No. 19-968

IN THE

Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,
Petitioners,

v.

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

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

BRIEF FOR AMICUS CURIAE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

DANIEL P. KEARNEY, JR.
Counsel of Record
KEVIN GALLAGHER
KEVIN R. PALMER
LYDIA LICHLYTER
HYUN-SOO LIM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
daniel.kearney@wilmerhale.com

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INTEREST OF AMICUS CURIAE[1]

Amicus is an incorporated group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. Representing members of the legal profession and as adherents of a minority religion, amicus has a unique interest in ensuring that the First Amendment protects the diversity of religious viewpoints and practices in the United States. Recognizing standalone nominal-damages claims serves to protect the religious liberty and freedom of speech of all Americans, including college students and religious minorities. To that end, amicus urges the Court to reverse the decision below.

SUMMARY OF ARGUMENT

Nominal damages allow plaintiffs to "vindicate deprivations of certain 'absolute' rights" that are "import[ant] to organized society." *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Among the most important of those rights is the freedom of speech enshrined in the First Amendment. And among the most important areas where freedom of speech requires protection is at colleges and universities—institutions that have had a historical role in promoting free inquiry and open discussion.

Freedom of speech is 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 officials' efforts to

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

escape constitutional review and moot their claims. A recent example is the circumstances of the certiorari petition presented to this Court in *Ben-Levi* v. *Brown*, where application of the voluntary cessation doctrine would have frustrated the petitioner's challenge to a prison policy that discriminated against Jewish prisoners. 136 S. Ct. 930, 935 n.7 (2016) (Alito, J., dissenting from denial of certiorari). The Eleventh Circuit's decision below presents yet another potential obstacle to First Amendment claims, and fails to recognize the importance of nominal damages in protecting the rights of religious minorities.

This Court should reaffirm the important role claims for nominal damages play in vindicating basic constitutional rights. Nominal-damages claims hold government officials accountable for their unconstitutional conduct; officials cannot escape review by tactically changing their policies prospectively. Such claims also recognize that free speech restrictions and other deprivations of basic constitutional rights inflict real injuries, even if those injuries are not financial or precisely quantifiable.

ARGUMENT

I. SPEECH ON UNIVERSITY CAMPUSES MUST BE PROTECTED WITH PARTICULAR VIGOR

This Court should reaffirm that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy* v. *James*, 408 U.S. 169, 180 (1972). Rather, the precedents of this Court "leave no room for the view" that "First Amendment protections should apply with less force on college campuses than in the community at large." *Id.* The decision below has significant consequences for cases involving

these constitutional principles, and opens the door to potential restrictions of students' free speech rights on college campuses.

Religious speech—like that of Petitioners—is not exempt from the growing tendency of colleges and universities to regulate speech. As this Court has lamented, "[i]n Anglo-American history, … government suppression of speech has … commonly been directed precisely at religious speech." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995). One study found that 1 in 4 students experienced religious intolerance or discrimination on their college campuses. Broderick & Fosnacht, *Religious Intolerance on Campus: A Multi-Institutional Study*, 4 (Nov. 2017), https://cpb-us-w2.wpmucdn.com/blogs.iu.edu/dist/1/159/files/2017/11/ASHE_2017_Broderick_Fosnacht-1wjv0t7.pdf. Such religious discrimination is distressingly common for religious minorities. *Id.* at 12. In particular, Jewish students have experienced significant Anti-Semitism on campus. *See, e.g.*, Shapiro, *Anti-Semitism at NYU*, Wall St. J. (Apr. 21, 2019), https://www.wsj.com/articles/anti-semitism-at-nyu-11555873457; Frazin, *Columbia University student first to file anti-Semitism complaint under Trump order*, The Hill (Dec. 26, 2019), https://thehill.com/homenews/administration/475980-columbia-university-student-first-to-file-anti-semitism-complaint. A blatant example of this is the University of California Los Angeles student who was rejected from student government because she was "very active in the Jewish community." Kosmin, *UCLA student is latest victim of anti-Semitism on campus*, CNN (Mar. 10, 2015), https://www.cnn.com/2015/03/10/opinions/kosmin-anti-semitism-campus/index.html.

While the freedom of speech is crucial to responding to this hostility, intolerance often leads to the imposition of speech restrictions on religious minorities. For instance, in 2017 the London "School of Oriental and African Studies student union passed a resolution banning anyone affiliated with Zionist ideology from speaking on campus *on any topic whatsoever*." Pessin & Ben-Atar, *The Silencing of Pro-Israel Students on Campus*, Tablet (Mar. 20, 2018), https://www.tabletmag.com/sections/news/articles/the-silencing-of-pro-israel-students-on-campus. Similarly, last year Williams College's student government rejected a proposal to create a Williams Initiative for Israel student group solely based on its pro-Israel viewpoint. Fink, *Williams College Investigated for Alleged Civil Rights Violation After Students Vote Against Pro-Israel Group*, Newsweek (June 4, 2019), https://www.newsweek.com/williams-college-investigation-pro-israel-civil-rights-1442118.

These examples are indicative of a larger problem on college campuses today: Freedom of speech is particularly vulnerable there. "Speech codes" that impermissibly prohibit or restrict speech and free expression in American universities date back to the 1980s. *See, e.g.*, Weinberg, *Treating the Symptom Instead of the Cause: Regulating Student Speech at the University of Connecticut*, 23 Conn. L. Rev. 743, 746 (1991) (noting a speech code at the University of Connecticut in the 1980s that banned "inappropriately directed laughter," "anonymous notes or phone calls," and "conspicuous exclusions from conversations and/or classroom discussions"). Today, speech restrictions continue to threaten freedom of speech on campuses through broad and vague regulations. One public university, for instance, bans any posting of materials on campus that contain

"obscene" or "vulgar" material, without explaining what is considered "obscene" or "vulgar." University of Tex. at San Antonio, *Handbook of Operating Procedures* § 9.09(II)(3)(d), utsa.edu/hop/chapter9/9-9.html (last visited Sept. 28, 2020). Another directs students to "report to university staff any incidents of intolerance, hatred, injustice, or incivility," without defining or explaining these terms. Sonoma State Univ., *Resolution in Support of an SSU Statement on Civility and Tolerance*, http://senate.sonoma.edu/resolutions/resolution-support-ssu-statement-civility-and-tolerance (last visited Sept. 28, 2020).

There has also been a proliferation of Orwellian "free speech zones" that are used to justify speech restrictions everywhere else on campus. Unfortunately, the restrictive "free speech zones" at Georgia Gwinnett College (GGC)—which comprised 0.0015% of campus and were only open about 10% of the week, Pet. App. 76a-78a, 138a, 146a—are not an outlier. One federal court recently struck down a free speech zone at the University of Cincinnati that comprised 0.01% of the campus. *See University of Cincinnati Chapter of Young Ams. for Liberty* v. *Williams*, 2012 WL 2160969 (S.D. Ohio June 12, 2012). And at Pierce College, a free speech zone consisted of just .003% of the campus, comparable to the area that an iPhone would take up on a tennis court. *See* Howard, *No Place for Speech Zones: How Colleges Engage in Expressive Gerrymandering*, 35 Ga. St. U. L. Rev. 387, 387 (2019). By quarantining expression to prescribed areas, these zones infringe upon the First Amendment rights of everyone on campus. The consequence of narrowly prescribed free-speech zones is that speech elsewhere on campus is restricted, which serves to undermine the very purpose of a university. *See Christian Legal Soc'y Chapter of*

Univ. of Cal., Hastings Coll. of Law v. *Martinez*, 561 U.S. 661, 705 (2010) ("A vibrant dialogue is not possible if students wall themselves off from opposing points of view.") (Kennedy, J., concurring).[2]

II. NOMINAL DAMAGES SERVE TO VINDICATE FUNDAMENTAL CONSTITUTIONAL PROTECTIONS FOR RELIGIOUS MINORITIES

Nominal-damages claims serve to prevent government officials from strategically mooting valid constitutional claims and thus closing off relief to adherents of minority faiths and other individuals. Governmental entities enjoy a troubling structural advantage in constitutional litigation, made worse by lower courts' application of the "voluntary cessation" exception to mootness. By affirming nominal damages claims, this Court would ensure a forum for adherents of minority faiths to seek redress for constitutional injuries.

As this Court has explained, the mootness doctrine flows from Article III's requirement of a "case or controversy." *Chafin* v. *Chafin*, 568 U.S. 165, 173 (2013). Generally, "a suit becomes moot[] 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* (quoting

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[2] The recent coronavirus (COVID-19) pandemic has introduced additional challenges to freedom of speech on college campuses. Sensitivity over criticism of university policies on reopening appears to be prompting speech restrictions on certain topics. For instance, student residential advisors have alleged that the Louisiana State University has prohibited them from speaking to the media, including the on-campus newspaper, regarding whether the students they oversee test positive for COVID-19. *See* Ballard, *Is LSU ready to house 7,000 incoming students on campus? A former RA doesn't think so*, The Advocate (Aug. 11, 2020), https://www.theadvocate.com/baton_rouge/news/education/article_35606f96-dc23-11ea-b194-4bc31fd3ddec.html.

Already, LLC v. *Nike, Inc.*, 568 U.S. 85, 91 (2013)). One "exception" to this general principle is the doctrine of "voluntary cessation." "[V]oluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). But this exception does not apply where "subsequent events ma[de] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

In recent years, government litigants have used the voluntary cessation doctrine to strategically moot constitutional claims, including claims brought by religious minorities. *See* Davis & Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. Forum 325, 329-332 (2019) (describing patterns of "strategic mooting"). The risk of this strategic behavior is particularly acute in the case of administrative regulations that can be easily rescinded once a lawsuit is filed (*e.g.*, a college speech policy). The facts of *Ben-Levi* v. *Brown*, a petition for certiorari this Court entertained a few years ago, highlight the danger. Mr. Ben-Levi was a Jewish prisoner who requested permission to study the Torah with fellow Jewish inmates. 136 S. Ct. 930, 930 (2016) (Alito, J., dissenting from denial of certiorari). The prison authority denied his request on the basis of her understanding that the "'requirements, practices and tenets of Judaism'" required "either a minyan"—"a quorum of 10 adult Jews"—"or

the presence of a qualified leader (such as a rabbi)," and Mr. Ben-Levi "could not assemble a quorum of 10 Jews," nor could the prison "find a rabbi or other qualified leader." *Id.* at 931. Mr. Ben-Levi then sued under 42 U.S.C. § 1983, alleging violations of the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act. *Id.* at 931-932. The district court granted summary judgment for the prison authority, and the Fourth Circuit affirmed. *Id.* at 932. Mr. Ben-Levi petitioned this Court for certiorari. In opposition to Mr. Ben-Levi's petition, the respondent asserted that the claims were moot because the prison had changed the policy at issue to, under some circumstances, permit "an inmate to lead a study group [] if a 'community volunteer is not available[.]'" *Id.* at 935 n.7. But as Justice Alito noted in his dissent from denial of certiorari, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Id.* (quoting *Knox*, 567 U.S. at 307). Application of voluntary-cessation mootness in *Ben-Levi* would have entirely frustrated the petitioner's challenge to the prison's discriminatory policy.

Cases involving the provision of kosher meals to prisoners similarly demonstrate the risk of authorities' strategically mooting claims. For instance, in response to a prisoner suit challenging the Commonwealth of Massachusetts's refusal to provide Jewish inmates with kosher meals, the state mooted the case by voluntarily providing the plaintiff with the requested meals, "avoid[ing] the prospect of a systemic change in policy." Davis & Reaves, 129 Yale L.J. Forum at 330-331; *see also Guzzi* v. *Thompson*, 2008 WL 2059321 (1st Cir. May 14, 2008) (per curiam). Another concern is that

government litigants might seek to moot cases where the prisoner is represented by counsel, while allowing *pro se* cases to proceed to final judgment. For instance, in recent years, Florida successfully litigated to final judgment at least two *pro se* prisoner claims concerning kosher meals, thus securing for itself favorable precedent against unrepresented adversaries. *See, e.g.*, *Gardner* v. *Riska*, 444 F. App'x 353, 354 (11th Cir. 2011) (per curiam) (affirming dismissal of a *pro se* prisoner's claim that he was denied a kosher diet); *Linehan* v. *Crosby*, 2008 WL 3889604, at *2 (N.D. Fla. Aug. 20, 2008) (dismissing *pro se* prisoner's claim for kosher meals upon finding a compelling state interest). On the other hand, the Florida Department of Corrections attempted to strategically moot a kosher meal case after the petitioner had retained counsel who adequately briefed the case. *See Rich* v. *Secretary, Fla. Dep't of Corrections*, 716 F.3d 525, 532 (11th Cir. 2013). This practice is common and reveals the bad-faith nature of strategic mooting. *Compare Baranowski* v. *Hunt*, 486 F.3d 112, 116-117 (5th Cir. 2007) (Texas Department of Criminal Justice litigated *pro se* prisoner's kosher-meal claim to final judgment) *with Moussazadeh* v. *Texas Dep't of Criminal Justice*, 2009 WL 819497, at *9 (S.D. Tex. Mar. 26, 2009) (Texas Department of Corrections strategically mooted kosher-meal claim by transferring prisoner who was represented by counsel).

Such conduct has also frustrated religious liberty claims brought by other religious minorities. In *Ajaj* v. *United States*, for instance, a Muslim inmate brought suit against federal prison officials who refused to distribute his medications before dawn and after sunset during Ramadan, thus preventing him from fasting during the holy month. 2016 WL 6212518, at *1 (D. Co-

lo. Oct. 25, 2016). Once the inmate filed suit, the government defendants changed their policy and had the claim dismissed as moot, leaving the inmate with no remedy for the two prior years in which he was denied the right to practice his religion. *Id.* at *3.

Likewise, in *Chesser* v. *Walton*, a Muslim inmate sued federal prison officials in Illinois claiming that he was impermissibly forbidden from congregating with other inmates for prayer. 2016 WL 6471435, at *1, *4 (S.D. Ill. Nov. 2, 2016). Prison officials transferred the inmate to a facility in Colorado, where he refiled his suit. *Chesser* v. *Director, Fed. Bureau of Prisons*, 2016 WL 1170448, at *1 (D. Colo. Mar. 25, 2016). The government then successfully moved to dismiss the Colorado suit as duplicative of the Illinois suit, *id.* at *2-4, and the Illinois suit as moot because the inmate had been transferred to Colorado and could not show that he would "likely … face the same conditions" (despite the fact that he alleged that he was subject to the same conditions in both prisons), *Walton*, 2016 WL 6471435, at *4.[3]

The expansive application of voluntary-cessation mootness forces litigants like these into a game of constitutional "whack-a-mole": their suits may induce the government to rescind the challenged policy, but the government is left free to try again, without the impediment of a court's determination that the prior policy was unconstitutional. "[T]his *ability* to reinitiate challenged conduct creates … continuing harm" by leaving

[3] Another example of such gamesmanship is *Johnson* v. *Killian*, where prison officials mooted a Muslim inmate's challenge to group-prayer restrictions by transferring him out of New York just days after he filed suit in the Southern District of New York. 2009 WL 1066248, at *1 (S.D.N.Y. Apr. 21, 2009).

litigants' rights ultimately unsettled, Davis & Reaves, 129 Yale L.J. Forum at 340, but is generally not a cognizable basis to defeat mootness, *see Larsen* v. *U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) ("'[T]he mere power to reenact a challenged [policy] is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists.'" (quoting *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997))).

In this respect, nominal-damages claims play a critical role. Even if a government authority changes its policy to strategically moot *prospective* relief, a plaintiff's claim for nominal damages arising from *past* constitutional injury survives and presents a live Article III controversy. Contrary to the Eleventh Circuit's reasoning below, there is nothing anomalous about this: "It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting Blackstone, 3 *Commentaries on the Laws of England* 23 (Oxford Clarendon Press 8th ed. (1768)). This Court has long recognized that nominal damages are an appropriate remedy for one-time torts such as libel or trespass. *See Pelham* v. *Way*, 82 U.S. (15 Wall.) 196, 202 (1872) (libel plaintiff "entitle[d]" to "nominal damages" in a suit to clear his name); *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 170 (1920) (nominal damages appropriate in a trespass suit without property damage). The same principle rightly applies to constitutional torts, particularly where vindication of a plaintiff's rights may otherwise be mooted by government gamesmanship. Nominal damages are thus a "solution to mootness," *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 69 n.24 (1997), and serve to ensure that

plaintiffs like Petitioners—and the many religious minorities who seek the protection of the federal courts—are able to obtain a remedy for violations of their constitutional rights.

What is ultimately at stake here is the ability of religious adherents subject to discriminatory policies to get their day in court and vindicate their constitutional rights. Access to the courtroom is vital for religious minorities whose practices are often unknown or misunderstood by government officials. Allowing adherents to present their First Amendment claims to a neutral arbiter—and to have those claims adjudicated—is essential to the protection of their constitutional rights.

CONCLUSION

This Court should reverse and remand.

Respectfully submitted.

DANIEL P. KEARNEY, JR.
Counsel of Record
KEVIN GALLAGHER
KEVIN R. PALMER
LYDIA LICHLYTER
HYUN-SOO LIM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
daniel.kearney@wilmerhale.com

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