No. 19-968

In the
Supreme Court of the United States

CHIKE UZUEGBUNAM, ET AL.,
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 *AMICI CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, NATIONAL ASSOCIATION OF EVANGELICALS, AND ETHICS AND RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The United States Conference of Catholic Bishops (USCCB) is an assembly of the hierarchy of the Catholic Church in the United States and the U.S. Virgin Islands that jointly exercises certain pastoral functions on behalf of the Catholic faithful in the United States. The purpose of the Conference is to promote the greater good that the Church offers humankind. The Bishops themselves constitute the membership of the Conference. The Conference is organized as a corporation in the District of Columbia. Its purposes under civil law are: "To unify, coordinate, encourage, promote and carry on Catholic activities in the United States; to organize and conduct religious, charitable and social welfare work at home and abroad; to aid in education; to care for immigrants; and generally to enter into and promote by education, publication and direction the objects of its being."

The National Association of Evangelicals (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. The

[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, and their counsel made a monetary contribution to its preparation or submission. All parties filed blanket consents to the filing of amicus briefs.

freedom to openly share one's faith is a fundamental value for evangelical Christians.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

INTRODUCTION AND SUMMARY OF ARGUMENT

The remedy of nominal damages is essential to the protection of our fundamental freedoms, which, though priceless, often lack quantifiable economic value associated with their infringement. That is especially so where a defendant's conduct violates the First Amendment's free speech and free exercise guarantees, the constitutional rights that are at issue in this case and that are of utmost concern to the *amici*. Because a defendant's conduct may grievously transgress these first freedoms without resulting in any measurable economic harm, nominal damages are often the only remedy available to vindicate those rights.

Indeed, the use of nominal damages to adjudicate past wrongs without quantifiable economic harm is of ancient pedigree. For centuries, it has been a fundamental principle that the law will not suffer an injury without a remedy. Our common law tradition has rested on the maxim that "[t]he Law will never imagine any such Thing as *Injuria sine Damno*." *Ashby v. White*, 17 HL Jour. 527, 529 (1704). Where the injury to a right is retrospective, rather than prospective, its remedy lies in damages. And where the damages flowing from that injury cannot be quantified, the remedy is nominal damages.

This basic precept was foundational to the English notion of justice, and it was woven into American common and constitutional law in the earliest days of our Republic. Because it was built into the legal system we inherited, it is fully consistent with our Constitution's limitation of federal jurisdiction to

Cases and Controversies. And it was enshrined in this Court's landmark decision in *Marbury v. Madison*.

Therefore, courts have long distinguished between injury without economic harm, which warrants nominal damages, and the lack of any injury, which precludes standing. Here, the Eleventh Circuit incorrectly conflated the two. In so doing, it not only upended bedrock doctrine, but insulated the invasion of our most cherished rights from judicial review. This Court should therefore reverse.

ARGUMENT

Injury and damages have long been distinct legal concepts. An injury occurs whenever a legal right is violated. Damages, meanwhile, are the mechanism for remedying past, completed injuries. Thus, while injury is what confers Article III standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), damages are only the measure of an injury. And nominal damages are the appropriate remedy for a past injury that has caused an unquantifiable harm. Rather than reflecting the *lack* of an injury, nominal damages thus affirm the *existence* of a non-economic injury. In that role, nominal damages provide moral and legal recognition to a valid claim, and they are critical to the vindication of constitutional rights. That is especially true with respect to free speech and free exercise rights, which are at issue here. Often, the violation of those rights causes no quantifiable economic loss. Yet, their invasion cuts to the core of our constitutional freedoms.

I. Nominal Damages Are Necessary to Protect Free Speech and Religious Liberty.

Nominal damages are particularly important to remedy the infringement of constitutional rights. As Petitioners have highlighted, the nominal damages remedy plays a critical role in providing *res judicata* effect and ensuring the development of the law through precedent. *See* Pet.Br.37-38. But it also ensures the vindication of our constitutional freedoms, whose value is fundamental but whose invasion often does not result in economic harm.

Anyone whose right to religion or free expression is infringed by the government experiences a fundamental harm. Indeed, "[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) (plurality opinion). Yet, such a plaintiff ordinarily does not lose money from that violation. If the violation is ongoing, an equitable remedy may provide relief. For example, this Court has reviewed cases where injunctions have secured the rights of religious organizations to equal access to limited public forums. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109 (2001). But injunctive relief is not available if the circumstances have changed, a student has graduated, or the government has voluntarily ceased its unlawful behavior, such that "there is no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). If a past, completed violation has not caused economic harm and there is no threatened recurrence, then

nominal damages are essential as the only recourse to redress a constitutional injury.

The decision below suggested that where nominal damages are the only remedy available, that is because the plaintiff lacks any injury. But that is simply incorrect as a legal and moral matter. While the freedoms of religion and speech are priceless, their denial always bears a cost—even if not economic.

Setting aside the Eleventh Circuit's outlier ruling, the lower courts have consistently recognized the importance of nominal damages to the protection of religious freedom. The Tenth Circuit, in a similar context, rejected the notion that a university's post-filing policy changes regarding religious expression would moot a claim for a past injury, since a policy change would not "erase[] the slate concerning the alleged First Amendment violations," which would entitle "plaintiff to at least nominal damages." *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1526-27 (10th Cir. 1992). The Ninth Circuit reached a similar conclusion in *Klein v. City of Laguna Beach*, 810 F.3d 693 (9th Cir. 2016), where the plaintiff was denied permission "to conduct religious 'youth outreach' on public sidewalks" with sound amplification equipment, *id.* at 696-97, ruling that even though the permitting ordinance was repealed, the plaintiff was entitled to nominal damages and an award of fees. *Id.* at 699–700; *Klein v. City of Laguna Beach*, 533 F. App'x 772 (9th Cir. 2013); *accord Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1023 (9th Cir. 2009). And in *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995), the Second Circuit held that plaintiffs were

"entitled to an award of nominal damages" because a town's zoning board had endeavored to exclude Orthodox Jews, even though the plaintiffs had not proven any economic damages. *Id.* at 419-24.

Without nominal damages, those plaintiffs would have suffered grievous burdens on their right to religious freedom without any kind of vindication or protection against future, recurring harms, and with no judicial determination to serve as a deterrent against future government wrongdoing. Without nominal damages, these courts would not have been able to legally vindicate fundamental rights under the First Amendment, which protects speech without regard to content and religion without regard to creed. Without nominal damages, government actors could simply wait for a strategic opportunity to moot meritorious litigation with a calculated policy change, thereby avoiding a bad precedent and the threat of attorneys' fees. Nominal damages are thus a vital remedy—and often the only remedy—to prevent such gamesmanship and to vindicate the rights of those who most need these core constitutional protections.

II. The Nominal Damages Remedy Is Deeply Rooted in Anglo-American Law.

Reflecting its critical importance, the nominal damages remedy was recognized as essential to the protection of rights long before our Republic was founded. At the outset, American courts adopted that principle and awarded nominal damages. Thus, since the Founding, nominal damages have served as a bulwark for the vindication of our most cherished rights—including critical free exercise and free speech rights like those at issue here.

The concept of nominal damages dates back more than three centuries. In eighteenth-century common law, the leading case on nominal damages was *Ashby v. White*, 17 HL Jour. 527 (1704). There, a plaintiff was eligible to vote in Parliamentary elections, but the town constable "fraudulently and maliciously" prevented him from doing so. *Id.* at 527. The lower court dismissed his claim on the ground that he had suffered no damages, and thus was not entitled to a remedy. *Id.* But the House of Lords reversed, recognizing the fundamental principle that every right has a remedy ("*ubi jus, ibi remedium*"). *Id.* Reasoning that "every Injury imports Damage in the Nature of it," the House of Lords concluded that the plaintiff was entitled to recover a nominal sum for the loss of his right to vote, even though he had suffered no financial harm from that injury. *Id.* at 529; *see also Parker v. Griswold*, 17 Conn. 288, 304 (Conn. 1846) ("The principle that every injury legally imports damage, was decisively settled, in the case of *Ashby v. White*.").

By the time of Blackstone, *Ashby*'s holding had become entrenched: "[I]t is a settled and invariable principle in the laws of England, that every right, when withheld must have a remedy, and every injury its proper redress." 3 W. Blackstone, Commentaries *109. Blackstone recognized that though some torts, such as trespass, produce negligible injury, the plaintiff remains entitled to a remedy. "[T]he law of England . . . has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases,) as an injury or wrong, for satisfaction of which an action of trespass will lie." *Id.* at *209. However, if "no other special loss can be assigned" for "the actual damage done," then the

plaintiff is entitled to "one general damage, viz.: the treading down and bruising his herbiage." *Id.* at *210. Blackstone explained that the same was true for the tort of assault, which "is an inchoate offense," since it involves the apprehension of a battery. *Id.* at *120. "[T]hough no actual suffering is proved, yet the party injured may have redress by action" and "shall recover damages as compensation for the injury." *Id.*[2]

Against the backdrop of the English common law, this Court recognized these principles as early as *Marbury v. Madison*. Indeed, Chief Justice Marshall's opinion in *Marbury* directly quoted Blackstone for the "'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.'" 5 U.S. 137, 163 (1803) (quoting 3 W. Blackstone, Commentaries *23). The Chief Justice further explained 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," and it is "[o]ne of the first duties of government . . . to afford that protection." *Id.* And he warned that we would "certainly cease to deserve th[e] high appellation" of being a "government of laws and

[2] The origin of nominal damages as a remedy for assault reaches all the way back to 1348, when "a woman brought suit against a man who tried"—unsuccessfully—"to strike her head with a hatchet." F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 281 (2008) (citing *I de S et ux. v. W de S*, Y.B.Lib.Ass. folio 99, placitum 60 (Assizes 1348), *reprinted in* William L. Prosser & John W. Wade, CASES AND MATERIALS ON TORTS 36 (5th ed. 1971)).

not men," if "the laws furnish no remedy for the violation of a vested legal right." *Id.*

Following *Marbury*, Justice Story applied the same principles in two different cases decided while riding circuit. *See Webb v. Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838); *Whipple v. Cumberland Mfg. Co.*, 29 F. Cas. 934, 936 (C.C.D. Me. 1843). As Justice Story put it, "the very elements of the common law" demand that "every injury imports damage in the nature of it," and that "if no other damage is established, the party injured is entitled to a verdict for *nominal damages*." *Webb*, 29 F. Cas. at 507 (emphasis added).

Justice Story also recognized the *res judicata* value of nominal damages: "Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain, that it may be lost or destroyed, without any possible remedial redress." *Id.* at 508. In short, "[a]ctual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right." *Id.*

Nor were these decisions outliers. The fundamental principle that an injury entails damages—even if only nominal damages—was clearly established in numerous state court decisions from the era. *See Parker*, 17 Conn. at 304; *Blanchard v. Baker*, 8 Me. 253, 268, 270 (Me. 1832) ("The plaintiffs have sustained an injury; and are therefore entitled to a legal remedy," which was "for nominal damages.");

Allaire v. Whitney, 1 Hill 484, 487 (N.Y. Sup. Ct. 1841) ("[A]ctual damage is not necessary to an action. A violation of right with a possibility of damages, forms the ground of an action," as shown by *Ashby v. White*.); *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 33 Mass. 241, 241 (Mass. 1834) ("[T]he law presumes damage when a right is invaded" and requires no "proof of actual damage."). Thus, the recognition of nominal damages as the appropriate retrospective remedy for an unquantifiable harm—such as the invasion of free speech and religious freedom—has been firmly established in our shared Anglo-American common law tradition.

III. The Traditional Nominal Damages Remedy Is Fully Consistent with This Court's Modern Standing Doctrine.

These bedrock principles of the nominal damages remedy fit easily within this Court's Article III standing doctrine. Indeed, because injury and damages are distinct, the mere fact that an injury does not cause financial harm has never meant that a plaintiff lacks standing to sue. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("intangible injuries" can be "concrete" and constitute an "injury in fact"). To the contrary, it is generally recognized under Article III standing doctrine that "[a] valid claim for nominal damages should avoid mootness." 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3 (3d ed. 2008).

Thus, in *Carey v. Piphus*, 435 U.S. 247 (1978), the Court held that, "because of the importance to organized society" that procedural due process be upheld, violations of that right were "actionable for

nominal damages" even where resulting harm could not be quantified. *Id.* at 266-67 (internal citations omitted). The same is true with respect to the religious freedom and free speech issues at stake in this case. Likewise, in *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 & n.11 (1986), the Court held that while "the abstract value of a constitutional right may not form the basis for § 1983 damages," "nominal damages" remain available as "the appropriate means of 'vindicating' rights" where no pecuniary harm can be quantified. *Stachura*, 477 U.S. at 308 & n.11. There, too, nominal damages were available to vindicate Petitioners' rights.

This Court's decision in *Lujan* upholds the tradition that every legal injury shall have a remedy. Indeed, *Lujan* relied on and quoted *Marbury* to explain that "'[t]he province of the court . . . is, solely, to decide on *the rights of individuals*.'" *Lujan*, 504 U.S. at 576 (quoting *Marbury*, 5 U.S. at 170) (emphasis added). *Lujan* thus reaffirmed the importance of the judicial role in adjudicating the rights of individuals where they have been injured, while holding that the plaintiffs in that case lacked standing because they had not shown that *they* had suffered or would suffer any injury at all. The issue was not the lack of damages, or even quantifiable damages, but the lack of an *injury* personal to the plaintiff, since "a general interest common to all members of the public" is insufficient to uphold Article III standing. 504 U.S. at 575 (quoting *Ex parte Levitt*, 302 U.S. 633, 636 (1937)).

Thus, commentators discussing *Lujan* have noted that "[t]he purpose of the factual injury requirement

is to ensure that plaintiffs are asserting their own private rights"—a requirement that becomes "superfluous" where, as here, the plaintiff plainly alleges the violation of his own right. *See* Hessick, *supra*, at 277. To allow a lack of quantifiable damages to prevent the vindication of a concrete, particularized injury suffered by the plaintiff is to "put the cart before the horse" and confuse the constitutional purpose of the Article III standing doctrine with the ultimate remedial question of damages. *Id.*

Justice Thomas has emphasized this point repeatedly: "[T]he concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights." *Spokeo, Inc.*, 136 S. Ct. at 1552 (Thomas, J., concurring). Accordingly, "[o]ur contemporary decisions have not required a plaintiff to assert an actual [harm] beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Id.* And those contemporary decisions have a rock-solid basis because, by "the 18th century, many common-law courts ceased requiring *damnum* in suits alleging violations of private rights." *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2146 (2020) (Thomas, J., dissenting).

In sum, while *Lujan* teaches that generalized public harm does not amount to a legal injury, *Ashby* and its centuries of progeny teach that harm to individual rights *does* amount to a legal injury and must have a remedy. These two principles are not in tension. And deprivations of individual rights of free exercise of religion or the freedom of speech are

unmistakably legal injuries. Therefore, those legal injuries must have a remedy.

Notably, this principle is borne out not only in cases like *Carey* and *Stachura* involving constitutional rights, but also in federal court diversity decisions that have adjudicated state-law claims for nominal damages. Those claims are just as much subject to constitutional standing requirements as those involving federal questions, and yet the federal courts have routinely adjudicated them even when plaintiffs can ultimately obtain only nominal damages. *See, e.g.*, *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992) (defamation); *Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163 (2d Cir. 2000) (defamation); *Wright v. Musanti*, 887 F.3d 577 (2d Cir. 2018) (battery). That is because those plaintiffs—like Petitioners here, and all others who suffer the violation of their free exercise and free speech rights—suffered very real (albeit nonpecuniary) harm that raised controversies amenable to federal jurisdiction. The nominal damages remedy both recognized their injuries and restored dignity under law.

The Court has never rejected nominal damages where injury is real, even if small or unquantifiable, as a basis for standing. It should not start doing so now. Whether it is a deprivation of the right to vote, an unlawful restriction on religious freedom or free speech, a slander, or a trespass, an injury that does not cause pecuniary harm nonetheless remains a concrete and particularized injury in fact. That injury can be redressed with an award of nominal damages, and the federal courts therefore have the power—as well as the duty—to consider and decide such

controversies. Because the lower court's decision was inconsistent with that history and threatens to immunize government intrusion on our fundamental liberties, this Court should reverse.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

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