the constitutional injury,

resulted from the constitutional violation. But like their claims for prospective relief when their constitutional rights are violated, students' claims for damages similarly face numerous hurdles. And given the regularity with which claims for injunctive relief become moot, only cases that survive qualified immunity will be fully litigated. But in a vicious cycle, few claims will be able to survive qualified immunity because of the dearth of case law.

Moreover, the types of constitutional questions raised in cases involving religious students are often the type that *Pearson* indicates may never be resolved. *Pearson* indicates that avoiding the constitutional question may be appropriate where "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Pearson*, 555 U.S. at 237. As the Fifth Circuit has noted, cases involving religious students often involve "balanc[ing] broad constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc). This is precisely the type of hard question that *Pearson* encourages courts to avoid. This is the Escherian Stairwell of which Judge Willett warns. See *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part) ("An Escherian Stairwell. Heads government wins, tails plaintiff loses.").

If nominal damages are insufficient to sustain a claim for a completed constitutional violation, then religious students whose constitutional rights are violated are left with the options of seeking prospective relief that will likely never reach a disposition on the merits and seeking to overcome qualified immunity on grounds that courts are unlikely to clearly establish. Students whose religious speech is being suppressed deserve better.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 29, 2020