No. 18-12676-AA

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,

Plaintiffs-Appellants

v.

STANLEY C. PRECZEWSKI, LOIS C. RICHARDSON, JIM B. FATZINGER, TOMAS JIMINEZ, AILEEN C. DOWELL, GENE RUFFIN, CATHERINE JANNICK DOWNEY, TERRANCE SCHNEIDER, COREY HUGHES, REBECCA A. LAWLER, AND SHENNA PERRY

Defendants-Appellees.

Appeal from the
United States District Court for the Northern District of Georgia
Case No. 1:16-cv-04658-ELR
The Honorable Eleanor L. Ross

BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1(a) and 28(a)(1) and 11th Cir. R. 26.1-1, 26.1-2, 26.1-3, and 28-1, the undersigned counsel of record certifies that the following listed persons and entities are known to have an interest in the outcome of this case or appeal:

- Alliance Defending Freedom
- Barham, Travis C.
- Board of Regents of the University System of Georgia
- Bradford, Joseph
- Carr, Christopher
- Chalmers, Roger
- Cortman, David A.
- Cusimano, Ellen
- Dowell, Aileen C.
- Downey, Catherine Jannick
- Fatzinger, Jim B.
- Georgia Gwinnett College
- Hughes, Corey
- Langhofer, Tyson C.
- Lawler, Rebecca A.
- Pacious, Kathleen M.
- Perry, Shenna
- Preczewski, Stanley C.

- Richardson, Lois C.
- Ross, Ellen L.
- Ruffin, Gene
- Schneider, Terrance
- Uzuegbunam, Chike
- Waggoner, Kristen K.

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Respectfully submitted this the 6th day of August, 2018.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants Chike Uzuegbunam and Joseph Bradford request oral argument. This case presents important jurisdictional and constitutional questions addressing when citizens—especially students at public universities—may pursue claims against state officials for violating their constitutional freedoms. Because of the important constitutional liberties implicated in this appeal and the nuanced nature of certain of the disputes it presents, counsel respectfully submit that oral argument would be of assistance to this Court in resolving the issues on appeal.

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STATEMENT OF JURISDICTION

Plaintiffs' amended complaint raises federal questions under the U.S. Constitution and 42 U.S.C. § 1983. Appellants' App. ("A.A.") 139. The district court exercised original jurisdiction over their claims under 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343 (civil rights jurisdiction). A.A.139.

Appellate jurisdiction exists under 28 U.S.C. § 1291. On May 25, 2018, the district court granted Defendants' motions to dismiss, ruling that all of Plaintiffs' claims were moot. A.A.724. The same day, it issued a Judgment for Defendants disposing of all of Plaintiffs' claims. A.A.725. On June 25, 2018, Plaintiffs filed a timely notice of appeal from both the May 25th order and judgment. A.A.727.

STATEMENT OF THE ISSUES

This appeal presents four issues:

1. **Types of Damages Sought:** On a motion to dismiss, courts must construe the complaint broadly and in a plaintiff's favor. Here, Plaintiffs sought "monetary damages" and "damages in an amount to be determined by the evidence." Yet, the district court ruled that these statements categorically excluded compensatory damages. Did the district court err in concluding that Plaintiffs only sought nominal damages?
2. **Mootness of Plaintiffs' Nominal Damages Claims:** Defendants applied two policies to stop a college student from distributing literature and from speaking publicly outdoors on campus about his faith. Another student self-censored to avoid a similar fate. Relying on *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017), the district court deemed the nominal damages claims stemming from this enforcement and the resulting chill moot. Did the district court err in applying *Flanigan's* to moot Plaintiffs' nominal damages claims?
3. **Mootness of Nominal Damages Claims Generally:** According to the Supreme Court, nominal damages compensate citizens for constitutional violations when those violations inflict an injury that cannot be valued monetarily. Thus, in practically every circuit but the Eleventh, nominal damages claims cannot be mooted. Should

the Court overrule *Flanigan's* and hold that nominal damages claims cannot be mooted?

4. **Dismissing Plaintiffs' Case:** Under FED. R. CIV. P. 15(a)(2), district courts "should freely give leave [to amend a complaint] when justice so requires." The goal is to resolve disputes on their merits. While Plaintiffs' Complaint sought compensatory and nominal damages, they also sought leave to amend to clarify that this was so due to *Flanigan's*. The district court precipitously rejected their request, dismissed the case, and rendered judgment. Did the district court err in dismissing Plaintiffs' case rather than granting leave to amend to clarify the types of damages sought?

STATEMENT OF THE CASE

I. Nature of the Case

The central question here is whether a public college may avoid accountability for unconstitutionally censoring its students—mooting even their damages claims—by later changing its policies. Chike Uzuegbunam, then a Georgia Gwinnett College ("GGC") student, tried to distribute literature peacefully in an outdoor campus plaza. GGC officials stopped him because he was outside the two tiny speech zones into which GGC quarantined all student speech. When Mr. Uzuegbunam complied with these rules and began speaking publicly within a speech zone weeks later, GGC officials stopped him again because his speech prompted a complaint. That complaint converted his speech into "disorderly conduct," which GGC defined to include expression that "disturbs the peace and/or comfort of person(s)."

These speech zone and speech code policies defy decades of law guaranteeing students the freedom to speak in the outdoor areas of campus and to say things others do not wish to hear. Sidestepping this precedent, the district court focused on mootness. In its view, GGC's mid-litigation policy changes mooted even Plaintiffs' damages claims—as if a policy change goes back in time and erases GGC's censorship of Mr. Uzuegbunam and its chilling of him and Mr. Bradford.

The cornerstone of the district court's ruling was an erroneous reading of *Flanigan's*. A.A.720-23. That case applies only when plaintiffs do *not*

seek compensatory damages. Here, Plaintiffs sought them. A.A.202 ¶¶ 417-18, 205 ¶¶ 434-35, 208 ¶¶ 450-51, 211 ¶¶ 469-70 (seeking "monetary damages" and "damages in amount to be determined by the evidence"). The district court erred in interpreting the complaint otherwise and then compounded its error by refusing to allow a clarifying amendment to the pleadings. Plus, *Flanigan's* does not moot all nominal damages claims.

Moreover, the district court applied a flawed decision. According to the Supreme Court, plaintiffs are entitled to nominal damages when constitutional violations cause injuries that cannot be valued monetarily. Freedom is so priceless that government must be held accountable, even when the injuries from those violations do not result in traditional forms of damages. But *Flanigan's* ruled—contrary to the rule in other circuits—that nominal damages claims can be mooted by the government's mid-litigation policy change. It effectively, but wrongly, declared that a past violation of a citizen's priceless liberties is not worth a court's time unless there is a financially demonstrable injury.

Flanigan's' flaws are perhaps most glaring in cases involving college students. According to the Supreme Court, "the First Amendment … does not tolerate laws that cast a pall of orthodoxy over the classroom [or campus]," and "the essentiality of freedom in the community of American universities is almost self-evident." *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967). Here, GGC cast exactly that pall and

stifled the "wide exposure to that robust exchange of ideas" upon which our future depends by censoring one student and chilling two. *Id.* Under *Flanigan's* per the district court, this does not matter. The actions of GGC's officials never get reviewed because subsequent events expunge them from history. Thus, colleges can censor their students without consequence, and the law is never clarified, giving officials plausible deniability to censor students similarly and still claim qualified immunity.

II. Statement of Facts

A. GGC's Censorship via Speech Zones

In July 2016, Mr. Uzuegbunam sought to share his Christian beliefs with his fellow students by distributing literature in an outdoor plaza on campus and engaging willing passersby in conversation. A.A.140, 168-69. He did so peacefully and unobtrusively, standing where students frequently converse and congregate. A.A.169-70.

Defendant Perry quickly stopped Mr. Uzuegbunam, saying he could not distribute literature there. A.A.170. Defendant Downey confirmed he could not do this outside GGC's two speech zones due to its *Speech Zone Policy*. A.A.170-71.

Under that policy, students could engage in expressive activities only in two speech zones and only after reserving them. A.A.154-55, 158-59. Open just eighteen hours a week (*i.e.*, 10% of the week), they comprised just 0.0015% of campus—one stretch of one sidewalk and the cafeteria patio. A.A.151, 155-56. If students wanted to speak during the other 90%

of the week, they first had to get a permit. A.A.156-57. If they wanted to speak anywhere outside those zones, they also had to get a permit. A.A.157. The policy provided no guidance on when these permits had to be granted. A.A.157. Also, Defendants could "modify the free speech areas based on the operational needs of the institution," whatever that means. A.A.157-58. Only one thing about this was clear: the policy placed no limits on when or how this happened. A.A.158.

To reserve the speech zones, students had to submit a form and any literature they intended to distribute three business days in advance. A.A.158-59. Four officials reviewed the literature, but the policy placed no limits on the scope of their review or how it impacted the granting of the permit. A.A.160-61. The policy listed fifteen considerations all speakers "must meet," A.A.159-60, two of which Plaintiffs challenged. A.A.159-61. But it never said which requests officials must grant, meaning that they could deny requests that satisfied all fifteen. A.A.159-60.

After explaining this policy, Defendant Downey referred Mr. Uzuegbunam to the Office of Student Integrity. A.A.171. There, Defendant Dowell again confirmed that the *Speech Zone Policy* prohibited distributing literature in that plaza (or anywhere else outside the speech zones) and that Mr. Uzuegbunam had to reserve those zones to use them. A.A.171-72. The policy also prohibited him from conversing with willing students about his religious beliefs, unless he were standing in a speech

zone he had previously reserved. A.A.172. Predictably, he stopped his expressive activities that day given the threat of punishment had he continued. A.A.172-73.

B. GGC's Censorship via Speech Codes

In order to be able to speak, Mr. Uzuegbunam later reserved the cafeteria patio speech zone to share his beliefs—by distributing literature and speaking publicly—with the students who gathered there. A.A.173-74. But when his day to speak came, he discovered that free speech was not even allowed in the tiny "free speech expression areas."

He stood in the reserved area at the proper time and spoke publicly about his beliefs without shouting, without amplification, without blocking traffic, and without inflammatory rhetoric. A.A.174-76. Soon, Defendant Hughes of the GGC police stopped him, explaining someone had complained about Mr. Uzuegbunam's expression. A.A.176. He went on to say that, due to the complaint, this expression constituted "disorderly conduct" because it disturbed "the peace and tranquility of individuals." A.A.178. He warned Mr. Uzuegbunam could face discipline under GGC's *Student Code of Conduct* if he continued speaking publicly. A.A.179.

Defendant Hughes did this because GGC's *Speech Code*, located in its *Student Code of Conduct*, prohibited "disorderly conduct" and defined it to include anything that "disturbs the peace and/or comfort of person(s)." A.A.163. It even regulated speech protected by the First Amendment. GGC did not exempt such speech from this speech code; it just promised

to "consider[]" First Amendment issues when enforcing the code. A.A.164.

Defendant Lawler, another GGC police officer, agreed that Mr. Uzuegbunam's open-air speaking constituted disorderly conduct due to the complaints: "[P]eople are calling us because their peace and tranquility is being disturbed and we've asked you to stop." A.A.179-80. Given these warnings and threats of discipline from uniformed officers, Mr. Uzuegbunam was forced to stop speaking and left the speech zone. A.A.181.

For Mr. Uzuegbunam, GCC offered no place for free speech. He was banned from speaking in the over 99.99% of campus outside the two speech zones unless he had a permit. During the 90% of the week they were closed, he could not speak in those zones unless he had a permit. Even in those zones and even with a permit, he could only say things so innocuous that they did not disturb anyone's comfort. His speech was regulated by the most sensitive person around—a classic heckler's veto.

III. Procedural History

On December 19, 2016, Mr. Uzuegbunam filed suit, raising First and Fourteenth Amendment claims. A.A.11-86. On February 1, 2017, Defendants filed a motion to dismiss, A.A.87-134, arguing that GGC's policies were constitutional, that its officials were entitled to qualified immunity, and that Mr. Uzuegbunam's speech—a discussion of the Christian Gospel—"arguably rose to the level of 'fighting words.'" A.A.119.

On February 15, 2017, Plaintiffs filed their amended complaint, adding Mr. Bradford as a plaintiff. A.A.135-426. This mooted Defendants'

motion. A.A.616. But they filed another about a month later, repeating most of the same arguments. A.A.427-75. Then, on March 31st, they filed another motion to dismiss only "Plaintiffs' claims for injunctive and declaratory relief." A.A.485; A.A.476-508. They claimed these were moot due to their newly adopted policies, which eliminated GGC's *Speech Code* and modified its *Speech Zone Policy*. A.A.485-88. Briefing on these motions concluded on May 22, 2017. A.A.617-29.

In June 2017, Plaintiffs sought a court-hosted settlement conference, hoping it would allow the parties to correct the remaining flaws and lack of clarity in GGC's new policies. A.A.630-35. The district court denied this request. A.A.647-49.

In April and May 2018, the parties filed supplemental mootness briefs. Defendants relied on *Flanigan's*, A.A.676-85; Plaintiffs explained why it neither controlled nor required the dismissal of their claims. A.A.686-98.

IV. District Court Opinion

On May 25, 2018, having waited over a year after briefing was complete, the district court finally issued a ruling. It concluded that Mr. Uzuegbunam's graduation mooted his prospective relief claims, A.A.703-04, and that GGC's revised policies mooted Mr. Bradford's. A.A.704-17. Next, it ruled that Plaintiffs only brought nominal damages claims, which were moot. A.A.717-24. Last, it rejected Plaintiffs' request for leave to amend the complaint. A.A.724 n.11. Thus, it dismissed the case without prejudice and rendered judgment for Defendants. A.A.724-25.

V. Standards of Review

This Court reviews mootness *de novo*, *Haynes v. Hooters of Am., LLC*, 893 F.3d 781, 784 (11th Cir. 2018), and denial of leave to amend the complaint for abuse of discretion. *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1074 (11th Cir. 2017).

SUMMARY OF THE ARGUMENT

Two college students sought to exercise their free speech rights on their campus—a "marketplace of ideas," where the need for free speech "is almost self-evident." *Keyishian*, 385 U.S. at 603. One was silenced; both were chilled. Those injuries, once proven, entitle them to relief. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (self-censorship is a "harm that can be realized even without an actual prosecution").

But to the district court, the students' damages claims for their past injuries are moot. Justice Stevens would be stunned:

> There is no precedent, either in our jurisprudence, or in any other of which I am aware, that provides any support for the suggestion that postcomplaint factual developments that might moot a claim for injunctive or declaratory relief could … moot a claim for monetary relief….

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 197 (2000) (Stevens, J., concurring).

To reach this unprecedented conclusion, the district court erroneously concluded Plaintiffs did not seek compensatory damages, though every count mentions them. It declined to interpret these paragraphs in Plaintiffs' favor, instead focusing on the absence of the magic word "compensatory." It bypassed FED. R. CIV. P. 54(c)'s directive to "grant the relief to which each party is entitled," whether named in the prayer for relief or not. Absent these errors, *Flanigan's* would not have applied, and Plaintiffs' damages claims would have been reviewed on their merits.

Next, the district court erred by dodging *Flanigan's'* indications that

not all unaccompanied nominal damages claims are moot. Had the court addressed the merits, it would have determined whether these students were rightly quarantined to miniscule areas of campus and then silenced via a heckler's veto. These determinations would have immediate practical effects for both these students and GGC officials. But it concluded that these past injuries did not merit judicial attention.

Applying *Flanigan's* compounded the injustice. That decision conflicts with everything the Supreme Court has said about nominal damages, ignores decades of rulings showing that nominal damages are critical for students whose equitable claims evaporate upon graduation, and rests on nothing more than two individual opinions and two misplaced analogies. It sends the unmistakable message to students that free speech may be valuable, but don't bother going to court over it.

Last, the district court erroneously denied Plaintiffs' leave to amend to clarify the type of relief sought so that the case could be decided on its merits. Focusing on form, the court ignored the procedural context, faulting Plaintiffs for not filing an unnecessary motion, and immediately entered judgment, rendering that motion improper. But leave to amend is to be freely given and should have been given here.

Accordingly, the district court should be reversed and *Flanigan's* overturned so college officials do not get a free pass for violating students' precious freedoms.

ARGUMENT

I. The district court erred in concluding that Plaintiffs' damages claims were moot under *Flanigan's*.

In declaring Plaintiffs' damages claims moot, the district court relied on one case: *Flanigan's*. A.A.720-24. But *Flanigan's* does not control because Plaintiffs sought compensatory damages, and the decision does not moot all nominal damages claims. The district court erred.

A. *Flanigan's* does not control because Plaintiffs pleaded compensatory damages claims.

Flanigan's involved plaintiffs who "did not request actual or compensatory damages." *Flanigan's*, 868 F.3d at 1263 n.11. It recognized that "the claim for actual damages maintains the live controversy." *Id.* at 1270 n.23. So it only governs when plaintiffs seek solely nominal damages. Here, Plaintiffs pleaded claims for both compensatory and nominal damages that remained live on a motion to dismiss.

1. The district court wrongly construed the complaint against Plaintiffs to reject their compensatory claims.

To survive a motion to dismiss, Plaintiffs simply have to plead "sufficient factual matter ... to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), meaning they just have to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Far from imposing a "probability requirement," *Iqbal*, 556 U.S. at 678, "Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because 'it strikes a savvy judge that actual proof of those facts is improbable.'" *Watts v. Fla. Int'l Univ.*,

495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 556).

At this stage, "the pleadings are construed broadly." *Watts*, 495 F.3d at 1295. Courts must "accept[] the complaint's allegations as true and constru[e] them in the light most favorable to [Plaintiffs]," *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012), and view "all inferences ... in the light most favorable to [Plaintiffs]." *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118, 1120 (11th Cir. 2006).

The district court ignored these principles when ruling that Plaintiffs never sought compensatory damages. A.A.717-20. In each and every count, Plaintiffs pleaded that they "are entitled to an award of monetary damages." A.A.202 ¶ 417, 205 ¶ 434, 208 ¶ 450, 211 ¶ 469. The district court even admitted that "monetary damages can encompass both compensatory and nominal damages." A.A.718; *accord Quinlan v. Pers. Transp. Servs. Co.*, 329 F. App'x 246, 249 (11th Cir. 2009) (using "monetary damages" to refer to compensatory and punitive damages); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198 (11th Cir. 2007) (same); *Virdi v. DeKalb Cnty. Sch. Dist.*, 216 F. App'x 867, 873 (11th Cir. 2007) ("request[ing] monetary damages ... d[oes] not waive … nominal damages").

In each and every count, Plaintiffs also sought "damages *in an amount to be determined by the evidence* and this Court." A.A.202 ¶ 418, 205 ¶ 435, 208 ¶ 451, 211, ¶ 470 (emphasis added). This language cannot possibly refer to nominal damages, whose amount does not depend on evidence.

Under the federal rules, a pleading "will be construed to give effect to

all its averments." 5 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1286 (3d ed. 2018). But the district court dismissed these averments as "blanket statements" insufficient to plead compensatory damages. A.A.719. But they clearly show Plaintiffs sought more than nominal damages, especially when viewed in Plaintiffs' favor. *Chaparro*, 693 F.3d at 1335.

At the very least, these eight paragraphs infer that Plaintiffs sought compensatory damages, and the district court should have given Plaintiffs the benefit of "all inferences," *Levine*, 437 F.3d at 1120, even if it found them ambiguous. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1249 (11th Cir. 2005) ("'At worst, this language is ambiguous ... and because the court was ruling on a motion to dismiss, the complaint should be construed in the light most favorable' to Plaintiffs." (quoting *Miccosuke Tribe of Indians of Fla. v. S. Everglades Restoration All.*, 304 F.3d 1076, 1084 (11th Cir. 2002))).

Instead, the district court construed these paragraphs against Plaintiffs, dubbing them "blanket statements" that "do not automatically lend themselves to a claim for compensatory damages and instead could also support a claim for nominal damages." A.A.719-20. Rather than finding that statements that *could* encompass both types of damages *did* (as it should have), it ruled "Plaintiffs only sought nominal damages." A.A.720.

This Court and the federal rules have long rejected construing the complaint against plaintiffs. 5 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1286 ("The federal rules do not adhere to the ancient principle that the

allegations of a pleading must be construed most strongly against the pleader."). When defendants moved to dismiss because plaintiffs never claimed to be among the injured, *Smith v. Meese*, 821 F.2d 1484, 1488, 1495 (11th Cir. 1987), this Court rejected a "more formalistic approach [which] would suggest that … the plaintiffs … *might* not be affected, and thus plaintiffs do not have standing." *Id.* at 1495-96. Dismissing "would take a step backwards from the innovations of notice pleading." *Id.* Doing so "for the failure to choose the correct words … would return us to the days of the common law forms of pleading." *Id.* Instead, "the initial pleading, which is required only to give notice of the claim, must be construed liberally so as to do substantial justice." *Id.* (citation omitted).

The district court embraced the "correct words" formalism this Court rejected by essentially saying that though the Complaint's language might encompass compensatory damages, it might not. A.A.719-20. It wrongly focused on "whether or not the averments in the paper pleadings have been artfully or inartfully drawn," when "lawsuits should be determined on the merits," 5 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1286, and "[p]leadings must be construed so as to do justice." FED. R. CIV. P. 8(e).

The district court apparently insisted on seeing the word "compensatory" before finding that Plaintiffs sought this relief. But "[u]nder the notice-pleading standard, we no longer require the hyper-technical code pleadings of ages past, and we draw on [our] judicial experience and common sense when construing the allegations of in a complaint." *Resnick v.*

AvMed, Inc., 693 F.3d 1317, 1324 (11th Cir. 2012) (internal quotations & citation omitted). So it is "specious" to argue that a complaint should be dismissed for saying "losses" rather than "unreimbursed losses," *id.*, or for omitting the word "solely." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1054 (11th Cir. 2015); *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819, 825 (11th Cir. 2001) (rejecting waiver arguments based on omitting "breach of fiduciary duty" and "truthful"). Case law required the district court to construe terms that even it admitted could encompass compensatory damages as doing so and to recognize that "damages in an amount to be determined by the evidence" cannot refer to nominal damages. It erred by "verg[ing] on requiring [P]laintiffs to invoke magic words in their complaints." *Godelia v. Doe 1*, 881 F.3d 1309, 1319 (11th Cir. 2018).

As every count sought "monetary damages" and "damages in an amount to be determined by the evidence and this Court," Plaintiffs pleaded compensatory damages claims. Rather than recognizing these plausible claims or construing these paragraphs (and the inferences they raise) in Plaintiffs' favor, the district court wrongly construed the Complaint against Plaintiffs, focusing on the absence of a magic word. As Plaintiffs sought compensatory damages, *Flanigan's* does not control, and the district court should be reversed.

2. The district court wrongly focused solely on the prayer for relief to reject Plaintiffs' compensatory claims.

To justify rejecting Plaintiffs' compensatory damages claims, the

district court focused only on the prayer for relief. A.A.718 ("[T]he only place where they specify the type of damages sought is in their Prayer for Relief…."); A.A.718-19 ("[I]n their Prayer for Relief, wherein they set forth the exact relief they seek…."). But it ignored FED. R. CIV. P. 54(c) and Supreme Court and Eleventh Circuit precedent that a prayer for relief does not curtail the available remedies.

Except in default judgments, federal courts "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." FED. R. CIV. P. 54(c). Only a default judgment—obviously not an issue here—"must not differ in kind from, or exceed in amount, what is demanded in the pleadings." *Id.* Thus, the federal rules do not confine Plaintiffs to the relief listed at the end of their complaint.

The Supreme Court ruled likewise when residents challenged statutes giving a city police powers over them, though they could not vote in city elections. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 61-63 (1978). Their complaint sought an injunction against these laws, not that they be given the franchise, and thus, the district court dismissed the case "because they sought the wrong remedy." *Id.* at 65. The Supreme Court rejected this: "a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." *Id.* After quoting Rule 54(c), it reminded courts: "[A]lthough the prayer for relief may be looked to for illumination where there is doubt as to the substantive theory under which a plaintiff is

proceeding, its omissions are not in and of themselves a barrier to redress of a meritorious claim." *Id.* at 66.

This Court—like other Circuits[1]—has long recognized this principle. When a district court rejected plaintiffs' punitive damages claim "because the complaint did not explicitly request such relief in the demand for judgment," this Court reversed, saying the district court "clearly erred." *Scutieri v. Paige*, 808 F.2d 785, 791 (11th Cir. 1987). Under Rule 54(c), "a specific prayer for punitive damages was unnecessary." *Id.* at 792. Likewise, "Vivid's failure to pray for rescission in its complaint does not bar its entitlement to such relief." *Vivid Invs., Inc. v. Best W. Inn*, 991 F.2d 690, 692 (11th Cir. 1993). In light of Rule 54(c), this Court rejected arguments that district courts lack jurisdiction to award attorneys' fees if a plaintiff fails to request them "in its pleadings." *Capital Asset Research Corp. v. Finnegan*, 216 F.3d 1268, 1269-71 (11th Cir. 2000). Similarly, a "district court should not have denied declaratory and injunctive relief merely because Carter failed to specifically request such relief in his complaint." *Carter v. Diamondback Golf Club, Inc.*, 222 F. App'x 929, 931 (11th Cir. 2007). Under Rule 54(c), "[t]he fact that Carter's complaint had not specifically requested declaratory or injunctive relief does not foreclose

[1] *See, e.g.*, *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1108-09 (8th Cir. 2011); *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002); *Pension Benefit Guar. Corp. v. E. Dayton Tool & Die Co.*, 14 F.3d 1122, 1127 (6th Cir. 1994); *Doss v. S. Cent. Bell Tel. Co.*, 834 F.2d 421, 424-25 (5th Cir. 1987); *Kan. City, St. L. & Chi. R.R. Co. v. Alton R.R. Co.*, 124 F.2d 780, 783 (7th Cir. 1941).

their availability." *Id.* at 931-32.

On a motion to dismiss, where complaint must be construed in Plaintiffs' favor, *Chaparro*, 693 F.3d at 1335, this principle carries even more force. For example, a district court dismissed a case, saying the plaintiff "failed to specify his damages" because the prayer for relief just cited a statute and sought "any and all other relief that the Court deems just and appropriate." *Levine*, 437 F.3d at 1123. This Court reversed because each count requested various remedies. *Id.* Under notice pleading, this was enough to state claims "for all of the available damages." *Id.*

Similarly, this Court vacated dismissal of a torture claim because another claim referenced a required element. *Aldana*, 416 F.3d at 1252-53. The "placement of the paragraph in another count is unimportant to our review" of dismissal under Rule 12(b) because "[w]e read the complaint as a whole." *Id.* at 1252 n.11. Thus, "a formulaic misstep by counsel is not fatal under the notice pleading standard (where fair notice is all that is required)" under Rule 8(a). *Id.* A party "cannot say it did not receive fair notice of the torture claim just because the language about lasting mental trauma was placed in another section of the complaint." *Id.*

Simply put, "the selection of an improper remedy in the Rule 8(a)(3) demand for relief will not be fatal to a party's pleading if the statement of the claim indicates the pleader *may* be entitled to relief of some other type." 5 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1255 (3d. ed. 2018) (emphasis added). The prayer for relief "is not considered part of the

claim" when assessing the "sufficiency of a pleading." *Id.*

Plaintiffs sought evidence-based "monetary damages" in each count, A.A.202 ¶¶ 417-18, 205 ¶¶ 434-35, 208 ¶¶ 450-51, 211 ¶¶ 469-70, and then sought "[a]ll other further relief" in the prayer for relief. A.A.213. Under *Levine*, this stated claims for *all* available types of damages. As in *Aldana*, these eight paragraphs provide the necessary reference to compensatory damages, putting Defendants on notice. A "specific prayer for [compensatory] damages was unnecessary." *Scutieri*, 808 F.2d at 792.

In sum, the district court erred because Plaintiffs sought compensatory damages in every single count, especially when those paragraphs and their inferences are construed in Plaintiffs' favor. The court erred again in concluding that the prayer for relief confines the available remedies. Thus, *Flanigan's* does not control, Plaintiffs' claims are not moot, and the district court should be reversed.

B. *Flanigan's* does not require the dismissal of all nominal damages claims as moot.

The district court separately erred by brushing aside the portions of *Flanigan's* that show that nominal damages claims are not automatically moot. A.A.720, 723. The district court concluded that *Flanigan's* holds simply that "nominal damages is insufficient to save this otherwise moot case." A.A.720. This parrots some of the decision's language. *Flanigan's*, 868 F.3d at 1267, 1269 ("[N]ominal damages cannot save an otherwise moot case" and "are not themselves an independent basis for [Article III]

jurisdiction."). But it ignores other parts because this holding "is, at best, undermined and, at worst, contradicted by its footnotes." *Id.* at 1272 (Wilson, J., dissenting). The decision also states that it "does not foreclose the exercise of jurisdiction in *all* cases where a plaintiff claims only nominal damages," *id.* at 1263 n.12 (emphasis added), and it "does not imply that a case in which nominal damages are the only available remedy is always or necessarily moot." *Id.* at 1270 n.23. Instead, it reiterated that "'[n]ominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages.'" *Id.* (quoting *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006)).

Facing these contradictions, other district courts have avoided relying on *Flanigan's*. *Am. Atheists, Inc. v. Levy Cnty.*, 2017 WL 6003077, *4 n.12 (N.D. Fla. Dec. 3, 2017) ("Whatever [*Flanigan's*] holding may be, this Court need not make meaning of these inconsistencies…."). But the district court here breezed past these nuances, concluding there was no "live controversy … regarding compensatory damages" and "nominal damages would have [no] practical effect on the parties' rights or obligations." A.A.723. In both respects, that was wrong.

First, a live dispute about compensatory damages remained ongoing. Plaintiffs challenged not only GGC's policies, but also their enforcement. *See, e.g.*, A.A.192-94, 198, 201, 209–10. At great length, GGC defended its officials' actions in censoring Mr. Uzuegbunam, first because he spoke

in the "wrong" place and then because he said the "wrong" thing in the "right" place. A.A.99-132 (first motion to dismiss); A.A.440-73 (second motion). At one point, GGC insisted that the Christian Gospel—a message the First Amendment has protected for centuries—"arguably rose to the level of 'fighting words.'" A.A.119. Throughout, it defended its officials' decision to ratify and enforce a heckler's veto by silencing Mr. Uzuegbunam due to complaints. If the Defendants' conduct were found to be illegal, Mr. Uzuegbunam could be entitled to compensatory damages. *See supra* Argument I.A.

Second, awarding nominal damages here "would have a practical effect on the parties' rights or obligations," and thus, Plaintiffs' claims are not moot and "the exercise of jurisdiction is plainly proper." *Flanigan's*, 868 F.3d at 1263-64. Explaining the "practical effect" that would prevent mootness, *Flanigan's* pointed to nominal damages claims for trespass, where the parties "wish to obtain a legal determination of a disputed boundary," and for libel, where the parties seek "to vindicate their reputations by proving that the supposed libel was a falsehood." *Id.* at 1263 n.12 (quotations & citations omitted). Plaintiffs' claims are akin to both.

Again, Plaintiffs sued because GGC officials repeatedly censored Mr. Uzuegbunam, first because he was outside the tiny "speech zones" and then because someone complained. Plaintiffs' nominal damages claims would determine the disputed boundary over how public colleges can restrict student expression. Can they confine student speech to small,

arbitrary zones on campus? Can they effectuate a heckler's veto by silencing complaint-inducing speech? Regardless of the current policies, these are questions that will recur. People will doubtlessly complain about what others say. So officials may try to do the same things, relying on different policies or no policies at all. Thus, determining the legal boundaries of where students may speak and what they may say on campus would have a practical, clarifying effect on all parties—students and officials. Especially given qualified immunity's "clearly established" analysis, determining the boundaries of students' freedoms and when officials have trespassed on them is a critical practical effect.

Moreover, a nominal damages award would answer an important question: Did GGC officials violate Mr. Uzuegbunam's rights when they censored him twice? GGC officials publicly silenced him twice—in full view of fellow students. The effect of this is unmistakable, declaring to all watching that he had misbehaved. This besmirching of his reputation has continued here, where GGC has claimed he was uttering "fighting words," A.A.119, and a "divisive message," A.A.119, that "bothered" students and "was disruptive." A.A.460. Just as "proving that [a] supposed libel was a falsehood" constituted a sufficiently practical effect to ward off mootness, *Flanigan's*, 868 F.3d at 1263 n.12, proving that GGC's actions violated Mr. Uzuegbunam's rights would as well.

In sum, the district court erred by applying only portions of *Flanigan's*. That decision "does not foreclose the exercise of jurisdiction in all cases

where a plaintiff claims only nominal damages." *Id.* Here, a nominal damages award would have "practical effect[s]," declaring Plaintiffs' rights and Defendants' obligations. *Id.* at 1263. *Flanigan's* does not moot Plaintiffs' nominal damages claims, and the district court erred in holding otherwise.

II. *Flanigan's* was wrongly decided and should be overruled.

In declaring Plaintiffs' nominal damages claims moot, the district court relied exclusively on *Flanigan's*, A.A.720-24—a decision that conflicts with long-established precedent from the Supreme Court and almost every other circuit and lacks any legal grounding. It should be reversed and *Flanigan's* overturned.

A. *Flanigan's* conflicts with Supreme Court precedent.

Flanigan's focuses on what the Supreme Court allegedly did *not* say and ignores what it *has* said. *Flanigan's*, 868 F.3d at 1266 ("[N]othing that it held, or even said, controls…."); *id.* at 1267 ("In the absence of any guidance from the Supreme Court…."). But what the Supreme Court *has* said makes it clear that nominal damages claims remain live.

1. In general, damages claims prevent mootness.

The Supreme Court has repeatedly ruled in many different contexts that damages claims prevent mootness. A congressman's damages claim for back pay "remains viable even though he has been seated" and ensured a live case. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). A prisoner's "transfer did not moot the damages claim" arising from his solitary confinement, meaning there was no "sufficient ground for affirming the

dismissal of the complaint." *Boag v. MacDougdall*, 454 U.S. 364, 364-65 (1982); *Bd. of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987) ("The action is not moot [after plaintiffs' release] …. [because] the complaint sought damages…."). Notably, the Court did not parse which sub-species of damages was involved.

Neither a consent order nor the parties' agreement mooted a "racial steering" case. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 (1982). "Irrespective of the issue of injunctive relief, respondents continue to seek damages to redress alleged violations of the Fair Housing Act." *Id.* That damages claim alone would have kept the case alive.

This holds true when a challenged policy changes mid-litigation. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 608-09 (2001) (declaring if plaintiff maintains a damages claim, "defendant's change in conduct will not moot the case."). When an affirmative action ordinance expired, the suit challenging it was "not rendered … moot" because a "live controversy" remained over whether a contract decision "pursuant to the ordinance was unlawful and thus entitles appellee to damages." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989).

Similarly, when an agency-fee rebate program expired, the challenge to it remained live (though injunctive claims were moot) because "petitioners also sought money damages." *Ellis v. Brotherhood of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 442 (1984); *Davenport v. Wash. Educ. Ass'n*,

551 U.S. 177, 182 n.1 (2007) ("Because petitioners sought money damages for respondent's alleged violation of the prior version of § 760, it still matters whether the Supreme Court of Washington was correct to hold that that version was inconsistent with the First Amendment."). After a department restored all laid off or demoted employees, the firefighters' lawsuit was not moot because their damages claim provided the needed "concrete interest." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568-69, 571 (1984). When parents challenged race-based school assignments, the fact that one "sought damages … is sufficient to preserve our ability to consider the question." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

Here, Plaintiffs sought damages for GGC's unconstitutional censorship. The Supreme Court has established what respected treatises echo: "Claims for damages or other monetary relief automatically avoid mootness…. Damages should be denied on the merits, not on grounds of mootness." 13C WRIGHT & MILLER, FED. PRAC. & PROC. JURIS. § 3533.3 (3d ed. 2018). *Flanigan's* should be overturned and the district court reversed.

2. Nominal damages claims vindicate the priceless and thus should not be mooted as worthless.

Flanigan's declares that a plaintiff's "right to a single dollar in nominal damages is not the type of 'practical effect' that should, standing alone, support Article III jurisdiction." *Flanigan's*, 868 F.3d at 1270; *id.* at 1269. This renders such claims worthless. When combined with other

relief, they serve no purpose. Standing alone, they cannot prevent mootness. But treating them as a waste of judicial time is contrary to 42 U.S.C. § 1983 and Supreme Court precedent.

That federal courts lack jurisdiction over solitary nominal damages claims would surprise those who passed the Civil Rights Act of 1871. An opponent complained: "The deprivation may be of the slightest conceivable character, the damages in the estimation of a sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts…." *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (quoting CONG. GLOBE, 42d Cong., 1st Sess. at App. 216 (1871)). Clearly, he and his colleagues had no idea these claims would be considered to fall outside Article III.

The Supreme Court first addressed nominal damages closely when some students' compensatory and punitive damages claims were dismissed "for complete lack of proof." *Carey v. Piphus*, 435 U.S. 247, 251-52 (1978). It ruled that compensatory damages cannot be awarded "without proof that [an] injury actually was caused." *Id.* at 264. But then it noted that "courts traditionally have vindicated deprivations of certain 'absolute' rights … through the award of a nominal sum of money." *Id.* at 266. Otherwise, priceless rights would be ignored: "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that

those rights be scrupulously observed…." *Id.* As one of those "absolute rights," procedural due process violations "should be actionable for nominal damages without proof of actual injury." *Id.* It cited numerous cases "approv[ing] the award of nominal damages under § 1983 where deprivations of constitutional rights are not shown to have caused actual injury." *Id.* at 266 n.24. Thus, even if their suspensions were deserved, these students were "entitled to recover nominal damages." *Id.* at 266-67.

Flanigan's tried to distinguish *Carey*, saying the students had "a live claim for actual damages." *Flanigan's*, 868 F.3d at 1266. But this ignores the import of *Carey's* final sentences. Under *Flanigan's*, if the students' suspensions were deserved, their compensatory damages claim would fail. At that instant, their only claim would be nominal damages, which "are not themselves an independent basis for … jurisdiction." *Id.* at 1269. Thus, their case would be dismissed as moot. By saying that the students were "entitled to recover nominal damages" no matter what, *Carey*, 435 U.S. at 267, the Court recognized that federal courts have jurisdiction over these claims alone.

The Supreme Court returned to the subject of nominal damages when a suspended teacher brought due process and academic freedom claims for compensatory and punitive damages. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 301-02 (1986). Holding "the abstract value of a constitutional right may not form the basis for § 1983 damages," the Court reiterated that compensatory damages require "proof of actual injury."

Id. at 308. It also emphasized that "nominal damages, and not damages based on some undefined 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Id.* at 308 n.11. Why are these trivial sums awarded? To "recognize[] the importance to organized society that those rights be scrupulously observed." *Id.* (quoting *Carey*, 435 U.S. at 266). It also ruled that plaintiffs can recover nominal damages when substantive (here First Amendment), not just procedural, rights are violated. *Id.* at 309 (rejecting "two-tiered system of constitutional rights"); *accord Harden v. Pataki*, 320 F.3d 1289, 1301 n.15 (11th Cir. 2003).

Again, *Flanigan's* dismisses *Stachura*, saying "the compensatory damages issue was alive throughout the entire litigation." *Flanigan's*, 868 F.3d at 1266 n.18. This ignores *Stachura's* effect. The Court remanded for reconsideration of damages. *Stachura*, 477 U.S. at 313. If the teacher could not prove actual damages, he would still recover nominal damages under *Carey*, as *Stachura* reaffirmed. Under *Flanigan's*, at that moment, his case would evaporate as moot. Hence, *Stachura* reaffirmed what *Carey* recognized: federal courts have jurisdiction over unaccompanied nominal damages claims.

After finding that an official violated a citizen's due process rights but did not cause his injuries, a jury awarded that citizen nothing. *Farrar v. Hobby*, 506 U.S. 103, 106-07 (1992). The Fifth Circuit remanded "for entry of judgment … for nominal damages. *Id.* at 107. When plaintiffs then

sought attorneys' fees, the Fifth Circuit ruled they did not prevail because "the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing." *Id.* The "nominal award of one dollar … did not in any meaningful sense change the legal relationship" between the parties, *id.*, and was too "technical" and "insignificant" a victory "to support prevailing party status." *Id.* at 108. *Flanigan's* channels this spirit. *Flanigan's*, 868 F.3d at 1270 ("[T]he parties' right to a single dollar in nominal damages is not the type of 'practical effect' that should, standing alone, support Article III jurisdiction.").

Not the Supreme Court. Reversing, it held that "a plaintiff who wins nominal damages *is* a prevailing party," *Farrar*, 506 U.S. at 112 (emphasis added), meaning one who obtained "actual relief on the merits of his claim materially alter[ing] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12. "A judgment for damages in any amount, *whether compensatory or nominal*, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* at 113 (emphasis added). Notably, the Court did not say "compensatory *and* nominal" are needed to have this effect; nominal damages alone suffice.

Under *Flanigan's*, *Farrar* would have turned out much differently. The initial remand would never have happened because at that point, only a nominal damages claim remained. *Flanigan's*, 868 F.3d at 1269

("[Nominal damages] are not themselves an independent basis for that jurisdiction."). But the Fifth Circuit and Supreme Court exercised jurisdiction over this unaccompanied nominal damages claim. Later, *Flanigan's* would, like the Fifth Circuit, minimize the significance of that relief. But the Supreme Court reversed, finding it to be "actual relief on the merits." *Farrar*, 506 U.S. at 111. Why? Because it "recognizes the importance to organized society that [constitutional] righ[ts] be scrupulously observed." *Id.* at 112 (quoting *Carey*, 435 U.S. at 266).

The Court again considered an unaccompanied nominal damages claim after a sexual harassment victim sought and received only this relief. *Faragher v. City of Boca Raton*, 524 U.S. 775, 781, 783 (1998). After the Eleventh Circuit reversed, *id.* at 783-84, the Supreme Court reinstated the award. *Id.* at 810. Under *Flanigan's*, this case should have been dismissed at the district court level because the victim was not seeking actual damages, *see Flanigan's*, 868 F.3d at 1270 n.23, illustrating yet again how out of step that decision is with Supreme Court precedent.

Since 1871, it has been clear that federal courts can grant solely nominal damages in § 1983 cases. For decades, the Supreme Court has ruled these awards safeguard priceless liberties, has instructed courts to award them (even as the sole relief), and has declared that awarding nominal damages alone confers "prevailing party" status, a term tied to their practical effect on the parties' rights and obligations. Nowhere has it even hinted that these claims, if unaccompanied, must be dismissed as moot.

Thus, *Flanigan's* should be overturned and the district court reversed.

3. Justiciability does not hinge on the amount of relief.

Ultimately, *Flanigan's* concluded that most unaccompanied nominal damages claims are moot because the sums involved are so small. It declared that such claims "serve no purpose other than to affix a judicial seal of approval" to an already determined outcome. *Id.* at 1264; *id.* at 1265 ("[T]here is simply nothing left for us to do."); *id.* at 1270 (describing them as "the parties' right to a single dollar"). But justiciability does not depend on the size or amount of the relief in question.

Flanigan's mooted nominal damages claims because plaintiffs "predominantly" sought equitable relief, *id.* at 1265, a rationale the Supreme Court has rejected. The *Powell* defendants claimed the back salary claim was a "mere incident" to the representative's quest to be seated. *Powell*, 395 U.S. at 498. Citing a prior case, they urged the Court "to dismiss this entire action as moot." *Id.* But the Court refused, noting the dismissal in the prior case was not because the "deprivation of salary was insufficiently substantial to prevent the case from becoming moot." *Id.* Powell's salary claim was "still unresolved and hotly contested by clearly adverse parties." *Id.* Defendants argued that the "wholly incidental and subordinate" salary claim was "not worthy of judicial consideration." *Id.* at 499. But the Court rejected the "theory that the mootness of a 'primary' claim requires a conclusion that all 'secondary' claims are moot." *Id.* Instead, one live claim suffices to stave off mootness. *Id.* at 497.

The Supreme Court has also refused to read an amount-in-controversy requirement into Article III. In the "closely connected" standing context, *Flanigan's*, 868 F.3d at 1267, it has "allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote; a $5 fine and costs; and a $1.50 poll tax." *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669, 689 n.14 (1973) (citing *Baker v. Carr*, 369 U.S. 186 (1962); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966)). "[A]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *Id.* As financial injuries of $1.50 and $5.00 satisfy the "more stringent standing analysis," *Flanigan's*, 868 F.3d at 1267 n.20, nominal damages of the same sums prevent mootness.

The same is true for mootness. *See, e.g.*, *Ellis*, 466 U.S. at 442 ("The amount at issue [in damages] is undeniably minute. But as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."); *Firefighters*, 467 U.S. at 571 ("Undoubtedly, not much money and seniority are involved, but the amount of money and seniority at stake does not determine mootness."). If "the parties have a concrete interest in the outcome …, the case is not moot notwithstanding the size of the dispute." *Firefighters*, 467 U.S. at 571. *Flanigan's* never identifies the "nominal damages exception" to this rule—because none exists.

Nor does agreeing on how to measure damages moot a case. *Havens*, 455 U.S. at 371 ("If respondents have suffered an injury that is compensable in money damages of some undetermined amount, the fact that they have settled on a measure of damages does not make their claims moot."). Nominal damages represent essentially a Court-endorsed damages measure when calculating a legal violation's actual harm proves elusive. Seeking this measure should also not moot cases.

Nor does labeling a nominal damages award as "technical" or "insignificant" moot a claim. It still shows plaintiff prevailed. *Farrar*, 506 U.S. at 113-14 ("Now that we are confronted with the question whether a nominal damages award is the sort of 'technical,' 'insignificant' victory that cannot confer prevailing party status, we hold that the prevailing party inquiry does not turn on the magnitude of the relief obtained."). Later, the Court addressed concerns about "mischievous defendants" mooting cases to avoid adverse rulings, saying that "so long as the plaintiff has a cause of action for damages"—without excluding unaccompanied nominal damages claims—"a defendant's change in conduct will not moot the case." *Buckhannon*, 532 U.S. at 608-09. As a nominal damages award alone can confer prevailing party status, *id.* at 604, these claims cannot be moot so plaintiffs can obtain these awards and such status.

It matters not whether *Flanigan's* or the district court want to diminish nominal damages as incidental, insignificant, or a mere trifle. "Identifiable trifles" confer standing, where the scrutiny is more rigorous than

for mootness. *SCRAP*, 412 U.S. at 689 n.14. Such awards confer prevailing party status as relief on the merits, and they also preserve a case from mootness. 13C WRIGHT & MILLER, FED. PRAC. & PROC. JURIS. § 3533.3 ("Nominal damages also suffice to deflect mootness."). Thus, *Flanigan's* should be overturned and the district court reversed.

B. *Flanigan's* conflicts with practically every other circuit.

When the Fifth Circuit erroneously decided that nominal damages did not confer prevailing party status, it conflicted with decisions from five—and soon, six—other circuits. *Farrar*, 506 U.S. at 108 n.2. *Flanigan's* represents an even greater aberration, conflicting with practically every circuit. Many circuits address this issue in remarkably familiar factual scenarios: a recent graduate challenging school policies modified mid-litigation that violated his rights when a student.

1. First Circuit

When a graduate brought IDEA claims against his *alma mater*, his injunctive claims were moot. *Thomas R.W. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997). But "a claim for damages will keep a case from becoming moot where equitable relief no longer forms the basis of a live controversy." *Id.* (internal quotations & citation omitted); *Kuperman v. Wrenn*, 645 F.3d 69, 73 (1st Cir. 2011) ("Because some relief [*i.e.*, nominal and punitive damages] is available on Kuperman's claims, they are not moot."). Even "a 'generalized claim' for monetary damages may be sufficient to prevent dismissal on the grounds of mootness, even where

claims for injunctive relief 'appear to be moot.'" *McKenna v. Wells Fargo Bank, N.A.*, 693 F.3d 207, 210 n.2 (1st Cir. 2012) (quoting *Ellis*, 466 U.S. at 441-42 & n.5).

2. Second Circuit

When college officials restricted the student newspaper and interfered in student elections, some students filed suit. The district court ruled their equitable claims were moot. *Husain v. Springer*, 494 F.3d 108, 120 (2d Cir. 2007). On appeal, they waived those claims, *id.* at 121 n.10, and sought "only … nominal damages." *Id.* at 135 n.17. The Second Circuit entertained the claim and denied qualified immunity to the college president, *id.* at 134, demonstrating (over the dissent's objections) that these claims were not moot.

The Second Circuit has emphasized the importance of nominal damages, *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2nd Cir. 1999) ("[W]hile the monetary value of a nominal damages award must, by definition, be negligible, its value can be of great significance to the litigant and to society."), and the function they serve, *id.* at 319 ("[T]hey are meant to guarantee that unconstitutional acts remain actionable rather than to 'measure' the constitutional injury in any meaningful sense."). Thus, dismissing "because only nominal damages are at stake is error" and "not harmless." *Id.* at 320-21. Hence, such claims are not moot.[2]

[2] *Accord Dean v. Blumenthal*, 577 F.3d 60, 66 (2d Cir. 2009); *Brody v. Vill. of Port Chester*, 345 F.3d 103, 112-13 (2d Cir. 2003); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001); *Beyah v. Coughlin*, 789 F.2d

3. Third Circuit

When a student sued her high school for violating the Equal Access Act, her graduation mooted her equitable relief claims. *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216-17 (3d Cir. 2003). But unlike *Flanigan's*, the Third Circuit ruled "her damages … claim[] continue[s] to present a live controversy," *id.* at 218, and evaluated the merits. *Id.* at 218-28; *accord Smith v. NCAA*, 139 F.3d 180, 183 n.1 (3d Cir. 1998) ("Title IX claim is not moot … because she retains a claim for damages.").

This principle that "the availability of damages or other monetary relief almost always avoids mootness" extends to nominal damages. *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 41 (3d Cir. 1985). Thus, a released inmate's "claim for damages is not moot" because nominal damages, unlike compensatory ones, are available. *Nelson v. Horn*, 138 F. App'x 411, 413 n.3 (3d Cir. 2005); *accord Doe v. Delie*, 257 F.3d 309, 314 & n.3 (3d Cir. 2001). Indeed, a nominal damages claim means that "redressability is easily satisfied." *Hassan v. City of N.Y.*, 804 F.3d 277, 293-94 (3d Cir. 2015). If these claims satisfy the "more stringent standing analysis," certainly they satisfy the more "flexible" mootness tests. *Flanigan's*, 868 F.3d at 1267 n.20.

4. Fourth Circuit

Disturbed at VMI's prayer policies, two cadets sought equitable relief

986, 989 (2d Cir. 1986); *McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332, 335 (2d Cir. 1981); *Ellis v. Blum*, 643 F.2d 68, 83 (2d Cir. 1981); *Davis v. Vill. Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978).

and nominal damages. *Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003). Mid-litigation, they graduated, mooting their equitable claims and leaving only nominal damages. *Id.* at 363-64. The Fourth Circuit concluded "their damage claim continues to present a live controversy," *id.* at 365, and considered the merits, *id.* at 365-77; *accord Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983) (ruling an expelled law student could receive nominal damages and "his request for damages remained a live controversy even after the disciplinary proceedings were dropped.").

More recently, a student's mid-litigation move mooted his equitable claims. *Am. Humanist Ass'n v. Greenville Cnty. Sch. Dist.*, 652 F. App'x 224, 229-31 (4th Cir. 2016). But the court noted that "a student who graduates typically continues to have a live claim for damages against a school for a past constitutional violation." *Id.* at 228. Hence, this "claim for nominal damages based on a prior constitutional violation is not moot because the plaintiffs' injury was complete at the time the violation occurred." *Id.* at 231; *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 550 (4th Cir. 2010) ("[E]ven permanent remedial measures will not moot the [student organization's compensatory or nominal] damages claim.").

Elsewhere, the Fourth Circuit has reiterated that nominal damages prevent mootness.[3] They even confer standing. *Covenant Media of S.C.,*

[3] *Accord Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 631-32 (4th Cir. 2016); *Rendleman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir.

LLC v. Town of Surfside Beach, 321 F. App'x 251, 253 (4th Cir. 2009) ("[T]he injury would at least be redressable by an award of nominal damages."). Thus, it rejects *Flanigan's*.

5. Fifth Circuit

The Fifth Circuit briefly adopted *Flanigan's* theory of nominal damages before quickly correcting its error, as should this Court. After a student challenged a high school policy, she graduated, and the policy was rescinded. *Ward v. Santa Fe Indep. Sch. Dist.*, 2002 WL 494510, *1 (5th Cir. Mar. 14, 2002). The Fifth Circuit ruled that the nominal damages claim "does not … convert an otherwise moot case into a live controversy." *Id.* Weeks later, it reversed course, concluding that its nominal damages ruling "was in error." *Ward v. Santa Fe Indep. Sch. Dist.*, 2002 WL 753502, *1 (5th Cir. Apr. 9, 2002). After all, *Carey* held that plaintiffs can "seek nominal damages for [constitutional] violation[s] in the absence of other damages" and "necessarily implied that a case is not moot so long as the plaintiff seeks to vindicate his constitutional rights through a claim for nominal damages." *Id.*; *accord Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 601-02 (5th Cir. 2004).

The Fifth Circuit has since clearly rejected *Flanigan's*. When a district court dismissed a student's case as moot because the high school changed the challenged policy, it was reversed. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 744 (5th Cir. 2009). The district court focused on the

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2007); *Davis v. Bayless*, 1990 WL 76574, *1 (4th Cir. May 24, 1990).

equitable claims, but "[t]his court and others have consistently held that a claim for nominal damages avoids mootness." *Id.* at 748; *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345 (5th Cir. 2017) ("The mootness doctrine applies to equitable relief but will not bar any claim for damages, including nominal damages.").[4] *Flanigan's* is an outlier.

6. Sixth Circuit

A fired student-newspaper editor sued, seeking "injunctive relief and money damages." *Murray v. Bd. of Trs., Univ. of Lousville*, 659 F.2d 77, 78 (6th Cir. 1981). Contra *Flanigan's*, the Sixth Circuit agreed his injunctive claims were moot but remanded for consideration of "plaintiff's claims for nominal damages." *Id.* at 79.

Later, a student challenged her middle school's dress code, but mid-litigation, she graduated and the school modified the dress code. *Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 386-87 (6th Cir. 2005). The Sixth Circuit, presuming her equitable relief claims were moot, concluded the case was not. "[T]he existence of a damages claim ensures that this dispute is a live one over which Article III gives us continuing authority." *Id.* at 387. Neither the policy change nor the graduation mooted it.

When addressing a pre-enforcement challenge to a repealed policy, the Sixth Circuit ruled that the plaintiff seeking nominal damages lacked standing. *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 607-11

[4] *Accord Brown v. Taylor*, 677 F. App'x 924, 930 (5th Cir. 2017); *Duarte v. City of Lewisville*, 759 F.3d 514, 521 (5th Cir. 2014); *Green v. McKaskle*, 788 F.2d 1116, 1124 (5th Cir. 1986).

(6th Cir. 2008). But in so doing, it reiterated that such claims were not moot. *Id.* at 611. It distinguished mootness from the "more stringent standing analysis." *Flanigan's*, 868 F.3d at 1267 n.20

Since, the Sixth Circuit has repeatedly emphasized that nominal damages claims for past constitutional violations are not moot, even when the challenged policy changes mid-litigation. *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010) ("[P]laintiffs' claims remain viable to the extent that they seek nominal damages as a remedy for past wrongs."); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 581 (6th Cir. 2012) (ruling a damages claim "preserves the plaintiff['s] backward-looking right to challenge the original law and to preserve a live case or controversy"); *Ermold v. Davis*, 855 F.3d 715, 719 (6th Cir. 2017).

7. Seventh Circuit

Facing an alleged prior restraint for opposing their university's mascot, some faculty and a graduate teaching assistant eventually received declaratory relief and nominal damages. *Crue v. Aiken*, 370 F.3d 668, 674, 677 (7th Cir. 2004). The Seventh Circuit ruled that retracting the restrictions mooted injunctive relief, but "the requests for declaratory relief and for damages remain." *Id.* The former simply served as a vehicle for the latter. *Id.* ("When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive."). Hence, the real issue was only nominal damages, a claim that did not become moot.

Since, the Seventh Circuit affirmed a district court's award of nominal damages alone, a claim (and appeal) that would have been moot under *Flanigan's*. *Moore v. Liszewski*, 838 F.3d 877, 879-80 (7th Cir. 2016). It reversed summary judgment for prison officials, although equitable claims were moot and statutes foreclosed compensatory damages, noting that nominal damages remained available. *Koger v. Bryan*, 523 F.3d 789, 803-04 (7th Cir. 2008). An inmate's release or transfer does not moot his nominal damages claims. *Young v. Lane*, 922 F.2d 370, 373-74 (7th Cir. 1991); *Markley v. Lawson*, 1994 WL 28366, *2 n.2 (7th Cir. Feb. 1, 1994).

Facing those who, like *Flanigan's*, deride nominal damages as "*de minimis*," the Seventh Circuit has, like the Supreme Court, rejected their arguments. *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 805 (7th Cir. 2016). *De minimis* harms are "exactly the situation for which nominal damages are designed." *Id.*

8. Eighth Circuit

After parents sued their school district for opting out of a school choice program, the legislature changed the law during the appeal, mooting their equitable claims. *Stevenson v. Blytheville Sch. Dist.*, 800 F.3d 955, 958-59, 964 (8th Cir. 2015). The Eighth Circuit noted that unlike equitable claims, "claims seeking monetary relief … generally are not mooted." *Id.* As the parents "could potentially recover money damages for any constitutional violation arising from" the then-repealed law, their "money-damages claims are not moot." *Id.* at 965. After all, "nominal damages

must be awarded when a plaintiff establishes a violation of the right to free speech." *Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). Hence, a nominal damages claim for a past constitutional violation staves off mootness. *Accord Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006).[5]

Likewise, the Eighth Circuit ruled that while a policy change might moot prospective equitable relief, it "did not deprive [plaintiff] of the opportunity to seek monetary damages for prior violations of his constitutional rights." *Keup v. Hopkins*, 596 F.3d 899, 904 (8th Cir. 2010). Thus, it upheld the district court's award of nominal damages.

Accentuating its differences with *Flanigan's*, the Eighth Circuit has ruled that plaintiffs who "might be entitled to nominal damages" have standing. *Advantage Media*, 456 F.3d at 803. If these claims satisfy the "more stringent standing analysis," they must satisfy the more "flexible" mootness tests. *Flanigan's*, 868 F.3d at 1267 n.20.

9. Ninth Circuit

Disturbed at his teacher's in-class comments, a student sought equitable relief and nominal damages. *C.F. v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 982 (9th Cir. 2011). His graduation mooted his declaratory

[5] When plaintiffs challenge an ordinance that was never enforced against them and then later repealed, their nominal damages claim was moot. *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012). This case erroneously relied on standing analysis and has no bearing here where Plaintiffs seek relief from actual censorship they experienced based on policies actually enforced against them.

claims (the only equitable relief at issue on appeal), but the Ninth Circuit ruled that "his damages claim remains viable." *Id.* at 983. Under *Flanigan's*, this unaccompanied nominal damages claim would have been moot. But to the Ninth Circuit, a "live claim for [even] nominal damages will prevent dismissal for mootness." *Id.* (quotation omitted).

Likewise, some students challenged their high school's dress code, seeking equitable relief and "appropriate damages." *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 423 (9th Cir. 2008). On appeal, only one plaintiff remained subject to such a policy, rendering their equitable claims suspect. *Id.* at 425. But a "live claim for [even] nominal damages will prevent dismissal for mootness." *Id.* (quotation omitted). The court emphasized that free speech claims resulting in "*only* nominal damages … nonetheless present justiciable challenges." *Id.* at 427.

Like the Fifth Circuit, the Ninth briefly flirted with *Flanigan's* rule, dismissing a church's RLUIPA appeal as moot after the church moved out of the property at issue. *Praise Christian Ctr. v. City of Huntington Beach*, 352 F. App'x 196, 198 (9th Cir. 2009). On rehearing, it reversed course, holding that a "claim for nominal damages creates the requisite personal interest necessary to maintain a claim's justiciability." *Id.*[6]

In the Ninth Circuit, these claims also confer standing. *Engbretson v.*

[6] *Accord Bayer v. Nieman Marcus Grp., Inc.*, 861 F.3d 853, 868 & n.4 (9th Cir. 2017); *Henry A. v. Willden*, 678 F.3d 991, 995 (9th Cir. 2012); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1018 (9th Cir. 2010); *Bernhardt v. Cnty. of L.A.*, 279 F.3d 862, 872 (9th Cir. 2002); *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 812 (9th Cir. 1997).

Mahoney, 724 F.3d 1034, 1038 (9th Cir. 2013); *Yniguez v. Arizona*, 975 F.2d 646, 647 (9th Cir. 1992) ("A plaintiff's pursuit of nominal damages … confer[s] standing … and thereby prevents mootness.").

10. Tenth Circuit

When their university suspended the showing of a controversial film, an association of students and others sued and eventually sought damages and equitable relief. *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1519-20 (10th Cir. 1992). The university then allowed the film to be shown and adopted new policies, mooting equitable relief. *Id.* at 1524-26. But neither action "erase[d] the slate concerning the alleged First Amendment violations in connection with the film." *Id.* at 1526. Thus, "the district court erred in dismissing the nominal damages claim which relates to *past* (not future) conduct." *Id.* at 1526-27.

Likewise, removing an allegedly unconstitutional statue from campus mooted equitable claims, but not nominal damages. *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1221-22 (10th Cir. 2005). The Tenth Circuit "ha[d] jurisdiction to consider the nominal damages claim"—the only one remaining in the case. *Id.* at 1222. It also considered a high school valedictorian's free speech and free exercise claims, even though "only [her] claim for nominal damages … remains for our review." *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009).

The Tenth Circuit has oft reiterated that nominal damages claims prevent mootness, *O'Connor v. City & Cnty. of Denver*, 894 F.2d 1210, 1216

(10th Cir. 1990) ("[B]y definition claims for past damages cannot be deemed moot. There is no question that the nominal damages … were past damages not affected by any changes in the Code."),[7] and suffice for standing. *Am. Humanist Ass'n, Inc. v. Douglas Cnty. Sch. Dist. RE-1*, 859 F.3d 1243, 1253-54 (10th Cir. 2017) (finding "injury is redressable" via nominal damages).

11. Eleventh Circuit

Flanigan's represents a sea change for this Court. Months earlier, an LGBT group sought equitable relief and nominal damages. *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty.*, 842 F.3d 1324, 1330 (11th Cir. 2016). When the student left the school, his equitable claims became moot. *Id.* Under *Flanigan's*, his nominal damage claim should have evaporated immediately, but it didn't: "H.F.'s … demands for nominal damages are not moot." *Id.* This Court drew on a long line of its own precedent, precedent that *Flanigan's* eviscerates. *See, e.g.*, *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1244 (11th Cir. 2011) ("When the plaintiff has requested damages, those claims [against a repealed ordinance] are not moot."); *KH Outdoor, LLC v. Clay Cnty.*, 482 F.3d 1299, 1303 (11th Cir. 2007); *Crown Media, LLC v. Gwinnett Cnty.*, 380 F.3d 1317, 1325 & n.17 (11th Cir. 2004); *Granite State*

[7] *Accord Lewis v. Clark*, 577 F. App'x 786, 802 (10th Cir. 2014); *Olson v. City of Golden*, 541 F. App'x 824, 828-29 (10th Cir. 2013); *McDaniels v. McKinna*, 96 F. App'x 575, 581 (10th Cir. 2004); *Faustin v. City & Cnty. of Denver*, 268 F.3d 942, 948 (10th Cir. 2001).

Outdoor Advert., Inc. v. City of Clearwater, 351 F.3d 1112, 1119 (11th Cir. 2003); *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1519 (11th Cir. 1992).

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In sum, no circuit has embraced *Flanigan's'* notion—implemented by expansively the district court—that claims seeking nominal damages are moot unless accompanied by other relief. Two did so momentarily, only to reject that position decisively. This Court should do likewise.

Indeed, the many cases cited above demonstrate why nominal damages remain critical, liberty-preserving relief. Time and again, students have used these claims to ensure that officials are held accountable for violating constitutional rights in the very community where those rights should be most cherished. *Keyishian*, 385 U.S. at 603. For students, equitable relief cannot serve this purpose because those claims vanish at the stroke of graduation. Nominal damages ensure that injustices do not get lost in a flurry of subsequent policy changes. For students, these claims serve the very purpose the Supreme Court outlined decades ago: ensuring their priceless constitutional rights are "scrupulously observed." *Carey*, 435 U.S. at 266.

This case highlights *Flanigan's'* flaws. Two students suffered injuries: being censored twice, being subjected to a heckler's veto, and having expression chilled. Due to *Flanigan's*, those past wrongs are ignored. Yes, Mr. Uzuegbunam graduated—partly because the district court took over a year (a quarter of a student's college career) to rule *on a motion to*

dismiss. Yes, GGC revised its policies, but those revisions do not purge the censorship and chilling effect. Under *Flanigan's* and the district court, these students can pursue their claims only if they repackage their nominal damages claims as *de minimis* compensatory claims. If Article III suddenly means—in the Eleventh Circuit alone—that federal courts cannot hear a $1 nominal damages claim but can hear a $10 compensatory damages claim (encompassing the cost of gas to and from campus or the like), formalism and "magic words" have returned to the legal system to an absurd degree. *Flanigan's* erred and led the district court astray. The former should be overturned; the latter reversed.

C. *Flanigan's* relies on two isolated opinions that have no legal force and two misplaced analogies.

Flanigan's lacks legal grounding as it primarily rests on two concurrences.[8] *Flanigan's*, 868 F.3d at 1267 n.19 (citing *Freedom from Religion Found., Inc. v. New Kensington Arnold Sch. Dist. ("FFRF")*, 832 F.3d 469, 482-92 (3d Cir. 2016) (Smith, J., concurring *dubitante*); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1262-71 (10th Cir. 2004) (McConnell, J., concurring)). But these are just the two judges' personal opinions, not the law. *See supra* Argument II.A-B.

Both judges recognized this. *FFRF*, 832 F.3d at 486 (Smith, J., concurring *dubitante*) ("I concede that my concerns about nominal damages and

[8] It ignored a third concurrence, perhaps because its author "disclose[d] at the outset that [he] ha[d] not read [the majority opinion]." *Husain*, 494 F.3d at 136 (Jacobs, J., concurring in part and dissenting in part).

justiciability do not appear to be shared by the majority of appellate courts to address the mootness subset of justiciability."). Judge McConnell *ruled* that unaccompanied nominal damages claims are *not* moot, *Utah Animal Rights*, 371 F.3d at 1257-58, and then separately concurred to set forth his personal views. Subsequent decisions correctly distinguish between his thoughts on what the law should be (*i.e.*, his concurrence) and what the law actually is (*i.e.*, his majority opinion). *See, e.g.*, *O'Connor*, 416 F.3d at 1222 (citing *Utah Animal Rights*, 371 F.3d at 1257-58) ("Unlike the claims for injunctive and declaratory relief, this [nominal damages] claim is not mooted by the removal of the statue….").

Flanigan's then resorted to two analogies. Referencing standing, it invoked the phrase "psychic satisfaction," which has *nothing* to do with damages of any kind. *Flanigan's*, 868 F.3d at 1268 (quoting *Steel Co v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)). That phrase addresses whether forcing a defendant to pay civil penalties to the government confers standing, and the Court noted that the plaintiff there "seeks not remediation of its own injury … but vindication of the rule of law." *Steel Co.*, 523 U.S. at 106-07. Hence, this phrase has no bearing on nominal damages, which plaintiffs seek as relief for their own past injuries.

Referencing declaratory relief, *Flanigan's* concluded that neither it nor nominal damages has a practical effect sufficient for Article III jurisdiction. *Flanigan's*, 868 F.3d 1268-70. But the Supreme Court rejected this analogy, reversing decisions that minimized the practical effect of

this relief and declaring that a nominal damages award confers prevailing party status. *Farrar*, 506 U.S. at 112. That is, this "actual relief on the merits … materially alter[s] the legal relationship … by modifying the defendant's behavior." *Id.* at 111-12. This is true for "damages in any amount, whether compensatory or nominal." *Id.* at 113. Analogies are needless given the Court's clear ruling.

All told, a decision that contradicts everything the Supreme Court has said about nominal damages, stands athwart almost every other circuit, and relies on two concurrences and two misconceived analogies should be overturned. The district court that relied on it exclusively and effectively immunized violations of students' rights from review should be reversed.

III. The district court erred in rejecting Plaintiffs' request for leave to amend the complaint.

Under FED. R. CIV. P. 15(a)(2), district courts "should freely give leave [to amend a complaint] when justice so requires." This instruction limits discretion to deny these requests. *Sieger v. Phillipp*, 2018 WL 2357518, *2 (11th Cir. May 24, 2018) (noting "discretion to deny leave is not unfettered"). It is a function of "[o]ne of the most important objectives of the federal rules"—"that lawsuits should be determine on their merits," not on pleading technicalities. 5 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1286. The district court abused its discretion by denying Plaintiffs' request—not for futility, etc., *Sieger*, 2018 WL 2357518, at *2—but because it appeared in a brief rather than a separate motion. A.A.724 n.11.

The district court relied on three cases, none of which control. In two, plaintiffs failed to "set forth the substance of the proposed amendment." *Burgess v. Religious Tech. Ctr., Inc.*, 600 F. App'x 657, 665 (11th Cir. 2015); *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009). Here, Plaintiffs clearly explained that they would amend the complaint to "clarify[] the type of damages sought." A.A.695-96. This simple, non-prejudicial amendment (*i.e.*, adding "compensatory and" to the prayer for relief and a paragraph describing Plaintiffs' financial injuries) would have rendered *Flanigan's* irrelevant, allowing the case to turn on the merits, not mootness. The third decision only addresses whether a court "***sua sponte*** must allow a plaintiff leave an opportunity to amend" before dismissing without prejudice. *Quinlan*, 329 F. App'x at 249 (boldface added). It carries no weight here, where Plaintiffs requested leave. A.A.695-96 n.2.

The district court overlooked a far more applicable ruling, where plaintiff "included within its response to [a] motion [to dismiss] a request for leave to file an amended complaint," *Ferrell Law, P.A. v. Crescent Miami Ctr., LLC*, 313 F. App'x 182, 185 (11th Cir. 2008), and described its proposed amendments. *Id.* at 186 n.2. After the district court dismissed, this Court ruled that it "erred in depriving Plaintiff an opportunity to amend when Plaintiff plainly … requested [it]." *Id.* at 186.

Similarly, Plaintiffs did not sit "idly by" waiting for a ruling. *Id.* Once Defendants raised *Flanigan's*-based arguments, Plaintiffs sought leave to clarify the types of damages at issue. A.A.695-96 n.2. They did not file

a separate motion, as this would have mooted two extensively-briefed, long-pending motions to clarify that something they already included in the complaint (*i.e.*, compensatory damages claims) was in fact included. A.A.696; *accord* A.A.691-94; *supra* Argument I.A. After the district court entered judgment immediately, they could no longer amend because FED. R. CIV. P. 15(a)(2) "governs amendment of pleadings *before* judgment is entered; it has no application *after* judgment is entered." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010).

Plaintiffs were as proactive as possible, seeking leave and describing the simple amendments that would have clarified that *Flanigan's* did not moot their claims. But the district court, abusing its discretion, rejected this request, insisting that Plaintiffs instead file a new lawsuit. This is not what FED. R. CIV. P. 15(a)(2) requires, and so the district court erred. Its decision on this point should be reversed. *Ferrell*, 313 F. App'x at 186.

CONCLUSION

Two students were unconstitutionally censored in their "marketplace of ideas" where free speech should be celebrated, not quarantined. The district court wrongly rejected their compensatory damages claims, wrongly ignored language in *Flanigan's* preserving their nominal damages claims, and wrongly refused to let them clarify the relief they sought. Then it applied a decision that contradicts the Supreme Court, lacks any support from other circuits, and lacks any real legal grounding.

Accordingly, Plaintiffs respectfully request that this Court reverse the

district court and remand with instructions that:

1. Plaintiffs seek compensatory damages or must be allowed to amend the complaint;
2. Plaintiffs' nominal damages claims remain live; and/or
3. *Flanigan's* is overturned.

Respectfully submitted this the 6th day of August, 2018.

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Date: 6 August 2018

CERTIFICATE OF SERVICE

Pursuant to FED. R. APP. P. 31 and 11th Cir. R. 31-3, I hereby certify that on August 6, 2018, one originally signed edition and six copies of the foregoing brief were sent via United Parcel Service Second Day Air, postage prepaid, to the Clerk of Court of the United States Court of Appeals for the Eleventh Circuit, and a digital copy of the brief was filed electronically with the Court using the its electronic filing system, which automatically sends an electronic notification to the following attorneys of record:

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