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

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONERS

ALLEN DICKERSON
Counsel of Record
ZAC MORGAN
MALLORY RECHTENBACH
OWEN YEATES
INSTITUTE FOR FREE SPEECH
1150 Conn. Ave., N.W.
Suite 801
Washington, D.C. 20036
adickerson@ifs.org
(202) 301-3300

Sept. 29, 2020

Counsel for Amicus Curiae

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Interest of *Amicus Curiae* 1

Introduction and Summary of the Argument 1

Argument 4

I. The Majority View Recognizes that Parties Suffering An Irreparable First Amendment Injury Cannot, By Definition, Be Made Whole 4

II. Reversal Would Assist The Adversarial System In Political Speech And Association Cases 6

III. Relief For Petitioners Will Disincentivize Governmental Gamesmanship 14

IV. Petitioners' Proposed Rule Will Undermine Neither Judicial Economy Nor The Dictates of Article III 16

Conclusion 21

TABLE OF AUTHORITIES

Cases

Allah v. Al-Hafeez,
226 F.3d 247 (3d Cir. 2000)..... 1, 5

Am. Legion Post 7 v. City of Durham,
239 F.3d 601 (4th Cir. 2001) 12

Amato v. City of Saratoga Springs, N.Y.,
170 F.3d 311 (2d Cir. 1999)..... 4

Baker v. Carr,
369 U.S. 186 (1962) 19

Bennie v. Munn,
822 F.3d 392 (8th Cir. 2016) 15

Brown v. Socialist Workers '74 Campaign Comm.,
459 U.S. 87 (1982) 7

Calzone v. Summers,
942 F.3d 415 (8th Cir. 2019) 8

Carey v. Piphus,
435 U.S. 247 (1978) 16

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 2, 7, 8

City of Riverside v. Rivera,
477 U.S. 561 (1986) 5

Coal. for Secular Gov't v. Williams,
815 F.3d 1267 (10th Cir. 2016) 8

Comm. for First Amend. v. Campbell,
962 F.2d 1517 (10th Cir. 1992) 6

Cooper v. Aaron,
358 U.S. 1 (1958) 7

Covenant Media of S.C., LLC v. City of N. Charleston,
493 F.3d 421 (4th Cir. 2007) 6

Davis v. Fed. Election Comm'n,
554 U.S. 724 (2008) 2, 8

Domegan v. Ponte,
972 F.2d 401 (1st Cir. 1992)..... 3

Elgin v. Marshall,
106 U.S. 578 (1883) 4

Elrod v. Burns,
427 U.S. 347 (1976) 2, 4, 20

Emineth v. Jaeger,
901 F. Supp. 2d 1138 (D.N.D. 2012) 8

Eu v. S.F. Cty. Democratic Cent. Comm.,
489 U.S. 214 (1989) 7

Familias Unidas v. Briscoe,
619 F.2d 391 (5th Cir. 1980) 6

Fed. Election Comm'n v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986) 7

Fed. Election Comm'n v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007) 2, 8, 9

Firefighters Local Union No. 1784 v. Stotts,
467 U.S. 561 (1984) 19

Harlow v. Fitzgerald,
457 U.S. 800 (1982). 14

In re Validation Proceeding…,
366 Ore. 295 (Or. 2020) 14

Indep. Inst. v. Fed. Election Comm'n,
216 F. Supp. 3d 176 (D.D.C. 2016) 2, 9

Jacobs v. Clark County School Dist.,
526 F.3d 419 (9th Cir. 2008) 6, 18

June Med. Servs. L.L.C. v. Russo,
591 U.S. __; 140 S. Ct. 2103 (2020)..... 16

Libertarian Nat'l Comm. v. Fed. Election Comm'n,
2014 U.S. App. LEXIS 25108
(D.C. Cir. 2014)..... 11

Libertarian Nat'l Comm. v. Fed. Election Comm'n,
924 F.3d 533 (D.C. Cir. 2019) 11

Libertarian Nat'l Comm. v. Fed. Election Comm'n,
930 F. Supp. 2d 154 (D.D.C. 2013) 10

Lozman v. City of Riviera Beach,
585 U.S. __; 138 S. Ct. 1945 (2018)..... 7

Manzanares v. City of Albuquerque,
628 F.3d 1237 (10th Cir. 2010) 18

McFadden v. City of Bridgeport,
422 F. Supp. 2d 659 (N.D. W.Va. 2006)..... 12

Memphis Cmty. Sch. Dist. v. Stachura,
477 U.S. 299 (1986) 3, 5, 6

Minn. Voters Alliance v. Mansky,
585 U.S. __; 138 S. Ct. 1876 (2018)..... 7

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010) 18

Payne v. Tenn.,
501 U.S. 808 (1991) 16

Pierce v. Underwood,
487 U.S. 552 (1988) 3, 15

Roe v. Wade,
410 U.S. 113 (1973) 9

Sec'y of State of Md. v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 18

Sossamon v. Lone Star State of Tex.,
560 F.3d 316 (5th Cir. 2009) 14

S. Dakota v. Wayfair, Inc.,
229 F. Supp. 3d 1026 (D.S.D. 2017)..... 14

Spencer v. Kemna,
523 U.S. 1 (1998) 9

Students for a Conservative Am. v. Greenwood,
378 F.3d 1129 (9th Cir. 2004) 12

Sugarman v. Vill. of Chester,
192 F. Supp. 2d 282 (S.D.N.Y. 2002). 12

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 12, 13

Thomas v. Rios,
548 Fed. Appx. 508 (10th Cir. 2013)..... 19

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 15

United States v. Stevens,
559 U.S. 460 (2010) 7, 19

United States v. Students Challenging Regulatory Agency Procedures,
412 U.S. 669 (1973) 20

United States v. Yonkers,
592 F. Supp. 570 (S.D.N.Y. 1984). 14

Utah Animal Rights Coal. v. Salt Lake City Corp.,
371 F.3d 1248 (10th Cir. 2004) 4, 18, 19

Va. v. Am. Booksellers Ass'n,
484 U.S. 383 (1988) 12

Van Wie v. Pataki,
267 F.3d 109 (2d Cir. 2001)..... 6

VFW John O'Connor Post # 4833 v. Santa Rosa Cty.,
506 F. Supp. 2d 1079 (N.D. Fla. 2007) 14

Williams v. Coal. for Secular Gov't,
580 U.S. __; 137 S. Ct. 173 (2016)..... 8

Younger v. Harris,
401 U.S. 37 (1971) 13

Constitutional Provisions and Statutes

U.S. Const. amend. I .....*passim*

52 U.S.C. § 30110 11

Other Authorities

The Federalist No. 51..... 15

Letter from Evan Muhlstein to Federal Election Commission,
MUR 7643 ("America Progress Now"),
Apr. 15, 2020..... 13

Thomas Paine,
The Crisis No. 1, Dec. 23, 1776 5

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. In particular, the Institute has substantial experience litigating challenges to political speech restrictions. The rule adopted below will make such cases more burdensome, more difficult for non-governmental parties, and less likely to contribute to the orderly development of the law. Accordingly, the Institute writes to explain this case's likely effect on First Amendment litigation arising outside the context of on-campus religious expression.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The "federal courts have consistently awarded nominal damages for violations of First Amendment rights." *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (collecting cases). That remains the case in the majority of the circuit courts of appeal, where a claim for nominal damages will preserve an otherwise-moot case. Pet. 11-22.

This Court should make that rule universal, not only because it will protect parties like Petitioners, but also because it will ease challenges to restrictions on political speech. At present, those cases generally proceed under the "capable of repetition, yet evading review" doctrine. *Fed. Election*

---

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. All Parties have consented to the filing of this brief.

Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007) ("*WRTL II*"). But that "'established exception to mootness,'" *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (quoting *WRTL II*), is applied cautiously in political speech matters. In such cases, a plaintiff seeking to challenge a political regulation must precisely plead just how it intends to trigger the offending statute, not merely in the election it seeks to contest, but all future elections that may take place during the pendency of the case. *Indep. Inst. v. Fed. Election Comm'n*, 216 F. Supp. 3d 176, 182-185 (D.D.C. 2016) (three-judge court) (discussing narrowness of mootness exception in context of First Amendment challenge to federal campaign finance law); *aff'd* 580 U.S. __; 137 S. Ct. 1204 (2017).

This is troubling because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., concurring). Nevertheless, this granular pleading requirement often prevents redress, because political speakers that do not plead nominal damages must constantly refine and explain their proposed activities or risk being thrown out of court. This is a challenging process because, as this Court knows, even in cases where Congress has fashioned a route for rapid review, political speech cases take their time. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed"). And as time passes, the particular communication a speaker might have proposed in one election, involving a particular issue or candidate, may shift –

potentially mooting the case despite a demonstrable history of past chill.

These impediments to the orderly development of the law would be rare under the rule Petitioners seek. Nominal damages will ensure that First Amendment injuries, assuming they can get past the courthouse door, will remain there and be litigated on their merits. For while a nominal "monetary damage award is minuscule in amount, in the eyes of the law its remedial significance is substantial," *Domegan v. Ponte*, 972 F.2d 401, 414-15 (1st Cir. 1992), a recognition of "the importance to organized society that [constitutional] rights be scrupulously observed." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (citation and quotation marks omitted). Such awards will discourage gamesmanship by state actors, bind government defendants, encourage the practice of consent decrees when a state actor concedes error, and make other jurisdictions think twice before abridging constitutional liberties.

At the same time, this Court need not bypass the requirements of Article III. A case or controversy susceptible to nominal damages would still be required, and could be limited to constitutional injuries where social harm is especially pronounced and where the government's "vast resources" and potential for "forc[ing] citizens into acquiescing" are especially dangerous. *Pierce v. Underwood*, 487 U.S. 552, 575 (1988) (Brennan, J., concurring).

ARGUMENT

I. The Majority View Recognizes That Parties Suffering An Irreparable First Amendment Injury Cannot, By Definition, Be Made Whole

At least in the context of the First Amendment, it is incorrect to argue that "nominal damages would serve no practical purpose, would have no effect on the legal rights of the parties, and would have no effect on the future." *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2004) (McConnell, J., concurring). Rather, nominal damages serve as the judicial system's acknowledgement that a significant, though unmeasurable, harm has been wrought. *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 316-321 (2d Cir. 1999) ("[W]hile the monetary value of a nominal damage award must, by definition, be negligible, its value can be of great significance to the litigant and to society").

It has long been recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (Brennan, J., concurring). If even a fleeting deprivation of an enumerated right is irreparable, it is, by definition, a harm that cannot be made whole through the remittance of compensation. *See Elgin v. Marshall*, 106 U.S. 578, 580 (1883) ("[R]ights…[which] are priceless, have no measure in money"). Free speech, a free press, the free exercise of religion, and free association are all priceless, and for that reason, "[h]istory and tradition do not afford any sound

guidance concerning the precise value that juries should place on [these] constitutional protections." *Stachura*, 477 U.S. at 310. Thus, First Amendment rights – those hardest to quantify[2] – are protected by "nominal damages, and not damages based on some undefinable 'value' of infringed rights." *Id.* at 308 n.11. Accordingly, "federal courts have consistently awarded nominal damages for violations of First Amendment rights," *Allah*, 226 F.3d at 251, 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).

An award of nominal damages would recognize that Mr. Uzuegbunam suffered a constitutional injury and that there is not enough money in the world to make him whole for the loss of his First Amendment freedoms. [3] Although respondents later eliminated their Speech Code in the middle of litigation, Pet. Br. at 11, the "irreparable" constitutional violation of Mr. Uzuegbunam's rights was already complete. Nominal damages are the judicial language of the non-compensable.

Indeed, the common-law tradition has always been to "vindicate[] deprivations of" such rights

---

[2] Thomas Paine, The Crisis No. 1, Dec. 23, 1776 ("Heaven knows how to put a proper price upon its goods; and it would be strange indeed if so celestial an article as freedom should not be highly rated") (capitalization altered).

[3] Moreover, this protection would extend to Mr. Bradford as well. The chill imposed by Georgia Gwinnett College imposed harm on all would-be-speakers, not merely those specifically ordered to cease and desist protected activity. Petitioner Bradford's self-silence is a constitutional injury for which nominal damages should be available. *See infra* at 12 (discussing importance of pre-enforcement challenges).

through nominal damages. *Stachura*, 477 U.S. at 308 (citation and quotation marks omitted). Actions for nominal damages exist at law because of "the importance to organized society that those rights be scrupulously observed." *Id*. There is no evidence that Congress ever intended to change this established remedy when it merged the courts of law and equity, when it drafted § 1983, or when it created the Declaratory Judgment Act. It is unsurprising, then, that the Eleventh Circuit's ruling is such an outlier among its sister circuits.[4]

II. Reversal Would Assist The Adversarial System In Political Speech And Association Cases

In addition to recognizing the inherent value of a First Amendment right, the rule Petitioners seek to preserve would particularly benefit political speech

---

[4] The other circuits dealing with the question have recognized a nominal damages exception for compelling injuries to First Amendment rights. *Comm. for First Amend. v. Campbell*, 962 F.2d 1517, 1526-27 (10th Cir. 1992) (noting state cannot "erase[]" violations); *Jacobs v. Clark County School Dist.*, 526 F.3d 419, 426-427 (9th Cir. 2008); *see also Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980) (holding that the infringement of First Amendment rights requires an award of nominal damages); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n. 4 (4th Cir. 2007) (holding plaintiff entitled to nominal damages upon demonstrating success on merits); *Van Wie v. Pataki,* 267 F.3d 109, 115 n. 4 (2d Cir. 2001) ("We note that had the plaintiffs sought money damages in addition to their request for injunctive relief, this controversy would not be moot. Indeed, for suits alleging constitutional violations under 42 U.S.C. § 1983, it is enough that the parties merely request nominal damages").

and association cases. While "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office,'" *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citation omitted), cases challenging the restriction or regulation of political speech are difficult to keep on the federal docket.

Plaintiffs bring political speech and association cases because they are being silenced. Sometimes directly. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Minn. Voters Alliance v. Mansky*, 585 U.S. __; 138 S. Ct. 1876 (2018). Sometimes indirectly, because speaking would trigger onerous obligations. *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982). And sometimes because of a credible fear of official retaliation. *Lozman v. City of Riviera Beach*, 585 U.S. __; 138 S. Ct. 1945 (2018).

A judicial remedy often is the only way to vindicate these freedoms, especially given the populist appeal of certain constitutional violations and the general popularity of campaign finance restrictions in particular. *Cf. United States v. Stevens*, 559 U.S. 460, 480 (2010) ("Not to worry, the Government says…But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*"); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (noting "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution").

Because of the time required for litigation, these cases are rarely decided when a person wishes to speak. The alleged government retaliation against Fane Lozman began in 2006, 138 S. Ct. at 1949, and

this Court did not even determine whether he could bring his retaliation claim until twelve years later. That case may be an outlier, but gaps of many years are hardly unusual. *E.g., Calzone v. Summers*, 942 F.3d 415 (8th Cir. 2019) (*en banc*) (concluding in November 2019 that enforcement initiated by November 2014 ethics complaint violated the Petition Clause); *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016) (motion for preliminary injunction filed August 2012, district court enjoined Colorado campaign finance law in October 2014, appellate court affirmed in March 2016); *cert. denied sub. nom Williams v. Coal. for Secular Gov't*, 580 U.S. __; 137 S. Ct. 173 (2016).

This plodding process often prevents plaintiffs from litigating a matter to judgment, much less protecting it on appeal, when their First Amendment injury is traceable to a specific upcoming election. As this Court lamented in *Citizens United*, it took "two years" for that nonprofit to "finally learn[]…whether it could have spoken during the 2008 Presidential primary." 558 U.S. at 334[5]; *see also Emineth v. Jaeger*, 901 F. Supp. 2d 1138, 1142 (D.N.D. 2012) ("Elections are, by nature, time sensitive and finite. While there will be other elections, no future election will be *this* election") (emphasis in original).

This Court has determined that such cases may be saved by the "established exception to mootness," of being "capable of repetition, yet evading review." *Davis*, 554 U.S. at 735 (quoting *WRTL II*, 551 U.S. at 462). This relaxation of standing requirements is

---

[5] Even *Citizens United* was decided with relative dispatch, owing to a provision in the federal law providing for an immediate appeal to this Court from the three-judge district court.

well-meaning, but it is an insufficient safety net. Unlike cases where the mere existence of a plaintiff suffices to preserve standing, *Roe v. Wade*, 410 U.S. 113, 125 (1973), the mere existence as a political committee, or the undisputed fact that a litigant was once involved in a controversy before a scheduled election, is insufficient to confer continual standing.

Rather, plaintiffs bear the burden of demonstrating a "'reasonable expectation that the same complaining party will be subject to the same action again.'" *WRTL II*, 551 U.S. at 462 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). In practice, this means continuously pleading that the plaintiff will remain active in future election cycles in a substantially similar manner under the same underlying statute. But that makes it impossible for litigants with an interest in *a particular* election to obtain final relief; only long-term, repeat players need apply.[6]

Moreover, because both the government and the courts must deeply probe standing under this ill-defined doctrine, these cases are further warped by irrelevant discovery and questioning about *future* plans even when prior political participation, or planned participation subject to the challenged

[6]"The Institute acknowledges that, after the 2016 election cycle concludes, neither of the Colorado Senators that its advertisement targets will be up for election before the 2020 primary season, and thus that the Act will not apply to this advertisement for roughly another four years." *Indep. Inst.*, 216 F. Supp. 3d at 185. Only "because the other Senator referenced in the advertisement—Senator Michael Bennet—is up for election this Fall, and the Institute made clear at oral argument that it still desires to run this particular advertisement during the 2016 general election cycle…the case before us is not moot." *Id*.

statute, is conceded. This ensures that large amounts of paper, irrelevant to the election and issue at hand, must be traded before a district court even reaches the merits. And the time expended in this process further delays the case and, consequently, further endangers standing. The opportunities for gamesmanship are obvious.

In practice, this rule also means that governments are immune from suit by genuine plaintiffs harmed a single time, especially where they choose not to speak in the face of an unconstitutional law and, consequently, are never subject to prosecution for violating that law. Spur-of-the-issue activists with no intention of turning into established, semi-permanent political groups are unlikely to stay for the long haul of a multiyear federal court battle, particularly where they will be placed in the awkward position of constantly refining and re-pleading their proposed activities, often under penalty of perjury, in order to avoid being tossed out of court.

Even then, this arrangement fails when it is impossible to predict when or how a constitutional injury will recur, rendering the capable-of-repetition exception illusory. For example, from 2013 to 2014, the Institute represented the Libertarian National Committee ("LNC") in a challenge, where nominal damages were not in issue, to the federal law capping contributions from a deceased person's estate. *Libertarian Nat'l Comm. v. Fed. Election Comm'n*, 930 F. Supp. 2d 154 (D.D.C. 2013). That case came involved a surprise bequest of hundreds of thousands

of dollars, a substantial sum to a third party that has never elected a federal candidate.[7]

Federal law limits the amount of money a political party may receive from an individual, even a deceased one who cannot expect future political favors on account of her bequest, and the LNC sought to receive the entire bequest at once. As the litigation wore on, the bequest, which was being collected from the estate at the maximum annual limit under then-current law, was exhausted before a court could hear the merits, even under the expedited review process provided by the Federal Election Campaign Act. 52 U.S.C. § 30110. The case was found to be moot in spite of the LNC's assurances that it would solicit large bequests in the future and would seek to receive future large testamentary gifts all at once. *Libertarian Nat'l Comm. v. Fed. Election Comm'n*, 2014 U.S. App. LEXIS 25108 (D.C. Cir. 2014) (*en banc*).

Five years later, the LNC received another bequest, was forced to return to federal court and duplicate its prior efforts, and finally obtained a binding decision that resolved the First Amendment questions in that case. *Libertarian Nat'l Comm. v. Fed. Election Comm'n*, 924 F.3d 533 (D.C. Cir. 2019) (*en banc*). The LNC's situation in 2014 should be an aberrant one, and it would be if Petitioners prevail and future plaintiffs seek nominal damages. By contrast, making the Eleventh Circuit's opinion the

---

[7] Justin Amash, who currently represents Michigan's Third District, has identified as a Libertarian since 2020, but was elected to the House as a Republican. No Libertarian has ever been elected to Congress.

law of the land would protect such inefficiencies and impediments to constitutional rights.

Political speech cases could, if Petitioners prevail, be saved by properly pled nominal damage claims when they would otherwise be rendered moot due to a change in government policy or the passage of time. *See e.g., Students for a Conservative Am. v. Greenwood*, 378 F.3d 1129 (9th Cir. 2004); *Am. Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001); *McFadden v. City of Bridgeport*, 422 F. Supp. 2d 659 (N.D. W.Va. 2006); *Sugarman v. Vill. of Chester*, 192 F. Supp. 2d 282 (S.D.N.Y. 2002).

In addition, this rule would also have salutary benefits in the case of chilled would-be-speakers, such as Petitioner Bradford, ensuring that they may bring suit based upon their "self-censorship; a harm that can be realized even without an actual prosecution." *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law"). By contrast, if one cannot claim nominal damages until actual, repeatable action is taken by the government, notwithstanding the clear text of an unconstitutional rule, would-be-speakers will be chilled from becoming plaintiffs in pre-enforcement challenges.

This is especially likely with political speech regulations, where civil penalties are often enforced through a process of third-party complaints to a state ethics or elections agency. "Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints

from, for example, political opponents." *Susan B. Anthony List*, 573 U.S. at 164. Thus, speaking out in violation of a censorial campaign law not only risks the reputational harm imposed by politically-driven complaints, but can also work to deny a federal forum via the abstention doctrine. *Younger v. Harris*, 401 U.S. 37 (1971). Allowing a chilled would-be-speaker to claim nominal damages based on her present "well-founded fear[s]" avoids this procedural trap entirely. *Susan B. Anthony List*, 573 U.S. at 160.

Ultimately, reliance on the capable-of-repetition standard to preserve standing is both insufficient and inefficient. Rather, it biases the federal docket toward meticulously planned test cases, designed to survive years of active litigation, and against the constitutional harms routinely suffered by average citizens – precisely the harms that are most likely to discourage active political participation.[8]

---

[8] Let me immediately state that I was unaware of the potential need to file any disclosures with the FEC and if an error has been made the commission has my sincerest apology…Given the apparent obstacles and unknowns of participating in the election process in this manner (of which I am learning some of now), it is highly unlikely I will ever participate in it again. I feel terrible for having been so ignorant to the process.

Letter from Evan Muhlstein to Federal Election Commission at 1-2, MUR 7643 ("America Progress Now"), Apr. 15, 2020; *available at*: https://www.fec.gov/files/legal/murs/7643/7643_04.pdf

III. Relief For Petitioners Will Disincentivize Governmental Gamesmanship

Petitioners' requested relief will also reduce opportunities for gamesmanship encouraged by the Eleventh Circuit's new rule. Government defendants already have significant advantages, from a presumption of good faith when changing their policies, *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009), to qualified immunity, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[9] The decision below offers another: the ability to

[9] While government defendants are routinely accorded a presumption of good faith, it is noteworthy that state actors sometimes pass or enforce laws contrary to established law, either to tee up their own test cases before this Court or to appease public opinion. *In re Validation Proceeding…*, 366 Ore. 295, 331 (Or. 2020) ("[A]s the county concedes, and we agree, the county's expenditure limits unambiguously violate the First Amendment. *Buckley* held that the government cannot restrict independent expenditures by individuals, *Citizens United* held [the same for] corporations and unions…The county's ordinance restricts both") (internal citations omitted); *United States v. Yonkers*, 592 F. Supp. 570, 577 (S.D.N.Y. 1984) (Congress passed a unicameral veto even though it "knew well that the technique was of questionable validity"); *S. Dakota v. Wayfair, Inc.*, 229 F. Supp. 3d 1026, 1036 (D.S.D. 2017) (noting state passed unconstitutional tax as a test case to overturn Supreme Court precedent); *VFW John O'Connor Post # 4833 v. Santa Rosa Cty.*, 506 F. Supp. 2d 1079, 1093 (N.D. Fla. 2007) ("[T]he Board would have enacted an ordinance banning such beverages within 2500 feet of schools and churches even had it known that the waiver provision would be declared unconstitutional").

manipulate the judicial process to wait out or outmaneuver plaintiffs challenging unconstitutional rules.

Should a challenge threaten a law or policy that a school district, public university, or state commission wants to preserve, it can solemnly put the tool away, but in an easy to reach place, until the courts are no longer looking. And if a plaintiff succeeds in obtaining an unfavorable decision, a state actor may simply change the rules after appealing and ask for the decision to be vacated. *See United States v. Munsingwear, Inc.,* 340 U.S. 36 (1950).[10]

As Madison noted, "[i]f angels were to govern men, neither external nor internal controls on government would be necessary." The Federalist No. 51. Thus, for example, Congress passed the Equal Access to Justice Act out of "[c]oncern[] that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation." *Pierce*, 487 U.S. at 575 (Brennan, J., concurring). Jurisdictions should not be trusted with the option of "plaintiff-shopping" for the most advantageous fact patterns before finally submitting their policies to the judgment of the courts.

Protecting nominal damages, then, will encourage more honest litigation and the orderly

---

[10] This gamesmanship is especially threatening in the context of political retaliation claims, where governments already enjoy the advantage of requiring that a chilled plaintiff prove her silence would be shared by a hypothetical person of "ordinary firmness." *See Bennie v. Munn*, 822 F.3d 392 (8th Cir. 2016) (finding person of ordinary firmness would not have been deterred by government action).

development of the law, as cases are more likely to be litigated to precedential judgment. *June Med. Servs. L.L.C. v. Russo*, 591 U.S. __; 140 S. Ct. 2103, 2134 (2020) ("Respect for precedent 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'") (quoting *Payne v. Tenn.*, 501 U.S. 808, 827 (1991)).

IV. Petitioners' Proposed Rule Will Undermine Neither Judicial Economy Nor The Dictates Of Article III

Providing for nominal damages will not unduly clog the dockets of district courts nor undermine federal civil procedure. As discussed above, nominal damages exist to "vindicate[] deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Accordingly, this exception protects only the most important constitutional rights. Violations of fundamental First Amendment freedoms, like those at issue here and in the election context, present precisely the situations where this exception should apply. But beyond such situations, the exception has no purpose or power to extend jurisdiction.

Moreover, it is unlikely that following the majority approach to nominal damages would lead to a significant increase in First Amendment cases defeating mootness, or even necessarily lead to an

increase at all.[11] As noted above, practitioners in the First Amendment area have traditionally pled their cases to maintain standing using the exception for cases capable of repetition yet evading review. If First Amendment plaintiffs relied on nominal damages for the same cases, courts would get to the merits without needless briefing, argument, and conjecture about potential future activity. And it would eliminate the waste of resources caused by repeatedly going to court and raising exactly the same issues, only to see the courts fail to provide a final judgment.[12] Indeed, this rule might well *reduce* the overall caseload by ensuring more cases end in precedential opinions which, in turn, will limit the universe of unanswered constitutional questions requiring future litigation.

But even if there were a slight increase in cases, that would be insufficient reason to abandon the rule Petitioners propose. This Court has recognized that the critical rights protected by the First Amendment sometimes require greater solicitude, and that is true even when it creates rules

---

[11] That these numbers are relatively small is highlighted by looking at the broader class of § 1983 cases. Even including all constitutional actions, not just those involving the First Amendment, *Amicus* found only a small set of cases where the government asserted mootness resulting from changes in law or policy. 57 cases arose in federal courts from 2016 to 2020, 44 from 2011 to 2015, 46 from 2006 to 2010, 25 from 2001 to 2005, 2 from 1996 to 2000, 12 from 1991 to 1995, and 14 in the two decades prior to that. These results reflect parallel searches in Westlaw and Lexis: In Westlaw reviewing the § 1983 cases in the key number for "voluntary cessation of challenged conduct," and in Lexis limiting the search results for § 1983 cases with the parameters "mootness and 'voluntary cessation.'"

[12] See, for example, the *Libertarian National Committee* litigation discussed in Section II, *supra.*

that lead to some increased work for the courts below. *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (relaxing rigid standing requirements in First Amendment facial overbreadth cases). These additional protections for First Amendment freedoms are rightly celebrated, and this Court should ensure that the courthouse door remains open to hear these vital cases.

Furthermore, there are significant safety valves to release frivolous cases that might strain the system. "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). The exception for nominal damages still requires that a party allege and prove "an 'injury in fact'—namely, deprivation of the First Amendment right to communicate a particular . . . message." *Jacobs*, 526 F.3d at 426-27. And mootness would still apply when a plaintiff's rights have already been protected through judicially awarded or sanctioned relief, or when the government simply accepts its error and pays the nominal damages. *See Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1243 (10th Cir. 2010) (denying retrial for city defendant on nominal damages because plaintiffs already had a decision that city employees had "acted unconstitutionally"); *Utah Animal Rights Coal.*, 371 F.3d at 1273 (Henry, J., concurring) ("A defendant could also simply *pay* the nominal damages, thereby mooting the case…").

In addition, the government may resort to a simple expedient, one that will limit the costs of litigation in the face of a sudden solicitude for citizens'

constitutional rights: a consent decree. As a "legally enforceable obligation," *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 591 (1984), consent decrees give citizens an assurance beyond mere hope for "the mercy of *noblesse oblige*," *Stevens*, 559 U.S. at 480, while protecting the public fisc from additional fee awards. *See e.g.*, *Thomas v. Rios*, 548 Fed. Appx. 508, 509 (10th Cir. 2013). Such an outcome, for example, would vindicate the rights of Petitioner Bradford in this very case.

Governments should recognize and respond to well-defined incentives. When a government's solicitude is sincere, it will end constitutional litigation by entering into a consent agreement and paying nominal damages. And the failure to do so will signal that a mootness-inducing change in law is merely a ploy to persist, someday, in unconstitutional behavior.

Nor will a nominal damages exception undermine the adversarial process. Our system requires that a party have sufficient "personal stake in the outcome of the controversy [so] as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Parties willing to spend years litigating constitutional issues are not doing so purely for some "symbolic" victory. *Utah Animal Rights Coal.*, 371 F.3d at 1264 (McConnell, J., concurring). They do so to seek justice, for themselves and others.

As noted above, to make a claim for nominal damages, plaintiffs must assert a violation of important constitutional rights. That is, they must demonstrate "irreparable" injuries to themselves.

Elrod, 427 U.S. at 373. And their purpose in continuing to litigate—solely in order to receive truly nominal damages—is to gain judicial recognition that the government's actions have violated their rights, and all the protections such a decision brings. In such cases, "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (internal quotation marks and citation omitted). That motivation is quite sufficient to promote the presentation of issues upon which the courts rely.

Thus, far from undermining judicial economy and the purposes of the Article III standing requirements, the exception to mootness for nominal damage claims will buttress them.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Eleventh Circuit.

Respectfully submitted,

ALLEN DICKERSON
Counsel of Record
ZAC MORGAN
MALLORY RECHTENBACH
OWEN YEATES
INSTITUTE FOR FREE SPEECH
1150 Conn. Ave., N.W.
Suite 801
Washington, D.C. 20036
adickerson@ifs.org
(202) 301-3300

Sept. 29, 2020 *Counsel for* Amicus Curiae