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 *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF THE PETITIONERS

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 987-3888

Michael J. Lockerby
Counsel of Record
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007
(202) 945-6079
mlockerby@foley.com

Counsel for Amicus Curiae The Rutherford Institute

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues. The First Amendment is an area in which the Institute has been particularly active in terms of legal representation and public education alike.[2]

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[1] The parties have consented to the filing of this brief, either by blanket consent filed with the Clerk or individual consent. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

[2] Recent cases before the Court in which the Institute has submitted an amicus brief include *Fulton v. City of Philadelphia*, No. 19-123; *FNU Tanzin v. Tanvir*, No. 19-71; *The American Legion v. American Humanist Ass'n and Maryland National Capital Park and Planning Commission v. American Humanist Ass'n*, Nos. 17-1717 and 18-18; *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*, No. 18-548; *Hoever v. Belleis*, No. 17-1035; and *Holt v. Hobbs*, No. 13-6827. Other First Amendment cases decided by the Court in which the Institute has been involved include *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001) and *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989).

The Institute has been similarly active at the state level. For example, the Institute challenged an Oklahoma requirement for submitting to a biometric photograph as a condition of obtaining a driver's license. It has also urged the California

This case is of particular concern to the Institute because the Eleventh Circuit's decision threatens not only one but two of the fundamental freedoms guaranteed by the First Amendment: freedom of speech and freedom of religion. The decision of the Eleventh Circuit is troubling not only because the deprivation of First Amendment rights was particularly egregious. Georgia Gwinnett College is a public, state supported university. As such, its "free speech zone" should be 100% of the campus on a 24/7 basis—not .0015% of the campus only 10% of the time. And more fundamentally, the "free speech zone" was no such thing because, even with a permit, a student's exercise of free speech and free exercise of religion could result in disciplinary action if the content of the speech made another student feel "uncomfortable." It should not have taken a federal case to get college officials to change policies that were so obviously violative of the First Amendment.

But what is even more disturbing about this case—prompting the involvement of the Institute—is the fact that the Northern District of Georgia and the Eleventh Circuit alike have simply ignored the longstanding rule, dating back to *Marbury v. Madison*,[3] "that where there is a legal right, there is also a legal remedy." *Franklin v. Gwinnett Cnty. Pub.*

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legislature to accommodate religious objections to a mandatory vaccine law.

[3] More than 200 years ago, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court recognized that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

Schs., 503 U.S. 60, 66 (1992) (quoting 3 WILLIAM BLACKSTONE, Commentaries *23 (1783)). The Eleventh Circuit stands alone in holding that government officials can eliminate the existence of a justiciable case or controversy by the simple expedient of changing the unconstitutional conduct and policies at issue. Consistent with this Court's precedents and the decisions of other U.S. Circuit Courts of Appeal cited herein, this Court should reverse the Eleventh Circuit and instead affirm the principle that claims for nominal damages are not moot if based on prior constitutional violations.

SUMMARY OF ARGUMENT

Especially in the critical areas of free speech and free exercise of religion, compensatory damages for violations of constitutional rights are often difficult to quantify, and punitive damages are rarely if ever recoverable against government officials acting in their official capacities. The need to deter future violations is among the reasons that this Court has long recognized that nominal damages alone may in certain circumstances be the only effective remedy for past violations. The fact that a government actor faced with litigation may henceforth cease its prior constitutional violations, while perhaps eliminating the need for prospective injunctive and declaratory relief, does not deprive the federal courts of Article 3 jurisdiction. Other U.S. Circuit Courts of Appeal have long recognized this fundamental principle. The Eleventh Circuit needs to be brought in line with this basic tenet of constitutional law.

The decision below also threatens to undermine the ability of citizens to obtain competent

representation for claims that they have been deprived of fundamental rights. By enacting 42 U.S.C. § 1988, which allows recovery of attorneys' fees by prevailing parties in civil rights cases, Congress sought to ensure effective access to the judicial process for persons with civil rights grievances. However, the practice of "tactical mooting" by civil rights defendants threatens the incentives provided by Section 1988 to public interest lawyers. Limiting the availability of nominal damages further diminishes the chances of obtaining the relief necessary to be a prevailing party eligible for Section 1988 attorneys' fees. Experience shows that this in turn lessens the chances that citizens, particularly the poor and powerless, have to obtain the representation they need to vindicate deprivations of their fundamental rights.

ARGUMENT

A. The Eleventh Circuit's Decision Is Inconsistent With This Court's Precedents Recognizing Nominal Damages Claims for Violations of Constitutional Rights.

This Court's precedents leave no doubt that nominal damage awards are permissible and indeed mandatory to vindicate deprivations of constitutional rights even in the absence of otherwise compensable harm. The Court's 1978 decision in *Carey v. Piphas*, 435 U.S. 247 (1978) that nominal damages are recoverable "even if [plaintiffs] did not suffer" additional injury beyond the invasion of constitutional rights (*id.* at 266-67) is based on a long line of precedents dating back to English common law.

See Pet. Br. at 17. In subsequent decisions, the Court has repeatedly reaffirmed the important role that nominal damage awards play in vindicating deprivations of constitutional rights. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion) ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."); *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 and n. 11 (1986) ("nominal damages" "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury" beyond the actual harm caused by the constitutional violation); *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) ("*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his right[s].").

The import of these precedents is clear. Petitioners in this case could have sought nominal damages alone for violation of their First Amendment rights. The fact that their claims for declaratory and injunctive relief later became moot therefore ought not eliminate the existence of a justiciable case or controversy.

B. Reversal of the Decision Below Is Both Necessary and Appropriate to Resolve the Circuit Split Caused By the Eleventh Circuit's Decision.

Both before and after the Court's decisions in *Carey*, *City of Riverside*, *Memphis County School District*, and *Farrar*, various Circuits have recognized that claims for nominal damages alone—when sought

with respect to prior violations of constitutional rights—present a justiciable case or controversy. *See, e.g., U.S. ex rel. Tyrell v. Speaker*, 535 F.2d 823, 829-30 (3d Cir. 1976) (due process); *Magnett v. Pelletier*, 488 F.2d 33, 35 (1st Cir. 1973) (per curiam) (unreasonable search); *O'Connor v. Huard*, 117 F.3d 12, 18 (1st Cir. 1997) (due process); *Fassett v. Haeckel*, 936 F.2d 118, 121 (2d Cir. 1991) (Fourth Amendment); *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (free exercise); *Price v. City of Charlotte*, 93 F.3d 1241, 1257 (4th Cir. 1996) (equal protection); *Archie v. Christian*, 812 F.2d 250, 252 (5th Cir. 1987) (due process); *Wolfel v. Bates*, 707 F.2d 932, 934 (6th Cir. 1983) (First Amendment right to petition for redress of grievances); *Reed v. Kemper*, 673 F. App'x 533, 537 (7th Cir. 2016) (right to marry); *Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005) (excessive force); *Klein v. Laguna Beach*, 810 F.3d 693, 697 (9th Cir. 2016) (free speech); *Stoedter v. Gates*, 704 F. App'x 748, 762 (10th Cir. 2017) (unreasonable seizure); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1282 (11th Cir. 2008) (Establishment Clause); *Carter v. Williams*, 897 F.2d 1168 (D.C. Cir. 1990)(table) (prisoner's right to access law library materials).

Again, a right without a remedy is no right at all. If left undisturbed, the Eleventh Circuit's decision will create a "First Amendment desert" in the States of Florida, Georgia, and Alabama. When it comes to the protections of the First Amendment and the other amendments comprising the Bill of Rights, such a result cannot be countenanced.

C. Limiting the Availability of Nominal Damages Will Undermine the Purpose of Fee-Shifting Statutes to Ensure Enforcement of Civil Rights.

The decision below also disrupts the system established by Congress and this Court to ensure that important civil rights are properly vindicated. Litigation by private citizens has long been recognized as critical to the effective enforcement of federal civil rights. To that end, Congress enacted 42 U.S.C. § 1988 allowing prevailing parties in civil rights actions to recover reasonable attorneys' fees as an incentive for public interest lawyers to take on cases seeking to protect and enforce important rights. Although this Court has recognized that a nominal damages award makes a plaintiff eligible for an award of fees under Section 1988 (*Farrar*, 506 U.S. at 111-12), the Eleventh Circuit's ruling limiting the availability of nominal damages claims threatens to further diminish the incentives for public interest litigation.

Our legal system "depends largely on the efforts of private citizens" to ensure "[t]he effective enforcement of Federal civil rights statutes." H.R. Rep. 94-1558, at 1 (1976); *see* Admin. Office of the U.S. Courts, 2015 Annual Report of the Director, *Judicial Business of the United States Courts*, tbl. C-2 (2015) (reporting that the United States brought fewer than 1% of the civil rights suits in federal court in 2015). However, "a vast majority of the victims of civil rights violations cannot afford legal counsel." H.R. Rep. 94-1558, at 1. While there are "often important principles to be gained in such litigation, and rights to be conferred and enforced," there is "often no large

promise of monetary recovery." 122 Cong. Rec. 33314 (1976) (statement of Sen. Kennedy). Because it is difficult to "attract competent counsel" to bring a lawsuit with a "low pecuniary value," civil rights litigants left to "rely on private-sector fee arrangements . . . might well [be] unable to obtain redress for their grievances." *City of Riverside*, 477 U.S. at 579-80 (plurality). By comparison, the government has "substantial resources" to defend against such suits, creating a "gap between citizens and government officials" that causes an "inequality of litigating strength." H.R. Rep. 94-1558 at 7.

Recognizing these challenges and the imbalance in available representation, Congress passed 42 U.S.C. § 1988 "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. 94-1558, at 1). Section 1988 authorizes a "reasonable attorney's fee" award to a plaintiff who "prevail[s]" in an action to enforce civil rights. 42 U.S.C. § 1988(b). As intended, Section 1988 became "a powerful weapon" for the "victims of civil rights violations" by "improv[ing] their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights." *Evans v. Jeff D.*, 475 U.S. 717, 741 (1986). Countless civil rights have been vindicated in suits permitting the recovery of attorney's fees under Section 1988.

In 2001, this Court narrowed the standard for what constitutes a "prevailing party" for the purpose of awarding attorneys' fees under fee-shifting provisions. In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), the Court considered

whether the Americans with Disabilities Act (ADA) and Fair Housing Amendments Act (FHAA)—which, like Section 1988, authorize a fee award to a "prevailing party"—permit an award of fees to a plaintiff who "achieves the desired result" not through a judgment or other court order, but "because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 601. Relying on what it found to be the "clear meaning" of "prevailing party," the *Buckhannon* majority held that the ADA and FHAA do not authorize recovery of fees under the catalyst theory. 532 U.S. at 606-07, 610. Instead, *Buckhannon* held that a plaintiff may be considered the "prevailing party" for purposes of attorneys' fees only if the litigation resulted in a court-ordered "alteration in the legal relationship of the parties." *Id.* at 605.

The dissent in *Buckhannon* cautioned that abolition of the catalyst theory would allow defendants to "escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray" (*id.* at 622) by engaging in what has been referred to as "tactical mooting." *See Goldstein v. Moatz*, 445 F.3d 747, 752 (4th Cir. 2006). Justices Ginsburg, Stevens, Souter, and Breyer warned that this would undermine the incentives Congress put in place through fee-shifting provisions designed "to encourage private enforcement of laws designed to advance civil rights." 532 U.S. at 644.

The *Buckhannon* majority dismissed these concerns, insisting that its ruling would not result in "mischievous defendants" seeking to "unilaterally moot[] an action before judgment in an effort to avoid

attorney's fees" for two reasons. *Id.* at 608-09. In particular, the majority wrote that "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Id.* Accordingly, the danger of tactical mooting presents itself only in cases where the plaintiff seeks equitable relief alone. The soundness of the *Buckhannon* decision, therefore, was predicated on an express understanding that the availability of a damages award would guard against the deleterious effects of tactical mooting.

The ruling below in this case makes tactical mooting a greater danger and threatens to further diminish the incentive for lawsuits vindicating constitutional right provided by Section 1988. The prospect that civil rights defendants can change their policies and practices in the course of litigation, even after plaintiff's counsel has invested months of time and energy in the cause of defending fundamental rights, and thereby eliminate claims for injunctive relief and nominal damages is a strong deterrent to public interest litigation and will upset the balance in the availability of representation Congress and this Court have sought to achieve through Section 1988. If even nominal damages become unavailable for constitutional deprivations, making the prospect of obtaining a court-ordered change in the parties' relationship less likely, the chances injured citizens have to obtain representation becomes even slimmer.

Data gathered since 2001 have confirmed the fears expressed by the *Buckhannon* dissenters: public interest cases seeking relief on behalf of impoverished and disenfranchised groups, such as impact litigation and civil rights lawsuits against government actors,

are particularly vulnerable to tactical mooting. Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1120-21 (2007). In 2004, Catherine R. Albiston and Laura Beth Nielsen conducted a national survey of 221 public interest organizations to determine the extent to which Buckhannon had made it harder for public interest organizations to pursue their objectives and deterred attorneys from representing civil rights plaintiffs. They concluded that "*Buckhannon* has had a chilling effect on the very forms of public interest litigation that Congress intended to encourage through fee-shifting provisions," including "discourag[ing] both public interest organizations and private counsel from taking on enforcement actions" by making fee recovery more doubtful. *Id.* at 1092, 1128-31.

Additional contemporary studies buttress the commonsense conclusion that the imposition of obstacles to recovering attorney's fees makes it more difficult for civil rights victims to obtain counsel, resulting in fewer civil rights suits being filed (and, of those filed, a larger percentage of litigants proceeding pro se). For example, a study published in 2016 found that prisoner filings in federal court have declined 60 percent nationwide since the Prison Litigation Reform Act (PLRA) was enacted in 1996. Margo Schlanger, *The Just Barely Sustainable California Prisoners' Rights Ecosystem*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 62, 64 (Mar. 2016). Likewise, while nearly 17 percent of prisoners who filed cases in federal court in 1996 were represented, only 5 percent of cases filed in 2012 had counsel. *Id.* The author attributes these declines, in part, to the

PLRA's fee-shifting provision, including its $213 hourly cap, which makes "prisoners' rights cases . . . both low paid and risky." *Id.* at 69-70.

These studies underscore the challenges faced by civil rights plaintiffs when attorneys' fees become more difficult to obtain. By limiting the availability of nominal damages, and thereby broadening the scope of claims susceptible to tactical mooting, the Eleventh Circuit's opinion will further add to these challenges, making it even more difficult for civil rights litigants to obtain counsel and litigate their grievances and undermining the important policies Section 1988 was intended to protect.

CONCLUSION

The Constitution has no meaning if citizens have no effective right of redress. In cases where the litigation effectively ends the practice at issue, or where compensatory damages may be difficult if not impossible to calculate, nominal damages may be the only effective remedy. Moreover, the availability of that remedy may be the *sine qua non* for citizens to obtain the competent representation they need to vindicate deprivations of fundamental right. The Institute therefore respectfully requests that the decision of the Eleventh Circuit be reversed.

Respectfully submitted,

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, Virginia 22911
Telephone: (434) 987-3888
Facsimile: (434) 978-1789

Michael J. Lockerby*
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007-5109
Telephone: (202) 945-6079
Facsimile: (202) 672-5399

**Counsel of Record*

Counsel for Amicus Curiae The Rutherford Institute