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 *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

ADÈLE A. KEIM
Counsel of Record
ERIC C. RASSBACH
JOSEPH C. DAVIS
KAYLA A. TONEY
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave., N.W., Suite 700
Washington, D.C. 20036
(202) 955-0095
akeim@becketlaw.org

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether a claim for nominal damages can preserve a First Amendment case from mootness following a government defendant's decision to change the challenged policy.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.[1]

Becket has litigated numerous cases under the First Amendment, the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Becket has litigated several RFRA cases in this Court, including one merits RFRA case last term. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020); *Zubik* v. *Burwell,* 136 S. Ct. 1557 (2016); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Many of Becket's RFRA cases involve challenges to government regulations. See, *e.g.*, *McAllen Grace Brethren Church* v. *Salazar*, 764 F.3d 465 (5th Cir. 2014); *Wheaton Coll.* v. *Sebelius,* 703 F.3d 551 (D.C. Cir. 2012). Becket has also litigated numerous cases under RFRA's companion statute, RLUIPA, including in this Court. See, *e.g.*, *Holt* v. *Hobbs,* 574 U.S. 352 (2015); *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525 (11th Cir. 2013); *Moussazadeh* v. *Texas Dep't of Crim. Just.*, 703 F.3d 781 (5th Cir. 2012); *Elijah Grp., Inc.* v. *City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011); *Albanian Associated Fund* v. *Township of Wayne*, No.

---

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

06-cv-3217, 2007 WL 2904194 (D.N.J. Oct. 1, 2007). Becket frequently represents high school and college students, whose free exercise claims can be particularly affected by mootness as students graduate or administrators change their policies in response to litigation. See, *e.g.*, *InterVarsity Christian Fellowship/USA* v. *University of Iowa*, 408 F. Supp. 3d 960 (S.D. Iowa 2019).

Becket submits this brief to explain why nominal damages play an especially important role in religious freedom cases. Without nominal damages as a barrier to mootness, religious claimants are left at the mercy of government actors, who can (and do) easily moot meritorious claims by providing temporary religious accommodations. This works a particular injustice for prison inmates, who are frequently barred by the Prison Litigation Reform Act (PLRA) from asserting claims for compensatory damages in religious freedom cases.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The doctrine of mootness plays an important role—alongside Article III standing, qualified immunity, the Administrative Procedure Act, and the PLRA—in limiting unnecessary litigation. But it can be abused, particularly by sophisticated repeat players from large government bureaucracies.

Take Bruce Rich, an Orthodox Jewish inmate in Florida state prison. He filed a pro se lawsuit requesting a kosher diet, which Florida had provided to other Jewish inmates in the past. Florida asserted that it had compelling interests in not providing a kosher diet

to Rich and won in district court. With the help of *Amicus*, Rich appealed. Two weeks before oral argument, Florida changed its policy and moved to dismiss Rich's suit as moot. A sudden change of heart? The court of appeals didn't think so. "Florida announced that it was going to change its policy only after Mr. Rich filed his counseled brief to this Court and after the U.S. Department of Justice filed suit against it[.]" *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013). Florida implemented the new policy at only one place: the prison where Rich was incarcerated. *Ibid.* And Florida continued to argue that its old policy was constitutional. *Ibid.* The court of appeals concluded that Florida's eleventh-hour policy change was nothing more than "an attempt to manipulate jurisdiction," *ibid.* (citation omitted), and ruled for Rich on the merits, *id.* at 534.

Rich's case had a just outcome, but many others do not. When challenging the actions of large government bureaucracies—whether regulatory agencies, universities, or prisons—religious liberty plaintiffs face the risk of having their cases strategically mooted at any stage, even after years of litigation. Indeed, experience teaches that the more meritorious the plaintiff's claim, the more likely it is that the government defendant will seek to moot the case before judgment. See Part I.B, *infra*.

It is no wonder, then, that every circuit to consider the issue—except the Eleventh—has agreed that plaintiffs may avoid this result by seeking nominal damages. This Court has long recognized that nominal damages play a uniquely important role in constitutional litigation because they allow plaintiffs to vindicate rights that are inherently difficult to quantify.

Carey v. *Piphus*, 435 U.S. 247, 266 (1978). And they play a particularly crucial role in preventing repeat defendants like prison systems from running away before judgment and so avoiding long-term accountability.

Here, however, the Eleventh Circuit has allowed Respondents to run away from their own egregious behavior—threatening a student with arrest for engaging in peaceful religious speech *inside* a "free speech zone"—simply by changing their policy. To reach this result, the court had to break with the longstanding consensus of other courts of appeals and invent a new rule that only *compensatory* damages will save a case from mootness.

Respondents argue that nothing would be lost if this Court affirmed the Eleventh Circuit's novel rule, because plaintiffs can always add a perfunctory claim for compensatory damages. Not so. The loss of constitutional rights is an "irreparable injury"—which by definition resists quantification. Even when compensation for the emotional harm caused by the loss of constitutional rights is allowed, the burden of proving such harm is often high and varies by circuit. And inmates—a group Congress has recognized as particularly vulnerable to free exercise violations—are barred by the PLRA from bringing claims for most compensatory damages unless they can show physical injury. This alone makes Respondents' rule unjust.

There are other problems as well. Some religious believers (including some Native American groups, members of the historic "Peace Churches," and groups such as the Amish), for theological reasons, seek damages reluctantly if at all. And many other religious liberty plaintiffs cannot rely on compensatory damages

alone because they are concerned with resolving injustices in a way that will protect not just themselves but also the religious communities to whom they belong. Thus, as a matter of justice, religious liberty plaintiffs should be allowed to hold government defendants accountable for past wrongs. Yet as a matter of conscience, large compensatory-damages claims should not be *required* in cases where they are unnecessary or unwanted. Nominal damages protect both of these interests well.

Nominal damages have also worked well in practice. They have saved religious liberty claims from mootness in meritorious cases involving inmates, students, and houses of worship. See Part II, *infra*. And because the usual constraints of Article III standing, administrative exhaustion, and qualified immunity still apply, allowing nominal damages to prevent mootness does not undermine the interest in judicial economy. See Part III, *infra*.

In short, nominal damages play an important role in vindicating the rights of religious liberty plaintiffs, especially inmates. This Court should protect these rights, reaffirm the longstanding rule, and reverse the decision below.

ARGUMENT

I. Nominal damages should preclude mootness in free exercise cases.

First Amendment rights may be "supremely precious in our society," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), but a plaintiff seeking to vindicate them in court must navigate a complex series of steps. If he's suffered a past deprivation of rights, sovereign im-

munity will bar a claim for damages against state officials unless the officials are properly sued in their personal capacity, *Kentucky* v. *Graham*, 473 U.S. 159, 165-168 (1985)—and even then the plaintiff must avoid qualified immunity by showing not only that the defendant violated his rights but that the right was "clearly established," *Lane* v. *Franks*, 573 U.S. 228, 243 (2014). If the plaintiff seeks prospective relief, by contrast, officials can be named in their official capacities. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989). But then, no matter how far the case has progressed—even to the point of this Court's granting certiorari, see, *e.g.*, *New York State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 140 S. Ct. 1525 (2020)—the case is always at risk of being mooted by the defendant's mid-litigation policy change, depriving the plaintiff of judicial recognition that the prior policy violated his rights.

Against this background, nominal damages have long played a vital role in protecting First Amendment rights. They provide a mechanism for vindicating past deprivations of rights that are difficult to quantify in monetary terms. *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). And—until the Eleventh Circuit's holding in this case—every circuit that had considered the issue agreed that nominal damages can prevent a plaintiff's case from going moot, even when the defendant's post-

litigation changes in conduct eliminate the possibility of prospective relief.[2]

A. Claims for nominal damages preclude mootness.

The Eleventh Circuit's holding is inconsistent with this Court's precedent. Mootness is a "demanding standard"; it applies "only if 'it is impossible for a court to grant any effectual relief whatever.'" *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (quoting *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013)). Meanwhile, this Court has already held that nominal damages provide the plaintiff "at least some relief on the merits of his claim," however small. *Farrar* v. *Hobby*, 506 U.S. 103, 111-113 (1992). Combining these propositions yields a straightforward and "widely recognized" conclusion: "a claim for nominal damages precludes mootness." *New York State Rifle & Pistol Ass'n*, 140 S. Ct. at 1535-1536 & n.6 (Alito, J., dissenting) (noting Eleventh Circuit's rule is "difficult to reconcile with" *Carey*, 435 U.S. at 247).

The Court should confirm that syllogism in this case. And it's especially important that it do so in the context of claims under the First Amendment like those asserted by Petitioners here. Pet.Br.10-11. Free exercise claims by their nature are almost always asserted against government officials—to whom the lower courts have granted broad leeway to moot claims

---

[2] See Douglas Laycock, *Modern American Remedies* 292 (5th ed. 2019) (stating that "[m]ost courts have held or assumed that a bona fide claim for nominal damages is enough to avoid mootness"; noting the Eleventh Circuit's contrary holding in *Flanigan's Enters., Inc. of Ga.* v. *City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017)).

seeking injunctive relief. Meanwhile, although claims for compensatory damages defeat mootness, compensatory damages are less likely to be available—or even sought—in a wide variety of cases asserting a deprivation of religious rights. Absent confirmation that nominal damages preclude mootness, then, claims based on free exercise—a "guarantee" that "lies at the heart of our pluralistic society," *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1754 (2020)—will all too often go unvindicated.

B. Government defendants frequently seek to strategically moot out meritorious free exercise claims.

Free exercise claimants usually seek relief against government officials—defendants the lower courts have granted "more solicitude" in their efforts to moot forward-looking relief. *E.g.*, *Bench Billboard Co.* v. *City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012). So if this Court were to agree with the Eleventh Circuit that such efforts *also* suffice to eliminate even requests for backward-looking nominal damages, free exercise claimants would bear a disproportionate share of the loss.

Ordinarily, defendants face a high bar to show that their voluntary mid-litigation change in conduct moots a claim for injunctive relief: the defendant must show it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000) (quoting *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). But many lower courts have "flipped [this] rule" when the defendant is a govern-

ment official. *Board of Trs. of Glazing Health & Welfare Trust* v. *Chambers*, 903 F.3d 829, 842 (9th Cir. 2018), rev'd en banc, 941 F.3d 1195 (9th Cir. 2019). These courts have held that government defendants are entitled to "a presumption of good faith" for purposes of voluntary cessation, *Sossamon* v. *Texas*, 560 F.3d 316, 325 (5th Cir. 2009), aff'd on other grounds, 563 U.S. 277 (2011), such that the *plaintiff* must offer evidence that the government defendant "will reverse course and reenact" the challenged policy. *Flanigan's Enters., Inc. of Ga.* v. *City of Sandy Springs*, 868 F.3d 1248, 1256 (11th Cir. 2017). Thus, government defendants can far more easily moot claims seeking injunctive relief than can private defendants—and "the cases are legion" in which they've done so. *National Advert. Co.* v. *City of Miami*, 402 F.3d 1329, 1333-1334 (11th Cir. 2005).

This approach comes with a host of problems, perhaps explaining why this Court has never endorsed it. See, *e.g., Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (applying ordinary voluntary-cessation standard to government defendant); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (same). For one thing, it finds no basis in the text or history of Article III, which requires the same "case or controversy" regardless who the parties are. For another, it mistakes the purpose of this Court's "stringent" voluntary-cessation standard, which is designed not just to discourage intentional gamesmanship but also to protect both "the scarce resources of the federal courts," *Friends of the Earth, Inc.*, 528 U.S. at 191-192, and

"the public interest in having the legality of [challenged] practices settled," *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974).

Most important here, though, is that its premise—that government defendants are "public servants" less likely to strategically moot cases than "self-interested private parties," *Sossamon*, 560 F.3d at 325—blinks reality. Government defendants have both more incentive and more opportunity to structure their post-complaint conduct to evade judicial review—making them, if anything, "*more* likely" than private defendants "to strategically moot cases, not less." Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. Forum 325, 335 (2019) (Davis & Reaves). It's therefore critical for civil rights litigation that nominal damages remain a viable avenue for obtaining judicial review despite these efforts.

Common sense dictates that government defendants, no less than private ones, have a strong "incentive * * * to strategically alter [their] conduct in order to prevent or undo a ruling adverse to [their] interest." *E.I. Dupont de Nemours & Co.* v. *Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006). No one likes losing a lawsuit. And indeed, the notion that government litigants can ordinarily be expected to temper their self-interest to maximize constitutional accountability contradicts 42 U.S.C. 1983 itself—which was enacted because "Congress * * * realized that state officers might, in fact, be antipathetic to the vindication of [constitutional] rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972).

On top of this ordinary interest in avoiding adverse rulings, however, government defendants have an

added incentive to engage in strategic mooting—they, far more than the average private defendant, are repeat litigants. "Governments manage millions of employees, oversee complex bureaucracies, and regulate many aspects of citizens' economic and social lives." Davis & Reaves 337. Because they can therefore safely predict future opportunities to litigate similar issues, they have "a strong incentive to be strategic about which cases they litigate to judgment—to litigate fully only those cases that they think they will win and to moot the rest, preventing unfavorable precedent." *Ibid.* Private defendants, meanwhile, typically "care less about the legal principles that will emerge from their case than about its concrete effect on the challenged action"—making it more likely that government defendants' mid-litigation behavior changes are undertaken with mootness in mind. *Ibid.*

Moreover, government defendants have abundant opportunity to resume challenged conduct after having a case dismissed as moot. A government official's policy decisions typically don't bind his successors. *E.g.*, *Dorsey* v. *United States*, 567 U.S. 260, 274 (2012) ("statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute"). Meanwhile, the first thing a successor official often does is reverse the actions of her predecessor—whether or not they were taken to moot a case. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005) ("a change in administrations" may result in "reversal of agency policy").

Many of these dynamics are present in the decade-long legal battle over the Department of Health and Human Services' (HHS) contraceptive mandate. After

dozens of religious nonprofits filed suit starting in 2011 to challenge HHS regulations that threatened them with millions of dollars in fines, courts allowed HHS to effectively moot the cases by crafting a limited "safe harbor" and announcing its intention to pass new regulations sometime in the future. *Colorado Christian Univ.* v. *Sebelius*, No. 11-cv-3350, 2013 WL 93188, at *4 (D. Colo. Jan. 7, 2013) ("Eight of the nine district courts [considering HHS mandate challenges] decided that they lacked jurisdiction over the nonprofit religious organizations before them" based on lack of standing, ripeness, or both.).

Having landed on a winning strategy, HHS continued to change the rules applicable to religious nonprofits (as opposed to for-profit companies) for the next eight years. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2374 (2020) (describing regulatory changes). As a result of the agency's shifting rules for religious nonprofits, their cases (many filed as early as 2011) were not heard on the merits until 2016—while cases filed by for-profit companies in 2012 were decided by this Court in 2014. *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *Burwell* v. *Hobby Lobby*, 573 U.S. 682 (2014). And there is no end in sight. The HHS mandate cases have become a political football, prompting campaign positions by both major parties in three successive presidential elections, including this year. The power of administrative agencies to issue new regulations at any time, combined with lower courts' lax application of the voluntary-cessation doctrine to government defendants, allows government gamesmanship and can postpone agencies' legal reckoning indefinitely.

Finally, individual government officials often have personal incentives that are out of alignment with the interests of the government bodies they serve in ways that encourage strategic mooting. The existence of municipal liability insurance, official indemnification agreements, and qualified immunity means there is little personal risk to government officials in authorizing the defense of a lawsuit, even when the challenged practices are blatantly unconstitutional. And since there is sometimes great personal political gain to be had by defending clearly illegal positions, government defendants may have strong reasons to vigorously defend the indefensible. When combined with easily-arranged mootness, that incentive structure means more government officials will be willing to roll the dice on a probably unconstitutional policy, with an eye toward mooting resulting litigation later if they dislike their odds. Indeed, officials attempted to do just that in a companion case to *Korematsu* v. *United States*, 323 U.S. 214 (1944), first defending the "morally repugnant order" there, *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2423 (2018), then offering early release to plaintiff Mitsuye Endo to prevent her case from going forward.[3]

For all these reasons and more, government defendants "can and will seek to manipulate a court's jurisdiction to moot an unfavorable case." Davis & Reaves 341. And this case is a perfect example. Respondents here changed the challenged policies only after "vigorously defend[ing] the[ir] constitutionality" in two motions to dismiss. *Parents Involved*, 551 U.S.

---

[3] See Stephanie Buck, *Overlooked No More: Mitsuye Endo, a Name Linked to Justice for Japanese-Americans*, N.Y. Times, Oct. 19, 2019, https://perma.cc/JP9K-YUMZ (recounting litigation concluding in *Ex parte Endo*, 323 U.S. 283 (1944)).

at 719; see Pet.Br.10-11. As the District Court recognized, the motivation for Respondents' change in policy was "unclear," Pet.App.31a, and Respondents moved to dismiss for mootness just one month after making the policy change. Pet.App.5a, 160a. The new policy poses many of the same First Amendment problems as the old one—suggesting that the real goal was to do as little as necessary to make this lawsuit go away while still unconstitutionally censoring religious speech.

Under this Court's precedent, Respondents' "predictable protestations of repentance and reform" should not even be enough to moot injunctive relief, much less claims for damages based on completed violations. *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 (1987) (internal quotation marks omitted). That government defendants have both a strong incentive to engage in this sort of behavior and a long leash from the lower courts to get away with it counsels strongly in favor of this Court confirming that nominal damages defeat mootness.

C. Nominal damages play a particularly important role in free exercise cases where compensatory damages are sometimes unavailable and often hard to prove.

In addition to frequently facing strategic, mootness-happy defendants, free exercise plaintiffs are often deprived of the ordinary antidote to mootness—compensatory damages. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 608-609 (2001). Respondents blithely assert that eliminating nominal damages as a check on strategic mooting will have no practical effect, because

litigants will always be able to assert claims for compensatory damages instead. BIO.9-13. Not so.

For one thing, compensatory damages require plaintiffs to quantify their injuries. But free exercise rights are often far more valuable than any related financial loss. This Court's precedent in the realm of equitable relief already recognizes as much. In *Elrod* v. *Burns*, this Court held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to support an injunction. 427 U.S. 347, 373-374 (1976). "Irreparable injury" is, of course, "injury that cannot be adequately measured or compensated by money." Black's Law Dictionary (11th ed. 2019). Respondents' suggestion that plaintiffs can insulate themselves against mootness via compensatory-damages claims trivializes the harm plaintiffs suffer when they lose the right to exercise their faith. Pet.Br.42 (discussing hypothetical claims for "a fraction of a tank of gas" or "a confiscated piece of sidewalk chalk").

The availability of damages for mental and emotional distress does not solve this problem. For, while this Court has held that Section 1983 plaintiffs may recover compensatory damages for "mental and emotional distress," *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-307 (1986) (citing *Carey*, 435 U.S. at 264), many circuits have imposed heavier evidentiary burdens for such injuries, holding that they generally can't be proved by the plaintiff's "subjective testimony, standing alone." *Patrolmen's Benevolent Ass'n* v. *City of New York*, 310 F.3d 43, 55 (2d Cir. 2002). Instead, in some circuits, a plaintiff is expected to offer evidence that she "suffered physically" or "sought professional psychiatric counseling," *Spence* v.

Board of Educ., 806 F.2d 1198, 1201 (3d Cir. 1986).[4] Hurdles like these will often discourage free exercise plaintiffs from asserting compensatory-damages claims in the first place, particularly given the often "internal," "private and somewhat invisible" nature of many deprivations of religious freedom. Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 Conn. L. Rev. 961, 961-965 (2018).

Under other statutes often invoked by free exercise plaintiffs, meanwhile, compensatory-damages claims may be barred outright. Congress enacted RLUIPA to protect the religious exercise of inmates, a group it recognized as particularly vulnerable to religious liberty violations. *Cutter* v. *Wilkinson*, 544 U.S. 709, 716-717 (2005) (citing 146 Cong. Rec. 16,698, 16,699 (2000)). But this Court held in *Sossamon* v. *Texas* that sovereign immunity bars damages claims brought against state officials in their official capacities under RLUIPA. 563 U.S. at 285-286. And some circuits have extended *Sossamon* to bar monetary damages in individual-capacity claims as well. See *Haight* v. *Thompson*, 763 F.3d 554, 570 (6th Cir. 2014) (collecting cases). As we have argued elsewhere, this interpretation of *Sossamon* is incorrect. Becket Amicus Br. at 21-24, *Tanzin* v. *Tanvir*, No. 19-71 (Feb. 12, 2020) ("the 'unequivocal expression' standard [applied in *Sossamon*] does not apply to suits against non-sovereigns

---

[4] See also, *e.g.*, *Price* v. *City of Charlotte, N.C.*, 93 F.3d 1241, 1254-1255 (4th Cir. 1996); *Brady* v. *Fort Bend County*, 145 F.3d 691, 718 (5th Cir. 1998); *Nekolny* v. *Painter*, 653 F.2d 1164, 1172-1173 (7th Cir. 1981). Perhaps for these reasons, some civil rights litigators have been leery of bringing compensatory damages claims at all. See, *e.g.*, Douglas Laycock, *The Triumph of Equity*, 56 L. & Contemp. Probs. 53, 63 (1993).

like government officials sued in their individual capacities" (quoting *Availability of Money Damages Under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 182 (1994))). But where this interpretation governs, nominal damages may be the only tool a RLUIPA plaintiff has to avoid strategic litigation tactics by government defendants.

The PLRA further constrains the ability of inmates to vindicate their statutory and free exercise rights. See 42 U.S.C. 1997e(e). It states that "[n]o Federal civil action may be brought by a prisoner * * * for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." *Ibid.* In light of Section 1997e(e), the circuits are split over whether inmates can ever bring damages claims for the deprivation of constitutional rights, absent some showing of physical injury.[5] But "every circuit, regardless of its interpretation of Section 1997e(e), agrees that nominal damages are available in this context." *Aref* v. *Lynch*, 833 F.3d 242,

[5] Six circuits have held that the PLRA bars all claims for compensatory damages unless the plaintiff can show physical injury. See *Thompson* v. *Carter*, 284 F.3d 411 (2d Cir. 2002); *Allah* v. *Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000); *Geiger* v. *Jowers*, 404 F.3d 371 (5th Cir. 2005); *Royal* v. *Kautzky*, 375 F.3d 720 (8th Cir. 2004); *Searles* v. *Van Bebber*, 251 F.3d 869 (10th Cir. 2001); *Brooks* v. *Warden*, 800 F.3d 1295 (11th Cir. 2015). In contrast, five circuits have held that the PLRA allows compensatory damages claims for some injuries that are not physical, mental, or emotional, such as constitutional injuries under the First Amendment. See *Wilcox* v. *Brown*, 877 F.3d 161 (4th Cir. 2017); *King* v. *Zamiara*, 788 F.3d 207 (6th Cir. 2015); *Rowe* v. *Shake*, 196 F.3d 778 (7th Cir. 1999); *Canell* v. *Lightner*, 143 F.3d 1210 (9th Cir. 1998); *Aref* v. *Lynch*, 833 F.3d 242 (D.C. Cir. 2016).

266 (D.C. Cir. 2016). So for religious inmates, nominal damages are uniquely important.

Finally, even in settings where the deprivation of religious freedom *could* support compensatory-damages claims, religious plaintiffs may often hesitate to assert them. For example, adherents of many Christian traditions, particularly historic "Peace Churches" such as the Amish, Brethren, Hutterites, and Mennonites, litigate only as a last resort. These churches take Jesus' words—"if anyone wants to sue you and take your coat, give your cloak as well"—to require as much.[6]

When they feel compelled to litigate, religious plaintiffs may be reluctant to seek damages because money is inadequate to compensate them for the loss of their religious exercise. The Lakota Nations lost access to the Black Hills through a "rank case of dishonorable dealings" and nineteenth-century treaties broken by the U.S. government. *United States* v. *Sioux Nation of Indians,* 448 U.S. 371, 388 (1980). When this Court acknowledged in 1980 that the government had unlawfully taken the Lakota's land, *id.* at 422, the only remedy offered was money damages with interest. Yet the Lakota Nations "have never accepted the significant money judgment," because their sacred sites were never for sale. Stephanie H. Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. (forthcoming 2021) (manuscript at 23).

---

[6] *Matthew* 5:39-40 (NRSV); see, *e.g.,* Donald B. Kraybill, "Litigation," Concise Encyclopedia of Amish, Brethren, Hutterites, and Mennonites 127 (Johns Hopkins 2010).

Likewise, many religious plaintiffs feel the need to have their rights publicly vindicated in order to shield other members of their religious community from similar harms. This phenomenon extends far into the past. For instance, when ancient Philippian authorities sought to quietly release the Apostle Paul from unjust imprisonment, he protested, "[t]hey have beaten us in public, uncondemned, men who are Roman citizens, and have thrown us into prison; and now they are going to discharge us in secret?"[7] He insisted that the local authorities personally escort him out of the prison, thus publicly establishing that he, and by implication those who followed the same faith, were not guilty of any crime.

In a more recent context, the Fish and Wildlife Service conducted an undercover raid of a Native American powwow, confiscated dancers' sacred eagle feathers, and imposed criminal fines on this core religious practice. *McAllen Grace Brethren Church* v. *Salazar*, 764 F.3d 465 (5th Cir. 2014). After a grueling nine-year legal battle, the Department of Interior finally agreed to return dancer and pastor Robert Soto's feathers and sought to moot the case. Yet as an issue of justice, and to protect others from similar harm, Pastor Soto insisted that the case go forward. His persistence resulted in a historic settlement agreement that protected not just his rights, but also the rights of all the members of the religious community he led. Settlement Agreement, *McAllen Grace Brethren*

---

[7] *Acts* 16:37 (NRSV); cf. *Megillat Esther* 8 (Queen Esther, after neutralizing senior Babylonian official planning to commit genocide against the Jewish community, sent royal edict to all the provinces of Babylon publicly authorizing Jewish communities to defend themselves against the planned attacks).

Church v. *Jewell*, No. 7:07-cv-060 (S.D. Tex. June 13, 2016), ECF No. 83-1.

Thus, as a matter of justice unique to free exercise claims, religious plaintiffs need the ability to pursue meaningful relief to safeguard the rights of other members of their religious communities. Yet as a matter of conscience, these same plaintiffs should not be *required* to seek large amounts of money damages when those rights are intangible. Nominal damages are the most effective way to preserve meritorious claims from mootness while respecting religious plaintiffs' altruistic goals.

II. The free exercise rights of a wide variety of religious people and institutions are at stake.

Experience teaches that religious liberty claims frequently fall victim to strategic mooting. This Court's confirmation that nominal damages avoid mootness would thus protect the rights of a wide variety of religious people and institutions.

A. Prison inmates

Nominal damages allow inmates to preserve meritorious claims against mootness—a common and significant barrier to the protections that the First Amendment, RLUIPA, and RFRA were intended to provide. That is because (as already discussed) Section 1997e(e) of the PLRA bars compensatory damages for mental or emotional injuries without allegations of physical injury. See *Allah*, 226 F.3d at 247 (rejecting free exercise plaintiff's claim for compensatory damages because he could not allege physical injury under Section 1997e(e), but allowing nominal damages plea to vindicate constitutional rights). Thus, nominal

damages are often the *only* way inmates can preserve viable claims from strategic mootness.

Nominal damages are particularly important for inmates because prison systems have proven highly adept at using eleventh-hour policy changes to moot meritorious cases. See p. 2-3, *supra* (discussing *Rich*, 716 F.3d 525). "While the wrong result was avoided in [*Rich*], the point remains: the state's course-reversal was not a good-faith decision to take a different approach toward kosher diets going forward, but a strategic attempt to avoid judicial resolution of a case that it was (correctly) worried it would lose." Davis & Reaves 330. This kind of strategic litigation behavior with respect to inmate plaintiffs is widespread. In a similar suit in the Fifth Circuit, Texas transferred an Orthodox Jewish plaintiff to a new unit and began providing kosher meals after eighteen months of litigation. *Moussazadeh* v. *Texas Dep't of Crim. Just.*, No. G-07-574, 2009 WL 819497 (S.D. Tex. Mar. 26, 2009). But negotiations broke down when Texas refused to guarantee this accommodation for the rest of his sentence. Two years later, the district court found that Texas' voluntary cessation had mooted the case. *Id.* When the plaintiff was transferred to a different facility that did not provide kosher food but only offered it for purchase from the commissary, the Fifth Circuit decided that changed circumstances revived his claim. See *Moussazadeh* v. *Texas Dep't of Crim. Just.*, 364 F. App'x 110 (5th Cir. 2010) (per curiam); see also *Moussazadeh* v. *Texas Dep't of Crim. Just.*, 703 F.3d 781, 785 (5th Cir. 2012) (finding plaintiff's RLUIPA claim meritorious eight years after his initial complaint). When cases like these are mooted, inmate plaintiffs

are forced to give up or keep suing—the very outcome the exceptions to mootness are designed to prevent.

Prison defendants can also moot cases by simply transferring an inmate to a different unit or facility where he must re-start the process of obtaining a religious accommodation. See *Meachum* v. *Fano*, 427 U.S. 215, 228 (1976) (under state law, "prison officials have discretion to transfer [prisoners] for whatever reason or for no reason at all"). In one particularly Kafkaesque example, a Muslim inmate sued under RFRA when federal prison officials forbade him from gathering with others for congregational prayer. *Chesser* v. *Walton*, No. 12-cv-1198, 2016 WL 6471435 (S.D. Ill. Nov. 2, 2016). When the prison system transferred him from Illinois to Colorado, Chesser filed a similar suit—only to have his second lawsuit dismissed as "duplicative." *Chesser* v. *Director Fed. Bureau of Prisons*, No. 15-cv-1939, 2016 WL 1170448, at *2 (D. Colo. Mar. 25, 2016). Meanwhile, the Illinois court dismissed his claim as moot, leaving him devoid of legal remedy. Recognizing that nominal damages claims preserve cases like this from mootness would not only allow inmates to pursue lasting relief for legitimate free exercise violations, but would also improve judicial efficiency so that straightforward religious freedom claims do not result in decade-long legal odysseys.

B. High school and college students

High school and college students often fall victim to strategic mooting, in which schools run out the clock by vigorously defending a challenged policy, and then move to dismiss the case as moot once the student has graduated. Because court cases can take years, students in particular need the ability to prevent mootness by pleading nominal damages. See, *e.g.*, *Brinsdon*

v. *McAllen Indep. Sch. Dist.*, 863 F.3d 338 (5th Cir. 2017) (high school student's graduation mooted equitable claims based on compelled speech, but nominal damages claim could proceed); see also *Donovan* v. *Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 218 (3d Cir. 2003) (high school student's graduation mooted equitable claim based on viewpoint discrimination under the Free Exercise Clause, but damages claims could proceed).

On many college campuses, student groups must re-register annually, providing new opportunities for university officials to penalize religious expression every year. In one recent case, the University of Iowa responded to a preliminary injunction order preventing it from de-registering one religious student group in the 2017-2018 academic year by moving to deregister 38 other student groups, including 10 religious groups, the next year. See *InterVarsity Christian Fellowship/USA* v. *Univ. of Iowa*, 408 F. Supp. 3d 960, 972 (S.D. Iowa 2019) (granting summary judgment and nominal damages to one of the de-registered groups). Against this backdrop, nominal damages serve as an important check on schools' power to manipulate litigation through strategic policy changes.

C. Houses of worship

Along with inmates and students, houses of worship are another group disproportionately affected by mootness. Mosques, gurdwaras, temples, churches, and synagogues routinely encounter discriminatory zoning treatment—so much so that in 2000, Congress unanimously passed RLUIPA to "protect religious as-

semblies and institutions from discriminatory and unduly burdensome land use regulations."[8] Although a religious community can sue under RLUIPA if a regulation infringes on its free exercise, such claims can be mooted when years of delay in zoning approval force dwindling religious congregations to relocate.

In *Albanian Associated Fund* v. *Township of Wayne,* the local planning board repeatedly rejected a Muslim congregation's land development application to build a mosque, citing "environmental issues" and "traffic concerns." No. 06-cv-3217, 2007 WL 2904194, at *2 (D.N.J. Oct. 1, 2007). After five years of delay, the Township exercised eminent domain to condemn the property. When the Mosque sued under RLUIPA, the Township argued that the lawsuit was not ripe because the planning board had not yet approved their application.[9] Yet after five years, it seemed doubtful the application would *ever* be approved—and if the Mosque waited until the Township finished condemnation proceedings, the case would be moot.

In *Layman Lessons Church* v. *Metropolitan Gov't of Nashville*, Nashville repeatedly interfered with two churches' efforts to renovate a storage barn for distributing food and clothing to the homeless. No. 3:18-cv-0107, 2019 WL 1746512 (M.D. Tenn. Apr. 18, 2019). The court rejected the city's attempt to moot the case, because the church had a valid damages claim and there was no guarantee that the misconduct would not

---

[8] Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (June 13, 2018), https://perma.cc/Z63Q-L6SG.

[9] Br. in Opp. at 3, *Albanian Associated Fund* v. *Township of Wayne*, 2007 WL 2904194 (No. 06-cv-3217).

recur; the city might again try to "stop work on the storage barn or reinstate a demolition order" for discriminatory reasons. *Id.* at *4.

Similarly, in *Praise Christian Ctr.* v. *City of Huntington Beach,* 352 F. App'x 196, 198 (9th Cir. 2009), the city ousted a tiny church from meeting in a warehouse unless it could make fire code improvements totaling $586,000. Unable to afford these costs, the church moved its services outdoors for two years, dwindled to 12 members, and sued under RLUIPA.[10] When the church eventually began borrowing another church's indoor space, the Ninth Circuit dismissed the case as moot because the church had moved out of the warehouse and not asked for damages on appeal. The court later reversed itself because the original complaint sought both nominal and actual damages. Only the plea for nominal damages preserved the case from mootness: the court held that "[a] claim for nominal damages creates the requisite personal interest necessary to maintain a claim's justiciability." *Id.* at 198.

III. Recognizing that nominal damages preclude mootness in free exercise cases will not create excessive litigation.

Vindicating Uzuegbunam's and Bradford's rights in this case will not result in excessive litigation. In *Flanigan's*, the Eleventh Circuit fretted that allowing nominal damages claims to "save an otherwise moot case" could "require[]" courts to "decide cases that could have no practical effect on the legal rights or obligations of the parties." *Flanigan's*, 868 F.3d at 1270.

---

[10] David Reyes, *Outdoor Church Going to Court in Land Fight*, Los Angeles Times (Mar. 15, 2004, 12:00 AM), https://perma.cc/U3UN-XK6L.

But nothing in this case would sweep away the important requirements imposed by Article III standing, administrative exhaustion, and qualified immunity. Each of these doctrines operates as an independent constraint on plaintiffs suing the government or government officials.

At a more basic level, the argument that nominal damages could be used to improperly re-animate moot cases proves too much. According to Respondents, Petitioners could have avoided mootness had they (1) alleged actual damages, and (2) received an award of nominal damages after failing to prove the actual damages they claimed. BIO.9, 12. This creates perverse incentives for First Amendment plaintiffs to allege and prove actual damages (with all the time and expense that entails for the courts and the parties) when what they truly seek is to prevent the injustice they suffered from happening again, to themselves or others.

Moreover, as we have already shown, there are frequently statutory, religious, and other reasons why religious liberty plaintiffs may wish to assert only nominal damages claims. See Part I.C, *supra*. Since that is so, and since in Respondents' view simply including a good-faith claim for monetary damages will already enable civil rights plaintiffs to keep otherwise-moot cases alive, judicial economy does not support Respondents here.

A. Article III standing requirements still apply.

First Amendment plaintiffs, like all civil plaintiffs, must satisfy the standing requirements in Article III. That is, a plaintiff must show that she "has suffered

an 'injury in fact,'" that the injury is "fairly traceable to the challenged action of the defendant," and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.*, 528 U.S. at 180-181.

This Court has often applied this standard to dismiss cases brought under the Religion Clauses. Thus, in *Hein* v. *Freedom From Religion Foundation, Inc.*, this Court dismissed an Establishment Clause challenge to conferences and other activities carried out as part of the presidential Faith-Based and Community Initiatives program, because the suit did not fall within the narrow exception to taxpayer standing recognized in *Flast* v. *Cohen*. *Hein*, 551 U.S. 587, 608-609 (2007) (citing *Flast*, 392 U.S. 83, 102 (1968)). Similarly, in *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, this Court held that Americans United and two of its members lacked standing to bring an Establishment Clause challenge to the transfer of federal property to a religious college. 454 U.S. 464, 486 (1982). And more recently, members of this Court have rightly argued for applying standing doctrine more faithfully in Establishment Clause cases. *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring in the judgment) ("This 'offended observer' theory of standing has no basis in law."). The same is true of some cases brought under the Free Exercise Clause. Thus, in *Harris* v. *McRae*, this Court dismissed a free exercise challenge to abortion funding restrictions on standing grounds, because the plaintiff religious group had failed to show that its members were individually harmed by the restriction. 448 U.S. 297, 321 (1980). In short, Article III standing has long

served as a meaningful check on litigation brought under the Religion Clauses.

B. Exhaustion requirements in the regulatory and prison contexts check excessive litigation.

In addition to standing requirements applicable to all civil plaintiffs, statutory and administrative rules prevent excessive litigation in specific contexts.

Regulatory litigation. Under the Administrative Procedure Act and their own regulations, administrative agencies have a set of tools designed to prevent excessive litigation. Among other things, plaintiffs challenging administrative actions must exhaust the agency's procedures, a process that can take years. *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1776 (2019) (describing the Social Security Administration's four-step process preceding judicial review, which averaged two years). Moreover, plaintiffs may only challenge agency actions that are "final," which by itself can pose a significant challenge to obtaining timely judicial review. See *id.* at 1771-1772 (resolving circuit split over whether administrative dismissals for untimeliness were reviewable with final orders nearly *seven years* after the underlying claim for benefits was filed). Taken together, these requirements significantly narrow the number of administrative and regulatory challenges that reach federal courts each year.

Prison litigation. The PLRA has been highly effective at curbing excessive litigation by inmates. Under the law, inmates may not file a lawsuit challenging prison conditions without first exhausting all available administrative remedies, a process that can take years. 42 U.S.C. 1997e(a). As already discussed, they

may not bring a claim for mental or emotional injury suffered while in custody without a prior showing of physical injury. 42 U.S.C. 1997e(e); 28 U.S.C. 1346(b)(2). Once filed, courts screen inmate lawsuits and dismiss claims that are "frivolous, malicious, or fail[] to state a claim upon which relief may be granted" or "seek[] monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A. As a result of these and other aspects of the law, "[t]he PLRA has had an impact on inmate litigation that is hard to exaggerate;" by 2001 "filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1559-1560 (2003).

C. Qualified immunity will shield many government defendants from suits for damages.

Finally, qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). As this Court has explained, "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009) (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)). As a result, "[p]ublic officials are immune from suit under 42 U.S.C. 1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *City of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1774 (2015) (internal quotation marks omitted). Where qualified immunity

applies, it protects government defendants from having to go to trial. *White*, 137 S. Ct. at 551-552. Thus, even where First Amendment plaintiffs successfully navigate the filters imposed by Article III standing and statutory limits, qualified immunity often prevents them from recovering damages from the officials they have sued. See*, e.g., Aref*, 833 F.3d at 268. The availability of nominal damages will not open the floodgates of litigation.

CONCLUSION

Nominal damages play an important role in vindicating the rights of religious liberty plaintiffs, especially inmates, students, and houses of worship. This Court should protect these rights, reaffirm the longstanding rule that pleading nominal damages preserves a case from mootness, and reverse the decision below.

Respectfully submitted.

ADÈLE A. KEIM
Counsel of Record
ERIC C. RASSBACH
JOSEPH C. DAVIS
KAYLA A. TONEY
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire
Ave., N.W., Suite 700
Washington, D.C. 20036
(202) 955-0095
akeim@becketlaw.org

Counsel for Amicus Curiae

SEPTEMBER 2020