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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
ccrawford@afphq.org
Counsel for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners on its own behalf.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring the freedom of expression guaranteed by the First Amendment, particularly on college campuses where the marketplace of ideas is both nourished and nourishes developing minds. College campuses are not just a place where free expression should be protected; it is vital to their mission. And they are uniquely positioned to instill in the next generation an appreciation for free speech. This is why *"[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted and emphasis added).

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Uzuegbunam v. Preczewski arises from a practice of governments, including some colleges and universities, to avoid judicial review of oppressive speech policies by mooting claims for equitable relief through strategic modification of policies while a case is pending. In cases like this one, where the injury is completed and non-speculative, such policy changes do not erase past harms. Nor do unilateral policy modifications, narrowly conformed to pleaded facts, provide equivalent relief to a court ruling that the policies *in toto* are repugnant to the Constitution. After all, the burden is on the government to narrowly tailor any infringement of speech rights. Carving out exceptions to unconstitutional policies to nullify individual plaintiffs' claims does not satisfy this burden. Nominal damages are the traditional means of validating infringement of a constitutional right where injury is manifest but not amenable to valuation.

The narrow question presented here is important because First Amendment cases frequently seek an injunction and declaratory judgment with little or no compensatory damages. While the actual harm to the exercise of fundamental freedoms is substantial, those violations—especially of First Amendment rights—may be accompanied by no additional financial harms. They are thus easy to moot—especially in university settings—by changing the challenged behavior so there is no policy or ongoing activity to enjoin or, as the lower court did here, by simply declaring the case moot upon the plaintiff's eventual graduation. Nominal damages validate infringement of priceless constitutional rights when there is no feasible way to

put a price tag on the plaintiff's injury. With certain narrow exceptions, all circuit courts, except the Eleventh, recognize nominal damages as a viable controversy worthy of judicial review. This split jeopardizes the protection of free expression for hundreds of thousands of college students in the Eleventh Circuit.

The Court should accept this case because the Eleventh Circuit's affirmance that a plaintiff who can achieve only nominal damages lacks standing[2] is in tension with this Court's precedent that an award of nominal damages is sufficient for a plaintiff to be a prevailing party under 42 U.S.C. § 1983. Now, in the Eleventh Circuit, a plaintiff who elsewhere could be a prevailing party under § 1983 is dismissed, creating a circular quandary: a decision rectifying the injury to a plaintiff's First Amendment rights—and awarding nominal damages—would be sufficient to be a prevailing party under 42 U.S.C. § 1988. But the plaintiff can't get that decision in the Eleventh Circuit because the availability of only nominal damages means that the case is dismissed. This shields

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[2] The district court below characterized the change in status as a loss of standing, but that is procedurally incorrect as standing is determined when the case is filed, not by what happens afterwards. "[S]tanding concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct 'was occurring at the time the complaint was filed,' . . . while mootness addresses whether that plaintiff continues to have an interest in the outcome of the litigation." *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 525 (6th Cir. 2001) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 184 (2000)). The district court blurred these doctrines and the Eleventh Circuit continued in that strain.

government agents from accountability and means that students' ability to seek redress for violations of their rights—and to leave their college more hospitable to free expression to those who come after them—depends upon their location.

The strategic mooting of student free speech cases is only one of the judicially created obstacles that prevent courts from settling the application of the First Amendment on campus. Student plaintiffs can only overcome qualified immunity in a §1983 case and be heard against individual defendants if there is well-established precedent on point. But precedent cannot be developed because claims against individual defendants routinely are dismissed under qualified immunity, thus making it impossible to get a ruling on the books. Judge Willett identified this very issue, describing it thus:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

Zadeh v. Robinson, 928 F.3d 457, 474, 480 (5th Cir. 2019), *petition for cert. filed*, No. 19-676 (U.S. Nov. 22, 2019).

The Eleventh Circuit has exacerbated this dilemma, creating an additional obstacle to the ability

of students and courts to define the application of the First Amendment on public university campuses. This serves neither students nor public universities well.

FACTUAL BACKGROUND

Mr. Uzuegbunum was a student at Georgia Gwinnett College ("GGC"). Pet. App. 59a. In July 2016, Mr. Uzuegbunam sought to share his Christian beliefs with his fellow students by distributing literature in an outdoor plaza on campus and engaging willing passersby in conversation. Pet. App. 90a. He did so peacefully, standing where students frequently converse and congregate. Pet. App. 90a–91a.

The college stopped Mr. Uzuegbunam, saying he could not distribute literature due to its Speech Zone Policy. Pet. App. 92a. Under that policy, students could engage in expressive activities only in two speech zones and only after reserving them. Pet. App. 92a–93a. Given the threat of punishment if he did not stop speaking, Mr. Uzuegbunam abandoned his expressive activities that day. Pet. App. 94a.

In order to be able to speak, Mr. Uzuegbunam later reserved the cafeteria patio speech zone to share his beliefs by distributing literature and speaking with the students who gathered there. Pet. App. 95a. At the reserved time, he stood in the designated area and spoke publicly about his beliefs using his natural voice, without shouting, blocking traffic, or employing inflammatory rhetoric. Pet. App. 96a–97a. But someone complained, leading a GGC police officer to stop him and tell him that his speech constituted "disorderly conduct" because it disturbed "the peace and tranquility of individuals." Pet. App. 97a–99a. GGC's Speech Code prohibited "disorderly conduct"

and defined it to include anything that "disturbs the peace and/or comfort of person(s)." Pet. App. 87a–88a. Mr. Uzuegbunam was warned that he could face discipline under GGC's Student Code of Conduct if he continued speaking publicly. Pet. App. 100a. Given these warnings and threats of discipline from uniformed officers, Mr. Uzuegbunam was forced to stop speaking and left the speech zone. Pet. App. 98a, 103a.

In December 2016, Mr. Uzuegbunam and Joseph Bradford—another GCC student who likewise was stymied in his desire to speak on campus—filed suit, raising First and Fourteenth Amendment claims. Pet. App. 115a–132a. In February 2017, Defendants filed a motion to dismiss, arguing that GGC's policies were constitutional, that its officials were entitled to qualified immunity, and that Mr. Uzuegbunam's speech—a discussion of the Christian Gospel—"arguably rose to the level of 'fighting words.'" Pet. App. 152a–156a. In March 2017, Defendants filed another motion to dismiss Plaintiffs' claims for injunctive and declaratory relief, claiming that they were moot because the college had adopted new policies that eliminated its Speech Code and modified its Speech Zone Policy. Pet. App. 25a, 160a.

The district court ruled that Mr. Uzuegbunam's graduation mooted his prospective relief claims; that GGC's revised policies mooted Mr. Bradford's claims; and that Plaintiffs' nominal damages claims were "insufficient to save this otherwise moot case." Pet. App. 26a–27a, 40a, 42a. The Eleventh Circuit affirmed, holding that under *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) [*Flanigan's Enterprises, Inc.*] (*en*

banc), "a prayer for nominal damages generally will not save an otherwise moot challenge to an allegedly unconstitutional policy or law". *Uzuegbunam v. Preczewski*, 781 F. App'x. 824, 827 (11th Cir. 2019). Although the Circuit acknowledged that in *Flanigan's*, "the challenged ordinance was never actually enforced against any of the plaintiffs," it held that, even though the speech policy had been enforced against Mr. Uzuagbunum, *Flanigan's* still controlled because he did not meet the narrow exception for well-pled but unproven compensatory damages. *Id*. at 830–32.

ARGUMENT

I. NOMINAL DAMAGES ARE ESSENTIAL TO PRESERVING PRICELESS FREEDOMS

The violation of fundamental rights by the government is undoubtedly an injury. Indeed, it is the kind of injury that this Court has recognized warrants extraordinary relief. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v Burns*, 427 U.S. 347, 373 (1976). Most Americans would deem government abridging their right to speak or exercise religion as more egregious than, for example, a $1 error in their tax refund. But it is often impossible to attach specific financial losses to the government's violation of fundamental rights. Nominal damages play a critical role in preserving these priceless constitutional freedoms—where their violation is the true injury—when accompanying financial damages cannot be proven or quantified. Recognizing this need for nominal damages to stand in the place of the irreparable injury to constitutional freedoms, the Court has authorized nominal damages

in § 1983 cases without proof of actual injury. *Carey v. Piphus*, 435 U.S. 247, 260, 266 (1978).

Nominal damages are also sufficient to render the plaintiff a prevailing party eligible for a fee award under § 1988. *Farrar v. Hobby*, 506 U.S. 103, 105 (1992). This framework encourages vindication of constitutional rights when a price tag cannot be placed on the injury, by allowing the plaintiff to prove infringement of constitutional rights, obtain a judgment, and potentially receive a fee award.

The Eleventh Circuit stands alone in cutting off pending cases for plaintiffs who established standing at the time of filing by pleading that a public university violated their fundamental rights, but who cannot prove accompanying financial harm and whose equitable demands become moot when (1) they graduate—as students naturally do—or (2) the university unilaterally changes a rule, sometimes years after the litigation began, to avoid a plaintiff's specific facts.

This stands in irreconcilable tension with the framework elucidated by this Court under which § 1988 attorneys' fees may be available to prevailing plaintiffs who are awarded nominal damages but would not be available to plaintiffs who achieve a mere "technical victory" in the form of declaratory relief. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) [hereinafter *Garland*] (providing examples of "technical" victories). It would be inconsistent to recognize a live case or controversy in a demand for declaratory relief that, if successful, could be deemed no more than a mere technical victory, but to dismiss as moot a case where

the plaintiff—if he could be heard—could prevail within the meaning of § 1988.

A. Nominal Damages Vindicate First Amendment Violations

This Court has consistently recognized that nominal damages may be awarded for constitutional violations without the proof of injury required to obtain compensatory damages under § 1983.

For example, in *Carey v. Piphus*, students who were suspended from school filed suit under § 1983 alleging violation of their due process rights. *Carey*, 435 U.S. 247 at 249–50. Both students sought declaratory and injunctive relief as well as actual and punitive damages. *Id*. The question presented to this Court was whether the plaintiffs needed to prove actual injury to obtain substantial damages under § 1983. The Court held that they did; *but*, consistent with the common law's traditional vindication of deprivation of certain absolute rights by the award of nominal damages, the Court further held that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.* at 266.

Similarly, in *Memphis Community School District v. Stachura*, the plaintiff alleged that his suspension as a schoolteacher deprived him of liberty and property without due process of law and violated his First Amendment right to academic freedom. He sought compensatory and punitive damages under § 1983 for those constitutional violations. 477 U.S. 299, 301–02 (1986). This Court affirmed the holding in *Carey* that compensatory damages are available for actual losses under § 1983. *Id*. at 308, and that nominal damages are "the appropriate means of

'vindicating' rights whose deprivation has not caused actual, provable injury." *Id.* at n.11.

Thus, following *Carey* and *Stachura*, it is undeniable that nominal damages are the appropriate remedy for non-compensable violations of constitutional rights, including violations of the First Amendment.

B. A Party May be a "Prevailing Party" Under § 1988 by Securing Nominal Damages

On the heels of *Carey* and *Stachura*, the Court was asked to decide whether a civil rights plaintiff who receives a nominal damages award in a § 1983 action qualifies as a prevailing party eligible to receive attorney's fees under 42 U.S.C. § 1988. In *Farrar v. Hobby*, the Court held that such a plaintiff is a prevailing party.

In *Farrar*, the plaintiff failed to establish causation for his injuries and thus received no compensatory damages. 506 U.S. at 106. He also was awarded no injunctive relief and no declaratory relief. The plaintiff did, however, secure an award for one dollar in nominal damages for the violation of a civil right. *Id.* at 107. This Court, relying on *Garland*, described the characteristics of a prevailing party within the meaning of § 1988.

> To be considered a prevailing party within the meaning of § 1988 . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. . . . [P]laintiffs in *Garland* were prevailing parties because they

> obtained a judgment vindicating their First Amendment rights as public employees and materially altered the defendant school district's policy.

Farrar, 506 U.S. at 111 (1992) (citing *Garland*, 489 U.S. at 792–93) (cleaned up). Nominal damages awarded for violation of a constitutional right serve such a purpose and thus the Court held that "a plaintiff who wins nominal damages is a prevailing party under § 1988." *Id*. at 112.

The award of nominal damages is dispositive because

> [n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant. A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages. A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.

Id. at 113.

The rule established in *Farrar* that nominal damages are enough to confer prevailing party status may be contrasted with the superficially similar example from *Garland* of a "technical victory" that, contrary to nominal damages, would not support

prevailing party status. That "technical victory" related to plaintiffs who secured a declaratory judgment that a regulation was unconstitutionally vague, but had never suffered deprivation by having the regulation imposed against them and thus obtained no judgment (nominal or compensatory) that could have altered the school board's behavior toward them for their benefit. *Id.* at 113–14 (citing *Garland*, 489 U.S. at 792).

This distinction, as applied to Mr. Uzuegbunam, would place him squarely within the "nominal damages" rule and make him eligible for prevailing plaintiff status under § 1988 because unconstitutional speech polices were applied to him, repeatedly, and to effect. Indeed, the Eleventh Circuit recited some of Mr. Uzuegbunam's extensive factual allegations: he was stopped by campus police for distributing religious literature; he was instructed that he could only speak in two designated free speech zones; he was stopped by campus police from speaking in the free speech zone that he had reserved in accordance with the school's policy; and, as a result of warnings from campus police and threats of disciplinary action, he stopped speaking against his will. *Uzuegbunam*, 781 F. App'x. at 826.

This is not a case in which the plaintiff simply sought a declaratory judgment and was fully satisfied with the policy changes. He was directly injured by the government's repeated deprivation of his First Amendment freedoms. He is entitled to nominal damages for those violations, and to the judiciary's engagement to safeguard his constitutional rights.

C. The Eleventh Circuit's Holding Circumvents this Court's Framework, Leaving Constitutional Claims in No Man's Land

The holding below multiplies an earlier error by the Eleventh Circuit regarding whether constitutional claims for nominal damages are cognizable. In *Flanigan's Enterprises, Inc.*, the Eleventh Circuit stated:

> The Supreme Court has never held that nominal damages alone can save a case from mootness and, although we are aware that a majority of our sister circuits to reach this question have resolved it differently than we do today, we are not convinced that the cases on which they have relied suggest the result that they have reached.

868 F.3d at 1265 (internal footnote omitted). Although, as discussed above and in Petitioner's brief, this assertion cannot be reconciled with the clear holdings from this Court on the sufficiency of nominal damages, this constricted focus misses the greater point—that "the law recognizes the importance to organized society that [certain] rights be scrupulously observed[.]" *Carey*, 435 at 266. Violations of fundamental rights should not be absolved through strategic manipulation of the infringing policy, and nowhere is the opportunity for such manipulation more present than on college campuses where each potential plaintiff has a limited window of time to press and fully resolve his constitutional claims.

II. The Eleventh Circuit's Decision Further Disincentivizes Proactive Protection of Free Expression

Despite frequent litigation challenging violations of the First Amendment, universities continue to retain unconstitutional policies. According to the Foundation for Individual Rights in Education, 88.1% of public universities continue to maintain policies that either clearly violate the First Amendment or, on their face, would permit application in ways that violate the First Amendment rights of students or faculty.[3] There is little legal reason for universities to be more proactive. In spite of frequent challenges to these policies, few campus free speech cases actually reach the merits because of qualified immunity and the potential mootness of the case once the student graduates or when a university revises its unconstitutional policy during litigation. Because universities can almost always play one or more these cards at any time in a typical case, they avoid not only a judgment against them but an attorneys' fee award for the plaintiff whose lawsuit forced the change. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 622 (2001) (attorneys' fees are generally only available under 42

[3] *See* Found. for Individual Rights, Spotlight on Speech Codes 2020: The State of Free Speech on Our Nation's Campuses at 6 (Dec. 4, 2019), *available at* http://bit.ly/2TusPqa (24.2% of institutions earned a "Red" rating, meaning the institution has "maintained at least one severely restrictive policy," and 63.9% of institutions earned a "Yellow" rating, meaning the institution maintained at least one policy that applied "either clear restrictions on a narrower range of expression or policies that, by virtue of vague wording, could too easily be applied to restrict protected expression").

U.S.C. 1988 where a plaintiff has secured a judgment altering "the legal relationship of the parties") Where constitutional violations can always be remedied later, without significant cost to the defendants and without risking an actual decision that would bind the defendants, the incentive is lacking to proactively correct unconstitutional policies. *See id.*at 608–09 ("[P]etitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case."). Why do today what you can always do tomorrow—especially when there are no damages at stake?

A. Universities Do Not Have a Special Dispensation from the Government's Burden to Justify and Tailor Infringement of Constitutional Rights

Contrary to the routine university practice of placing the burden on students to pre-clear speech ahead of time, the burden is squarely on the government to justify speech limitations by ensuring that they comport with the First Amendment—a bar that is particularly high against prior restraints. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("[B]arriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it."). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct.

2218, 2226 (2015). Time, place, and manner restrictions must be "justified without reference to the content of the regulated speech," "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). Even in the realm of commercial speech, "it is the State's burden to justify its content-based law as consistent with the First Amendment," by showing "that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571–72 (2011) (citations omitted).

The purpose of constitutional review is thus not to create carve-outs to overbroad restrictions *seriatim* until there are no plaintiffs left, but rather to ensure that any restrictions comport with the First Amendment for all people. It is backwards to evade review by making narrow exceptions to moot specific examples of infringement while maintaining restrictions that are not narrowly tailored and require pre-clearance of speech. To retain the proper focus on whether the rule itself is constitutional—not on whether it is possible to dispose of a particular plaintiff—adjudication is necessary, if for no other reason than because a court's ruling would not rejigger an unconstitutional rule to carve out an exception limited to the plaintiff.

B. Schools are Normalizing Prior Restraints

The risk to free speech from offending policies is particularly acute in educational settings as anti-speech pressures and the ability of governing bodies

to creatively impose restrictions on speech and to modify policies with an alacrity unavailable to legislatures minimize the risk or effect of litigation. But the risk to speakers who dare to challenge those policies pales in comparison to the danger of educating future generations in the belief that the government not only must, but rightfully should, be asked for permission before speaking, creating thousands of college-educated mendicants who would go hat in hand to pray for government approval of their speech or would docilely abandon their rights where permission is declined or simply too cumbersome to obtain.

Government speech rules that are inconsistent with the First Amendment thus not only infringe the rights of individual students, but also educate students in a misunderstanding of the American system that is anathema to the rights secured by the Constitution. Written policies that tell students they may only speak in certain small areas of the campus, only with a government permit, and on topics that have been pre-screened by the administration educate the next generation that this is the kind of relationship citizens should expect with their government.[4] Compelling students to sign student codes that censor their speech and inuring them to being stopped from speaking and threatened with expulsion—even if they have a permit—simply because someone else doesn't like what they have to

[4] The inclination toward a converse-Lotus principle, where everything that is not allowed is forbidden, is contrary to the American and English traditions and should be avoided. *See generally Everything which is not forbidden is allowed*, Wikipedia, http://bit.ly/2TgF5vB (last visited Mar. 2, 2020).

say teaches them that their "rights" exist at the pleasure of government. Beyond the application of such policies to individual students in violation of their rights, these kinds of policies affect not only those on campus, but our civic culture. These students will leave the university after four years. Will they carry with them the understanding that government must respect constitutional freedoms, or instead—trained by the policies they have grown accustomed to living under—believe that much of our normal discourse is too dangerous to permit?

III. THE ELEVENTH CIRCUIT'S DECISION EXACERBATES THE PROBLEMS CREATED BY QUALIFIED IMMUNITY

Dismissing cases seeking nominal damages in which the equitable claims were rendered moot by changes to the underlying unconstitutional behavior during litigation has an important side effect: it disrupts the development of precedent that is critical to overcoming qualified immunity.

The doctrine of qualified immunity protects government officials from liability for civil damages to the extent that they did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine exists to protect public officials from liability when they perform their duties reasonably, but to allow them to be held accountable when they exercise their power irresponsibly. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity is immunity from suit not just a defense to liability. *Id*. If the right at issue was not "clearly established at the time" of the infringement, then the individual government

defendant is immune from suit. *Id*. at 243–44. The spirit of qualified immunity is violated when a public official abuses his power but cannot be held accountable due to lack of precedent.

The requirement that unlawfulness of conduct be "clearly established at the time" makes more pernicious the dismissal of free speech cases on the basis of mootness when unconstitutional policies are changed during litigation because the precedential value of those cases is thus lost. To be clearly established, the right must be "settled law," which requires "a robust consensus of cases of persuasive authority." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018) (cleaned up). While it may seem that First Amendment rights would be settled law by now, context matters, and as such, overcoming qualified immunity requires caselaw with a similar factual context. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("The dispositive question is whether the violative nature of **particular conduct** is clearly established. . . . This inquiry must be undertaken in light of the **specific context of the case**, not as a broad general proposition.") (cleaned up and emphases added). The cumulative effect of purging nominal damages cases from the pool of potential precedent is to undermine development of clearly established law and increase the incentive to make cases go away through strategic policy changes.

The anti-precedent trap was summarized thus by Judge Willett in his dissent in *Zadeh v. Robinson*[5]:

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[5] Dr. Zadeh has filed a petition for writ of certiorari, asking: Whether the Court should recalibrate or reverse the doctrine of

> To rebut the officials' qualified-immunity defense and get to trial, [plaintiff] must plead facts showing that the alleged misconduct violated clearly established law.
>
> * * *
>
> Controlling authority must explicitly adopt the principle; or else there must be a robust consensus of cases of persuasive authority. Mere implication from precedent doesn't suffice.
>
> * * *
>
> But owing to a legal *deus ex machina*—the clearly established prong of qualified-immunity analysis—the violation eludes vindication.
>
> * * *
>
> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established

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qualified immunity. AFPF has joined an *amicus* brief in support of Petitioners. *See* Br. of Cross-Ideological Grps. Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enf't, & Promoting the Rule Of Law as *Amici Curiae* in Supp. of Pets., *Zadeh v. Robinson*, No. 19-676 (U.S. filed Dec. 20, 2019).

> law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

Zadeh, 928 F.3d at 474, 477, 478–80.

So too here, where the god in the machine is helped along by university administrators who elude review by simply changing their policies during litigation, thus ensuring that future violators are preserved from "knowing" that their actions violate free speech rights. The Eleventh Circuit's decision further constrains the development of the law to deprive, not just current students, but future students from vindicating their First Amendment rights.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(202) 499-2421
ccrawford@afphq.org

Counsel for Amicus Curiae

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