

**A DOLLAR FOR YOUR THOUGHTS:  
DETERMINING WHETHER NOMINAL DAMAGES  
PREVENT AN OTHERWISE MOOT CASE FROM  
BEING AN ADVISORY OPINION**

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*This Note examines whether nominal damages should sustain an otherwise moot constitutional claim. A majority of circuit courts have held that a lone claim for nominal damages is sufficient. A minority of circuit courts have determined that nominal damages are insufficient because there is no practical effect in determining such a case. The courts in the minority analogize nominal damages to declaratory judgments and justify their rulings on the basis of judicial economy. This Note proposes that the minority rule is impermissible under current precedent from the U.S. Supreme Court. However, this Note also proposes that the majority rule be adjusted slightly to address the concerns and criticisms of the minority rule. This Note argues that courts should scrutinize the lone claim for nominal damages and require that plaintiffs allege a specific incident of constitutional deprivation to ensure that there is an ongoing case and controversy. Finally, this Note suggests that the Supreme Court provide more guidance to federal courts on the doctrine of mootness.*

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#### INTRODUCTION

In a claim for nominal damages,<sup>1</sup> the value of a dollar is priceless. Litigation will likely cost hundreds of thousands of dollars and require the dedication of precious judicial resources.<sup>2</sup> But to the plaintiff, the dollar has no monetary value; rather, it is a symbolic gesture that society values his or her absolute rights, such as constitutional rights.<sup>3</sup> Because nominal damages may be sought when there is no other available remedy, they provide plaintiffs the opportunity to request a judicial check on executive and

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1. Nominal damages are a trivial sum, such as one dollar, that is awarded to the plaintiff when the defendant has violated the plaintiff's legal rights but the plaintiff is unable to prove damages under another measure. *Tatum v. Morton*, 386 F. Supp. 1308, 1313 (D.D.C. 1974); DAN B. DOBBS & CAPRICE L. ROBERTS, *LAW OF REMEDIES* 225 (3d ed. 2018).

2. See generally EMERY G. LEE III & THOMAS E. WILLGING, *FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS* (2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv1.pdf> [<https://perma.cc/WM3B-BW7Q>] (presenting a multivariate analysis of litigation costs in 2008).

3. See *infra* notes 40–47 and accompanying text.

legislative power. However, the judiciary does not have unlimited power and must avoid issuing impermissible advisory opinions.<sup>4</sup> When a plaintiff requests only nominal damages, the judiciary is in a precarious position and must balance the vindication of absolute rights, the risk of running afoul of its constitutionally limited powers, and concerns about its limited resources.<sup>5</sup>

The U.S. Supreme Court has not yet addressed whether a sole remaining claim for nominal damages can save an otherwise moot constitutional claim.<sup>6</sup> This issue may arise when the cause for a plaintiff's complaint is no longer an ongoing issue, such as where a challenged statute is repealed.<sup>7</sup> Many federal appellate courts have considered this issue, but they have not agreed on how to resolve it. A majority of circuit courts have held that nominal damages will prevent a moot constitutional claim from being dismissed.<sup>8</sup> Recently, a small number of courts have adopted an opposing rule, which would potentially bar plaintiffs from obtaining vindication for violations of their constitutional rights.<sup>9</sup>

There are two apparent reasons this conflict has developed. First, there are differing interpretations of nominal damages: they may be seen either as a retrospective remedy to vindicate constitutional deprivations<sup>10</sup> or merely as a vehicle for declaratory judgments.<sup>11</sup> Second, this conflict likely developed because the Supreme Court has failed to clearly define the boundary between prudential and constitutional mootness.<sup>12</sup>

This Note argues that nominal damages are more than just a vehicle for declaratory judgments due to their special purpose in constitutional law.<sup>13</sup> This Note proposes a flexible standard whereby the courts should take a second look to scrutinize claims for nominal damages to ensure they are sufficiently pled.<sup>14</sup> This standard should be applied in determining whether a claim for nominal damages may stand and adjusts the majority rule to address the legitimate concerns of the courts that apply the minority rule.<sup>15</sup>

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4. See *infra* note 75 and accompanying text.

5. See Daniel Harris Brean, *Ending Unreasonable Royalties: Why Nominal Damages Are Adequate to Compensate Patent Assertion Entities for Infringement*, 39 VT. L. REV. 867, 880 n.36 (2015).

6. See *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2004) (McConnell, J., concurring).

7. *Id.*

8. See *infra* note 143 (collecting pertinent circuit court cases).

9. The Eleventh and Eighth Circuits and district courts in the Seventh and First Circuits have adopted this rule. See *infra* Part II.B.

10. Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 876 (2016).

11. See *Morrison v. Bd. of Educ.*, 521 F.3d 602, 610 (6th Cir. 2008); *Freedom from Religion Found., Inc. v. Franklin County*, 133 F. Supp. 3d 1154, 1158 (S.D. Ind. 2015) ("Under Seventh Circuit case law, nominal damages are more akin to declaratory relief, and should be subject to the same justiciability principles.").

12. See *infra* Part III.C.

13. See *infra* Part I.A.4.

14. See *infra* Part III.

15. See *infra* Part III.B.

Finally, this Note provides guidance on how the Supreme Court could clarify the prudential and constitutional aspects of the mootness doctrine.

Part I of this Note provides the background of the relevant legal doctrines, nominal damages, and mootness. First, it gives a brief overview of damages, declaratory judgments, and injunctive relief. It then defines nominal damages generally and in the context of constitutional violations. Finally, Part I examines the requirements and purposes of mootness and discusses perspectives on the constitutional versus prudential nature of mootness. Part II analyzes the majority and minority rules. Part III proposes that the majority rule should be adjusted to a flexible, yet more exacting, standard. In conclusion, Part III then suggests that this conflict developed because of a lack of guidance on the doctrine of mootness and outlines different models the Supreme Court could adopt.

## I. AN OVERVIEW OF REMEDIES AND FEDERAL JURISDICTION

To understand how this conflict developed, it is necessary to understand nominal damages as a remedy as well as mootness as a requirement of federal jurisdiction. Part I.A overviews remedies and explains the special function of nominal damages. Part I.B gives a brief overview of federal jurisdiction and explains mootness in depth.

### A. Remedies

Lawsuits are typically brought when a plaintiff has suffered a legally recognized harm or a violation of his or her legal rights. Once the court has determined that the plaintiff's substantive rights have been violated, or will be violated, it must determine how to remedy that violation. A remedy is the means by which rights are enforced or violations of rights are prevented, redressed, or compensated.<sup>16</sup> Part I.A.1 provides a brief overview of compensatory damages.<sup>17</sup> Part I.A.2 explains injunctive and declaratory relief. Part I.A.3 then highlights the unique nature of nominal damages as a remedy that combines aspects of damages and declaratory judgment. Finally, Part I.A.4 describes the function of nominal damages in protecting individuals' constitutional rights.

#### 1. Compensatory Damages

It is a "cardinal principal . . . in Anglo-American law" that damages compensate the plaintiff for the injury caused by the defendant's breach of

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16. *Remedy*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "remedy" as "[t]he means of enforcing a right or preventing or redressing a wrong").

17. Punitive and other types of noncompensatory damages are outside the scope of this Note and will not be discussed. Nominal damages are discussed separately from compensatory damages because they serve a distinct function, separate from compensation. See *infra* Part I.B.

duty.<sup>18</sup> However, different categories of damages serve distinct purposes.<sup>19</sup> The Restatement (Second) of Torts § 901 describes the purpose of damages as to: “(a) give compensation, indemnity or restitution for harms; (b) to determine rights; (c) punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help.”<sup>20</sup>

The purpose of compensatory damages is to make the victim whole again—to make it as if the harm never happened.<sup>21</sup> These damages are not intended to be a windfall for the plaintiff, but rather to indemnify the plaintiff for his or her harm or loss that the defendant’s wrongful conduct caused.<sup>22</sup> Compensable harm includes not just “out-of-pocket loss and other monetary harms, but also such injuries as ‘impairment of reputation . . . , personal humiliation, and mental anguish and suffering.’”<sup>23</sup>

## 2. Injunctive and Declaratory Relief

Injunctive relief serves a different function than damages. Injunctions cannot be ordered to redress past wrongs but rather offer prospective relief.<sup>24</sup> They prevent future violations of law and future harm, whereas damages, generally, compensate for harm that has already occurred. When the court orders injunctive relief, it directs the defendant to take or to refrain from taking some particular action.<sup>25</sup> If the defendant fails to comply, he or she may be held in contempt of court.<sup>26</sup>

Congress enacted the Federal Declaratory Judgment Act,<sup>27</sup> which authorizes courts to issue declaratory judgments, as an alternative remedy to injunctive relief.<sup>28</sup> Congress intended for plaintiffs to seek declaratory relief

18. 4 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 25.1 (3d ed. 2007); *see also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986); Carey v. Piphus, 435 U.S. 247, 254–55 (1978); RESTATEMENT (SECOND) OF TORTS § 901(a) cmt. a, § 903(a) cmt. a. (AM. LAW INST. 1979).

19. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Cooper Indus. v. Leatherman Tool Grp. Inc., 532 U.S. 424, 432 (2001); DOBBS & ROBERTS, *supra* note 1, at 3–4, 215–17 (discussing the various compensatory and noncompensatory purposes of damages).

20. RESTATEMENT (SECOND) OF TORTS § 901(a) (AM. LAW INST. 1979).

21. *See* United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958); *see also* Chronister Oil Co. v. Unocal Ref. & Mktg., 34 F.3d 462, 464 (7th Cir. 1994) (holding that the point of compensatory damages is “to put the victim where he would have been had the breach or tort not taken place”).

22. *See* State Farm, 538 U.S. at 416.

23. *Stachura*, 477 U.S. at 307 (alteration in original) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

24. *See* Lacassagne v. Chapuis, 144 U.S. 119, 124 (1892).

25. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 235 (3d ed. 2002).

26. *Id.*

27. 28 U.S.C. § 2201 (2012).

28. *See* Steffel v. Thompson, 415 U.S. 452, 467 (1974) (“The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy.” (quoting Perez v. Ledesma, 401 U.S. 82, 111–15 (1971) (Brennan, J., concurring))).

to test the constitutionality of statutes without fear of prosecution.<sup>29</sup> Without this form of relief, testing such constitutionality might require the party to violate the statute and present this argument as a defense.<sup>30</sup> In doing so, the plaintiff would risk losing the argument and being convicted or otherwise penalized.

Declaratory judgments allow courts to resolve disputes through a legal determination of parties' rights, but the court does not enter a direct order enforcing those rights.<sup>31</sup> The purpose of declaratory judgments is to clarify legal relationships before rights have been violated.<sup>32</sup> Although there is no direct enforceable order, declaratory relief helps resolve legal uncertainty and prevents harm from occurring.<sup>33</sup> For example, a potential defendant in a patent infringement suit might seek a declaratory judgment that a patent is invalid, unenforceable, or not infringed.<sup>34</sup> Therefore, the parties are able to guide their behavior depending on the judicial determination with respect to the patent.

The Supreme Court has held that declaratory judgments are an improper remedy in the absence of an ongoing case or controversy.<sup>35</sup> If there is no controversy, this remedy runs afoul of the prohibition on advisory opinions because courts would be academically advising on the law.<sup>36</sup> Congress did not intend for this remedy to be used by those "merely curious or dubious as to the true state of the law."<sup>37</sup> In determining whether an action for declaratory judgment meets the case-or-controversy requirement, the Supreme Court requires "that the dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character.'"<sup>38</sup>

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29. *See* *Bykofsky v. Middletown*, 389 F. Supp. 836, 846 (M.D. Pa. 1975).

30. *See* LAYCOCK, *supra* note 25, at 523 (discussing declaratory judgment as an option to find out what a party's rights were without incurring the risk of additional penalties by violating the statute). Sometimes the same can be accomplished by enjoining enforcement of the statute. *See* DOBBS & ROBERTS, *supra* note 1, at 7. However, injunctive relief, unlike declaratory judgment, requires a showing of irreparable harm, which makes it more difficult to show that this remedy is appropriate. *See* LAYCOCK, *supra* note 25, at 517; *see also* *Steffel v. Thompson*, 415 U.S. 452, 466 (1972) ("Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable . . .").

31. *See* LAYCOCK, *supra* note 25, at 3–4.

32. *See* *Alsager v. Dist. Court*, 384 F. Supp. 643, 648 (S.D. Iowa 1974); *Nat'l Union Fire Ins. Co. v. Lippert Bros.*, 233 F. Supp. 650, 656 (D. Neb. 1964).

33. DOBBS & ROBERTS, *supra* note 1, at 7.

34. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007).

35. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937).

36. *See id.* at 241.

37. *Fair v. Adams*, 233 F. Supp. 310, 312 (N.D. Fla. 1964).

38. *MedImmune*, 549 U.S. at 127 (alteration in original) (quoting *Haworth*, 300 U.S. at 240–41).

### 3. Nominal Damages: Why Bother Suing for One Dollar?

Lawsuits are expensive, so suing for one dollar begs the question, why bother?<sup>39</sup> Taylor Swift, an American pop singer, was awarded one dollar in a suit for sexual assault. Her attorney told the jury that although it was only a “single symbolic dollar, the value [of that dollar] is immeasurable to all women in this situation.”<sup>40</sup> She was widely praised for standing up for women and taking a stand against her assailant.<sup>41</sup>

Nominal damages are not compensatory, but they serve a special function in the American legal system.<sup>42</sup> Nominal damages are a trivial sum, such as one dollar, which are awarded to the plaintiff when the defendant has violated the plaintiff’s legal rights, but the plaintiff is unable to prove damages under another measure.<sup>43</sup> Nominal damages are not appropriate where damages are a required element of a cause of action, such as in an action for negligence.<sup>44</sup> Nominal damages are not meant to be reparative in compensation, but they “publicly affirm that the defendant violated the plaintiff’s rights”<sup>45</sup> and can be sought so that the plaintiff obtains an authoritative judicial determination of the parties’ legal rights.<sup>46</sup> Additionally, courts often award nominal damages to plaintiffs who cannot show that they suffered an actual injury, but who can show that they were deprived of “certain ‘absolute’ rights.”<sup>47</sup>

Nominal damages can be considered a precursor to the previously impermissible declaratory relief remedy later established by statute.<sup>48</sup> Central to this conflict, some courts consider nominal damages a mere

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39. See, e.g., *Moore v. Liszewski*, 838 F.3d 877, 879 (7th Cir. 2016) (“If the plaintiff goes around bragging that he won his suit, and is asked what exactly he won, and replies ‘\$1 dollar,’ he’ll be laughed at.”); *Azimi v. Jordan’s Meats, Inc.*, 456 F.3d 228, 237 (1st Cir. 2006) (“One might ask why the parties should care on appeal about whether a nominal damages award, for as little as one dollar, should be ordered.”).

40. See Phoebe Lett, Opinion, *Taylor Swift’s Priceless Dollar*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/opinion/taylor-swift-groping-assault.html> [<https://perma.cc/2A8E-UGW6>].

41. *Time Magazine* recognized Taylor Swift in its 2017 Person of the Year issue as one of the “Silence Breakers” who inspired woman to speak out about harassment. See Stephanie Zacharek et al., *The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/Q9UF-UQZP>] (last visited Oct. 4, 2018).

42. See LAYCOCK, *supra* note 25, at 561 (discussing the special function of nominal damages in constitutional law).

43. See *Tatum v. Morton*, 386 F. Supp. 1308, 1313 (D.D.C. 1974); DOBBS & ROBERTS, *supra* note 1, at 225.

44. DOBBS & ROBERTS, *supra* note 1, at 225.

45. See Gregory C. Keating, *Is There Really No Liability Without Fault?: A Critique of Goldberg & Zipursky*, 85 FORDHAM L. REV. RES GESTAE 24, 32 n.47 (2017).

46. See *Morrison v. Bd. of Educ.*, 521 F.3d 602, 610–11 (6th Cir. 2008) (noting that nominal damages only have a declaratory effect); see also LAYCOCK, *supra* note 25, at 561 (describing the declaratory function of nominal damages where there is no available formal declaratory relief).

47. *Carey v. Phipus*, 435 U.S. 247, 266 (1978); see *infra* Part I.A.4.

48. See DOBBS & ROBERTS, *supra* note 1, at 226 (discussing how claims for nominal damages may have been used to get issues before a court before declaratory judgments were a recognized remedy).

vehicle for declaratory judgment.<sup>49</sup> One court stated that nominal damages have “only declaratory effect and do not otherwise alter the legal rights or obligations of the parties . . . . [T]hey can sometimes constitute effectual relief, *but only with respect to future dealings* between the parties.”<sup>50</sup>

However, a plaintiff’s ability to bring a claim for nominal damages when declaratory relief is impermissible highlights an important distinction between nominal damages and declaratory relief.<sup>51</sup> Courts award nominal damages to vindicate plaintiffs for past harm, while declaratory relief provides a prospective determination of rights before harm has occurred.<sup>52</sup> Nominal damages are most appropriate when there has been “a one-off event that affected [the plaintiff] in the past and will not (under modern standing and ripeness decisions) support a claim for injunctive or declaratory relief.”<sup>53</sup> For example, a student who has graduated from school or a prisoner who has been released from prison will no longer have a live claim for injunctive or declaratory relief against his or her school or prison respectively,<sup>54</sup> but he or she may still have a claim for nominal damages. Despite this difference, nominal damages and declaratory relief may have the same practical effect or outcome—a judicial determination of the parties’ rights.<sup>55</sup>

Nominal damages can also serve as a vehicle for nonpecuniary damages and attorneys’ fees.<sup>56</sup> Courts can award noneconomic monetary damages, such as those for pain and suffering or punitive damages, in conjunction with nominal damages.<sup>57</sup> Additionally, a plaintiff who is awarded nominal damages is considered the prevailing party and may be eligible to receive

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49. See *Morrison*, 521 F.3d at 610; *Freedom from Religion Found., Inc. v. Franklin County*, 133 F. Supp. 3d 1154, 1158 (S.D. Ind. 2015) (“Under Seventh Circuit case law, nominal damages are more akin to declaratory relief, and should be subject to the same justiciability principles.”).

50. *Morrison*, 521 F.3d at 610–11 (alterations in original) (quoting *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1267–68 (10th Cir. 2004) (McConnell, J., concurring)).

51. See LAYCOCK, *supra* note 25, at 561 (describing instances where nominal damages can be sought but declaratory judgment is unavailable); see also DOBBS & ROBERTS, *supra* note 1, at 7 (“The chief problem in obtaining declaratory relief lies in the rules of justiciability: rules that courts will not issue advisory opinions, decide moot cases or those that are not ripe, or deal in any dispute that does not count as a case or controversy.”).

52. See LAYCOCK, *supra* note 25, at 561 (describing instances where nominal damages can be sought but declaratory judgment is unavailable).

53. James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1606 (2011).

54. Such an individual may be able to bring his or her case if the claim falls within an exception to mootness, such as that for class certification. See *supra* Part I.B.2.b for a discussion about the exceptions to the mootness doctrine.

55. See *Moore v. Liszewski*, 838 F.3d 877, 879 (7th Cir. 2016) (noting that an award for nominal damages is not functionally an award for damages at all); *Butler v. Dowd*, 979 F.2d 661, 673 (8th Cir. 1992) (noting that nominal damages “amount[] to an implicit declaration of the same things that plaintiffs are requesting in their motion for declaratory relief”).

56. DOBBS & ROBERTS, *supra* note 1, at 226.

57. See *id.* at 225–26. Not all courts allow punitive damages to be awarded in conjunction with an award of nominal damages. See LAYCOCK, *supra* note 25, at 737–38 for a discussion of the split among courts.

reasonable attorneys' fees under certain statutes.<sup>58</sup> Because there is a chance of being awarded attorneys' fees, a plaintiff may bring a claim for nominal damages and hope to shift the cost burden to the defendant.<sup>59</sup> However, the court's award of nominal damages does not automatically enable the plaintiff to recover reasonable attorneys' fees as courts may still determine reasonable attorneys' fees to be zero.<sup>60</sup>

A plaintiff may also bring a claim for nominal damages because he or she is motivated to change the law or challenge the constitutionality of the practice or policy. For example, awards of nominal damages can "prompt a municipality to change its policies."<sup>61</sup> In cases where the plaintiff is not seeking monetary relief, but instead seeks social change, the case can be characterized as public litigation or being brought by "non-Hohfeldian plaintiffs."<sup>62</sup> These are ideological plaintiffs that bring claims to enforce "legal principles that touch others as directly as themselves and that are valued for moral or political reasons independent of economic interests."<sup>63</sup>

#### 4. Nominal Damages as a Constitutional Remedy

Nominal damages serve a special purpose in the protection of constitutional rights because they may be the only available remedy to the plaintiff for a constitutional violation.<sup>64</sup> Supreme Court precedent "makes clear that nominal 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."<sup>65</sup> Therefore, nominal damages help individuals and courts protect constitutional rights and are an important remedy when a plaintiff can establish a violation of a

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58. Most circuit courts award reasonable attorneys' fees in a claim for nominal damages. See Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 793 nn.235–36 (2012).

59. *Id.*

60. See *Farrar v. Hobby*, 506 U.S. 103, 117 (1992) (if the "victory is purely technical or de minimis, a district court need not go through the usual complexities involved in calculating attorney's fees").

61. DiSarro, *supra* note 58, at 743, 769 ("[C]ursory review of annual reports prepared and distributed by municipal law departments reveals that municipalities measure themselves by the success rate in Section 1983 litigation and the aggregate amount of damages awarded against their agents."); see, e.g., *Amato v. City of Saratoga Springs*, 170 F.3d 311, 318 (2d Cir. 1999) (observing that nominal damage awards could "encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue"); *Cadiz v. Kruger*, No. 06-CV-5463, 2007 WL 4293976, at \*10 (N.D. Ill. Nov. 29, 2007) (noting that a nominal-damages verdict against the city could provide a greater incentive for the city to make a change than a damages award against individual officers because the city could dismiss the latter as the conduct of rogue employees).

62. Non-Hohfeldian plaintiffs are those that "invoke the judicial power to redress injuries not easily definable in terms of personal, financial loss or other harms actionable at common law." Richard H. Fallon, Jr., *Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 3–4 (1984).

63. *Id.*

64. See *Carey v. Phipus*, 435 U.S. 247, 266 (1978).

65. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986).

constitutional right but is unable to demonstrate a compensable injury. In these cases, the plaintiff need only prove a constitutional violation to recover nominal damages and vindicate their rights.<sup>66</sup>

Where harm cannot be shown, the plaintiff *is not* entitled to compensatory damages, but he or she *is* entitled<sup>67</sup> to nominal damages.<sup>68</sup> Additionally, the plaintiff may not be entitled to injunctive and declaratory relief if the constitutional violation is one that occurred in the past and is neither ongoing nor reasonably expected to occur in the future.<sup>69</sup> Therefore, without the remedy of nominal damages, one-off events that deprive individuals of constitutional rights but cause no harm may not be vindicated.<sup>70</sup>

### *B. Determining Federal Jurisdiction: What Is a Proper Dispute?*

There are three doctrines that control whether a case may be heard in federal court: ripeness, standing, and mootness.<sup>71</sup> If a claim fails to meet one of these requirements, federal courts cannot reach the merits of the case. Part I.B.1 discusses federal jurisdiction and the requirement that a plaintiff's claim not be moot. Part I.B.2 discusses the constitutional and prudential aspects of mootness and uses the exceptions to mootness to illustrate the prudential considerations of this doctrine.

#### 1. Overview of Federal Jurisdiction

Federal jurisdiction is limited to "cases" or "controversies"<sup>72</sup> where a litigant has suffered some actual injury that can be redressed.<sup>73</sup> Federal courts cannot hear or decide cases that will not affect the rights of the parties before them.<sup>74</sup> If there is no remedy available, or if the court's decision will not affect the rights of the parties before it, the order would be an impermissible advisory opinion.<sup>75</sup> If that is the case, the court must dismiss

66. *See Carey*, 435 U.S. at 266.

67. *See Kerman v. City of New York*, 374 F.3d 93, 123 (2d Cir. 2004) (holding that the district court erred in instructing the jury that an award of nominal damages was permissible rather than mandatory if they concluded that the plaintiff's constitutional rights were violated).

68. *See Stachura*, 477 U.S. at 308 n.11; *Carey*, 435 U.S. at 266.

69. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (holding that claims for injunctive and declaratory relief are moot because "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects" (alterations in original) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974))).

70. *See Pfander*, *supra* note 53, at 1606.

71. *See ERWIN CHEMERINSKY*, FEDERAL JURISDICTION 55, 119, 131 (6th ed. 2012). Ripeness "seeks to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action." *Id.* at 119. Ripeness will not be discussed further because it is outside the scope of this Note.

72. U.S. CONST. art. III, § 2.

73. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70, 78 (1983); *Williams v. United States*, 401 U.S. 667, 678 (1971) (Harlan, J., concurring in part and dissenting in part).

74. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

75. *See Teague v. Lane*, 489 U.S. 288, 316 (1989).

the claim and refrain from entering a judgment. In *Flast v. Cohen*,<sup>76</sup> Chief Justice Earl Warren explained that the jurisdictional requirements of ripeness, standing, and mootness serve a two-fold purpose: to ensure that federal courts only adjudicate adversarial questions and to maintain separation of powers.<sup>77</sup>

Standing<sup>78</sup> and mootness each originate from Article III of the U.S. Constitution, which grants federal courts the power to hear only “cases” or “controversies.”<sup>79</sup> Although standing and mootness are similar,<sup>80</sup> the Supreme Court has applied different standards to evaluate standing and mootness because, despite similar requirements, they serve distinct roles.<sup>81</sup> The Supreme Court has recognized that “conduct may be too speculative to support standing, but not too speculative to overcome mootness.”<sup>82</sup> Several courts have held that a sole claim for nominal damages is insufficient to confer standing on a plaintiff,<sup>83</sup> but at least one court has held that a claim for nominal damages is sufficient.<sup>84</sup>

## 2. If There Is No Dispute—Your Case Is Moot!

In deciding whether a plaintiff’s claim is moot, courts must assess whether the factual or legal circumstances have changed such that there is no longer a justiciable question before the court.<sup>85</sup> A case becomes moot when a court

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76. 392 U.S. 83 (1968).

77. *See id.* at 95.

78. Standing is a threshold jurisdictional requirement that a plaintiff must satisfy to invoke federal judicial power. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 88–89 (1998). The plaintiff must meet three requirements to prove he or she has standing to bring a claim: the plaintiff must have suffered (1) an injury-in-fact that is (2) fairly traceable to the actions of the defendant and (3) likely to be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

79. U.S. CONST. art. III, § 2.

80. *See U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (“One commentator has defined mootness as ‘the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).’” (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973))).

81. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000).

82. *See id.*

83. *See Morrison v. Bd. of Educ.*, 521 F.3d 602, 611 (6th Cir. 2008) (“While we may have allowed a nominal-damages claim to go forward in an otherwise-moot case, we are not required to relax the basic standing requirement that the relief sought must redress an actual injury.”); *Freedom from Religion Found., Inc. v. Mercer Cty. Bd. of Educ.*, No. 1:17-00642, 2017 WL 5473923, at \*6 (S.D. W. Va. Nov. 17, 2017) (holding that the claim of nominal damages is insufficient to confer standing), *appeal docketed sub nom. Deal v. Mercer Cty. Bd. of Educ.*, No. 17-2429 (4th Cir. Dec. 15, 2017).

84. *See Advantage Media L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802 (8th Cir. 2006). However, the Eighth Circuit, in an en banc opinion, has also held that where a defendant has amended an ordinance, a claim for nominal damages is insufficient to challenge prior versions of the ordinance. *See Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012) (en banc).

85. *See Richard K. Greenstein, Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897, 898 (1983).

cannot grant any “effectual relief.”<sup>86</sup> Thus, there are two aspects to mootness: First, when the issue itself is no longer ongoing or the parties no longer have stake in the outcome.<sup>87</sup> This flexible doctrine requires courts to practically assess whether a case or controversy remains in light of the particular facts at hand.<sup>88</sup> The claim must be alive at all stages of the controversy, not just when the complaint is filed.<sup>89</sup> If a case becomes moot, then the court cannot decide the merits of the case unless an exception applies.<sup>90</sup>

In general, a court will determine a case is moot if:

“the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”; or when subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur; or when subsequent events make it impossible for the court to grant to the prevailing party effectual relief, since “the thing sought to be prohibited has been done, and cannot be undone by any order of court.”<sup>91</sup>

Under the first aspect, an issue becomes moot if, for example, the plaintiff cannot show that a “governmental action or policy . . . has adversely affected and continues to affect a present interest.”<sup>92</sup> Generally, claims for damages cannot be moot.<sup>93</sup>

A case also becomes moot if the plaintiff no longer has a continued “personal stake” in the outcome—a requirement connected to the adversarial requirement.<sup>94</sup> Courts do not have an investigative arm,<sup>95</sup> so they require

86. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Knox v. Serv. Emps. Int’l Union*, Local 1000, 567 U.S. 298, 307 (2012)); see *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (“The crucial question is whether ‘granting a present determination of the issues offered . . . will have some effect in the real world.’” (alteration in original) (quoting *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir. 1999))).

87. See *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 400–01 (1980).

88. See *id.*; STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 951 (10th ed. 2013) (“[T]his apparently simple concept has become embroidered with distinctions that seem to turn less on whether a concrete dispute between the original parties continues to exist and more on whether, as a matter of policy, the intervening factors should be allowed to frustrate judicial review of publicly important issues.”).

89. See *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

90. See *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (per curiam); *United States v. Felin & Co.*, 334 U.S. 624, 640 (1948); *Cover v. Schwartz*, 133 F.2d 541, 546 (2d Cir. 1942).

91. See *Parsons Inv. Co. v. Chase Manhattan Bank*, 466 F.2d 869, 871 (6th Cir. 1972) (citations omitted) (first quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969); then quoting *Jones v. Montague*, 194 U.S. 147, 153 (1904)).

92. See *Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115, 125–26 (1974).

93. Claims for damages may be moot if the parties settle or the plaintiff is otherwise made whole and seeks no other relief. See *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 77 (2013) (“[A] claim for damages cannot evade review; it remains live until it is settled [or] judicially resolved . . .”).

94. See *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477–78 (1990) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)).

95. See Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Towards a Coherent Theory*, 62 CALIF. L. REV. 1385, 1409 (1974).

that the parties be adverse; this allows courts to consider the entirety of the problem and the parties' opposing considerations.<sup>96</sup> When the plaintiff no longer has a personal stake, the plaintiff may not advocate as effectively because he or she may not be motivated to bring the same effort needed to succeed as one who is facing the real possibility of an unfavorable outcome.<sup>97</sup> If the plaintiff does not sufficiently prosecute his or her case and the court makes an error of law, the consequences of this precedent may be grave for future parties litigating the same issues.<sup>98</sup>

However, a case should not be dismissed as moot if any of the relief sought is still available to the plaintiff.<sup>99</sup> In *Powell v. McCormack*,<sup>100</sup> Adam Clayton Powell, Jr., sued the U.S. House of Representatives for refusing to allow him to take his seat in Congress.<sup>101</sup> Powell sought a declaratory judgment that this action was unconstitutional as well as back pay.<sup>102</sup> However, before a decision could be rendered, he was seated in the next House of Representatives, which mooted his claim for injunctive relief.<sup>103</sup> Although injunctive relief was no longer available, the Supreme Court held that the case was not moot because Powell still had a claim for relief in the form of the money he sought in back pay.<sup>104</sup>

*a. Beyond Article III: The Unclear Boundary of Prudential Mootness*

The common-law doctrine of mootness, a discretionary and prudential doctrine,<sup>105</sup> predates the Constitution.<sup>106</sup> It was not until the late twentieth century that mootness developed as a mandatory jurisdictional bar.<sup>107</sup> The Supreme Court has noted that there are prudential aspects to its mootness

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96. See *id.* at 1408–09; Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772, 773 (1955) (“This adversary system depends upon self-interest as the motive best suited to bring all pertinent facts, policies and legal issues before the court.”).

97. See Kates & Barker, *supra* note 95, at 1409; Note, *supra* note 96, at 773.

98. See Note, *supra* note 96, at 773.

99. See Kates & Barker, *supra* note 95, at 1390.

100. 395 U.S. 486 (1969).

101. See *id.* at 489–93.

102. See *id.* at 496.

103. See *id.* at 495–96.

104. See *id.* at 496.

105. See Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 569 (2009) (noting that courts historically dismissed cases as moot because of “instrumental concerns, such as conservation of judicial resources, preservation of judicial authority, the desire to ensure that issues are litigated by properly motivated parties, and the desire to prevent collusive cases” (footnotes omitted)).

106. See *Alton & S. Ry. v. Int’l Ass’n of Machinists*, 463 F.2d 872, 877 (D.C. Cir. 1972) (“[Mootness] may be usefully referred to as a common law limitation on the duty of a court to decide cases presented.”); Hall, *supra* note 105, at 567–73 (discussing the significant differences between nineteenth-century mootness and the current mootness doctrine).

107. See *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964) (“Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.”); Hall, *supra* note 105, at 562–64 (discussing recent cases that have taken the position that mootness is grounded in Article III but doubting that this was historically the case).

jurisprudence that fall outside the boundary of constitutional mootness created by the Article III case-and-controversy requirements.<sup>108</sup>

Generally, courts begin their mootness inquiry with the Constitution but often justify their decision to dismiss<sup>109</sup> or their decision to reach the merits of the case on the basis of prudential mootness.<sup>110</sup> Beyond Article III, courts often justify dismissing a case as moot based on judicial economy and instrumental concerns.<sup>111</sup> It does not seem fair to subject adverse parties, or the court system, to onerous litigation when there is no longer a controversy and the only result would seem to be personal vindication.<sup>112</sup> It seems a waste of limited judicial resources to allow moot cases to continue.<sup>113</sup> Courts also argue that it is not the proper role of federal courts to decide such cases and that doing so would diminish the authority of the court system.<sup>114</sup> For example, in *Flast v. Cohen*,<sup>115</sup> the Supreme Court recognized that “a policy limitation is ‘not always clearly distinguished from the constitutional limitation.’”<sup>116</sup>

*b. Mootness Exceptions: Illuminating the Prudential Aspects of Mootness*

The Supreme Court has noted that the starting point of the mootness inquiry is in the Constitution, but the exceptions to the doctrine are based on “practicalities and prudential considerations.”<sup>117</sup> Federal courts will hear moot claims if they fall under one of four exceptions, generally described as: (1) capable of repetition, yet evading review; (2) class certification; (3) voluntary cessation; and (4) collateral consequences.<sup>118</sup> In *Honig v.*

108. See Hall, *supra* note 105, at 574–75 n.55; see also *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 288 (2000) (“Our interest in preventing litigants from attempting to manipulate the Court’s jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here.”). But see *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (“[P]urely practical considerations have never been thought to be controlling by themselves on the issue of mootness in this Court. While [states] may choose to adjudicate a controversy simply because of its public importance, and the desirability of . . . statewide decision[s], we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties.”).

109. See *infra* Part II.B.3.

110. The exceptions to the doctrine look “to practicalities and prudential considerations.” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980).

111. See Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1675 (1970). For a definition of “instrumental concerns,” see *supra* note 105.

112. See *Kates & Barker*, *supra* note 95, at 1387.

113. See *id.* at 1433–34 (arguing that judicial economy is concerned with the allocation of resources that have not been used rather than what has already been expended).

114. See *Morrison v. Bd. of Educ.*, 521 F.3d 602, 611 (6th Cir. 2008) (“Allowing [the case] to proceed to determine the constitutionality of an abandoned policy . . . trivializes the important business of the federal courts.”).

115. 392 U.S. 83 (1968).

116. *Id.* at 97 (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1958)). Although a distinct doctrine, the Court’s reasoning and analysis on standing is instructive on mootness due to the similarities between the doctrines. See *supra* notes 74–84 and accompanying text.

117. See *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980).

118. See CHEMERINSKY, *supra* note 71, at 135–51. The collateral-consequences exception is generally limited to criminal cases: cases of wrongful conviction and habeas corpus

*Doe*,<sup>119</sup> Chief Justice William Rehnquist argued that although there may be an attenuated justification for mootness in the Constitution, the exceptions to the doctrine imply that the doctrine is not fully a jurisdictional issue.<sup>120</sup> Additionally, Rehnquist argued that if mootness is fully grounded in the Constitution, then the federal courts would not be able to override it and allow exceptions to the rule because it would be impermissible to do so if mootness is solely a constitutional doctrine.<sup>121</sup>

In *Honig*, Rehnquist wrote a concurrence to argue for reconsideration of the mootness requirement.<sup>122</sup> Rehnquist argued for a relaxed test or an additional exception for mootness when supervening events make the case moot after the Supreme Court has granted certiorari.<sup>123</sup> To justify relaxing or suspending the mootness doctrine, Rehnquist argued that the doctrine is not fully grounded in the Constitution.<sup>124</sup> He looked at the historical development of mootness and noted that the earliest cases did not base mootness in the Constitution.<sup>125</sup> He further argued that the Supreme Court's unique ability to decide federal questions in a way that binds every court in the country is a sufficient justification to relax or abandon the doctrine of mootness in these instances.<sup>126</sup>

To apply the “capable of repetition, yet evading review” exception, there are two factors that must be simultaneously present: “(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.”<sup>127</sup> Under the second prong, it is not sufficient if there are other similarly situated litigants; it must be the very same plaintiff, defendant, and injury. The issue may temporarily disappear, making the case moot, but the exception allows the issue to be litigated as long as the parties can demonstrate a continued personal stake by showing they will likely be injured by recurrence of the harm.<sup>128</sup>

There is a further subset of cases which highlight the underlying prudential considerations of this doctrine. In these cases, the Court has also relaxed or

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petitions. *See Sibron v. New York*, 392 U.S. 40, 57 (1968) (“[A] criminal case is moot only if it is shown that there is no possibility that any legal consequences will be imposed on the basis of the challenged conviction.”). The collateral-consequences exception is not relevant to this Note and will not be discussed further.

119. 484 U.S. 305 (1988).

120. *See id.* at 331 (Rehnquist, C.J., concurring) (“[A]n unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.”).

121. *See id.*

122. *See id.* at 329.

123. *See id.* at 330.

124. *See id.*

125. *See id.* at 330–31 (citing *Mills v. Green* 159 U.S. 651 (1895) and *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)) (noting that the “capable of repetition, yet evading review” exception was adopted because of pragmatic considerations, with no mention of Article III).

126. *See id.* at 332.

127. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

128. *See S. Pac. Terminal Co.*, 219 U.S. at 515.

done away with the same-party requirement.<sup>129</sup> Instead, courts apply the exception if there is a high probability that the issue will recur between the defendant and other members of the public at large.<sup>130</sup> This additional exception highlights situations where courts are willing to further relax the mootness requirement if the issue is ongoing, but the plaintiff's personal stake may be short-lived and not likely to recur.<sup>131</sup>

In applying the class certification exception, courts are more willing to use their discretion in deciding whether to allow a claim to proceed even though the plaintiff lacks a personal stake in the case.<sup>132</sup> A class representative's claim may become moot after class certification is granted, such as where a prisoner is seeking to challenge a prison policy and is released from prison. However, this does not moot the case or the representative's status.<sup>133</sup> This is based on the premise that the unnamed persons acquire legal statuses separate from the named plaintiff.<sup>134</sup>

A defendant who voluntarily ceases the challenged conduct does not moot the underlying controversy unless there is no reasonable possibility that the challenged conduct will resume.<sup>135</sup> Generally, a case will not be dismissed merely because the plaintiff failed to prove that the defendant is likely to repeat the challenged conduct.<sup>136</sup> The defendant has the burden to prove it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."<sup>137</sup> Similar to the "capable of repetition, but evading review" exception, courts seek to review ongoing issues, even if the plaintiff may lack a personal stake.<sup>138</sup>

## II. WHAT IS A SUFFICIENT DISPUTE?

Mootness disputes typically boil down to the availability of an alternative remedy.<sup>139</sup> This conflict has developed not because there is disagreement as to whether nominal damages are available, but rather a disagreement as to

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129. The Court has relaxed the same-party requirement in abortion cases. *See Roe v. Wade*, 410 U.S. 113, 125 (1973) ("[H]uman gestation period is so short that the pregnancy will come to term before the usual appellate process is complete [so that] pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied."); *see also Doe v. Bolton*, 410 U.S. 179, 187 (1973). The Court has similarly relaxed the same-party requirement in election cases. *See Rosario v. Rockefeller*, 410 U.S. 752, 756–57 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

130. *See Honig*, 484 U.S. at 335–36 (Scalia, J., dissenting).

131. *See Hall*, *supra* note 105, at 563.

132. *See supra* notes 129–31 and accompanying text.

133. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975).

134. *See id.* at 399–402.

135. *See Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221–24 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

136. *See Nat'l Res. Def. Council v. City of Los Angeles*, 840 F.3d 1098, 1104 (9th Cir. 2016) (reversing the district court's decision, which impermissibly shifted the burden of proof to the plaintiff); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237–38 (9th Cir. 1999).

137. *Friends of the Earth*, 528 U.S. at 189 (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

138. *See Hall*, *supra* note 105, at 601.

139. *See Kates & Barker*, *supra* note 95, at 1403.

the purpose and function of nominal damages and whether they will affect or influence any future conduct.<sup>140</sup> In cases where plaintiffs have alleged a constitutional deprivation but the conduct is no longer ongoing, courts have issued conflicting opinions regarding the mootness of such claims. Part II.A discusses the majority rule, which primarily relies on Supreme Court precedent and holds that nominal damages are the appropriate remedy for past violations of constitutional rights and therefore warrant a determination of the merits of the case.<sup>141</sup> Part II.B discusses the viewpoint of a minority of courts, which have taken a functionalist approach and looked at the practical effects of awarding nominal damages to determine whether the parties are still adversarial when the statute—the real cause of the dispute—has been repealed.<sup>142</sup>

*A. Majority Rule: Nominal Damages Are Always Sufficient*

A vast majority of circuit courts that have ruled on this issue have held that a claim for nominal damages will sustain an otherwise moot constitutional claim.<sup>143</sup> This majority rule differs from the minority rule in its view that nominal damages are a retrospective damages award, not a vehicle for a declaratory judgment. Courts rely primarily on Supreme Court precedent, which established that nominal damages are the appropriate remedy for a constitutional deprivation.<sup>144</sup>

The Supreme Court decisions that courts rely on are *Carey v. Piphus*<sup>145</sup> and *Memphis Community School District v. Stachura*.<sup>146</sup> The Court held in *Carey*,<sup>147</sup> and affirmed in *Stachura*,<sup>148</sup> that compensatory damages cannot be awarded without some showing of an actual compensable injury and that nominal damages are the appropriate remedy in that instance. Courts have

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140. *See* *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1263 (10th Cir. 2004) (McConnell, J., concurring); *Kates & Barker*, *supra* note 95, at 1403 (objecting to the availability of declaratory judgment on the grounds “that the remedy will be ineffective because no future conduct will be influenced by the decree” and noting that “[i]f it can confidently be predicted that no future conduct will be affected, then considerations of judicial economy would dictate a holding of mootness”).

141. *See infra* Part II.A.

142. *See infra* Part II.B.

143. *See* *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 n.32 (5th Cir. 2009); *Utah Animal Rights Coal.*, 371 F.3d at 1257–58; *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *Doe v. Delie*, 257 F.3d 309, 313–14 & n.3 (3d Cir. 2001); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317–20 (2d Cir. 1999); *Henson v. Honor Comm. of the Univ. of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981). The D.C. Circuit Court of Appeals has not ruled on this issue. *PETA v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005) (“We assume, without deciding, that a district court’s award of nominal damages—\$1—prevents a case from becoming moot on appeal.”).

144. *See, e.g., Bernhardt*, 279 F.3d at 872; *Amato*, 170 F.3d at 317; *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1526–27 (10th Cir. 1992); *Henson*, 719 F.2d at 72 n.5.

145. 435 U.S. 247 (1978).

146. 477 U.S. 299 (1986).

147. 435 U.S. at 254–55.

148. 477 U.S. at 306.

reasoned that although the Supreme Court did not “squarely address[] the issue,” the cases “necessarily impl[y] that a case is not moot so long as the plaintiff seeks to vindicate his constitutional rights through a claim for nominal damages.”<sup>149</sup>

Courts often rely on this precedent, but a few have further justified their rulings by looking to the special purpose of nominal damages in constitutional law.<sup>150</sup> It tends to be hard for victims of constitutional violations to show actual compensable injury, but nevertheless, courts have determined that these rights are worthy of vindication, even if only by an award of one dollar.<sup>151</sup> Such an award balances the recognition of “the importance to organized society that those rights be scrupulously observed” with an acknowledgement of the “principle that substantial damages should be awarded only to compensate actual injury.”<sup>152</sup> Further, courts note the importance of determining liability not just for the litigant but for society as well because holding a government entity liable can encourage reform.<sup>153</sup>

Courts further recognize that in a claim for nominal damages, the plaintiff is not seeking prospective relief, such as an injunction or declaratory relief, but has plausibly alleged a past constitutional harm capable of vindication.<sup>154</sup> Courts allow these claims to be heard because even though the challenged conduct has ceased and the court has found that it will not occur again, merely repealing the statute does not “erase[] the slate concerning the alleged [constitutional] violations.”<sup>155</sup>

For example, in *Ermold v. Davis*,<sup>156</sup> the U.S. Court of Appeals for the Sixth Circuit held that a claim for damages was not moot even though a claim for

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149. *Ward ex rel. Ward v. Santa Fe Indep. Sch. Dist.*, 35 F. App'x 386, 386 (5th Cir. 2002) (per curiam); *see, e.g., Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 428 (4th Cir. 2007); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999); *Murray v. Bd. of Trs.*, 659 F.2d 77, 80 (6th Cir. 1981); *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978); *Fitzgerald v. City of Portland*, No. 14-CV-00053, 2014 WL 5473026, at \*5 (D. Me. Oct. 27, 2014).

150. *See, e.g., Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) (quoting *Carey*, 435 U.S. at 266); *Fitzgerald*, 2014 WL 5473026, at \*5–6 (noting the incongruity that a claim for declaratory relief is moot but a claim for nominal damages is not, but justifying this outcome based on the special purpose of nominal damages).

151. *See Bernhardt*, 279 F.3d at 871 (“Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.” (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986))); *Amato*, 170 F.3d at 317–18.

152. *Bernhardt*, 279 F.3d at 871 (quoting *Carey*, 435 U.S. at 266).

153. *See, e.g., Amato*, 170 F.3d at 317–18; *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1243 (9th Cir. 1995) (en banc) (holding that nominal damages were an appropriate remedy because “[t]he right of free speech . . . must be vigorously defended” and “the protection of First Amendment rights is central to guaranteeing society’s capacity for democratic self-government”), *rev’d on other grounds sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

154. *See Fitzgerald*, 2014 WL 5473026, at \*5; *see also Burns v. Pa. Dep’t of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008) (holding that a completed violation of constitutional rights would entitle plaintiff to an award of nominal damages).

155. *See Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1526 (10th Cir. 1992).

156. 855 F.3d 715 (6th Cir. 2017).

injunctive relief was.<sup>157</sup> Although the claim for damages in *Ermold* was not limited to nominal damages, the reasoning of the court is instructive. In *Ermold*, a same-sex couple was denied a marriage license.<sup>158</sup> While the case was ongoing, the claim for injunctive relief became moot due to superseding law.<sup>159</sup> The court held that although the claim for injunctive relief was moot, the case would not be dismissed as moot because the plaintiffs were a specific set of individuals who sought damages for a particularized harm.<sup>160</sup> The court noted that the case was not brought merely as a general challenge to a policy.<sup>161</sup>

### B. Minority Rule: A Functionalist Approach

A minority of courts have held that nominal damages are insufficient to sustain an otherwise moot constitutional claim if the plaintiff cannot show a compensable injury and there is no chance of recurrence. These courts include the Eleventh Circuit and the Eighth Circuit,<sup>162</sup> as well as district courts in the First and Seventh Circuits.<sup>163</sup> Part II.B.1 addresses the functionalist approach that the Eleventh Circuit and the district courts in the First Circuit have adopted. Part II.B.2 discusses the bright-line rule the Eighth Circuit and district courts in the Seventh Circuit have adopted. Finally, Part II.B.3 notes the prudential and judicial economy reasons for this rule.

#### 1. Flexible Functionalist Approach

In *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs*,<sup>164</sup> the city of Sandy Springs adopted an ordinance criminalizing the commercial distribution of obscene material.<sup>165</sup> The Eleventh Circuit originally upheld the city ordinance because of binding precedent and encouraged the

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157. *See id.* at 717.

158. *Id.* at 716.

159. *Id.* at 718.

160. *Id.* at 718–20.

161. *See id.* at 718.

162. *See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1263–64 (11th Cir. 2017) (en banc), *cert. denied sub nom. Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018); *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012) (en banc) (holding that, where the defendant has amended the ordinance, a plaintiff's claim for nominal damages "cannot revive an otherwise moot constitutional claim against 'a regime no longer in existence'" (quoting *Morrison v. Bd. of Educ.*, 521 F.3d 602, 611 (6th Cir. 2008))).

163. *See, e.g., Soto v. City of Cambridge*, 193 F. Supp. 3d 61, 71 (D. Mass. 2016) (holding that a claim for nominal damages was insufficient to save the case from being dismissed as moot); *Freedom from Religion Found., Inc., v. Concord Cmty. Schs.*, 207 F. Supp. 3d 862, 874 n.7 (N.D. Ind. 2016) (noting that multiple district courts have found nominal damages insufficient to save an otherwise moot constitutional claim), *aff'd*, 885 F.3d 1038 (7th Cir. 2018).

164. 868 F.3d 1248 (11th Cir. 2017) (en banc), *cert. denied sub nom. Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018).

165. *See id.* at 1253.

appellants to seek a rehearing en banc to overturn the precedent.<sup>166</sup> After the Eleventh Circuit granted rehearing en banc, the City Council unanimously voted to repeal the portion of the ordinance at issue.<sup>167</sup> The court held that the repeal of the ordinance mooted the plaintiff's claims for declaratory and injunctive relief.<sup>168</sup>

The court then had to decide whether a claim for nominal damages would be sufficient to save the claim from dismissal as moot and held that it does not.<sup>169</sup> The Eleventh Circuit took a functional approach and did not foreclose the possibility that nominal damages could survive as a lone remedy, but held that there needed to be some other "practical effect."<sup>170</sup> First, the court distinguished the Supreme Court cases that the majority rule relies on.<sup>171</sup> Next, the court analogized nominal damages as functionally similar to declaratory judgment.<sup>172</sup> Finally, the court addressed policy concerns.<sup>173</sup>

To distinguish Supreme Court precedent, the court reasoned that none of the Supreme Court decisions that the majority rule relies on are directly on point.<sup>174</sup> The court found that *Carey* was distinguishable because there were other damages remedies available to the plaintiff, and the claim was more than just a sole claim for nominal damages.<sup>175</sup> Next, the court distinguished *Stachura* because that case did not address mootness; rather, it only confirmed that nominal damages are the appropriate remedy for a constitutional violation that causes no actual provable injury.<sup>176</sup> Finally, the court distinguished *Arizonans for Official English v. Arizona*<sup>177</sup> because nominal damages were not an available remedy, so the Court never reached the question of whether they saved the case from mootness.<sup>178</sup>

Instead, the court relied on a Supreme Court case on standing, *Steel Co. v. Citizens for a Better Environment*,<sup>179</sup> to support its holding.<sup>180</sup> In *Steel Co.*, the Supreme Court held that "psychic satisfaction" is insufficient to confer standing on the plaintiff.<sup>181</sup> The Eleventh Circuit similarly found the claim for nominal damages would only result in psychic satisfaction, or judicial

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166. See *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 831 F.3d 1342, 1348 (11th Cir. 2016) ("Therefore, unless and until our holding in *Williams IV* is overruled en banc, or by the Supreme Court, we are bound to follow it. . . . Appellants are free to petition the court to reconsider our decision en banc, and we encourage them to do so."), *vacated on reh'g en banc*, 868 F.3d 1248 (2017).

167. See *Flanigan's Enters.*, 868 F.3d at 1254.

168. See *id.* at 1263.

169. See *id.* at 1263–64.

170. See *id.* at 1264.

171. See *id.* at 1265–68.

172. See *id.* at 1268–69.

173. See *id.* at 1270.

174. See *id.* at 1265.

175. See *id.* at 1265–66 & n.18.

176. See *id.*

177. 520 U.S. 43 (1997).

178. See *Flanigan's Enters.*, 868 F.3d at 1267.

179. 523 U.S. 83 (1998).

180. See *Flanigan's Enters.*, 868 F.3d at 1267–68.

181. 523 U.S. at 107.

validation of an outcome that has already been determined.<sup>182</sup> However, this is not to say that the court in *Flanigan's Enterprises* did not consider constitutional violations to be a harm deserving of vindication. The court reasoned there was no practical effect because the real dispute, repealing the statute, was resolved and there was no longer a live dispute.<sup>183</sup> Similarly, Judge Michael McConnell, in his concurrence in *Utah Animal Rights Coalition v. Salt Lake City Corp.*,<sup>184</sup> compared constitutional violations to actions for libel or trespassing where there is some other dispute that satisfies the “case” or “controversy” requirement.<sup>185</sup> Judge McConnell reasoned that where there is some ongoing dispute, there is merit in allowing the case to continue to a judicial determination because it will affect the parties’ rights.<sup>186</sup>

Next, the court held that nominal damages function as a declaratory judgment and therefore should be treated the same under the law.<sup>187</sup> The court noted that the Federal Declaratory Judgment Act was intended to expand the type of remedies available, but not increase federal jurisdiction.<sup>188</sup> It explained that neither nominal damages nor declaratory relief is itself an independent source of jurisdiction.<sup>189</sup> The court then reasoned that because declaratory judgment is not available as a remedy for an otherwise moot case, neither should nominal damages be.<sup>190</sup>

The court did not adopt a bright-line rule and noted there would be instances where a sole remaining claim for nominal damages would not be moot.<sup>191</sup> The court noted that if an alleged constitutional violation was still a live dispute, the claim would not be moot even if the only remedy available is nominal damages.<sup>192</sup> The court did not define what would be considered a live dispute or ongoing controversy, nor what a practical effect of a claim for nominal damages would be.<sup>193</sup> For example, the court could have limited its holding to a statute or ordinance that had never been enforced but neglected to do so.

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182. *See Flanigan's Enters.*, 868 F.3d at 1268.

183. *See id.* at 1264–65.

184. 371 F.3d 1248, 1262 (10th Cir. 2004) (McConnell, J., concurring).

185. *See id.* at 1264.

186. *See id.*

187. *See Flanigan's Enters.*, 868 F.3d at 1264.

188. *See id.* at 1268 (citing *Schilling v. Rogers*, 363 U.S. 666, 677 (1960)).

189. *See id.*

190. *See id.*

191. *See id.* at 1263 n.12.

192. *See id.* at 1263–64.

193. *See id.* at 1273–74 (Wilson, J., dissenting).

The First Circuit has not ruled directly on this issue<sup>194</sup> and district courts in the First Circuit have been inconsistent in their rulings.<sup>195</sup> In *Soto v. City of Cambridge*,<sup>196</sup> the court held that the plaintiff's claims for injunctive and declaratory relief were moot because the city repealed the ordinance and nominal damages were insufficient to save the otherwise moot case.<sup>197</sup> Similar to the Eleventh Circuit, the court in *Soto* recognized that this is not a bright-line rule, and there are cases where a sole remaining claim for nominal damages will be sufficient; however, where the ordinance has been repealed, the court held the case should be dismissed as moot.<sup>198</sup> Similar to the reasoning in the Eleventh Circuit, the court in *Soto* reasoned it would be inconsistent and would "accomplish nothing" if it allowed the claim for nominal damages to go forward while the claim for declaratory relief is moot.<sup>199</sup> Conversely, in *Fitzgerald v. City of Portland*,<sup>200</sup> the District Court of Maine touched upon the oddity that nominal damages and declaratory relief are functionally the same.<sup>201</sup> However, the court ultimately held that it was appropriate to allow the claim for nominal damages to be heard because the plaintiffs had "plausibly alleged a past constitutional harm capable of vindication."<sup>202</sup>

Although these district courts in the First Circuit appear to be inconsistent, both employ a flexible approach that focuses on the alleged harm. In *Soto*, the court did not hold that nominal damages will never save an otherwise moot constitutional claim, similar to the court in *Flanigan's Enterprises*.<sup>203</sup> Rather, the court took a closer look to determine whether there was still an

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194. See *ACLU v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 n.7 (1st Cir. 2013) (noting that nominal damages are unavailable as a remedy but not discussing whether this would have saved the case from dismissal); *Kuperman v. Wrenn*, 645 F.3d 69, 73 n.5 (1st Cir. 2011) (holding that a claim for nominal damages and punitive damages saves an otherwise moot claim from dismissal); *Cty. Motors, Inc. v. Gen. Motors Corp.*, 278 F.3d 40, 43 (1st Cir. 2002) (discussing that a claim for damages may save a case from mootness, but determining that the plaintiff had waived its claim to nominal damages); *Anthony v. Commonwealth of Massachusetts*, 415 F. Supp. 485, 494 (D. Mass. 1976) (holding that the claim for nominal damages was incidental to relief sought and could not save the case from mootness), *rev'd on other grounds*, 442 U.S. 256 (1979). *But see* *Fitzgerald v. City of Portland*, No. 14-CV-00053, 2014 WL 5473026, at \*5 (D. Me. Oct. 27, 2014) (holding that a claim for nominal damages is sufficient to save an otherwise moot case from dismissal).

195. Compare *Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983) (holding that "where the inquiry is mootness *vel non*, the possibility of an award of nominal damages will not keep an otherwise deflated claim afloat"), and *Soto v. City of Cambridge*, 193 F. Supp. 3d 61, 71 (D. Mass. 2016), with *Fitzgerald*, 2014 WL 5473026, at \*6 (holding that the claim is not moot because the plaintiffs alleged a plausible constitutional violation and were entitled to nominal damages).

196. 193 F. Supp. 3d 61 (D. Mass. 2016).

197. See *id.* at 71 (citing *Duffy*, 576 F. Supp. at 342).

198. See *id.*

199. See *id.* at 72.

200. No. 14-CV-00053, 2014 WL 5473026 (D. Me. Oct. 27, 2014).

201. See *id.* at \*20.

202. See *id.*

203. See *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1270 n.23 (11th Cir. 2017) (en banc), *cert. denied sub nom.* *Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018); *Soto*, 193 F. Supp. 3d at 71.

otherwise live dispute or harm to be vindicated.<sup>204</sup> This approach is also what the court did in *Fitzgerald*, however, the court in *Fitzgerald* determined the alleged constitutional violation was sufficient to sustain the claim for nominal damages as opposed to the court in *Soto*, which found that there was no harm that needed to be vindicated.<sup>205</sup> This flexible approach, which requires the courts to look at the alleged harm, contrasts with the bright-line approach that the majority of appellate courts<sup>206</sup> and district courts in the Seventh Circuit have applied.<sup>207</sup>

## 2. Bright-Line Functionalist Approach

Prior to *Flanigan's Enterprises*, district courts in the Seventh Circuit held that nominal damages are insufficient to save an otherwise moot constitutional claim.<sup>208</sup> Their rulings were not limited to instances where plaintiffs were unable to show a previous constitutional violation. In fact, courts have applied this rule where the conduct actually occurred, regardless of whether harm occurred.<sup>209</sup>

The district courts in the Seventh Circuit adopted a bright-line rule that nominal damages should be treated the same as declaratory judgment under the law, and therefore in instances where declaratory judgment is improper, a claim for nominal damages is also improper.<sup>210</sup> This bright-line rule treats nominal damages as synonymous with declaratory judgment and analyzes them as such for the purposes of justiciability.<sup>211</sup> District courts within the Seventh Circuit have held that “nominal damages are more akin to declaratory relief and should be subject to the same justiciability

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204. *See Soto*, 193 F. Supp. 3d at 71.

205. *See id.*; *Fitzgerald*, 2014 WL 5473026, at \*5.

206. *See supra* Part II.A.

207. *See infra* Part II.B.2.

208. *See Freedom from Religion Found., Inc., v. Concord Cmty. Schs.*, 207 F. Supp. 3d 862, 874 n.7 (N.D. Ind. 2016) (noting that multiple district courts have found nominal damages insufficient to save an otherwise moot constitutional claim), *aff'd*, 885 F.3d 1038 (7th Cir. 2018). The Seventh Circuit has not yet ruled on this issue. *See Concord Cmty. Schs.*, 885 F.3d at 1052–53 (holding that the defendant had not met its burden under voluntary cessation and therefore declining to “decide the jurisdictional issue [the defendant] raised—whether a suit for nominal damages alone is a sufficiently justiciable controversy under Article III”).

209. *See, e.g., Freedom from Religion Found., Inc. v. Franklin County*, 133 F. Supp. 3d 1154, 1159–60 (S.D. Ind. 2015) (holding that if the government voluntarily ceases the alleged illegal conduct, the claims, including claims for nominal damages, should be dismissed as moot absent some evidence that the offer is disingenuous); *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1031 (E.D. Wis. 2008) (holding that nominal damages were insufficient even if the challenged conduct occurred but ceased before the lawsuit was filed).

210. *See, e.g., Franklin County*, 133 F. Supp. 3d at 1158 (“Under Seventh Circuit case law, nominal damages are more akin to declaratory relief, and should be subject to the same justiciability principles.”).

211. *See id.*

principles.”<sup>212</sup> The rulings look to whether the underlying purpose of the suit is to stop the challenged conduct rather than to vindicate individual rights.<sup>213</sup>

In particular, these courts’ rulings look to whether there is an ongoing constitutional violation rather than if any alleged unconstitutional conduct has occurred in the past.<sup>214</sup> In *Freedom from Religion Foundation, Inc. v. Franklin County*,<sup>215</sup> the court held that because there was no “present proof of violation or deprivation, just past allegations, there [wa]s no need to vindicate rights.”<sup>216</sup> Further, the court noted that seeking to “determine the constitutionality of a [repealed] policy . . . vindicates no rights and is not a task of the federal courts.”<sup>217</sup>

Similarly, the Eighth Circuit, sitting en banc, held that nominal damages are not sufficient to sustain a claim against repealed versions of a statute and instead opted to limit the constitutional challenge only to the current version of the statute.<sup>218</sup> Curiously, the court did not rely on Eighth Circuit precedent which held that nominal damages are sufficient to confer standing.<sup>219</sup> Rather, the court cites *Morrison v. Board of Education*,<sup>220</sup> a Sixth Circuit decision, for the proposition that a claim for nominal damages “cannot revive an otherwise moot claim against ‘a regime no longer in existence.’”<sup>221</sup>

### 3. Prudential and Judicial Economy Considerations

Courts also rely upon prudential and judicial economy concerns to support dismissing a sole claim for nominal damages. This is in contrast to the typical invocation of prudential concerns, which courts use to justify reaching the merits of a moot claim.<sup>222</sup> However, when courts invoke prudential concerns to dismiss cases involving nominal damages claims, they focus on wasting

212. *See id.* at 1159 (citing *City of Green Bay*, 581 F. Supp. 2d at 1029–30).

213. *See id.* at 1159–60; *City of Green Bay*, 581 F. Supp. 2d at 1033 (“[T]he plaintiffs have already won. The Defendants have changed their offending behavior. Practically speaking, the Plaintiffs have a concrete victory that actually changes the circumstances on the ground. Having obtained a real-life victory, there is nothing to be gained from spending years and thousands of dollars to obtain a piece of paper saying that the Plaintiffs were right.”).

214. *See Franklin County*, 133 F. Supp. 3d at 1159–60 (“Because there is no present proof of violation or deprivation, just past allegations, there is no need to vindicate rights. The Court finds that [plaintiff]’s legally cognizable interest of eliminating constitutional violations . . . no longer exists. Accordingly, [plaintiff] cannot not use nominal damages to compensate for past wrongs . . .”).

215. 133 F. Supp. 3d 1154 (S.D. Ind. 2015).

216. *See id.* at 1159.

217. *See id.* at 1160.

218. *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012) (en banc).

219. *See Advantage Media L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802 (8th Cir. 2006) (holding that a lone claim for nominal damages is sufficient to confer standing); *see also* *Kuhr ex rel. Kuhr v. Millard Pub. Sch. Dist.*, No. 8:09CV363, 2012 WL 10387, at \*2 (D. Ne. Jan. 3, 2012) (stating that, in *Advantage Media*, the Eighth Circuit spoke to the issue of whether a claim for nominal damages was sufficient to prevent dismissal as moot).

220. 521 F.3d 602 (6th Cir. 2008).

221. *Phelps-Roper*, 697 F.3d at 687 (quoting *Morrison*, 521 F.3d at 611).

222. The exceptions to the doctrine look “to practicalities and prudential considerations.” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980); *see supra* Part I.B.2.b.

judicial resources and resources of municipalities and plaintiffs' ability to manipulate jurisdiction.<sup>223</sup>

Courts and judges are concerned that deciding the merits of cases for nominal damages is a waste of precious judicial resources where the outcome is already determined.<sup>224</sup> Courts are particularly concerned about expending judicial resources when the only result is “purely psychic satisfaction” or “judicial validation . . . of an outcome that has already been determined.”<sup>225</sup> The concern is that, because the plaintiffs in these cases did not seek compensatory damages, there is no retrospective relief for the alleged constitutional violation that could have made them whole;<sup>226</sup> plaintiffs are only seeking the “moral satisfaction” of a judicial ruling.<sup>227</sup> Finally, there is a concern that “the relief sought must have legal effect in determining the present and future rights and obligations of the parties”<sup>228</sup> and that awarding nominal damages based on a policy no longer in effect would have “no effect on the legal rights of the parties.”<sup>229</sup> In *Morrison*, the Sixth Circuit stated that “[a]llowing [the claim for nominal damages] to proceed to determine the constitutionality of an abandoned policy—in the hope of awarding the plaintiff a single dollar—vindicates no interest and trivializes the important business of the federal courts.”<sup>230</sup>

A further concern is that plaintiffs will be able to manipulate jurisdiction and ensure that their case will not be dismissed as moot by pleading a claim for nominal damages.<sup>231</sup> Although courts will be skeptical of a belated claim for nominal damages,<sup>232</sup> a plaintiff can likely evade judicial skepticism by pleading a claim for nominal damages simultaneously with his or her claim for injunctive and declaratory relief.

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223. *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1270 (11th Cir. 2017) (en banc), *cert. denied sub nom. Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018); *Morrison*, 521 F.3d at 611 (holding that allowing a claim for nominal damages to go through “trivializes the important business of the federal courts”); *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1033 (E.D. Wis. 2008) (“[T]here is nothing to be gained from spending years and thousands of dollars to obtain a piece of paper saying that the Plaintiffs were right.”).

224. *Morrison*, 521 F.3d at 611; *Amato v. City of Saratoga Springs*, 170 F.3d 311, 322 (2d Cir. 1999) (Jacobs, J., concurring) (disagreeing with the majority’s justification that even though the plaintiffs can only collect one dollar, there are significant benefits to the litigant and society, and instead noting the “wasteful imposition on the trial judge and on the taxpayers”).

225. *Flanigan's Enters.*, 868 F.3d at 1268 (11th Cir. 2017).

226. *See Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1263 (10th Cir. 2004) (McConnell, J., concurring).

227. *See id.*

228. *See id.*

229. *See id.* at 1265 (emphasis added).

230. *See Morrison v. Bd. of Educ.*, 521 F.3d 602, 611 (6th Cir. 2008).

231. *See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1270 (11th Cir. 2017) (en banc), *cert. denied sub nom. Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018).

232. *See Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 869 (9th Cir. 2017) (“When invoked to avoid mootness, a claim for nominal damages not explicitly stated in the complaint bears close inspection to ensure it does not fail as a matter of law.”).

### III. BALANCING JUDICIAL ECONOMY AND VINDICATING CONSTITUTIONAL RIGHTS

Both the majority and minority rules are overly broad. Adjusting the majority rule into a flexible, but more exacting, standard would address concerns of the courts in the minority without drastically shifting the law. Even though the Supreme Court declined to hear *Flanigan's Enterprises*,<sup>233</sup> the circuit courts could adopt this flexible standard without disrupting the current law. Further, this dispute, and the inconsistencies in the law, shows that the lower courts would benefit from the Supreme Court's guidance on the issue of prudential mootness.

This Part argues that courts should adopt a flexible standard, which would allow a well-pled claim for nominal damages to sustain an otherwise moot constitutional claim. However, when all but the nominal damages claim is dismissed as moot, the courts should take a second, more exacting, look at the claim for nominal damages and determine if the plaintiff has alleged a particularized deprivation of a constitutional right or harm sufficient to allow the claim to continue. Conclusory allegations that the plaintiff was harmed or his or her constitutional rights were violated should not suffice to save the case from dismissal.

Part III.A argues that the minority rule is overbroad and impermissible under current Supreme Court precedent. Part III.B then argues that the majority rule can be revised slightly to address the prudential concerns of the minority rule without a drastic shift in the current law. Finally, Part III.C discusses how this issue has arisen from a lack of clarity in the mootness doctrine and argues that the Supreme Court should provide more guidance in this area of the law.

#### *A. The Minority Rule Is Overbroad and Impermissible*

The minority rule is overbroad and impermissible under Supreme Court precedent. The minority rules, both the bright-line and flexible standard, are overbroad because they include cases where constitutional rights have not actually been violated, where there is no claim for compensatory damages, and where there is no ongoing dispute.<sup>234</sup> The rules also violate Supreme Court precedent by disregarding the special purpose nominal damages serve in constitutional law and the availability of secondary remedies.

The minority rules incorrectly treat nominal damages as a declaratory judgment by another name and disregard the special purpose this remedy serves in constitutional law.<sup>235</sup> It is often difficult for plaintiffs to prove or quantify the harm they have suffered from constitutional violations,<sup>236</sup> but

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233. *See* *Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018) (mem.) (denying certiorari).

234. *See supra* Part I.A.4.

235. *See supra* Part I.A.4.

236. *See, e.g., Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374–75 (2009) (discussing the “embarrassing, frightening, and humiliating” effects of a strip search on a middle school student); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (noting the feeling

the Supreme Court has held that these harms are absolute and appropriately vindicated by nominal damages.<sup>237</sup> By treating a lone claim for nominal damages as insufficient to survive dismissal, courts are in violation of this precedent.

The minority rules, particularly the bright-line approach, wrongly look to whether there is an ongoing controversy or a prospective harm that can be remedied rather than whether the plaintiff has alleged a past constitutional violation. By only looking to the practical or prospective effect of nominal damages, courts will allow past constitutional violations to go unvindicated. This rule impermissibly treats nominal damages the same as declaratory relief, despite their obvious differences.<sup>238</sup> In addition, this rule ignores the special purpose of nominal damages in constitutional law.<sup>239</sup>

Further, the minority rules impermissibly focuses on the plaintiff's underlying purpose for seeking nominal damages rather than determining what remedies are available to the plaintiff based on the injuries he or she alleges.<sup>240</sup> The Eleventh Circuit, in *Flanigan's Enterprises*, noted that the complaint prayed predominantly for declaratory and injunctive relief and did not ask for actual damages.<sup>241</sup> That court's inquiry into a plaintiff's true purpose or goal is impermissible under *Powell v. McCormack*.<sup>242</sup> The Court established in *Powell* that courts must hear cases where there is still an available remedy, regardless of whether the remedy is secondary or principal.<sup>243</sup> Rather than look to what the complaint predominantly prays for, the court should take a closer look at the claim for nominal damages itself and determine whether the plaintiff sufficiently pled a past violation.

### B. Taking a Closer Look

This Part proposes a new standard where courts take a second look at the claim for nominal damages when the remaining remedies have become moot. This Part first outlines why this standard is a more balanced approach than the minority and majority rules. Then, this Part establishes that it is a permissible standard under current Supreme Court precedent. Finally, this Part argues that this conflict developed because of the lack of clarity from the Supreme Court on mootness and proposes that the Supreme Court should provide more clarity on the doctrine.

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of inferiority that results from segregation); *see also* H.R. REP. NO. 96-1461, at 1 (1980) (explaining that people whose individual rights have been violated should not be prevented from seeking redress in federal court because their injury is not sufficiently economic).

237. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986); *Carey v. Phipps*, 435 U.S. 247, 266 (1978).

238. *See supra* notes 51–55 and accompanying text.

239. *See supra* Part I.A.4.

240. *See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1264–65 & n.16 (11th Cir. 2017) (en banc), *cert. denied sub nom. Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018).

241. *See id.* at 1264–65.

242. 395 U.S. 486, 496 (1969).

243. *See id.*

### 1. This Flexible Test Is a More Balanced Approach Than the Minority and Majority Rules

Instead of determining whether the court has jurisdiction based solely on whether nominal damages have been pled, courts should determine whether the plaintiff has pled a specific incident or deprivation where he or she was affected by the challenged conduct.<sup>244</sup> This inquiry would focus on whether the plaintiff has sufficiently alleged an injury rather than whether a judgment would have some prospective practical effect. This approach would prevent courts from dismissing cases where individual rights may have been violated. Courts would still be required to consider the specific incident that is alleged to be a constitutional violation, which would ensure that nominal damages function to remedy constitutional violations rather than as declaratory judgments.

If the defendant is able to meet the high bar of the voluntary cessation exception<sup>245</sup> and the court finds the claims for declaratory judgment and injunctive relief are moot, this should tip the scale in favor of dismissing the claim for nominal damages as well. Where a defendant has proved the challenged conduct will not recur, “judicial economy will dictate dismissal without the necessity of reaching the constitutional point.”<sup>246</sup> However, “[t]here may be no mechanical rule for determining when the balance tips in favor of dismissal, especially when the necessity of weighing other factors is considered, but it is balancing that is required, not automatic dismissal.”<sup>247</sup> Therefore, the court should take a second, closer look at the claim for nominal damages and determine whether the plaintiff has sufficiently alleged a particularized deprivation of his or her rights. For example, in *Flanigan’s Enterprises*, the plaintiffs could have alleged that they attempted to purchase the banned materials and, even though the statute was never enforced, businesses that previously sold these items no longer did so after the statute was enacted.<sup>248</sup>

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244. Compare *Soto v. City of Cambridge*, 193 F. Supp. 3d 61, 71 (D. Mass. 2016) (noting that the statute was never enforced and did not affect the plaintiff), with *Fitzgerald v. City of Portland*, No. 14-CV-00053, 2014 WL 5473026, at \*5 (D. Me. Oct. 27, 2014) (holding that the plaintiff had shown there was an actual constitutional violation and the claim for nominal damages should move forward).

245. Generally, cases are not dismissed as moot where the defendant voluntarily ceases the challenged conduct unless the defendant has the burden to prove it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968)).

246. See *Kates & Barker*, *supra* note 95, at 1410.

247. See *id.* at 1420.

248. See generally *Flanigan’s Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2017) (en banc), cert. denied *sub nom.* *Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018).

The proposed standard is a slight shift from the incidental test previously used by the Second Circuit.<sup>249</sup> In the incidental test, the courts looked at the underlying purpose of the suit to determine whether the claim for nominal damages was incidental to the moot claims.<sup>250</sup> However, rather than the impermissible method that the Eleventh Circuit used,<sup>251</sup> the Second Circuit decided whether the claim for nominal damages was incidental by determining whether the plaintiff was harmed or affected in any way by the challenged conduct.<sup>252</sup> This is similar to the approach currently used by the district courts in the First Circuit.<sup>253</sup>

Adopting this test would not represent a major shift from the majority rule. For instance, where the plaintiff has sufficiently alleged that the defendant deprived him or her of a constitutional right, the court would be unable to dismiss the case.<sup>254</sup> This ensures that constitutional rights are vindicated by the courts with the appropriate remedy. “[J]usticiability is ‘not a legal concept with a fixed content’” rather it is a doctrine “of uncertain and shifting contours.”<sup>255</sup> And this rule would give courts more flexibility to determine if there is jurisdiction and to avoid advisory opinions. This would ensure that courts adjudicate claims based on a specific incident involving a policy or statute rather than hypothetical facts. For example, if a statute is challenged as unconstitutional but is later repealed, a court would be issuing an impermissible advisory opinion on what the law should be without adjudicating a specific incident.

This approach would not disrupt the availability of attorney’s fees as to the cases that would be dismissed as moot because an award of nominal damages does not automatically confer reasonable attorney’s fees.<sup>256</sup> The Supreme Court has held that a claim for nominal damages may not provide a basis for

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249. See *Kerrigan v. Boucher*, 450 F.2d 487, 489–90 (2d Cir. 1971) (“[T]he claim for nominal damages, which is clearly incidental to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists.”).

250. See *id.*

251. See *supra* Part II.B.1.

252. See *Kerrigan*, 450 F.2d at 489–90 (holding that an award of nominal damages was incidental because the plaintiff had already been made whole).

253. See *supra* notes 194–207 and accompanying text.

254. See *Fitzgerald v. City of Portland*, No. 14-CV-00053, 2014 WL 5473026, at \*5 (D. Me. Oct. 27, 2014) (holding that a claim for nominal damages was not moot because the plaintiffs plausibly alleged a constitutional violation); *supra* Part III.A.

255. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 401 (1980) (first quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion); then quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

256. See *Farrar v. Hobby*, 506 U.S. 103, 117 (1992) (if the “victory is purely technical or de minimis, a district court need not go through the usual complexities involved in calculating attorney’s fees”); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 n.5 (2d Cir. 1999) (“[A] nominal damage award can be grounds for denying or reducing an attorney’s fee award.”); see also *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989) (“The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship . . . . Where such a change has occurred, the degree of the plaintiff’s overall success goes to the reasonableness of the award . . . not to the availability of a fee award *vel non*.”).

attorney's fees.<sup>257</sup> However, most circuit courts have taken this to mean that attorney's fees are not automatically unavailable, but rather it is within the courts discretion to determine if the fees are appropriate given the circumstances.<sup>258</sup> The proposed standard only applies to cases at the periphery, where plaintiffs would be unable to show with particularity that they were deprived of constitutional protections by the defendant. In these instances, even if nominal damages were awarded, a court may determine that the award of nominal damages is not a significant legal victory and be less likely to award attorney's fees.<sup>259</sup>

This flexible approach properly balances judicial economy and separation-of-powers concerns while still vindicating plaintiffs' constitutional rights. First, this test prevents impermissible advisory opinions based on hypothetical facts.<sup>260</sup> Further, this flexible rule allows courts to dismiss cases where there is not a sufficient basis to continue to hear the case. Additionally, plaintiffs cannot manipulate jurisdiction under this rule.<sup>261</sup> Plaintiffs would not be able to save the case merely by adding nominal damages as an additional remedy. Instead, they would have to allege a specific constitutional deprivation.

## 2. A Closer Look Is Permissible Under Supreme Court Precedent

The proposed flexible standard is more aligned with Supreme Court precedent than the minority and majority rules. This test is permissible under the Supreme Court's ruling in *Carey v. Phipus*. In that case, the Supreme Court held that, where the plaintiff proves a constitutional violation but cannot prove a compensable injury, the plaintiff's award is limited to nominal, rather than compensatory, damages.<sup>262</sup> The plaintiffs were specifically denied their due process right to a hearing, which would constitute a deprivation under this test.<sup>263</sup> Therefore, here, where the plaintiffs sufficiently alleged an actual constitutional deprivation, the court would not have the discretion to dismiss the case. However, where the plaintiff is unable to do so—for example, because the statute was not enforced nor abided by—the court would be permitted to dismiss the claim as moot.

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257. *Farrar*, 506 U.S. at 113–17.

258. *See* *Jama v. Esmor Corr. Servs., Inc.*, 577 F.3d 169, 176 (3d Cir. 2009) (“[W]e find no case in which a court of appeals has interpreted *Farrar* to require the automatic denial of fees . . . when only nominal damages are awarded.”); *Bos.’s Children First v. City of Boston*, 395 F.3d 10, 18 (1st Cir. 2005) (denying attorney’s fees where a nominal damages award was “a minimal success” and “[id] not represent a victory on a significant legal issue”).

259. *See, e.g., Bos.’s Children First*, 395 F.3d at 18 (denying attorney’s fees where a nominal damages award was “a minimal success” and “[id] not represent a victory on a significant legal issue”).

260. *See* *Flanigan’s Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1269 (11th Cir. 2017) (en banc), *cert. denied sub nom. Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018).

261. *See id.* at 1270.

262. *See* *Carey v. Phipus*, 435 U.S. 247, 254–55 (1978).

263. *See id.*

Further, the Court’s ruling in *Arizonans for Official English* supports a more exacting standard than the majority rule.<sup>264</sup> In that case, the Supreme Court briefly touched upon the issue of nominal damages and mootness.<sup>265</sup> The Court ultimately dismissed the case as moot because nominal damages were an improper remedy<sup>266</sup> and the state was not a proper party to the case.<sup>267</sup> The Court chastised the Ninth Circuit for reading in a claim for nominal damages, which the plaintiffs did not request in the complaint and clearly added later only to save the case from dismissal—circumstances that deserved “close inspection.”<sup>268</sup> This case implies that a claim for nominal damages may save an otherwise moot case but notes that these claims should be scrutinized.<sup>269</sup> Taking a closer look at the underlying claim is consistent with the court’s reasoning and serves to ensure that the nominal damages are not pled to manipulate jurisdiction, but allows courts to hear factually supported claims.

*C. The Supreme Court Should Clarify the Distinction Between Prudential and Constitutional Mootness*

One of the underlying reasons why this conflict developed is the unclear boundary of mootness.<sup>270</sup> The blended constitutional and prudential considerations have caused confusion among courts.<sup>271</sup> Courts are unable to differentiate between cases that are dismissed as moot because of constitutional restrictions or for discretionary prudential reasons. For example, courts cite prudential reasons for both deciding a moot case<sup>272</sup> and dismissing a case as moot.<sup>273</sup> Generally, in the federal courts, mootness has centered on the requirements necessary to adjudicate a case on the merits.<sup>274</sup> The minority rule uses the doctrine of mootness to avoid adjudicating the

264. 520 U.S. 43, 71 (1997).

265. *See id.*; *see also* Freedom from Religion Found., Inc. v. New Kensington Arnold Sch. Dist., 832 F.3d 469, 486 (3d Cir. 2016) (Smith, J., concurring) (noting that the Supreme Court has not addressed this issue and the only case where the Court has discussed nominal damages and justiciability is *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)).

266. *See Arizonans for Official English*, 520 U.S. at 68–69.

267. *See id.* at 64–65.

268. *See id.* at 71.

269. *See New Kensington Arnold Sch. Dist.*, 832 F.3d at 486–87 (Smith, J., concurring) (discussing how *Arizonans for Official English* implies that nominal damages will sometimes support an otherwise moot claim, but noting that attempts to save jurisdiction through a claim for nominal damages should be subject to scrutiny).

270. *See supra* Part I.B.2.a.

271. This confusion is most apparent in *Flanigan’s Enterprises* where the court tried to develop a flexible standard that aims to balance vindicating constitutional rights and judicial economy but fails to abide by Supreme Court precedent. *See supra* Part III.A (discussing how the minority rule is impermissible); *see also* Flanigan’s Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1272–73 (11th Cir. 2017) (en banc) (Wilson, J., dissenting) (discussing how the majority opinion contradicts Supreme Court precedent), *cert. denied sub nom.* Davenport v. City of Sandy Springs, 138 S. Ct. 1326 (2018).

272. *See supra* Part I.B.2.a.

273. *See supra* Part I.B.2.a.

274. *See supra* Part I.B.2.a; *see also* North Carolina v. Rice, 404 U.S. 244, 246 (1971).

merits of a case.<sup>275</sup> The Supreme Court should provide guidance and clarity on the boundaries and scope of constitutional and prudential mootness. Specifically, the Court should address when, if ever, judicial economy considerations might dictate dismissal of justiciable claims as moot.

As highlighted by the exceptions to mootness, courts usually rely on prudential mootness to reach the merits of the case. However, the courts applying the minority rule use prudential mootness as a doctrine to avoid adjudication. These courts touch upon the Constitution, but they rely primarily on whether there is an effective judicial remedy, similar to the common-law doctrine of mootness.<sup>276</sup> The common law focuses on the court's ability to practically effect a dispute, beyond just determining the merits of the case.<sup>277</sup> Courts further justify dismissing claims as moot because litigation wastes judicial resources<sup>278</sup> and trivializes the business of federal courts.<sup>279</sup> These reasons highlight lower courts' need for Supreme Court guidance on the boundaries of prudential and constitutional mootness.

Some scholars have called for a purely prudential doctrine of mootness.<sup>280</sup> A purely prudential doctrine would allow courts to dismiss any moot case or claim in its discretion.<sup>281</sup> These scholars argue that courts adhere blindly to the mootness doctrine because they believe it is a constitutional limitation, rather than a judicially created doctrine.<sup>282</sup> Although a justification for this application of mootness is judicial economy, when a case is dismissed at the appellate-court level, all the time and resources that have been invested in this case have been wasted.<sup>283</sup> The purely prudential doctrine would allow courts to consider what has been invested in the case before dismissing it.

However, this model would be a drastic shift from the current doctrine, which is "embedded in the case-or-controversy limitation imposed by the

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275. See *supra* Part II.B.

276. See Note, *supra* note 111, at 1674–76.

277. See *id.*

278. See *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007) (Jacobs, C.J., concurring in part and dissenting in part) (discussing the wasted time and resources for a verdict of two dollars).

279. See *Morrison v. Bd. of Educ.*, 521 F.3d 602, 611 (6th Cir. 2008).

280. See Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 623–25 (1992); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996); Kristen M. Shults, Comment, *Friends of the Earth v. Laidlaw Environmental Services: A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolution of Issues on Remand*, 89 GEO. L.J. 1001, 1036 (2001).

281. See *infra* note 292 and accompanying text.

282. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365, 1397 (1973) (discussing doctrines including mootness as a rule of self-denial); Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 375 n.12 (1974) (noting that the Supreme Court did not offer an explanation or authority for characterizing mootness as a constitutional doctrine, and that later courts accepted this characterization by citing to Supreme Court decisions).

283. Cf. Kates & Barker, *supra* note 95, at 1433–34 (arguing that judicial economy is concerned with the allocation of resources that have not been used rather than resources that have already been expended).

Constitution.”<sup>284</sup> This model unhinges a limitation on judicial power from the Constitution and would mean that the judiciary would be self-policed with only policy considerations to rely on.<sup>285</sup> This would likely compound the issues with the current doctrine and lead to a system with even less guidance and consistency.

Additionally, the Court could hold that the doctrine is purely a constitutional doctrine that is firmly ingrained in Article III. Although courts would be able to consider the prudential aspects of mootness under this model, the prudential aspects would never be able to override the constitutional limitations.<sup>286</sup> To hold that this doctrine is primarily constitutional and cannot be overridden would undermine courts’ ability to use the exceptions to this doctrine.<sup>287</sup> In addition, the Court has acknowledged the prudential aspects of this doctrine by noting that the starting point of this doctrine is grounded in the Constitution while holding that it is permissible to reach the merits of the case when prudential considerations are compelling.<sup>288</sup>

Finally, the Court could adopt a model which recognizes the dual policy and constitutional considerations of the doctrine.<sup>289</sup> Adopting this dichotic model would help guide federal courts in determining when they are required to dismiss a case as moot, or when dismissal is within their discretion.<sup>290</sup> This would allow courts to determine in their discretion whether there are prudential reasons to dismiss the case as moot or compelling reasons to allow the claim to move forward.

One way the Court could recognize the dual aspects of this doctrine would be by recognizing the implicit distinction between cases where the issue has become moot and where the plaintiff no longer has a personal stake.<sup>291</sup> One commentator argues that courts already implicitly treat these two types of cases differently,<sup>292</sup> so adopting this model would not be a shift in the law but rather would provide more guidance and require courts to be explicit in their analysis. Where the issue has become moot, the court lacks jurisdiction and is required by the Constitution to dismiss the case as moot.<sup>293</sup> Where the

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284. See *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 412 (1980) (Powell, J., dissenting); see also *Honig v. Doe*, 484 U.S. 305, 329 (1988) (Rehnquist, C.J., concurring) (noting that courts have held that the mootness doctrine is constitutionally required for decades).

285. See Note, *supra* note 111, at 1677 n.29 (arguing that the constitutional aspect of this doctrine ensures cases are presented in a form “traditionally thought to be capable of judicial resolution”).

286. See *Honig*, 484 U.S. at 329 (Rehnquist, C.J., concurring).

287. See *supra* Part I.B.2.b for a discussion of how the exceptions are an anomaly to the idea that mootness is a mandatory constitutional doctrine.

288. See *Geraghty*, 445 U.S. at 406 n.11.

289. See Greenstein, *supra* note 85, at 898–900; Note, *supra* note 111, at 1672.

290. See Hall, *supra* note 105, at 600.

291. See *id.*

292. See *id.*; see, e.g., *Geraghty*, 445 U.S. at 400–01 (holding that an action brought on behalf of a class does not become moot when the class representative’s claim becomes moot).

293. See Hall, *supra* note 105, at 565.

plaintiff's personal stake has become moot, the court has the discretion to decide to dismiss the case as moot.<sup>294</sup>

This model is consistent with the underlying policy of mootness. In *Flast*,<sup>295</sup> Chief Justice Warren explained that the jurisdictional requirements serve a two-fold purpose: to limit the questions presented to federal courts to ones in an adversarial context and to ensure separation of powers.<sup>296</sup> The personal stake and issue requirements are connected to the adversarial requirement.<sup>297</sup> Where the issue has become moot, such as where a statute has been repealed, the plaintiff may not advocate as effectively because he or she may not be motivated to bring the same effort needed to succeed as one who is facing an unfavorable outcome—like the statute being upheld.<sup>298</sup> Conversely, where the plaintiff's personal stake has become moot, such as where the passage of time has mooted injunctive and declaratory relief and there is no claim for damages, the plaintiff may continue to be motivated to pursue her claim in order to vindicate her constitutional rights.

Applying such a rule to the conflict central to this Note would provide significantly more clarity to courts. For example, allowing courts to have this explicit discretion would prevent the unnecessarily complicated, and incorrect, constitutional analysis that the Eleventh Circuit developed to avoid determining the merits of *Flanigan's Enterprises*.<sup>299</sup> If the Eleventh Circuit had the discretion to dismiss cases where the issue had become moot for prudential reasons—such as where a statute has been repealed—the court could have done so here, avoiding an incorrect constitutional analysis.

#### CONCLUSION

The conflict that has developed—whether or not to allow a claim for nominal damages to proceed when the claim is otherwise moot—has potentially allowed constitutional rights to go unvindicated. Part of the reason this conflict has developed is because of the lack of clarity in the doctrine of mootness. A minority of courts have sought to dismiss these claims for prudential reasons, which they have styled as dismissals for lack of jurisdiction. Meanwhile, a majority of courts have held that complaints that have plausibly alleged a claim for nominal damages are sufficient for federal courts to exercise jurisdiction. The Supreme Court should clarify the doctrine of mootness and explain when dismissal is permissible and when it is mandatory. Regardless of whether the Court takes up that issue, courts should adopt the flexible standard proposed in this Note, which will allow them to balance the competing concerns of judicial economy and vindicating plaintiffs for violations of their constitutional rights.

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294. *See id.* at 600; *see, e.g., Geraghty*, 445 U.S. at 400–01; *Sosna v. Iowa*, 419 U.S. 393, 401–02 (1975); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

295. 392 U.S. 83 (1968).

296. *See id.* at 95.

297. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–78 (1990).

298. *See Kates & Barker, supra* note 95, at 1409; Note, *supra* note 96, at 773.

299. *See supra* Part III.A.