

No. 18-12676

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHIKE UZUEGBUNAM, *et al.*,
Plaintiffs-Appellants

v.

STANLEY PRECZEWSKI, *et al.*,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF *AMICUS CURIAE*
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1(a) and 29(a)(4)(A), and 11th Cir. R. 26.1-1, 26.1-2, 26.1-3, and 29-2, the undersigned counsel for *amicus curiae* Foundation for Individual Rights in Education certifies that in addition to the persons and entities identified in the Certificate of Interested Persons provided by Plaintiffs-Appellants in their initial brief, the following have an interest in the outcome of this appeal:

1. Foundation for Individual Rights in Education.
2. Woodhouse LLC.
3. Woodhouse, Samuel.

Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amicus* states that no party's counsel authored this certificate in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting this certificate; and no person other than *amicus curiae* or their counsel contributed money that was intended to fund preparing or submitting this certificate.

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INTEREST OF AMICUS CURIAE¹

The Foundation for Individual Rights in Education (“FIRE”) is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation’s institutions of higher education. Since 1999, FIRE has worked to protect student First Amendment rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights on campus.

FIRE coordinates and engages in targeted litigation to ensure that student First Amendment rights are vindicated when violated at public institutions like Georgia Gwinnett College. The students FIRE defends rely on access to federal courts to secure meaningful and lasting legal remedies to the irreparable harm of censorship. If allowed to stand, the lower court’s ruling will threaten the possibility of redress following violations of students’ First Amendment rights.

¹ Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 29(a), all parties have consented to the filing of this brief.

STATEMENT OF THE ISSUES

The lower court relied on this Court's decision in *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) to declare Plaintiffs-Appellants' nominal damages claims moot. In light of the central importance of nominal damages claims for litigants seeking to remedy civil liberties violations—and the particular necessity of such claims for student-plaintiffs alleging First Amendment violations such as those at issue here—was the lower court's reliance on *Flanigan's* in error?

SUMMARY OF ARGUMENT

The district court's decision presents a serious threat to the ability of public college and university students to meaningfully redress constitutional violations and prevent their repetition.

In relying on *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017), to moot Plaintiffs-Appellants' nominal damages claims, the lower court ignored the fact that nominal damages are of crucial importance in civil liberties litigation and to students facing campus censorship in contravention of the First Amendment. If the lower court's decision is allowed to stand, public colleges throughout the Eleventh Circuit will effectively be granted at least one "free pass" towards violating student rights, knowing that a policy change on the eve of litigation may prevent judicial recognition of wrongdoing. This result is particularly galling in the instant case, as it involves a prior restraint on speech—arguably the most egregious of First Amendment violations, and one that requires a real remedy.

The lower court's decision is especially problematic because it exacerbates the considerable difficulties student-plaintiffs must overcome to vindicate their rights. Like other civil liberties plaintiffs, students must already contend with significant procedural limitations on their ability to

access judicial remedies. Because students have a limited time to challenge rights violations as they progress towards graduation, preserving the availability of nominal damages is of particular importance. Forcing student-plaintiffs to incorporate compensatory damages into pleadings will not sufficiently address the loss of nominal damages claims. Under the lower court's holding, future constitutional violations will be left without remedy, and lasting uncertainty over the contours of student First Amendment rights will impermissibly chill campus speech.

This result is not an idle threat. Despite remarkable precedential clarity with regard to the unconstitutionality of broad and vague restrictions on public college student speech rights—"speech codes"—*amicus* FIRE knows all too well that censorship is commonplace on campuses nationwide. As in the instant case, public colleges continue to violate student First Amendment rights to limit controversy or criticism. If colleges may simply revise policies just before litigation to avoid a judicial determination or legal consequence, student speech rights are left at risk. Judicial clarity is required to keep students' First Amendment rights secure.

ARGUMENT

I. If Allowed to Stand, the District Court’s Ruling Will Hinder Students at All Educational Levels from Vindicating Their Constitutional Rights in Court.

A. Nominal Damages Are Necessary to Remedy Intangible Harm to Students Caused by First Amendment Violations.

Nominal damages compensate plaintiffs for violations of their constitutional rights absent “proof of actual injury.” *Carey v. Piphus*, 435 U.S. 247, 266 (1978). As the Supreme Court of the United States recognized in *Carey*, it is through nominal damages that “the law recognizes the importance to organized society that those [absolute] rights be scrupulously observed.” *Id.* The Court reiterated the value of nominal damages as a method of recognizing constitutional harm absent proof of compensable injury in *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986). Nominal damages do more than vindicate a plaintiff’s constitutional right; indeed, “a plaintiff who wins nominal damages is a prevailing party under § 1988.” *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Accordingly, nominal damages are an essential component of constitutional litigation.

For precisely this reason, the dissent in *Flanigan’s Enterprises, Inc. v. City of Sandy Springs* expressed concern that the majority opinion ignored *Carey*’s holding “that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.” *Flanigan’s*

Enters., Inc. v. City of Sandy Springs, 868 F.3d 1248, 1272–73 (11th Cir. 2017) (*en banc*) (Wilson, J., dissenting) (quoting *Carey*, 435 U.S. at 226). As the *Flanigan*'s dissent observed, the Supreme Court has awarded nominal damages without accompanying compensatory, declaratory, or injunctive relief. 868 F.3d at 1273 (Wilson, J., dissenting) (citing *Farrar*, 506 U.S. at 103); *see also Memphis Cmty. Sch. Dist.*, 477 U.S. at 308 n.11 (1986) (“[N]ominal damages, and not damages based on some undefinable ‘value’ of infringed rights, are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury”). Numerous circuit courts have reached the same conclusion.²

² *Flanigan*'s, 868 F.3d at 1265 n.17 (“See, e.g., *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 & n.32 (5th Cir. 2009) (noting that “[t]his court and others have consistently held that a claim for nominal damages avoids mootness’ and collecting cases); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (suggesting that a claim was not moot because the plaintiff ‘might be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures’); *Utah Animal Rights*, 371 F.3d at 1257 (majority opinion) (‘It may seem odd that a complaint for nominal damages could satisfy Article III’s case or controversy requirements, when a functionally identical claim for declaratory relief will not. But this Court has squarely so held.’ (footnote omitted)); *Bernhardt v. Cty. of L.A.*, 279 F.3d 862, 872 (9th Cir. 2002) (‘A live claim for nominal damages will prevent dismissal for mootness.’); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) (stating in dicta that ‘plaintiffs in election cases could avoid the potential for mootness by simply expressly pleading that should the election pass before the issuance of injunctive relief, nominal money damages are requested’).”).

The case now before this Court presents the very fact pattern the dissent in *Flanigan*'s predicted, wherein the government is poised to “get away with” a violation of civil rights:

Plaintiffs believe that their rights were violated ...
. *They are asking for judicial recognition of that right so that it is not violated again.* Declaring that their rights were violated is of legal significance...
. For a number of civil rights violations (e.g., free speech, procedural due process), compensable damages may not always exist. Under the majority opinion, as long as the government repeals the unconstitutional law, the violation will be left unaddressed; the government gets one free pass at violating your constitutional rights.

868 F.3d at 1275 (Wilson, J. dissenting) (emphasis added). In the instant case, the government wrongdoing at issue is a prior restraint on speech—“the most serious and the least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). “In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.” *Near v. Minnesota*, 283 U.S. 697, 713 (1931). Intentional government action to undermine the primary purpose of the most foundational American right is an injury worthy of this Circuit’s time and deserving of a remedy, even in the first instance.

B. Nominal Damage Claims Are Often the Only Means to Vindicate Student First Amendment Rights Due to Circumstances Outside a Student’s Control.

a. Injunctive and declaratory claims are frequently mooted by graduation.

Students are a transient population, with a finite amount of time to seek vindication of their civil rights. Most students at four-year nonprofit colleges graduate after four years.³ The most vocal and active students are likely to be upperclassmen, who, in turn, are likely to be graduating in two years or less.⁴ This problem is exacerbated at community colleges, which are primarily two-year institutions.

Meanwhile, the *median* time it took a federal district court to complete a trial in 2015 was 25.2 months.⁵ In the Northern District of Georgia, from

³ U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, TABLE 326.10, *available at* https://nces.ed.gov/programs/digest/d16/tables/dt16_326.10.asp.

⁴ See Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J.L. & EDUC. 609, 630 (2011) (“If one assumes that leadership positions are held by juniors or seniors, the window for successful litigation shrinks to just one or two years before the injury becomes moot.”).

⁵ ADMIN. OFFICE OF U.S. COURTS, TABLE C-5: U.S. DISTRICT COURTS—MEDIAN TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, *available at* http://www.uscourts.gov/sites/default/files/c05mar15_0.pdf.

which this appeal originates, that median was 28 months.⁶ The net result is that a public college or university, which presumptively has ample resources with which to file an appeal, is all but assured that graduation will moot injunctive and declaratory relief before appeals are exhausted.

Among the students who have seen their rights evaporate while waiting for justice are student prayer leaders,⁷ objectors to student prayers,⁸ student journalists,⁹ ROTC students,¹⁰ valedictorians,¹¹ students who wanted to demonstrate cookware in their dorms,¹² and other high school students¹³

⁶ *Id.* at p. 3. The trial court decided the present case seventeen months and ten days after it was filed. *Uzuegbunam*, No. 16-CV-04658 (N.D. Ga. filed Dec. 16, 2016; dismissed May 25, 2018).

⁷ *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (student forced to apologize for religious valedictory speech held to lack standing to maintain declaratory and injunctive claims); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000) (finding First Amendment claims moot where plaintiffs were prevented from giving religious speeches at graduation ceremony).

⁸ *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (dismissing as moot injunctive and declaratory claims from former students who objected to inclusion of student-initiated prayer at graduation ceremonies).

⁹ *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975); *Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007); *Husain v. Springer*, 691 F.Supp.2d 339, 340–41 (E.D.N.Y. 2009).

¹⁰ *Sapp v. Renfroe*, 511 F.2d 175, 175–76 (5th Cir. 1975) (finding challenge to ROTC guidelines moot after graduation).

¹¹ *See, e.g., Corder*, 566 F.3d at 1225; *Cole*, 228 F.3d at 1098–99.

¹² *Fox v. Bd. of Trs. of the State Univ.*, 42 F.3d 135, 139 (2d Cir. 1994) (dismissing as moot injunctive and declaratory claims of students prevented from demonstrating cookware in their dorms as part of sales pitch).

and college students.¹⁴ The only common thread is that they graduated before their institutions could be held to account.

That injunctive and declaratory claims are mooted by graduation provides an incentive for schools to avoid settling claims, even meritorious claims—*especially* meritorious claims—leaving schools secure in the knowledge that any equitable relief will be moot by the time the case is resolved. The only way to serve any semblance of justice for these student-plaintiffs is to preserve the availability of nominal damages.

Those courts that have preserved the declaratory and injunctive rights of student-plaintiffs after leaving their institutions have done so in light of the potential for future censorship by the same actors. In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court held that a middle school student prevented from giving a graduation prayer could seek injunctive relief against her school district because she was planning to attend high school in the same district. Similarly, in *Moore v. Watson*, 738 F. Supp. 2d 817, 829 (N.D. Ill.

¹³ See, e.g., *Bd. of Sch. Comm'rs v. Jacobs*, 420 U. S. 128 (1975); *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999); *Ceniceros v. Bd of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 879 n.1 (9th Cir. 1997) (plaintiff lost at trial but won on appeal, but had graduated in the interim, mooting out all but nominal damage claims).

¹⁴ See, e.g., *Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007); *Fox v. Bd. of Trs. of the State Univ.*, 42 F.3d 135, 139 (2d Cir. 1994); *Husain v. Springer*, 691 F. Supp. 2d 339, 341–41 (E.D.N.Y. 2009).

2010), a student who withdrew from his university after the student newspaper for which he served as editor-in-chief was censored had standing to pursue injunctive and declaratory relief because he asserted an interest in returning to school to finish his education. Short of situations where student-plaintiffs have expressed an interest in returning to the institutions that abused them, however, claims for injunctive and declaratory relief are consistently deemed moot.

b. Injunctive and declaratory claims are frequently mooted by policy change during litigation.

Even when students have the “good fortune” to be victims of administrative wrongdoing early enough in their education that they can maintain student status during years of litigation, institutions acting pursuant to a challenged policy can, and often do, change the challenged policy on the eve of trial. In such cases, courts frequently find declaratory and injunctive claims that arose under the prior policy moot, provided the court has some reason to believe the original policy won’t be reinstated.

Such policy changes can be entirely voluntary¹⁵ or imposed by statute,¹⁶ but, to be effective, must be accompanied by evidence showing that

¹⁵ See, e.g., *Husain v. Springer*, 494 F.3d 108, 120 (2d Cir. 2007) (injunctive claim against school cancelling student election due to student media coverage found moot after election policy changed); *Boston’s Children First v. Boston Sch. Comm.*, 240 F. Sup. 2d 318, 322–23 (D. Mass. 2003) (finding

“it is ‘absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur.’”¹⁷ While not every school is willing to meet that threshold,¹⁸ it is entirely within the school’s control to do so. That creates yet another incentive for schools to drag out litigation as long as possible: Even if it appears that the student will get a trial before graduation, the school always has the option to simply walk away from declaratory and injunctive claims by changing its policy and making a statement disavowing the former policy.¹⁹

as moot request for injunctive relief prohibiting race-conscious school assignment program when plaintiffs had not sought reclassification under replacement race-blind program), *aff’d sub nom. Anderson v. City of Boston*, 375 F.3d 71 (1st Cir. 2004).

¹⁶ *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1195 (9th Cir. 2000) (finding trial court had properly dismissed as moot requests for injunctive and declaratory relief against race-conscious admissions policy that state legislature had subsequently altered by statute).

¹⁷ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007), citing *Friends of Earth, Inc. v. Laidlaw Env’t Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

¹⁸ *See, e.g., DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (rejecting defendant’s claim that injunctive relief was moot where defendant could re-institute original policy after litigation ended).

¹⁹ Of course, surviving mootness is not the end of the story. It is possible for a case to have non-moot injunctive claims but ultimately not be entitled to injunctive relief. *See Freedom from Religion Found. v. Concord Cmty. Sch.*, 240 F. Supp. 3d 914, 919–20, 294–25 (N.D. Ind. 2017) (refusing to dismiss as moot injunctive claims against religious school plays where the play format had subsequently changed and school had not clearly indicated it would never return to that format, but also denying a permanent injunction where plaintiff had indicated it would never perform the specific shows in question).

- c. If, as in this case, nominal damages claims may not survive when injunctive and declaratory claims are dismissed, a school has incentive to drag out litigation until a student graduates or to wait until it is sued before addressing unconstitutional policies.***

It is poor public policy to provide incentives for bad actors to continue behaving badly. Affirming the district court's ruling, which is poor public policy, would lead to immeasurable constitutional harm in this Circuit. Bad actors will violate student rights, especially the rights of students nearing graduation, knowing that mootness will end any non-economic claims well before a court could determine what the institution had done. Institutions that make even innocent mistakes will have strong incentives to refuse to admit wrongdoing, casting student civil rights into further doubt and disuse. The few institutions actually facing a trial involving a current student will avoid consequence by writing a new policy and advertising it as a triumph of their conscience, rather than as a last-ditch effort to shirk accountability.

Amicus has, on more than one occasion, witnessed this very kind of judicially-inspired revelation in schools that have violated student rights.²⁰ If the lower court's decision is allowed to stand, student rights in this Circuit

²⁰ See, e.g., *Roberts v. Haragan*, 346 F.Supp. 2d 853, 857 n.5 (N.D. Tex. 2004) (granting mootness dismissal of claim against enforced speech code policy because university replaced it with an "interim policy" during lawsuit); *DeJohn*, 537 F.3d at 309 (rejecting mootness claim by defendant college that abandoned policy during lawsuit without making adequate showing the policy would not be reinstated).

will be little more than a philosophical exercise: If a right is violated, but no court may hear the claim, does that right exist at all?

C. Student-Plaintiffs Face Additional Significant Procedural Hurdles to Vindicating Their First Amendment Rights.

If allowed to stand, the district court's ruling that a claim for nominal damages cannot by itself sustain a challenge to a potentially unconstitutional speech code will throw up another significant barrier to enforcing a student's First Amendment rights, adding to the many already faced by civil rights litigants. Plaintiffs face significant and often insurmountable procedural limitations on litigation under 42 U.S.C. § 1983, too often resulting in constitutional violations going without remedy and perpetuating confusion over the state of the law.

a. *Standing and pre-enforcement challenges*

“Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies[,]” which requires that “a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.” *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). In First Amendment cases, courts apply a more relaxed standing analysis that can allow for a constitutional challenge to a college speech code before a student suffers consequences by its application. *See, e.g., Lopez v. Candaele*, 630 F.3d 775,

785 (9th Cir. 2010). Even in First Amendment cases, however, a plaintiff must demonstrate injury-in-fact, specifically showing “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting *Babbitt v. Farm Workers*, 442 U. S. 289, 298 (1979)). In other words, a student must show that she intends to engage in protected speech that is likely to get her punished.

This showing can be difficult to make where an unconstitutionally overbroad speech code is on the books, but it is hard to show if and when it will be applied to punish a student’s speech. For example, FIRE’s Spotlight Database documents hundreds of college policies prohibiting harassment that on their face sweep a great deal of protected speech within their ambit—“speech codes.”²¹ But courts have dismissed challenges to such policies for lack of standing—even when potential for punishment was raised with regard to past speech—where students could not show they intended to engage in particular speech in the future that would be interpreted as harassment. *See Lopez*, 630 F.3d at 791–92 (plaintiff lacked standing to challenge sexual harassment policy that on its face could be employed to

²¹ FOUND. FOR INDIV. RIGHTS IN EDUC., *Spotlight Database*, available at <https://www.thefire.org/spotlight> (last visited Aug. 5, 2018).

punish merely “offensive” speech); *Abbott v. Pastides*, 263 F. Supp. 3d 565, 579–80 (D.S.C. 2017) (plaintiffs lacked standing to challenge sexual harassment policy that on its face prohibited “insulting,” “inappropriate,” or “suggestive” speech); *cf. City of L.A. v. Lyons*, 461 U.S. 95 (1983) (plaintiff lacked standing to seek injunction against use of constitutionally suspect choke hold by police, though police had used it on him in the past, because plaintiff could not predict if or when he would be stopped by police and again subjected to hold). It can also be difficult, if not impossible, for a student to establish standing where a college disavows enforcement of an existing policy in order to avoid a legal challenge. *See, e.g., Lopez*, 630 F.3d at 788 (“[P]laintiffs’ claims of future harm lack credibility when ... the enforcing authority has disavowed the applicability of the challenged law to the plaintiffs.”).

Consequently, facially unconstitutional speech codes often remain in place until specifically employed to punish or censor students willing to challenge them, in the meantime chilling the rights of all who read, comply, and do not speak in the first instance. Moreover, as the *Flanigan’s* dissent rightly notes, under the rule crafted by the *Flanigan’s* majority, a student’s challenge to a speech code will likely be dismissed as moot if she graduates or the policy is changed during its pendency *even where* a court has

acknowledged that an injury occurred because the plaintiff established standing. *See* 868 F.3d at 1274 (Wilson, J., dissenting) (“To be clear, the majority concedes there was an Article III injury in this case by dismissing it on mootness grounds instead of on standing grounds. Under the majority’s opinion, declaring that someone’s constitutional rights have been violated is not a practical effect.”). Given the unequivocal importance of the First Amendment for college students particularly and our democracy more generally, this result is untenable.

b. Qualified immunity

Students may also find their claims for relief stymied by the doctrine of qualified immunity. Qualified immunity protects government officials from liability for damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1979). This personal immunity creates a high bar for a student-plaintiff to reach in seeking remedy for a constitutional injury because “officials are liable not for all of their unconstitutional acts, but only for their *clearly* unconstitutional acts ...” MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 163 (5th ed. 2016) (emphasis added).

The Supreme Court has established a two-part test for qualified immunity: (1) whether the facts establish violation of a constitutional right, and (2) whether the right was “clearly established” at the time of the government actor’s conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). However, courts are not mandated to perform the analysis in that order and may decide the law was not clearly established without deciding whether a constitutional injury took place. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). When courts perform this order of analysis, the contours of the law are not advanced or clarified by courts, increasing the likelihood that the law will be no more clearly established for the next plaintiff. The Supreme Court has compounded the lack of clarity by declining to rule on the source or quantity of existing precedent necessary for a right to be “clearly established.” *See Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) (assuming but not finding a right could be clearly established based on a single Circuit Court of Appeals decision); *Harlow*, 457 U.S. at 818 n.32 (declining to decide whether the state of the law should be evaluated by reference to decisions of the Supreme Court, appellate courts, or district courts).

The *Flanigan*’s ruling relied on by the district court compounds the uphill battle civil rights plaintiffs already face to advance the law on clearly

established rights. If a nominal damages claim will be mooted where claims for injunctive and declaratory relief are mooted, courts will not reach the qualified immunity analysis in the first instance, let alone the question of whether a constitutional violation has taken place. *Flanigan's* significantly shrank the universe of cases that present the opportunity for courts to analyze, advance, or provide clarity on constitutional rights to guide parties' conduct in the future. This is particularly alarming in the context of student rights, where claims for injunctive and declaratory relief suffer a high likelihood of becoming moot in the course of federal civil litigation.

Consequently, and due to circumstances outside students' control, the state of the law on students' constitutional rights is likely to progress at a glacial pace at best in the Eleventh Circuit, to the lasting detriment of both students and society as a whole.

Prior to *Flanigan's* and the district court's ruling here, nominal damages claims were already subject to significant procedural hurdles preventing courts from addressing the full breadth of legal harm done by the maintenance of unconstitutional speech codes. These decisions make it immeasurably more difficult for a student to mount a constitutional challenge.

D. The District Court’s Ruling Creates an Incentive for Plaintiffs to Rely on Strained Compensatory Damage Claims.

The district court’s ruling will encourage plaintiffs to rely on strained compensatory damage claims and elevates form over substance. Future plaintiffs will have little choice but to look for creative ways to force compensatory damages into their pleadings in the event their desired remedies—injunctive and declaratory relief—are mooted out. Moreover, a rule that nominal damages will not support a claim is at odds with the logic of *Carey*, 435 U.S. at 266. In *Carey*, the Court expressly recognized that nominal damages have been traditionally been used to vindicate “deprivations of certain ‘absolute’ rights that are not shown to have caused actual injury.” *Id.*

The district court’s opinion also errs in elevating form over substance. As the district court itself recognized, the Plaintiffs’ First Amended Complaint included claims for “monetary damages and equitable relief.” However, because the Plaintiffs did not elaborate on the types of damages and only mentioned “nominal damages” in their prayer for relief, the district court concluded that the Plaintiffs sought only nominal damages. *Uzuegbunam* at 20–21. The practical effect of this restrictively formalistic reading is particularly problematic in this instance because “the abstract

value of a constitutional right may not form the basis for § 1983 damages.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (1986). As a result, Plaintiffs will be forced to find strained ways to argue that they are entitled to compensatory damages when their desired relief is nominal damages—recognition that their constitutional rights were harmed.

II. Clear Legal Precedent Is Necessary to Curb Rampant Campus Censorship.

A. Speech Codes Are Prevalent at Colleges and Universities Around the Country.

Preserving the ability of students to seek meaningful judicial remedies is particularly important because the First Amendment rights of public college students are threatened with depressing regularity. *Amicus* FIRE annually reviews speech policies maintained by more than 460 colleges and universities; its 2018 report found that 91 percent of public colleges and universities surveyed maintained at least one policy that restricts speech or expression protected by the First Amendment. FOUND. FOR INDIV. RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2018: THE STATE OF FREE SPEECH ON OUR NATION’S CAMPUSES, <https://www.thefire.org/spotlight-on-speech-codes-2018> (last accessed July 31, 2018). These restrictive speech codes are routinely used to silence students and student organizations. Since its founding in 1999, FIRE has received thousands of reports of censorship on

public college campuses and has successfully defended student and faculty rights in hundreds of instances.

B. Universities Often Revise Policies Only to Reinstate Them Later.

In FIRE’s experience, the fact that a university revises a policy—particularly under pressure—is no guarantee that the university will not later try to reinstate its old policy or restrict the same type of expression by other means. FIRE’s archives abound with examples of universities that eliminated problematic policies only to reinstate them, or policies substantially similar to them, at a later date. The only real safeguard against continued censorship is clear judicial precedent delineating the appropriate limits of policies regulating campus speech.

In 2003, a student named Chris Stevens sued California’s Citrus College in federal court, challenging a policy that limited students’ expressive activities to three small “free speech areas” and required students to provide advance notice of their intent to use those areas. *Stevens v. Citrus Comm. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. filed May 20, 2003). On June 5, 2003, the Citrus College Board of Trustees unanimously adopted a resolution revoking the policies, and the lawsuit was settled. Resolution of the Citrus Coll. Bd. of Trs. (June 5, 2003), *available at*

<https://www.thefire.org/resolution-of-the-citrus-college-board-of-trustees-june-5-2003>.

In 2013, however, the Citrus College Board of Trustees adopted a new “Time, Place, and Manner” regulation, once again limiting students’ expressive activities to a designated free speech area. *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. filed Jul. 1, 2014). Under this new policy, Citrus student Vincenzo Sinapi-Riddle was threatened with removal from campus for soliciting signatures for a petition against National Security Agency (NSA) spying outside of Citrus’ small free speech area, which comprised just 1.37 percent of the college’s campus. Citrus settled with Sinapi-Riddle, once again agreeing to revise its policies. Settlement Agreement, *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. Dec. 3, 2014), *available at* <https://www.thefire.org/settlement-agreement-sinapi-riddle-v-citrus-college>.

In 2003, two students at Shippensburg University of Pennsylvania brought a federal lawsuit alleging that several of the university’s speech codes violated their First Amendment rights. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003). After a judge in the Middle District of Pennsylvania issued a preliminary injunction against Shippensburg, the

university settled with the students, agreeing to repeal the challenged policies as part of the settlement.²²

The university did not, however, comply with the terms of the settlement. According to a 2008 complaint filed by a Christian student group at Shippensburg, administrators “failed and/or refused to rewrite the [previously challenged policy], and instead, reenacted the stricken policy *verbatim* in the Code of Conduct.” *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. filed May 7, 2008). In October 2008, Shippensburg settled this second lawsuit as well, agreeing—for the second time—to revise its speech codes.²³ Shippensburg’s recidivistic impulse demonstrates that universities will change a policy when challenged—and change it back when the threat of litigation seems to fade.

In other instances, FIRE has worked with administrators at colleges and universities to revise problematic policies, only to have other administrators reinstate those policies, or equally problematic policies, at a

²² Press Release, FOUND. FOR INDIV. RIGHTS IN EDUC., *A Great Victory for Free Speech at Shippensburg* (Feb. 24, 2004), available at <https://www.thefire.org/a-great-victory-for-free-speech-at-shippensburg>.

²³ Will Creeley, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement, University Once Again Dismantles Unconstitutional Speech Code*, FOUND. FOR INDIV. RIGHTS IN EDUC. (Oct. 24, 2008), <https://www.thefire.org/victory-for-free-speech-at-shippensburg-after-violating-terms-of-2004-settlement-university-once-again-dismantles-unconstitutional-speech-code>.

later date. In 2012, for example, the University of Mississippi revised a policy that had limited unplanned student demonstrations and other expressive activities to designated “Speaker’s Corners,” severely restricting the ability of students to engage in spontaneous expressive activity on campus. In its place, the university adopted a policy providing that students could engage in spontaneous expression anywhere on campus “so long as the expressive activities or related student conduct does not violate any other applicable university policies.”²⁴

Recently, however, the university amended that policy to once again prohibit spontaneous student demonstrations on campus, requiring that student organizations must “contact the Dean of Students in advance of the activity and complete a [Registered Student Organization] Event Registration form.”²⁵

C. Without Clear Precedent Declaring Speech Codes Unconstitutional, Students Will Continue to Face Widespread Censorship.

Campus speech codes have been repeatedly defeated in court in an almost unbroken string of legal precedent stretching back nearly thirty

²⁴ UNIV. OF MISS., *Free Inquiry, Expression, and Assembly* (Jan. 18, 2012) (on file with author).

²⁵ UNIV. OF MISS., *Free Inquiry, Expression, and Assembly* (Nov. 27, 2017), available at <https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=11079224>.

years.²⁶ Despite the clarity of the legal precedent, however, censorship of student expression on our nation's public campuses continues to run rampant. Unfortunately, as here, public college administrators too often trample students' rights to free expression in an effort to limit controversy or criticism of the university. If a college or university can avoid legal consequences simply by revising a policy that has been challenged, protecting students' speech rights becomes a never-ending game of whack-a-

²⁶ See, e.g., *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (invalidating "free speech zone" policy); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-CV-135, 1998 WL 35867183 (E.D. Ky. July 22, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

mole in which an individual student may succeed in beating back a policy, only to have that policy—or one just like it—pop back up again moments later. But unlike the whack-a-mole player who is still standing at the ready with a rubber mallet, students graduate and move on, making it exceedingly difficult to know whether a university has truly kept its promise to revise a policy unless and until another student or student group is censored. Only a judicial determination that a policy violates students' First Amendment rights can truly secure those rights going forward.

CONCLUSION

To ensure that students are able to vindicate their constitutional rights, the lower court's opinion should be reversed and remanded.

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Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States
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CERTIFICATE OF COMPLIANCE

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6016 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

3) This brief and cover pages were prepared in compliance with 11th Cir. R. 32-4.

/s/ Samuel S. Woodhouse
Samuel S. Woodhouse, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on August 13, 2018, which will automatically send notification to the counsel of record for the parties.

/s/ Samuel S. Woodhouse
Samuel S. Woodhouse, Esquire