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 THE NATIONAL CONFERENCE OF STATE LEGISLATURES; THE COUNCIL OF STATE GOVERNMENTS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; THE GOVERNMENT FINANCE OFFICERS ASSOCIATION; THE NATIONAL SCHOOL BOARDS ASSOCIATION AMICI CURIAE IN SUPPORT OF RESPONDENTS

Lisa Soronen
Executive Director
State & Local Legal Center
444 North Capitol Street, N.W.
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

Patrick M. Kane
(counsel of record)
Kip D. Nelson
Fox Rothschild LLP
230 N. Elm Street
Suite 1200
Greensboro, NC 27401
(336) 378-5200
PKane@foxrothschild.com
KNelson@foxrothschild.com

Christopher McNamara
Fox Rothschild LLP
345 California Street
Suite 2200
San Francisco, CA 94104
(415) 539-3357
CMcNamara@foxrothschild.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Constitutional Provisions:

Other Authorities:

INTEREST OF AMICI[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on pressing issues. NCSL advocates for the interests of state governments before Congress and federal agencies and regularly submits amicus briefs in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. The organization offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities (NLC) is the oldest and largest organization representing municipal

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Blanket consent letters are on file with the Clerk.

governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The United States Conference of Mayors (USCM) is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of more than 12,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United

States and Canada. GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its more than 19,000 members are dedicated to the sound management of government financial resources.

The National School Boards Association (NSBA), founded in 1940, is a nonprofit organization representing state associations of school boards across the country. Through its member state associations, NSBA represents more than 90,000 school board members who govern nearly 14,000 local school districts serving almost 50 million public school students. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as an amicus curiae in numerous cases before this Court.

SUMMARY OF ARGUMENT

This case asks whether a change in the law renders a case moot when the plaintiff has not sought compensatory damages but has included a token request for nominal damages. To answer this question, the Court must consider the scope of Article III jurisdiction, the core principles of this country's adversarial judicial system, and our federalist system of government. The mootness doctrine recognizes the limits of Article III, protects the integrity of the adversary system, and respects federalism. The mootness doctrine is not, as petitioners implicitly characterize it, a way for government defendants to avoid decisions on the merits.

Strict adherence to the constitutional provision that limits federal courts' jurisdiction to "Cases" or "Controversies" is important because it ensures that a favorable judicial decision is likely to redress a plaintiff's claimed injuries. When only nominal damages are at stake, because a law or policy has been changed and there has been no actual injury, a judicial determination will not redress anything and the case is moot. That judicial determination would be no more than an advisory opinion that at best would provide some measure of psychic satisfaction to one of the parties. Thus, as a practical matter, petitioners here are asking this Court (and lower courts) to sanction the issuance of advisory opinions. Our Constitution strictly prohibits that.

Advisory opinions run counter to the need to conserve judicial resources, and they run counter to the fundamental premise of our adversary system that something real must be at stake so that parties are sufficiently and appropriately motivated to present their case. Under petitioners' proposed rule, constitutional litigation will never be moot so long as the plaintiff inserts a boilerplate request for nominal damages. In other contexts, this Court has already recognized that the purpose of constitutional litigation should be to develop proper laws and policies in actual cases and controversies—not to reward plaintiffs with Pyrrhic victories.

The rule espoused by the Eleventh Circuit in the case below also respects federalism. As recent pandemic-related litigation and many other examples

show, states, local governments, and school districts often must make difficult constitutional judgment calls in rapidly evolving situations with public safety at stake and without clear jurisprudence to guide them. When there is a challenge to a law or policy enacted in these situations and the government voluntarily changes the law or policy with no likelihood of reenactment, then federalism dictates that the case is moot. Like the well-established doctrines of absolute and qualified immunity, this recognition encourages public officials to timely act when the public interest requires bold and unhesitating action. It encourages government officials to reevaluate and, if appropriate, change laws and policies when they are challenged as constitutionally questionable. It also mitigates the expenditure of judicial resources reaching decisions on constitutional issues that have no practical effect, minimizes the burden on the lower courts, prevents the waste of taxpayer resources on the unnecessary litigation of constitutional issues, and lessens the risk of bad decision-making by ensuring the parties presenting the case are properly motivated. And under the decision below, individuals still can redress an actual injury caused by a constitutional violation, as a case can only be dismissed as moot if the plaintiff did not suffer a tangible and compensable injury.

Contrary to the United States' argument, local governments and government officials should not be forced to accept judgments against them in order to avoid protracted and costly litigation over a single dollar. These judgments carry many negative consequences. And petitioners' and their amici's

desire for more constitutional opinions does not justify ignoring the legal doctrine of mootness.

The decision below should be affirmed and the rule be adopted by this Court: when a challenged law or policy has been changed and all that remains in the case is a request for nominal damages, the case is moot.

ARGUMENT

I. Our Judicial System and This Court's Jurisprudence Are Based on Adherence to the Constitutional Requirement that Federal Courts May Only Entertain Actual Cases and Controversies.

A. The mootness doctrine is necessary to ensure that an actual case or controversy exists at all stages of the litigation.

Article III of the Constitution restricts the jurisdiction of federal courts to "Cases" and "Controversies." *Chafin v. Chafin,* 568 U.S. 165, 171-72 (2013). The words "Cases" and "Controversies" limit the business of federal courts to questions presented in an adversarial context and "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). To establish a case or controversy, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016).

Injury in fact is thus a constitutional requirement. *Id.* The injury must affect the plaintiff in a personal

and individual way, and it must be concrete. *Id.* at 1548. Although an injury may be intangible, it still must exist. *Id.* at 1549. The injury must also be redressable by a favorable decision in the lawsuit. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

These requirements ensure that the named plaintiff is a proper party to prosecute the claims, an element fundamental to our adversarial justice system. In this adversary system, the parties not only frame the issues but also develop the evidence and arguments. *See Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."); *Pennsylvania v. Finley*, 481 U.S. 551, 568 (1987) ("The very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

The mootness doctrine enforces this constitutional requirement that an actual controversy exist "at all stages of review, not merely at the time the complaint is filed." *Alvarez v. Smith,* 558 U.S. 87, 92-94 (2009). A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Otherwise, the litigation is no longer about the plaintiff's particular legal rights but is merely an "abstract dispute about the law," which "falls outside of the constitutional words 'Cases' and 'Controversies.'" *Alvarez,* 558 U.S. at 92-94 (2009).

The decision below recognized that the mootness doctrine appropriately applied to this case. This rule, clarifying that a case is moot if the challenged law has been changed and the only remaining issue is nominal damages, ensures fidelity to the Constitution's mandate that federal courts' jurisdiction be limited to actual cases or controversies. As this Court has stated, "[a] federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U.S. 41, 42 (1943); *see also North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("Mootness is a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions."). Strict adherence to the case-or-controversy requirement is especially important when a court is asked to decide a constitutional question, since "[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347-48 (1936) ("The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.").

B. Nominal damages alone do not satisfy the redressability requirement.

When a plaintiff sufficiently alleges facts supporting an actual injury in fact and compensable damages, a change in the law at issue will not render the case moot. *See, e.g., Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). The reason for this principle is simple: if there is a claim for actual damages, the case is not just an abstract argument

about legal rights but rather a case seeking redress for a compensable injury. In short, when potential compensatory damages exist, a claim is capable of redress and an actual case or controversy exists.

But redressability disappears if the only issue in the case is nominal damages. "Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement." *Ashcroft v. Mattis*, 431 U.S. 171-73 (1977). If it were, "few cases would ever become moot." *Id; see also Diamond v. Charles*, 476 U.S. 54, 66 (1986) ("Article III requires more than a desire to vindicate value interests.").

A nominal damages award provides nothing more than moral satisfaction, akin to a declaration that a past practice was unconstitutional. This Court recognized as much in *Farrar v. Hobby*, 506 U.S. 103 (1992). There, plaintiffs sought $17 million in compensatory damages. *Id.* at 106. As to one defendant—Hobby—a jury found that he had deprived the plaintiffs of a civil right but that the plaintiffs suffered no damages from that deprivation. *Id.* On appeal, the circuit court remanded the case for entry of judgment against Hobby for nominal damages. *Id.* at 107. The issue presented to this Court was whether the award of nominal damages made the plaintiffs the prevailing party for purposes of recovering attorney's fees under 42 U.S.C. § 1988. The Court held that a plaintiff who obtains nominal damages is technically a prevailing party. *Id.* at 113. Even so, the Court explained that, despite being the prevailing party, the plaintiffs should not be awarded attorney's fees. *Id.* at 115. The Court emphasized that the award of nominal damages was purely an emotional victory: "This litigation accomplished little beyond giving petitioners the moral satisfaction of

knowing that a federal court concluded that [their] rights had been violated in some unspecified way." *Id.* at 114.

Justice O'Connor's concurrence in *Farrar* further explained that denial of attorney's fees was dictated by both the law and common sense. *Id.* at 116 (O'Connor, J., concurring). When a plaintiff's success is purely technical or de minimis, it is "only a Pyrrhic victory for which the reasonable fee is zero." *Id.* at 117. "Chimerical accomplishments are simply not the kind of legal change that Congress sought to promote in the fee statute." *Id.* at 119.

The mootness rule espoused in the decision below would prevent cases without redressable injury from proceeding through the judicial system solely to attain the "Chimerical accomplishments" that the Court sought to discourage in *Farrar*. The rule moots those cases in which the only practical result of a judgment is an emotional victory. Although petitioners repeatedly focus on the Court's statement from *Farrar* that an award of nominal damages "materially alter[s] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," Pet. Br. 22, 23, 24, the logic of *Farrar* shows the opposite: the Court determined that the nominal damages award accomplished little beyond providing moral satisfaction to the plaintiffs. *Farrar,* 506 U.S. at 114. As *Farrar* implicitly recognized, when an award of nominal damages will only provide the plaintiff the moral satisfaction of a conclusion that her rights had been violated, the litigation should stop. The possibility that one dollar might exchange hands should not keep the case alive. If it were otherwise,

the Court in *Farrar* would have allowed for attorney's fees to the plaintiffs.

A contrary rule (that a request for nominal damages alone prevents mootness) conflicts with both the redressability requirement and with common sense. A rule that allows a prayer for nominal damages to render an otherwise moot issue still a "Case" or "Controversy" under Article III would mean that no case involving a constitutional claim would ever be moot, even if the claim were not redressable. Any alleged deprivation of a constitutional right will support a prayer for nominal damages. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Thus, so long as a plaintiff includes a request for nominal damages, the case would never be moot even if the plaintiff suffered no injury, subsequent events (such as a change in the law) make it clear that the allegedly wrongful behavior could not reasonably be expected to recur, and the plaintiff had nothing further to gain from the litigation. The case would continue, and federal courts would be called on to issue what is just an advisory opinion on a constitutional issue. This outcome is contrary to the longstanding principles that constitutional questions should be avoided if possible and that the validity of a statute should be addressed only if the plaintiff shows that she is injured by its operation. *Lyng*, 485 U.S. at 445; *Ashwander*, 297 U.S. at 347-48.

C. The decision below is consistent with the prohibition against advisory opinions.

The prohibition against advisory opinions is supported in part by the rationale that advisory opinions may result from less than vigorous advocacy by either or both parties when little is at stake. When

a suit relates to constitutional or public policy issues, and may have significant implications beyond the named parties, it is especially imperative that the litigants are appropriately motivated. The decision below ensures as much. If cases could still proceed after the relevant law or policy has been changed, a defendant may not be motivated to defend the former law or policy. Likewise, a plaintiff may decide that a bare claim for nominal damages is not worth vigorously prosecuting. And if the law has already been changed, and the only thing that remains is a claim for nominal damages, the parties may be more motivated by the collateral consequences of a judgment (such as the potential for an award of attorney's fees) rather than a resolution of the substantive claims or the constitutionally correct result.

In these situations, both judicial resources and the taxpayer resources of the governmental entities defending such litigation would be better spent on cases or controversies in which a judgment would have more than symbolic value. *Cf. Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009) (recognizing that qualified immunity should be determined early in the case to prevent the "expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case"). This is particularly true today, when "federal courts [are] faltering under crushing caseloads." Tim Ryan, *Senators Urge Addition of Judgeships as Caseloads Balloon*, Courthouse News Service (June 30, 2020), https://www.law360.com/articles/1287677/key-senators want-to-add-new-federal-judgeships-this-year. Since 1992, case filings in the federal courts have increased by 55%; the federal judiciary has grown just 4% in

that same time, and the last new seats on the federal bench were created in 2002. Andrew Kragie, *Key Senators Want to Add New Federal Judgeships This Year*, Law360 (June 30, 2020). Civil rights suits against school districts are also on the rise, according to a 2017 report. *Civil Rights Suits Against Schools More Than Double in Last Four Years*, Transactional Records Access Clearinghouse (Aug. 16, 2017), https://trac.syr.edu/tracreports/civil/478/. In a time when bipartisanship is rare in Congress, both Republicans and Democrats alike are pushing for more federal judgeships to ease "crushing caseloads." Meanwhile, the federal judiciary itself recommended in 2019 that 73 new district court judgeships be created to address the proliferation of federal litigation. *See* Kragie, *supra*. Petitioners' proposed rule stands only to increase this already momentous strain on the judiciary, and for the sole purpose of achieving what are essentially just advisory opinions.

Finally, federal courts need not issue advisory opinions when a law or policy has changed because there are already enough real cases and controversies that allow for the bounds of constitutional law to be set. For example, amici's research indicates that *in the last five years*, petitioners' counsel Alliance Defending Freedom alone has been plaintiff's counsel for 112 civil rights lawsuits, and amici supporting petitioners—Council on American-Islamic Relations, Pacific Legal Foundation, Public Citizen Litigation Group, American Civil Liberties Union, and Institute for Justice—have filed more than 1,100 civil rights

lawsuits.[2] Cases that seek nominal damages alone and would be mooted after a change in law or policy are rare. There are enough opportunities for constitutional law to be established without needing to add those that are seeking an advisory opinion to the courts' dockets.

D. A rule that nominal damages alone prevent mootness allows an end run around the Court's rejection of the "catalyst theory."

Under the "catalyst theory," a plaintiff would be considered the prevailing party for the purpose of entitlement to attorney's fees under 42 U.S.C. § 1988 if the plaintiff's lawsuit caused a change in the defendant's conduct. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). Although most circuit courts had recognized such a theory, this Court squarely rejected it in *Buckhannon*. *Id.* at 604. This Court held that a party can only be deemed a prevailing party if that party obtains judicial relief through a judgment or consent decree. *Id.* at 604. The Court specifically rejected the argument that the "catalyst theory" was necessary to prevent defendants from unilaterally mooting an action in an effort to avoid fees as "entirely speculative and unsupported by any empirical evidence." *Id.* at 608. The Court further noted that this issue could only arise in cases without a claim for actual damages, and even in those circumstances the case would not be moot unless it was "clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*

---

[2] Statistics obtained from Monitor Suite and Bloomberg Law.

These concerns, already addressed in *Buckhannon*, are the same that petitioners and their amici advance here. As in *Buckhannon*, they should be rejected. As this Court noted, the "catalyst theory" might deter defendants from voluntarily changing their conduct:

> Petitioners discount the disincentive that the "catalyst theory" may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal. The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than their potential liability on the merits…, and the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct.

Id. (internal citation and quotation omitted). A rule holding that a request for nominal damages prevents mootness would present the same deterrent effect, particularly for governmental entities.

The decision below prevents recurrence of this disincentive by ensuring that plaintiffs cannot circumvent *Buckhannon* by simply including a perfunctory request for nominal damages. Under the rule that petitioners propose, even if a defendant voluntarily changes a law or policy and the allegedly wrongful behavior could not be reasonably expected to occur, a plaintiff could still attain prevailing party status and entitlement to attorney's fees just by requesting nominal damages. As the Court recognized in *Buckhannon*, this outcome creates a disincentive for defendants to voluntarily change the law or policy at issue for fear of being subject to an award of

attorney's fees. By contrast, the decision below *encourages* a voluntary change in the law or policy, as the change could end the litigation and prevent a debilitating award of attorney's fees on a governmental entity with an already strained budget. The policy benefits of the decision below are plain. And again, plaintiffs who have suffered actual injuries can still seek compensation (and attorney's fees) if they obtain a favorable judgment.

II. Federalism Supports Adoption of the Decision Below.

Under our federalist system of government, the role of states, local governments, and school districts in promoting and protecting the public interest cannot be overstated. Pursuant to the Tenth Amendment to the United States Constitution, all powers not granted to the federal government are reserved to the states and the local governments. As a practical matter, then, states, local governments, and school districts are charged with protecting and promoting the public interest in myriad ways, and they are uniquely situated to do so. As Justice Marshall stated, "[l]ocal officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good within their respective spheres of authority." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 544 (1989) (Marshall, J., dissenting). Governmental entities must often make difficult judgment calls affecting the constitutional rights of individuals under circumstances in which the law is not clear. If a state, local government, or school district later determines that a law or policy should be rescinded or modified because the circumstances have changed, competing interests

have been reevaluated, or the constitutionality of the law or policy has been questioned, it should not be punished by facing expensive and time-consuming litigation when there has been no compensable harm.

It is indisputably challenging for states, local governments, and school districts to adopt and implement constitutionally compliant laws and policies. This Court's thousands of decisions interpreting the Constitution, which often include multiple dissenting and concurring opinions, illustrate that constitutional jurisprudence is extraordinarily complex. And the sheer volume of issues that states, local governments, and school districts encounter often means that previous caselaw does not clearly match the issue presented. It is therefore unsurprising that when public servants with little or no legal training must implement policies, particularly when time is of the essence, there might be a reasonable debate on whether they have acted constitutionally. *See, e.g.*, *Morse v. Frederick,* 551 U.S. 393, 397 (2007) (holding 5-4 that a high school principal did not violate the First Amendment when she disciplined a student who unfurled a banner stating "BONG HiTS 4 JESUS" during an approved school event). As Chief Justice Roberts recognized in *Morse*:

> School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge,

> including Frederick, about how serious the school was about the dangers of illegal drug use.

Id. at 409-10. When governmental entities reevaluate and change a law or policy, and the old law or policy has caused no compensable injury, a federal court advisory opinion is unwarranted.

The responses of states and local governments to the ongoing COVID-19 pandemic provide a timely example of the challenges inherent to adopting and implementing law or policy in the face of constitutional complexity. To protect the public interest in the face of a public health emergency, state and local governments countrywide have instituted emergency orders. These orders necessarily limited individual rights in ways that could not have been fathomed just a short time ago. As a result of these orders, many state and local governments and government officials have faced and continue to face lawsuits challenging the breadth of the orders. *See, e.g.*, *Agudath Israel of Am. v. Cuomo*, --- F.3d ---, 2020 WL 6559473, at *3 (2d Cir. Nov. 9, 2020); *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 730 (9th Cir. 2020). Some of those lawsuits have made their way to this Court, and the central issue in those cases—whether religious speech may be treated better or worse than other speech—is one that is extremely fraught. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020).

In many instances, the emergency orders have been rescinded or modified as more information has become available to government officials and as time has allowed for more precise drafting of such orders.

See, e.g., *Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 563 (6th Cir. 2020); *S. Wind Women's Ctr. LLC v. Stitt*, 823 F. App'x 677, 679 (10th Cir. 2020) (per curiam); *Spell v. Edwards*, 962 F.3d 175, 178 (5th Cir. 2020). Chief Justice Roberts has noted that under our federalist system, state and local government officials must make judgment calls about what policies both are constitutional and protect the public's health and safety. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14 (Roberts, C.J., concurring in denial of application for injunctive relief).

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

Id. (internal quotations and citations omitted). And sometimes those judgment calls must change in the face of new information. *Calvary Chapel,* 140 S. Ct. at 2605 (Alito, J., dissenting from denial of application for injunctive relief) ("As more medical and scientific evidence becomes available, and as

states have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.").

As these orders change or are rescinded, if lawsuits challenging them assert no claim for compensatory damages, then those lawsuits should end—there is nothing to be gained by continued litigation. A rule that nominal damages alone can keep a case alive would only spend diminishing public resources on litigation long after the restrictions have been lifted or changed. On the other hand, a rule confirming mootness in such situations would encourage public officials to act decisively in the public interest, knowing that they could vacate or modify emergency orders when appropriate without fear of protracted litigation when only nominal damages are at stake. And again, individuals who suffered actual compensable injury would still be able to pursue claims for damages. Federalism suggests that federal courts should remove themselves from disputes that states, local governments, and school districts have already resolved.

The precise situation presented by the COVID-19 pandemic will prove to be rare, one hopes. But other recent, high-profile events also show that government officials should have latitude to react to rapidly developing situations in which public safety is imperiled without fear of federal court involvement if they later change a law or policy. This summer, for example, many local governments enacted curfews in response to racial justice demonstrations and protests that became violent. Just as with the pandemic restrictions, lawsuits ensued. *See, e.g.*, *Black Lives Matter – L.A. v. Garcetti*, No. 2:20-cv-04940-PSG-PVC (C.D. Cal. filed June 3, 2020). Under petitioners'

proposed rule, the local governments implementing temporary curfews might be mired in lengthy and expensive litigation that continues long after the curfews are lifted, even if the plaintiffs suffered no actual injury—so long as the plaintiffs included a perfunctory claim for nominal damages in their complaint.

The ever-changing world of technology provides more mundane examples of situations that do not always fit neatly into a body of established law. While social media has been popular for more than fifteen years, only a handful of cases have decided whether government officials can block individuals from posting from accounts that they use (as least in part) for government business. *See generally Robinson v. Hunt Cty.*, 921 F.3d 440 (5th Cir. 2019); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019). Similarly, courts have struggled with determining when school officials may constitutionally search student cell phones. *See, e.g.*, *Jackson v. McCurry*, 762 F. App'x 919 (11th Cir. 2019). And lower courts have disagreed about whether and when students may be disciplined for off-campus speech. *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 189 (3d Cir. 2020), *petition for cert. filed*, (U.S. Aug. 28, 2020) (No. 20-255).

As shown by the continued litigation, many states, local governments, and school districts have chosen to keep their laws or policies in place and defend them. But when a governmental entity chooses to change its law or policy—either because it agrees that the law or policy might be unconstitutional or because it lacks the resources or community support to defend the law or policy—and only a claim for nominal damages remains, all that is left for a federal court to do is issue

an advisory opinion. Federalism requires a different result.

Given these complexities (which will always exist, no matter the number of cases decided by the federal courts), the public interest is best served by policies that allow government officials to act in real time and to adapt to changing circumstances and the unanticipated consequences of their official acts. By the same token, the public interest is harmed when government officials cannot act quickly and decisively in the face of immediate threats out of fear that someone might challenge that act and then drag the governmental entity through endless litigation—even if the government changes the challenged law and nobody suffered actual injury from any potential infringement of rights.

The rule from the decision below is also supported by this Court's jurisprudence in other aspects of constitutional law. This Court's immunity precedent and the presumption that government officials act in good faith, both of which this Court has adopted in recognition of the challenges that governmental entities and their officials face in adopting and implementing constitutional policies, support a finding of mootness in cases like this. This Court has held that state and local legislators are entitled to absolute immunity from liability for their legislative acts. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998). Likewise, this Court has held that qualified immunity protects all government officials from liability for civil damages, so long as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known. *Pearson*, 555 U.S. at 231. In addition, the law has long afforded government officials a

presumption that they will act in good faith.[3] *See Beck v. Ohio*, 379 U.S. 89, 97 (1964) (assuming police officers acted in good faith). The same policies that underlie the deference afforded by absolute and qualified immunity, and the presumption of good faith afforded government officials, support adopting the decision below that government officials should not be subjected to litigation over one dollar when they have changed a challenged law or policy. The case is moot.

III. Local Governments Cannot Simply End the Litigation by Accepting an Entry of Judgment.

The United States suggests in its amicus brief that when there is no live claim for prospective relief or compensable harm, a defendant can just end the litigation without a resolution of the constitutional merits by simply "conceding" and accepting entry of judgment for nominal damages. U.S. Br. 29. This proposed "solution" should be rejected. First, a government that is presumed to have acted in good faith should not have to accept fault when no court has ruled on the merits. A change in policy is not a concession of unconstitutionality. Indeed, a governmental entity may change a policy upon being sued for many reasons other than unconstitutionality, including: the community supports the policy change regardless of whether it is legally required; the governmental entity does not want the potential

[3] Petitioners' argument that local governments will "routinely ignore [constitutional rights]," Pet. Br. 44, turns this presumption on its head. Petitioners start from the position that their proposed rule is necessary because government officials should be presumed to act nefariously. Such a presumption is entirely unjustified and without evidence to support it.

reputational damages associated with protracted litigation; or the governmental entity cannot afford or does not want to expend limited taxpayer resources on litigation.

Second, governments may experience other negative collateral consequences by simply accepting a judgment against them. A judgment of a constitutional violation can negatively impact bond ratings; it can raise a government's insurance costs; it can impact a local government's ability to receive grants or qualify for other funding programs (like HUD Community Development Block Grants or United States Department of Transportation Federal Transit Administration grants); and it can erode citizens' trust in their local governments and governing officials. A judgment entered in such a situation might also be alleged as evidence of a "policy or practice" for *Monell* claims under 42 U.S.C. § 1983, thus allowing constitutional litigation against a local government or school board to proceed when it otherwise would be dismissed. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion) (explaining that proof of a single incident of the unconstitutional activity charged is not sufficient to prove the existence of a municipal custom). Finally, in many cases (such as the one below) government officials are named individually as defendants. These public servants cannot be expected to accept a judgment against them personally, along with all of the attendant negative consequences, to avoid protracted litigation. In short, the United States' proposal stands to cost states, local governments, and school districts much more than a single dollar in nominal damages.

Third, the United States' argument fails to recognize that entry of judgment for nominal damages would not end the litigation. The plaintiff in such a circumstance would almost certainly seek attorney's fees as the prevailing party. Thus, the United States' position would create the same disincentive to a governmental entity changing the law or policy that this Court cited in rejecting the catalyst theory in *Buckhannon*. And it would allow large, well-funded advocacy organizations to intimidate, through the threatened cost of litigation, small local governments and school districts into changing laws or policies that may be legally defensible—and still collect fees to boot. That is simply the catalyst theory in disguise.

IV. A Desire for Additional Law Does Not Justify Disregarding Mootness.

Petitioners and many of their amici argue that their preferred rule is necessary to make clearly established law for the purposes of a qualified immunity analysis. For example, one amicus states that an "award of nominal damages sets a new baseline for Respondents and other state officials because a determination that Respondents violated Petitioners' First Amendment rights will be used to evaluate whether law is 'clearly established' for purposes of qualified immunity proceedings." Christian Legal Society Br. 8. That assertion is true only if a court actually determines, one way or the other, whether the policy violated the Constitution. If the court instead merely recognized government officials' qualified immunity, as it may under *Pearson*, no additional "baseline" would be set. Regardless, this argument is beside the point. Courts decide "Cases" and "Controversies; they do not clarify constitutional

jurisprudence for the sake of a future hypothetical case.

Additionally, an amicus argues that "[b]y allowing plaintiffs to pursue nominal damages claims for constitutional injuries, the Court mitigates *Pearson*'s constitutional stagnation problem." Christian Legal Society Br. 11. But this Court was aware of the possibility of "constitutional stagnation" when it decided *Pearson* and still rejected the mandatory two-step qualified immunity analysis from *Saucier v. Katz*, 533 U.S. 194 (2001). *Pearson*, 555 U.S. at 232. In fact, the policy reasons underlying this Court's rejection of *Saucier's* requirement that courts must always determine whether the Constitution was violated highlight the same problems that petitioners' proposed rule would create:

- "The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Id.* at 236-37 (emphasis added).
- "District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise." *Id.* at 237 (emphasis added).
- "Unnecessary litigation of constitutional issues also wastes the parties' resources." *Id.* (emphasis added).
- Because of the fact-dependent nature of some constitutional questions, "opinions following [the *Saucier* rule] often fail to make a

meaningful contribution to such development." *Id.* (emphasis added).

- The *Saucier* rule may create a risk of bad decision-making, as the "lower courts sometimes encounter cases in which the briefing of constitutional questions is woefully inadequate," *id.* at 239, and there is a "risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented." *Id.* (emphasis added).
- "Adherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* at 241 (emphasis added) (internal quotations and citations omitted).
- A more flexible rule "properly reflects our *respect for the lower federal courts that bear the brunt of adjudicating these cases*." *Id.* at 242 (emphasis added).

The above rationales for rejecting *Saucier's* two-step process apply with equal force to the question here, and this Court should therefore conclude that the case below is moot. A rule that nominal damages alone prevent mootness, on the theory that it will create needed constitutional law, is a solution in search of a problem. If judges want to develop the law in a particular area for the purposes of qualified immunity, there are sufficient opportunities for this Court and the lower courts to do so in cases alleging an actual, compensable injury.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Lisa Soronen
Executive Director
State & Local Legal Center
444 North Capitol Street, N.W.
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

/s/ Patrick M. Kane
Patrick M. Kane
(counsel of record)
Kip D. Nelson
Fox Rothschild LLP
230 N. Elm Street
Suite 1200
Greensboro, NC 27401
(336) 378-5200
PKane@foxrothschild.com
KNelson@foxrothschild.com

Christopher McNamara
Fox Rothschild LLP
345 California Street
Suite 2200
San Francisco, CA 94104
(415) 539-3357
CMcNamara@foxrothschild.com

Counsel for Amici Curiae