No. 19-968

In The Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,

Petitioners,

v.

STANLEY C. PRECZEWSKI ET. AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.

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INTEREST OF AMICUS[1]

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate for employee free choice since 1968. To advance this mission, Foundation staff attorneys have represented individual employees in numerous cases before this Court, lower federal courts, and federal agencies.[2]

The Foundation has an interest in the question presented here because Foundation attorneys have represented many employees in First Amendment cases that included a request for nominal damages under 42 U.S.C. § 1983.[3] In some of these cases, defendants have sought to avoid judicial review of their unconstitutional conduct by changing their unlawful policy only after a lawsuit has been substantially litigated.[4]

In most Foundation funded cases, a labor union is the defendant. These unions have a fiduciary obligation to the employees the Foundation lawyers assist.[5] Despite this obligation, unions fight the employees'

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[1] Both parties provided blanket consent to the filing of amicus briefs under Supreme Court Rule 37.3(a). Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus made a monetary contribution to its preparation or submission.

[2] *E.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chicago Tchrs. Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984).

[3] *See*, *e.g.*, *Janus*, 138 S. Ct. 2448; *Harris*, 573 U.S. 616; *Knox*, 567 U.S. 298; *Hudson*, 475 U.S. 292.

[4] *See, e.g.*, *Knox*, 567 U.S. at 307–08; *Hudson*, 475 U.S. at 305 n.14.

[5] *See*, *e.g.*, *Janus*, 138 S. Ct. at 2460, 2467–68.

claims until the litigation rises to a level at which a court can create binding precedent. At that point, unions often attempt to moot the litigation by returning or disclaiming the disputed union fees. The employees thus not only suffer a violation of their constitutional rights, but also suffer the rigors of litigation without the vindication of those rights.

If the decision below stands, it will further embolden constitutional wrongdoers, such as labor unions and cooperating employers, to keep implementing unconstitutional policies without ever having a court hold them responsible for their illegal actions—as long as they reverse course after being sued.

SUMMARY OF ARGUMENT

Petitioners' brief forcefully shows why a government's post-filing change of its unconstitutional policy does not moot a nominal-damages claim under 42 U.S.C. § 1983. The Foundation writes this amicus brief to highlight another reason for reversing the lower court's decision: Its holding creates serious separation of powers problems. It judicially constricts Article III's jurisdictional requirements and displaces a long-standing, congressionally enacted remedy for individuals to vindicate their constitutional rights.

A. Nominal damages have been an available remedy for private rights violations for hundreds of years. The remedy has its roots in pre-Constitution common law and fulfills the foundational legal principle that where there is a right there is a remedy. Nominal damages on their own provide—and have provided

since before the Founding—"effectual relief" for plaintiffs. This relief satisfies Article III's constitutional minimum for federal court jurisdiction.[6]

B. The Fourteenth Amendment grants to Congress the power to enact legislation to remedy constitutional violations. Congress exercised this power when it enacted 42 U.S.C. § 1983. Section 1983 provides individuals a means not only to stop ongoing illegal government conduct—or conduct by anyone else acting "under color of state law"—through equitable remedies, but also to redress past and ongoing injuries through "actions at law." Nominal damages were a remedy for "actions at law" when Congress passed Section 1983 and are still part of that remedial scheme today.

C. Petitioners show that the lower court's Article III "practical effects" test has no basis in the Constitution's text or history and conflicts with this Court's precedent.[7] But the test also contravenes Congress's legislative power by stripping individuals of the long-standing statutory nominal-damages remedy given to them by Section 1983. Courts should not narrowly interpret constitutional provisions like Article III to

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[6] Supreme Court precedent makes it clear that a case becomes moot "only when it is impossible for a court to grant '*any effectual relief* whatever.'" *Knox*, 567 U.S. at 307 (emphasis added) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). In other words, if "the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 307–08 (quoting *Ellis*, 466 U.S. at 442). "[A]n identifiable trifle," such as a $1.50 tax or $5 fine, "is enough for standing." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973); *see Ellis*, 466 U.S. at 442 ("undeniably minute" amount of interest sufficient).

[7] *See* Pet. Br. 18–20.

take away congressionally prescribed remedies—remedies designed to redress injuries to fundamental civil and constitutional rights.

This Court should reverse the Eleventh Circuit's judgment.

ARGUMENT

A Government's post-filing change in policy does not moot a nominal-damages claim under 42 U.S.C. § 1983.

A. Nominal damages have provided individuals "effectual relief" since common law.

1. By at least the eighteenth century, English common law recognized the fundamental legal maxim that "where there is a legal right, there is also a legal remedy."[8] William Blackstone summarized the common law tradition by explaining that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[9] This rule, according to Blackstone, "has long been one of the best accepted maxims of the law."[10]

The nominal-damages remedy emerged as one solution to fulfill the promise of this rule. Indeed, nominal damages are a fundamental solution to an enduring problem—making whole a party who suffered a violation of his or her rights without compensable damages.[11] Nominal damages were thus predominately

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[8] 3 William Blackstone, *Commentaries* *29 n.8.

[9] *Id.* at *23.

[10] *Id.* at *29 n.8.

[11] *See generally* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 279–281 (2008) (detailing

available as a remedy to redress private rights at common law—the natural rights of life, liberty, security, and property.[12]

So while violations of these private rights often resulted in compensable injury, proof of actual harm was not required for a claimant's recovery in many cases.[13] Instead, a plaintiff who had his or her private rights violated only needed to prove a "legal injury" through a proper "writ of trespass" to have a claim. Proof that a defendant violated a plaintiff's legal interest was thus sufficient for the claim because the law considered private rights "absolute" and integral to the dignity of citizenship.[14]

A 1348 case, *I de S et ux. v. W de S*, provides an early example.[15] The court allowed a woman to recover damages against a man who unsuccessfully attempted to throw a hatchet at her head.[16] The court ruled that even though the defendant's conduct did not cause actual injury, recovery was still warranted

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the common law and early American law background of nominal damages).

[12] *Id.* at 280 (citing 2 James Kent, *Commentaries on American Law* 1 (O.W. Holmes Jr. ed., 12th ed. 1873) ("The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable.")).

[13] 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 32, at 28 (Arthur G. Sedgwick & Joseph H. Beale eds., 9th ed. 1920).

[14] 1 William Blackstone, *Commentaries* *122–41.

[15] *I de S et ux. v. W de S*, YB Lib. Ass. folio 99, *placitum* 60 (Assizes 1348), *reprinted in* William L. Prosser & John W. Wade, *Cases and Materials on Torts* 36 (5th ed. 1971).

[16] *Id.*

because the man had trespassed against her person—which constituted a redressable invasion of her private right of security.[17]

Later, common law English courts continued to hold that they could redress trespasses against a private right through nominal damages. In the next century, the court in *Hulle v. Orynge* found an action in trespass against a neighbor who entered onto a landowner's property to pick up thorns but caused no property damage.[18] The court reasoned the trespasser's violation of the landowner's absolute right to keep others from entering his property required an award of nominal damages—no matter whether there was compensatory property damage.[19]

At the beginning of the eighteenth century, common law courts distinguished between writ of trespass claims for nominal damages and the "action on the case."[20] Unlike a writ of trespass, a successful action on the case required proof of both legal injury and actual damage when a defendant indirectly violated a plaintiff's rights. In *Ashby v. White*, for example, the plaintiff brought an action on the case against his

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[17] *Id.*

[18] *Hulle v. Orynge,* YB 6 Edw. 4, fol. 7, Mich, pl. 18 (1466), *reprinted in* A.K.R. Kiralfy, *A Source Book of English Law* 128–32 (1957).

[19] *Id. See also Greene v. Cole* (1670) 85 Eng. Rep. 1037; 2 WMS Saunders 252 (awarding nominal damages to a land owner where a tenant installed a new door in a rented house but did not damage the house); *Robinson v. Lord Byron* (1788) 30 Eng. Rep. 3; 2 Cox 4 (awarding nominal damages when the plaintiff proved that the defendant invaded his riparian rights but failed to offer proof of actual damage).

[20] Hessick, *supra*, at 280–82 (detailing the distinction between writ of trespass and action on the case causes of action).

county's constables for preventing him from voting for his preferred representative in parliament.[21] The court dismissed the case reasoning that there was no actual harm and thus the plaintiff did not meet the prerequisites for an action on the case.[22]

Outraged by the court's failure to provide the plaintiff a remedy, Chief Justice Holt famously dissented:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[23]

According to Lord Holt, an injury to a voter's franchise right—or an injury to any private right—"imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right."[24]

Chief Justice Holt's reasoning reflects the common law sentiment that personal rights are sacred and absolute. And these rights necessarily transcend even the sovereign's power to impose the force of law against them.[25]

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[21] *Ashby v. White* (1702) 92 Eng. Rep. 126, 136–37; 2 Ld. Raym. 938, 953–56.

[22] *Id.*

[23] *Id.* at 953.

[24] *Id.* at 955.

[25] The House of Lords eventually overturned the court's decision for political reasons, but the courts of England, and later, the

2. American lawmakers followed the common law tradition and imported the nominal-damages remedy at the Founding. Indeed, the nominal-damages remedy was ubiquitous in the American legal system at the Nation's birth. Founding era state constitutions, Supreme Court rulings, many state court rulings, and restatements and treatises all support the remedial propriety of nominal damages. This evidence makes it is safe to infer that the Framers never intended for Article III to limit a person's recovery to compensatory damages in claims asserting the violation of a constitutional right.

Around the time of the Constitution's ratification, Delaware, Maryland, Massachusetts, New Hampshire, and Vermont had all promulgated a guarantee for redress of the violations of rights in their state constitutions.[26]

Though proposed, the language of these state constitutions about the redressability of rights did not

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early courts of the United States viewed Chief Justice Holt's dissent as correctly stating the law. *See Embrey v. Owen* (1851) 155 Eng. Rep. 579, 585; 6 Ex. 353, 368 ("Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage; injuria sine damno is actionable, as was laid down in the case of *Ashby v. White* by Lord Holt, and in many subsequent cases. . . ." (citation omitted)); *see also Mayor of London v. Mayor of Lynn* (1796) 126 Eng. Rep. 1026, 1041; 1 Bos. and Pul. 487, 516 ("[T]he inference seems unavoidable, that damages actually sustained could not be of the essence of the action, and that the right alone was essential.").

[26] *See* Del. Const. of 1792, art. I, § 9; Md. Const. of 1776, para. 17; Mass. Const. of 1780, art. XI; N.H. Const. of 1783, art. 14; Vt. Const. of 1786, ch. 1, para. 4.

make it into the federal Constitution's language.[27] But the Supreme Court, through Chief Justice John Marshall, soon recognized that the traditional nominal-damages remedy and its purpose—as understood by Blackstone and the common law cases cited above—were the correct legal view as a matter of federal law.[28] In so doing, Marshall reiterated Blackstone's fundamental legal maxim that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[29] And, he asserted, that the United States "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[30]

Together with the state constitutions cited above, many state courts throughout the nineteenth century also awarded nominal damages for the violation of private rights.[31]

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[27] *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to A Law for the Redress of Wrongs*, 115 Yale L.J. 524, 560–61 (2005).

[28] *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries* *23).

[29] *Id.*

[30] *Id.*

[31] *See, e.g.*, *Hendrick v. Cook*, 4 Ga. 241, 261 (1848) (rejecting the argument that "there must be some *perceptible damage* shown, to entitle the plaintiff to recover; that injury without damage, is not actionable" and explaining that "whenever there has been an illegal invasion of the *rights of* another, it is an *injury*, for which he is entitled to a remedy by an action"); *Dixon v. Clow*, 24 Wend. 188, 190–91 (N.Y. Sup. Ct. 1840) ("[I]f the plaintiff succeeded in showing an unlawful entry upon his land, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for nominal damages at the

Nominal-damages awards for private rights violations followed throughout American history in hundreds of cases, treatises, and restatements of American law.[32]

B. Congress provided individuals with a nominal-damages remedy in Section 1983 to give them "effectual relief" from state actors' constitutional violations.

After the American people amended the Constitution to add the Fourteenth Amendment, Congress passed Section 1983. In so doing, it provided a vehicle for individuals to remedy violations of their civil and constitutional rights in federal court.[33] One remedy Congress provided was nominal damages.

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least. It was not necessary for him to prove a *sum*, or that any particular *amount* of damages had been sustained . . . ."); *Abel v. Bennet*, 1 Root 127, 127-28 (Conn. Super. Ct. 1789) (permitting award of nominal damages for breach of bond when an inmate of debtors' prison briefly walked off the premises of the jail and then immediately returned of her own accord).

[32] *See* 1 Sedgwick, *supra*, at 164–91 (listing several hundred cases awarding nominal damages for violating rights); 1 J. G. Sutherland, *A Treatise on the Law of Damages* §§ 9-10 (John R. Berryman ed., 4th ed. 1916) (same); *see also Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 197 (1881) (endorsing the rule that proof of infringement alone in a patent case entitles the patentee to maintain an action for nominal damages); *Tracy v. Swartwout*, 35 U.S. 80, 85 (1836) (stating that an award of nominal damages "plainly intimate[s] that the law [is] with the plaintiffs").

[33] *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'). (citation omitted).

Section 1983's text explicitly included "actions at law"[34]—which encompasses the nominal-damages claims available at common law. An "action at law" under [Section 1983] is a "suit seeking legal relief."[35] Damages are the classic form of legal relief. A Section 1983 lawsuit seeking damages for unconstitutional conduct is a "suit seeking legal relief" and therefore an action at law—because "[d]amages for a constitutional violation are a legal remedy."[36]

And damages, of course, include nominal damages.[37] "Nominal damages are, by definition, minimal

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[34] Section 1983's text reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law*, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983 (emphasis added).

[35] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999).

[36] *Id.* at 710.

[37] 25 C.J.S. *Damages* § 9 (2020); *Nominal Damages*, *Black's Law Dictionary* 469 (4th ed. 1968) (defining nominal-damages as "a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant's duty, or in cases where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount.").

monetary damages."[38] Courts thus have "always included [nominal-damages] under general damages."[39] As this Court has recognized since the nineteenth century: "in an action at law, if the plaintiff rested his case, after proof of infringement merely, he was entitled only to nominal damages."[40] This Court has similarly stated elsewhere that nominal-damages are a remedy for actions at law:

> As the case in hand is one at law, . . . the evidence disclosing . . . no damages of any kind—we think the court should have instructed the jury that, if they found for the plaintiffs at all, to find nominal damages only.[41]

At bottom, nominal damages are a longstanding remedy for "actions at law"—which Congress explicitly provided for in Section 1983 as a remedy for constitutional violations.[42] Congress drew on the common law tradition and democratically gave the people a remedy to vindicate their civil and constitutional rights. Yet the lower court's "practical effects" test strips plaintiffs of that remedy under the guise of judicial restraint.

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[38] 22 Am. Jur. 2d *Damages* § 8 (2020).

[39] *W. Union Tel. Co. v. Glenn*, 8 Ga. App. 168 (1910).

[40] *Root*, 105 U.S. at 197.

[41] *Coupe v. Royer*, 155 U.S. 565, 582–83 (1895).

[42] This Court has also consistently found that nominal damages are available under Section 1983. *See* Pet. Br. 18, 36–38.

C. The Eleventh Circuit's "practical effects" test for Article III mootness creates serious separation of powers problems, because it judicially strips Section 1983 plaintiffs of the "effectual relief" Congress gave them.

The court below ruled that Petitioners' case became moot after the government amended its policy.[43] In so doing, the panel relied on a prior Eleventh Circuit precedent, which held that a nominal-damages claim—at least if not accompanied by a compensatory-damages claim—could not avoid mootness.[44] Relying on Article III, the court said this was so because the court's judgment would have no "practical effect."[45] This "practical effects" test, the court noted, reflected judicial "restraint" and "reflects the 'great gravity and delicacy' inherent in the federal courts' role in passing on the constitutionality of legislative acts."[46]

The lower court's holding is flawed and should be reversed. Besides ignoring hundreds of years of legal tradition[47] and contravening this Court's Article III

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[43] *See id.* at 10–14.

[44] *Id.*

[45] *See id.* at 45 (citing *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1266 (10th Cir. 2004) (McConnell, J., Concurring).

[46] *Flanigan's Enterprises, Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1269 (11th Cir. 2017) (citing *Ashwander v. TVA*, 297 U.S. 288, 345 (1936)).

[47] *See supra* section A; *see also Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (noting that historically judges did not refer to Article III when determining its meaning, but "refer[red] directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms ("The

precedent,[48] this "practical effects" test also creates serious separation of powers problems.

First, narrowly construing the Constitution—i.e., changing the law—merely to avoid having to pass on unconstitutional legislation is not judicial restraint. Although Article III serves as an important cog in the Constitution's separation of powers design,[49] courts can improperly use it as a weapon to suppress people's rights. As some scholars have noted, "[s]tanding developed principally at the hands of Justices Brandeis and Frankfurter in an effort to protect progressive legislation from judicial attack[.]"[50] But more to the point, applying weight to the constitutional scale to reach a preferred outcome—rather than faithfully applying the Constitution's original meaning—is not judicial restraint. It is judicial activism masked as restraint.

Second, this so called "restraint" also conflicts with Article III itself, which promises that "Article III judges [will] exercise independent judgment."[51] "Although 'judicial independence' is often discussed in terms of independence from external threats, the

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judicial Power"; "Cases"; "Controversies") that have virtually no meaning except by reference to that tradition.").

[48] *See supra* section A.

[49] *See generally*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk Univ. L. Rev. 881 (1983).

[50] Hessick, *supra*, at 276. *See also*, Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* 218 (2000) ("Justice Louis Brandeis and then-professor Felix Frankfurter developed standing to shield progressive regulatory programs, culminating in the New Deal, from attack in the federal courts . . . .").

[51] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 120–21 (2015).

Framers understood the concept to also require independence from the 'internal threat' of 'human will.'"[52] Thus, "[i]ndependent judgment required judges to decide cases in accordance with the law of the land"—the Constitution—"not in accordance with pressures placed upon them through either internal or external sources."[53] Yet that is what happened here. The Eleventh Circuit's rule does not apply the law as Congress intended. Instead, it denies Petitioners the remedy to which they are entitled under Section 1983 because of internal judicial policy concerns.

Third, using narrow constitutional constructions—with no basis in text, history, or this Court's precedent—to upend long-standing congressional civil rights remedial legislation runs perilously close to legislating. As noted, Section 1983's plain meaning incorporates the common law nominal-damages remedy. This was a choice the legislature made to provide people with a way to redress their civil and constitutional rights. As this Court noted long ago, "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."[54]

Courts should not displace an important, congressionally provided remedy in the name of restraint. "It is for Congress to determine whether § 1983 litigation

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[52] *Id.* at 120 (citing P. Hamburger, *Law and Judicial Duty* 507, 508 (2008); The Federalist No. 78 (Alexander Hamilton) ("The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment . . . .").

[53] *Id.* at 120–21 (citing Hamburger, *supra*, at 508–521.).

[54] *Mitchum*, 407 U.S. at 238–39.

has become too burdensome."[55] Indeed, "in our constitutional system[,] the commitment to the separation of powers is too fundamental for [courts] to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'"[56]

The Eleventh Circuit's novel test for what constitutes mootness under Article III does just that, because it narrows federal court jurisdiction over civil rights claims in the name of judicial "restraint." But this is not judicial restraint, it is judicial abdication—abdication that creates serious separation of powers issues.[57]

CONCLUSION

For the reasons stated in this brief, and those stated by the Petitioner, this Court should reverse the decision below.

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[55] *Tower v. Glover*, 467 U.S. 914, 923 (1984).

[56] *TVA v. Hill*, 437 U.S. 153, 195 (1978).

[57] *Cf.* Pet. Br. 43–45.

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