No. 20-538

In The

Supreme Court of the United States

RENTBERRY, INC. and DELANEY WYSINGLE,
Petitioners,

v.

CITY OF SEATTLE,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH AND THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Free Speech ("IFS") is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. In particular, the Institute has substantial experience litigating challenges to political speech restrictions. The rule adopted below will impose a "magic words" test on complainants seeking to bring such challenges. Such pleading formalism is particularly harmful in the context of political speech cases, which are often brought on short notice and with a particular election in mind. As the Institute observed in its *amicus curiae* brief in *Uzuegbunam v. Preczewski*, Case No. 19-968 (U.S. Sept. 29, 2020), the adversarial system benefits when political speakers are provided with judicial rules that ensure that nominal damages claims for constitutional injuries are litigated to judgment in the federal courts.

* * *

The Council on American-Islamic Relations ("CAIR") was founded in 1994 with the purpose of securing civil rights, promoting justice, empowering Muslim Americans, and enhancing society's understanding of Islam. One of the things CAIR does in furtherance of this mission is represent parties when they suffer deprivations of their constitutional rights by their government.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. All Parties have consented to the filing of this brief.

When CAIR and civil rights groups litigate to protect these constitutional rights, governments often seek to throw these cases out based on mootness. The fleeting nature of many constitutional violations make this a real impediment to the adjudication of such claims in a lot of cases. And as a result, vindicating the constitutional rights of Americans in court becomes a ritual of procedural tag while the deeper, more serious issues around our constitutional freedoms take a back seat. Even worse, it creates a safe haven for government actors to preserve their ability to commit constitutional violations that would otherwise be deterred by a court order or binding disposition.

CAIR's ability to protect Americans' constitutional rights often turns on the ability to allege and maintain standing in situations where the government is guilty of violating the U.S. Constitution but can make ancillary changes to avoid having those claims addressed in court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case should have been resolved on the merits without a detour to this Court. Petitioners challenged a flat ban on a category of commercial speech—a classic First Amendment injury. The Ninth Circuit, along with the majority of the circuits, allows a claim for nominal damages to keep a case or controversy on the docket, even where a government defendant seeks to moot the case by altering or amending its constitutionally offensive law.

But because Petitioners relied on a Rule 54(c) statement, asking for all relief they are entitled to, rather than specifically requesting nominal damages,

the Ninth Circuit simply dismissed the case. This was error, given both the plain terms of Rule 54(c) and due consideration for the Bill of Rights. Nominal damages are a vital part of the infrastructure permitting constitutional cases to be heard in Article III courts, and the Federal Rules of Civil Procedure ought to be read liberally to save such cases from falling prey to the mootness doctrine, as this Court has often done in applying the Cases or Controversies Clause in other First Amendment litigation.

Thorny questions regarding First Amendment rights, especially in the context of political speech cases, which often must be filed quickly due to the pressing demands of an upcoming election, should not be dismissed merely because a litigant filed a general complaint. A rule to the contrary will amplify a government defendant's ability to manipulate the mootness doctrine to insulate uncomfortable, yet meritorious, cases from judicial review—as both the States and the federal government often do.

Accordingly, the writ should be granted.

ARGUMENT

I. The Ninth Circuit Erred In Allowing Pleading Formalism To Outweigh The Value Of Litigating A First Amendment Matter To Judgment.

Petitioners initially came to court to challenge a speech ban. They are here now because their case was dismissed for, at best, incomplete pleading. Specifically, while Petitioners' complaint requested all just and proper remedies to which they were entitled, it did not specifically demand the nominal

damages they are entitled to by circuit law. That omission was fatal. Had the complaint expressly asked "'for nominal damages,'" those words would have "'prevent[ed] dismissal for mootness.'" App. 2a (quoting *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002)).[2] But because it did not, it did not.

The nominal damages exception to mootness serves a vital role in preventing governments from escaping liability for their unconstitutional actions by simply clawing back the offending order, decree, statute, or regulation. While a government's decision to quit raining down blows is obviously welcome, it is hardly cause for celebration when this cessation lets a state actor off the hook for depriving an American of her liberty. *Infra* at 14-19 (describing such cases litigated by *Amicus* CAIR). The nominal damages exception avoids this scenario by permitting litigation to reach the merits based on the already completed constitutional harm, regardless of the government's subsequent contrition once hauled into court. After all, even a fleeting deprivation of an enumerated right is irreparable, and a government ought to be legally bound against undertaking similarly unconstitutional actions in the future.[3] Thus, the

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[2] The Ninth Circuit rule that a live claim for nominal damages saves an otherwise moot constitutional claim is the majority rule in the circuit courts of appeal. *See* Br. of *Amicus Curiae* Inst. for Free Speech at 1, 6 n.4, *Uzuegbunam v. Preczewski*, No. 19-968 (U.S. Sept. 29, 2020) ("IFS Br.").

[3] *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J., in-chambers) ("It is clear that even a short-lived 'gag' order in a case of widespread concern to the community

availability of nominal damages "awards…discourage gamesmanship by state actors, bind government defendants, encourage the practice of consent decrees when a state actor concedes error, and make other jurisdictions think twice before abridging constitutional liberties." IFS Br. at 3. Ironically, even though fundamental rights rank as "priceless," with "no measure in money," *Elgin v. Marshall*, 106 U.S. 578, 580 (1883), it is this placing of a symbolic dollar in the dock that "vindicate[s] important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).[4]

But the decision below shredded that protection, resulting in precisely the outcome that such a rule would prevent. The result: a government freed from the judicial consequences of imposing a flat prohibition on speech. And why? Because a litigant relied on its request for all justice it was entitled under Ninth Circuit law, rather than enumerating every form of judgment within that list. This bow to formalism is difficult to square with "the importance

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constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., plurality op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *see also Neb. Press Ass'n. v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in-chambers) ("[A]ny First Amendment infringement that occurs with each passing day is irreparable").

[4] Thomas Paine, The Crisis No. 1, Dec. 23, 1776 ("Heaven knows how to put a proper price upon its goods; and it would be strange indeed if so celestial an article as freedom should not be highly rated") (capitalization altered).

to organized society that [constitutional] rights be scrupulously observed" by the federal courts. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (citation and quotation marks omitted).

Worse still, the decision also blew past another protection: the text of the Federal Rules of Civil Procedure, which insists that "final judgment 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) (emphasis supplied). As Petitioners correctly noted, Pet. 31, Rule 54(c) was adopted precisely to prevent a "magic words" test to pry open the courthouse door. Yet the Ninth Circuit has imposed just such a requirement.

Even if Rule 54(c) were not pellucidly clear, that rule still should have been read together with the Constitution's robust protections for speech, assembly, press, petition, and due process. Such an outcome would be in keeping with this Court's previous acknowledgments that the need for judicial redress in the First Amendment context can place a doorstopper on the courthouse threshold.

Thus, in the context of a First Amendment facial overbreadth challenge, plaintiffs may bring "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick v. Okla.*, 413 U.S. 601, 612 (1973) (citation and quotation marks omitted); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). Civil society groups are permitted to stand in the shoes of their individual members, "who are not of course parties to the litigation," notwithstanding the Court's

typical "insist[ence] that parties rely only on constitutional rights which are personal to themselves." *NAACP v. Ala.*, 357 U.S. 449, 459 (1958). And the Court has provided an exception to the mootness doctrine so that First Amendment cases involving a specific election may be fully litigated, even after the specific election involved has passed. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 461-464 (2007) (Roberts, C.J., controlling op.).[5]

Bluntly, if the First Amendment must be read in these fashions into standing, a doctrine born of the Cases or Controversies Clause, similar care for substantive, constitutional freedoms ought be read into the "general rules of practice and procedure" for the courts issued pursuant to statute. 28 U.S.C. §§ 2072, 2073; *cf.* 28 U.S.C § 2072(b) ("Such rules shall not *abridge*, enlarge[,] or *modify* any substantive right") (emphasis supplied).

Thus, to give effect to the nominal damages exception, the text of Rule 54(c), and the needs of the First Amendment itself, the writ ought to be granted and the formalistic pleading requirements demanded by the Ninth Circuit eliminated.

II. The Rule Petitioners Seek Would Help Balance Against Government Efforts To Game The Mootness Doctrine.

Amici have shared experiences where courts have given government defendants far too much

[5] This exception, however, is not a panacea. IFS Br. at 8-13 (discussing the relatively modest benefits, as modernly applied, of this exception).

benefit of the doubt when they allege mootness. The Ninth Circuit's ruling is yet another note in this song. Granting the writ here would provide an opportunity for the Court to scupper this trend.

Amicus Institute for Free Speech typically brings political speech and association cases. *See* IFS Br. at 7 ("Plaintiffs bring political speech and association cases because they are being silenced. Sometimes directly. Sometimes indirectly, because speaking would trigger onerous obligations. And sometimes because of a credible fear of official retaliation") (internal citations omitted). Often, but not always, these cases involve an upcoming election, and a plaintiff has a very short and rushed time period in which to have its claims heard before election day comes and goes. *Emineth v. Jaeger*, 901 F. Supp. 2d 1138, 1142 (D.N.D. 2012) ("Elections are, by nature, time sensitive and finite. While there will be other elections, no future election will be *this* election") (emphasis in original).

These cases, then, often live or die upon exceptions to general mootness, such as the "capable of repetition, yet evading review" doctrine. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735-736 (2008). But on appeal, courts often narrowly read complaints filed shortly before an election to preclude a plaintiff from continuing her quest for relief once the election has passed; even if the complaint pleads an intent to remain involved in future elections. *See* IFS Br. at 8-13 (describing that the capable-of-repetition exception, in actual practice, "makes it impossible for litigants with an interest in *a particular* election to obtain final relief; only long-term, repeat players need apply") (emphasis in original). Thus, a ruling that a Rule 54(c) statement is sufficient to invoke the

nominal damages exception, particularly if that outcome is paired with relief for Petitioners in the *Uzuegbunam* case, would provide a sturdy judicial backstop to the federal docket for future election-related cases.

Just this year, *Amicus* IFS represented a client before the Ninth Circuit that ran afoul of such a narrow reading of a complaint's indications of future electoral activity. That case involved a challenge to the on-communication disclaimers imposed by a San Francisco law. S.F. Campaign & Gov'tl Conduct Code § 1.161(a). Among other things, this law imposed upon the plaintiffs' political ads a verbal disclaimer "roughly twenty-eight seconds" long when "read in a clearly spoken manner and in a pitch and tone substantially similar to the rest of a typical television advertisement." *Yes on Prop. B v. City and Cnty. of S.F.*, 440 F. Supp. 3d 1049, 1053 (N.D. Cal. 2020) ("*YPB I*") (citation and quotation marks omitted).

The plaintiffs challenged these burdens as unconstitutional, both facially and as-applied, in advance of San Francisco's March 2020 municipal elections. The verified complaint filed in district court contained a prayer for "such further and additional relief as the Court may deem just and proper," V. Cmplt. at 10, *YPB I*, 440 F. Supp. 3d 1049, ECF No. 1 (N.D. Cal. Jan. 28, 2020), and also averred that the treasurer "anticipate[d] being active in the City's November 2020 election, either through the Committee or a different committee." *Id.* at 4, ¶ 4. The plaintiffs supplemented this pleading with an affidavit from the treasurer proclaiming an intent "to participate in future ballot measure and other campaigns in San Francisco…particularly" the November 2020 elections "either with this Committee

or with another," Decl. of Todd David at 6, ¶ 35, *YPB I*, 440 F. Supp. 3d 1049, ECF No. 5-5 (N.D. Cal. Jan. 28, 2020). [6] The plaintiffs' request for a preliminary injunction was denied by the district court. *YPB I*, 440 F. Supp. 3d at 1062.

Meanwhile, the March 2020 election came and went, and the case was fully briefed on appeal. However, the government argued the case was mooted by the passage of the March election, and the court of appeals agreed, finding that while both appellants "each indicated they intend to participate in future elections, including the November 2020 election," *Yes on Prop. B v. City and Cnty. of S.F.*, 2020 U.S. App. LEXIS 33210 at *2 (9th Cir. Oct. 21, 2020) (unpublished) ("*YPB II*"), their statements were not precise enough about those activities to remain within the capable of repetition, yet evading review exception. *YPB II* at *3. Under the rule sought by Petitioners here, such a narrow reading of the complaint would have been unnecessary and the plaintiffs' Rule 54(c) statement and its inherent invocation of a request for nominal damages would have provided sufficient cause to reach the merits.

Amicus faced a similar issue in another of its cases, brought shortly before the 2014 election. There,

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[6] These sentiments were also amplified by the plaintiffs in a statement to the media from the treasurer after an appeal was taken. Bay City Beacon Staff, "Yes on Prop B Campaign Appeals District Court's Ruling," The Bay City Beacon, Apr. 16, 2020 ("'There are still many issues the Prop B Committee cares deeply about and it plans to be active in November's election and beyond'"); *Davis*, 554 U.S. at 736 ("satisfied that [the] facial challenge [was] not moot" upon a litigant's statement to the media regarding his future activity shortly before the filing of his U.S. Supreme Court reply brief).

it represented the Independence Institute in a First Amendment challenge to the reporting provisions of the Bipartisan Campaign Reform Act ("BCRA") as it applied to ads run shortly before an election which mentioned a candidate for office, but did not signal support or opposition to that candidate's election campaign. Specifically, the Independence Institute sought to run a radio advertisement in support of a proposed federal criminal justice reform, which concluded by asking viewers to call both of Colorado's U.S. senators and urge them to support the measure. *Indep. Inst. v. Fed. Election Comm'n*, 216 F. Supp. 3d 176, 180-181 (D.D.C. 2016) (three-judge court); *aff'd* 580 U.S. __; 137 S. Ct. 1204 (2017). Because one of those senators, Mark Udall, was seeking re-election in 2014, mentioning his name converted the ad into an "electioneering communication," with attendant reporting and donor disclosure obligations. 52 U.S.C. § 30104(f). The Institute's case was unable to be litigated before the passage of the November 2014 elections, and its case was very nearly derailed for failure to plead the future with specificity. *Indep. Inst.*, 216 F. Supp. 3d at 182-185 (discussing narrowness of mootness exception in context of First Amendment challenge to federal campaign finance law). Only a fluke of the 2016 election calendar, "because the other Senator referenced in the advertisement—Senator Michael Bennet—is up for election this Fall…and [that] the Institute made clear at oral argument that it still desires to run this particular advertisement during the 2016 general election cycle…the case" was found "not moot." *Id.* at 185. Had Senator Bennet chosen to retire instead of seek re-election, the case would have been dismissed

and the merits gone unaddressed until, one supposes, sometime right about now. *Id*. at 185.[7]

Of course, at least in election cases, a plaintiff has some idea that it must allege future political activity to invoke the capable-of-repetition exception. But "this arrangement fails when it is impossible to predict when or how a constitutional injury will recur, rendering the capable-of-repetition exception illusory." IFS Br. at 10. As *Amicus* IFS recounted in its brief in the *Uzuegbunam* case, IFS Br. at 10-11, that is precisely what happened to the Libertarian National Committee ("LNC") when it challenged the federal limit on campaign contributions as they applied to testamentary bequests:

> Federal law limits the amount of money a political party may receive from an individual, even a deceased one who cannot expect future political favors on account of her bequest, and the LNC sought to receive the entire bequest at once. As the litigation wore on, the bequest, which was being collected from the estate at the maximum annual limit under then-current law, was exhausted before a court could hear the merits, even under the expedited review process provided by the Federal Election Campaign Act. 52 U.S.C. § 30110. The case was found to be moot in spite of the LNC's assurances that it would solicit large

[7] "[N]either of the Colorado Senators that its advertisement targets will be up for election before the 2020 primary season, and…the Act will not apply to this advertisement for roughly another four years. Four years would provide the Institute with sufficient time to litigate its challenge before the next election."

> bequests in the future and would seek to receive future large testamentary gifts all at once. *Libertarian Nat'l Comm. v. Fed. Election Comm'n*, 2014 U.S. App. LEXIS 25108 (D.C. Cir. 2014) (*en banc*).
>
> Five years later, the LNC received another bequest, was forced to return to federal court and duplicate its prior efforts, and finally obtained a binding decision that resolved the First Amendment questions in that case. *Libertarian Nat'l Comm. v. Fed. Election Comm'n*, 924 F.3d 533 (D.C. Cir. 2019) (*en banc*). The LNC's situation in 2014 should be an aberrant one, and it would be if Petitioners prevail and future plaintiffs seek nominal damages.

In these cases, of course, the harm came from courts reading complaints or the capable-of-repetition exception narrowly, but in good faith—albeit with some adverse consequences for the orderly development of the law. But, as Petitioners' own experience suggests, governmental defendants can game the mootness doctrine for their own purposes. [8]

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[8] Despite the routine accordance of a presumption of good faith to government defendants, they often act in a fashion that suggests this affordance is too swiftly given. *In re Validation Proceeding…*, 366 Ore. 295, 331 (Or. 2020) ("[A]s the county concedes, and we agree, the county's expenditure limits unambiguously violate the First Amendment. *Buckley* held that the government cannot restrict independent expenditures by individuals, *Citizens United* held [the same for]…corporations and unions…The county's ordinance restricts both") (internal

That event is neither harmless nor hypothetical. Both State and federal defendants, provided the opportunity to do so, will strategically moot difficult litigation from reaching final judgment, as clients represented by *Amicus* CAIR have regularly experienced.

Bahia Amawi is a speech pathologist who worked with the Pflugerville Independent School District conducting speech therapy and early childhood evaluations for nine years. In 2018, Ms. Amawi was prevented from continuing to work with Pflugerville because she boycotted Israel, and Texas had signed a law ("Anti-BDS Law") [9] preventing state and local governments from contracting with those who participated in such boycotts. With support from *Amicus* CAIR, Ms. Amawi challenged this law as unconstitutional and the Western District of Texas agreed: "Plaintiffs' BDS boycotts are not only inherently expressive, but as a form of expression on a public issue, rest on the highest rung of the hierarchy of First Amendment values." *Amawi v.*

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citations omitted); *United States v. Yonkers*, 592 F. Supp. 570, 577 (S.D.N.Y. 1984) (Congress passed a unicameral veto even though it "knew well that the technique was of questionable validity"); *S. Dakota v. Wayfair, Inc.*, 229 F. Supp. 3d 1026, 1036 (D.S.D. 2017) (noting state intentionally passed unconstitutional tax as a test case to overturn Supreme Court precedent); *VFW John O'Connor Post # 4833 v. Santa Rosa Cnty.*, 506 F. Supp. 2d 1079, 1093 (N.D. Fla. 2007) ("[T]he Board would have enacted an ordinance banning such beverages within 2500 feet of schools and churches even had it known that the waiver provision would be declared unconstitutional").

[9] The Texas statute, and others like it, is commonly referred to as an "anti-BDS" law, for "anti-boycotts, divestment, and sanctions."

Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 745 (W.D. Tex. 2019) (cleaned up), *vacated as moot*, 956 F.3d 816 (5th Cir. 2020).

Not two weeks later, the Texas state legislature amended the Anti-BDS Law. The new law did nothing to change the law's unconstitutionality. It instead excluded sole proprietorships, like Ms. Amawi's, and small companies from the law. It otherwise continued to apply, in the same way and with full force, against others. This may have been because large companies, like Airbnb, were perceived to be less likely to challenge Texas's law prohibiting unpopular speech. *See* Elizabeth Findell, *Airbnb reverses policy that landed it on Texas's anti-Israel list,* Austin-American Statesman (Apr. 9. 2019).[10]

Once the amendment to the Anti-BDS Law was passed, Texas moved to dismiss *Amawi* the next day and claimed mootness. The district court rejected Texas's claims of mootness, holding that the Amendment "does not ameliorate the constitutional defects the Court identified in its order granting Plaintiffs preliminary injunctive relief. All it does is limit its reach to fewer companies." *Amawi v. Pflugerville Indep. Sch. Dist.*, 2019 U.S. Dist. LEXIS 177646 at *22 (W.D. Tx. July 23, 2019). "Accordingly, Defendants have neither argued nor produced evidence showing that the amendments to [the Anti-BDS Law] completely and irrevocably eradicated the effects of the constitutional violations." *Id.* (quotation marks omitted). "Plaintiffs still have standing to challenge the statute, at the very least, 'not because

[10] *Available at:* https://www.statesman.com/news/20190409/airbnb-reverses-policy-that-landed-it-on-texas-anti-israel-list.

[Plaintiffs'] own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Id.* (citing *Broadrick*, 413 U.S. at 612) (brackets in original).

But the Fifth Circuit reversed. "This appeal is moot because…Texas enacted final legislation that exempts sole proprietors from the 'No Boycott of Israel' certification requirement. The plaintiffs are all sole proprietors. Because they are no longer affected by the legislation, they lack a personal stake in the outcome of this litigation." *Amawi v. Paxton*, 956 F.3d 816, 819 (5th Cir. 2020). The Fifth Circuit gave no explanation in response to the points made by the district court. All that mattered was, with the presumption of good faith, it was unlikely that Texas would reimpose the Anti-BDS Law on this particular set of plaintiffs. *See id.* at 821.

State governments are not the only ones to rely on mootness to avoid constitutional scrutiny. The federal government uses mootness as a defense in cases defending the constitutionality of its terror watchlist and no-fly list. The government, often without sufficient evidence or legitimacy, treats more than a million people as "known or suspected terrorists" and places them on watchlists and no-fly lists, without their knowledge, and always without due process. Their placement is then shared with their employers, banks and financial institutions, foreign governments, and law enforcement. Whether their placement is justified, and it virtually never is, these Americans' lives are irrefutably changed for the worse. So, when they bring their constitutional challenges to court, the government invariably

responds by finding ways to avoid making meaningful improvements and instead plucking plaintiffs from its lists as they seek redress in the courts—thereby attempting to moot their claims, with varying success.

Yonas Fikre, a businessman and American citizen, sued the government because of his wrongful placement on the no-fly list. His placement on that watchlist led him to be tortured by a foreign country and exiled from the United States for several years. *See Fikre v. Wray*, 2020 U.S. Dist. LEXIS 145667 at *25 (D. Or. Aug. 12, 2020). In response to his constitutional challenge, the government removed Mr. Fikre from the no-fly list and even told him they did so, without providing any explanation. The government then swiftly moved to dismiss his complaint, and the district court accordingly dismissed Fikre's due process claims as moot thereafter. *Fikre v. Fed. Bureau of Invest.*, 2016 U.S. Dist. LEXIS 133307 (D. Or. Sep. 28, 2016) at *48-49; Judgment, *Fikre v. Fed. Bureau of Invest., et. al*, Case No. 13-899, ECF No. 108 (D. Or. Oct. 24, 2016).

But the Ninth Circuit reversed. *Fikre v. Fed. Bureau of Invest., et al.*, 904 F.3d 1033 (9th Cir. 2018). The Ninth Circuit held the government had not met its burden in proving mootness because the "FBI's decision to restore Fikre's flying privileges is an individualized determination untethered to any explanation or change in policy, much less an abiding change in policy." *Id.* at 1039-1040. The "mere announcement that Fikre was removed from the list f[ell] short of meeting the government's burden" of

proving mootness. *Id*. at 1039.[11] On remand, the government defendants tried again, disclosing a possible change to Plaintiff's terrorism watchlist status as well. *See* Mot. for Protective Order at 2, *Fikre*, ECF No. 131 (D. Or. June 19, 2019). This time the district court found Plaintiffs' travel-related due process claims as moot, though it reached the merits of (and rejected) Mr. Fikre's stigma-related due process claims. Minutes of Proceedings, ECF No. 141 (D. Or. Nov. 14, 2019); *Fikre*, 2020 U.S. Dist. LEXIS 145667. That case is now again on appeal. *Fikre v. Fed. Bureau of Invest., et al.*, Case No. 20-35904 (9th Cir. 2020).

Mr. Fikre's experience is just an example of broader practice. In other cases, the evidence has indicated that the only effective way to eliminate watchlist-related harms is to file suit against it. *See, e.g.*, Mem. in Opp'n, *Elhady v. Kable*, Case No. 16-375, ECF No. 313 (E.D. Va. Mar. 25, 2019) (recounting how many Plaintiffs' watchlist experiences went away after bringing suit). And the federal government has argued that such elimination of harms precludes those plaintiffs from having any standing. Reply Mem. at 18-27, *Elhady v. Kable*, ECF No. 316 (E.D. Va. Apr. 1, 2019). Indeed, right now, the Fourth Circuit is in the process of deciding the effect on mootness of yet another case where the federal government removed a person from the no-fly list in response to a legal challenge, and then argued that this action mooted the individual's claims. *See*

[11] In a similar situation, a different plaintiff's case was similarly found not moot because he remained on the broader terrorism watchlist even as he was removed from the no-fly list. *Tarhuni v. Sessions*, 692 F. App'x 477 (9th Cir. 2017) (unpublished).

generally Long v. Pekoske, Case No. 20-1406 (4th Cir. 2020).

* * *

The majority of circuits in the Nation allow a plea for nominal damages to serve as an exception to the mootness doctrine. In *Uzuegbunam*, this simple rule should be applied nationwide, which will allow cases such as those recounted *supra* to be litigated to judgment if they plead nominal damages, rather than being mooted by the conclusion of an election cycle or the strategic gamesmanship of a government defendant. Such a ruling should be paired with a decision for Petitioners in this case: making plain that there is no need for magical incantations in a prayer for relief, beyond a general Rule 54(c) statement, to ensure that litigants seeking redress for violations of fundamental freedoms are protected by the *Uzuegbunam* decision.

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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