

UZUEGBUNAM V. PRECZEWSKI: HOW THE INJURY-IN-FACT REQUIREMENT  
FURTHERS REDRESSABILITY ARGUMENTS

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**INTRODUCTION**

Not all cases have the right to be heard and addressed by the Supreme Court.<sup>2</sup> Article III of the Constitution provides a broad outline of the cases and controversies the judicial branch can hear. The Supreme Court has adopted several doctrines to assess the justiciability of cases such as standing, ripeness, and mootness.<sup>3</sup> However, the Court has not adopted a unified theory that outlines the specific qualities a case needs for standing in federal court.<sup>4</sup> As a result, the doctrines employed to determine justiciability have created unpredictable results and have kept valuable constitutional cases from being decided on their merits.<sup>5</sup>

One way in which the Court is limited in cases that can be heard, is the standing requirement that requires litigant to have an “injury-in-fact” to bring a case.<sup>6</sup> Beginning in early English common law cases and extending into early American common law cases, courts have struggled to determine whether they have the tools necessary to resolve non-economic harm.<sup>7</sup> In *Association of Data Processing Service Organization, Inc. v. Camp*, the Court indicated that an injury was not limited to an economic harm.<sup>8</sup> This decision allowed the Court to address non-economic injuries including environmental, religious, and electoral issues.<sup>9</sup> One way in which courts have addressed non-economic injuries is by granting nominal damages, which are

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<sup>2</sup> U.S. CONST. art. III, § 2.

<sup>3</sup> Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 265 (1990).

<sup>4</sup> *Id.* at 232–33.

<sup>5</sup> *Id.* at 234.

<sup>6</sup> Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1921 (1986).

<sup>7</sup> *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 799–800 (2021) (citing *Ashby v. White*, 2 Raym. Ld. 938, 955, 92 Eng. Rep. 126, 137 (K. B. 1703)).

<sup>8</sup> *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); Nichol, *supra* note 6, at 1921.

<sup>9</sup> Nichol, *supra* note 6, at 1921 (citing *Ass’n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 154).

minimal monetary amounts<sup>10</sup> awarded to the harmed party when there is no actual monetary loss or the amount of the damages cannot be proven.<sup>11</sup>

While current federal courts have held competing opinions on whether nominal damages can be the tool to resolve non-economic harm,<sup>12</sup> in the Supreme Court's 2021 decision *Uzuegbunam v. Preczewski*, the Court held that nominal damages alone can be the tool not only to redress a non-economic injury, but also to keep a case alive after a policy has been revoked.<sup>13</sup> This Comment will argue that the Court's decision in *Uzuegbunam* was made correctly, but the majority opinion relied too heavily on the redressability requirement in Article III without utilizing the injury in fact requirement. By employing the injury in fact requirement in Article III to support the majority's redressability analysis, the majority would be able to better rebut the dissenting opinion's concern about expanding the judicial branch's powers while also establishing better policy for future judicial decisions.

## I. BACKGROUND

Federal jurisdiction is limited to cases or controversies that satisfy three elements: (1) there must be an injury in fact; (2) there must be a causal connection between the injury and the defendant's conduct; and (3) the injury must be likely to be redressed by a favorable decision.<sup>14</sup> There are also limitations within these three elements. To satisfy the injury in fact requirement, the injury must be: (1) concrete and particularized; and (2) "actual or imminent, not conjectural or hypothetical."<sup>15</sup> Additionally, to satisfy the third element, an injury is redressable if relief granted by the court remedies the plaintiff's injury.<sup>16</sup> To remedy the injury, the relief must do more than give the plaintiff happiness or satisfaction.<sup>17</sup>

A case or controversy must meet these Article III standing requirements throughout the entire proceeding.<sup>18</sup> If at any point during the proceeding the case no longer meets the standing requirements, the case

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<sup>10</sup> Generally, a total of one dollar is awarded.

<sup>11</sup> Megan E. Cambre, Note, *A Single Symbolic Dollar: How Nominal Damages Can Keep Lawsuits Alive*, 52 GA. L. REV. 933, 936 (2018).

<sup>12</sup> *Id.* at 933–34.

<sup>13</sup> *Uzuegbunam v. Preczewski*, 141 U.S. 792, 797 (2021).

<sup>14</sup> U.S. CONST. art. III, § 2.

<sup>15</sup> Cambre, *supra* note 11, at 938 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 939.

becomes moot and no longer has standing to be heard in federal court.<sup>19</sup> A claim becomes moot when two conditions are met: (1) the alleged injury is not reasonably expected to occur again; and (2) events occurred since the injury that eradicate the effects of the injury.<sup>20</sup> If the controversy becomes moot, the Court risks issuing advisory opinions.<sup>21</sup> Advisory opinions are those that academically advise on what the law is without solving a controversy.<sup>22</sup> The Supreme Court is not entitled to issue advisory opinions because the Supreme Court's duty is to remedy controversies and not to give hypothetical opinions about the law for those who are "merely curious."<sup>23</sup>

Determining when an issue becomes moot is not always clear.<sup>24</sup> Courts have debated how to address mootness in cases where a policy causes an injury but the policy is later revoked so the injury cannot reoccur.<sup>25</sup> One way courts have allowed plaintiffs to keep their claims alive and to avoid mootness is by awarding nominal damages.<sup>26</sup> Nominal damages are not designed to precisely compensate a plaintiff, but, instead, are intended to affirm the defendant violated the plaintiff's rights.<sup>27</sup> This can include cases where plaintiffs cannot show they suffered an injury outside of being deprived of absolute rights.<sup>28</sup> Nominal damages are different from compensatory damages that address monetary harms as well as mental or emotional distress a plaintiff suffered.<sup>29</sup>

In the Supreme Court case *Carey v. Piphus*, the Court unanimously held that nominal damages can redress certain absolute constitutional rights even if no actual injury is proven.<sup>30</sup> In *Carey*, two schools, one elementary school and one secondary school, denied two students their procedural due process rights.<sup>31</sup> The Court reasoned that because due process rights are absolute rights "scrupulously observed," "the denial of procedural due

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<sup>19</sup> Maura B. Grealish, Note, *A Dollar for Your Thoughts: Determining Whether Nominal Damages Prevent an Otherwise Moot Case from Being an Advisory Opinion*, 87 FORDHAM L. REV. 733, 744 (2018).

<sup>20</sup> Cambre, *supra* note 11, at 940 (quoting *L.A. Cnty. v. Davis*, 440 U.S. 625, 631 (1979)).

<sup>21</sup> *Id.*

<sup>22</sup> Grealish, *supra* note 19, at 738.

<sup>23</sup> *Id.* (citing *Fair v. Adams*, 233 F. Supp. 310, 312 (N.D. Fla. 1964)).

<sup>24</sup> See generally Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary Cessation-Cessation Doctrine*, 129 YALE L.J.F. 325 (2019).

<sup>25</sup> *Id.*

<sup>26</sup> Cambre, *supra* note 11, at 943–44.

<sup>27</sup> Grealish, *supra* note 19, at 739.

<sup>28</sup> *Id.*

<sup>29</sup> *Memphis Community Sch. Dist. v. Stachura* 477 U.S. 299, 306–07 (1986).

<sup>30</sup> *Carey v. Piphus*, 435 U.S. 247, 266 (1978); see also Grealish, *supra* note 19, at 937.

<sup>31</sup> *Carey*, 435 U.S. at 248.

process should be actionable for nominal damages without proof of actual injury.”<sup>32</sup> The Supreme Court later affirmed the *Carey* decision in *Memphis Community School District v. Stachura*, where the Court held that both procedural and substantive due process rights could be redressed with nominal damages.<sup>33</sup>

The Supreme Court has held nominal damages can redress constitutional injuries, however, federal courts have had different interpretations as to whether nominal damages *alone* can satisfy the redressability requirement outlined in Article III.<sup>34</sup> In a recent Eleventh Circuit case, *Flanigan’s Enterprises, Inc. v. City of Sandy Springs*, the court held nominal damages alone could not redress constitutional violations if the harm was unlikely to occur again.<sup>35</sup> The federal court reasoned that the plaintiffs had received relief from their harm when the city repealed the ordinance that had caused the injury.<sup>36</sup> However, the decision was divided.<sup>37</sup> The dissent advocated for a bright line rule allowing nominal damages to protect constitutional claims from becoming moot, a position taken by most other federal circuit courts.<sup>38</sup>

More generally than the *Flanigan’s* decision on constitutional claims, the Tenth Circuit Court in *Utah Animal Rights Coalition v. Salt Lake City Corporation* held nominal damages alone can redress an unconstitutional injury and therefore can be used to satisfy Article III requirements for justiciability.<sup>39</sup> Here, by the time the case reached the Tenth Circuit, the ordinance that had caused the injury had been amended, so there was no possibility the harm would reoccur or continue.<sup>40</sup> However, the court held that, because the plaintiffs sought nominal damages, this relief was sufficient to satisfy the Article III requirements and to allow the court to decide the case on its merits even though there was no risk the harm would reoccur.<sup>41</sup> Other circuit courts have also voiced their support for this position and agree nominal damages alone are sufficient to redress an injury and establish Article III standing.<sup>42</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 938.

<sup>34</sup> 868 F.3d 1248, 1270 (2017); *see also* Cambre, *supra* note 11, at 941–49.

<sup>35</sup> Cambre, *supra* note 11, at 941.

<sup>36</sup> *Id.* at 942.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 371 F.3d 1248, 1261–62 (2004); *see also* Cambre, *supra* note 11, at 944.

<sup>40</sup> Cambre, *supra* note 11, at 944–45.

<sup>41</sup> *Id.* at 945.

<sup>42</sup> *Id.* at 946.

There is no widely accepted position on the issue of whether nominal damages alone can redress an injury, and there are strong arguments on both sides of the issue.<sup>43</sup> On one side, it is argued that Article III places important limitations on federal jurisdiction to preserve the separation of powers by ensuring federal courts only rule on adversarial cases that can be remedied by a court decision.<sup>44</sup> Because nominal damages are so minimal, some argue they cannot fully redress an injury on their own and, therefore, seeking nominal damages alone does not satisfy Article III standing requirements and expands judicial power beyond what was conceptualized by the Founding Fathers.<sup>45</sup>

Others argue that nominal damages redress claims where an injury cannot be redressed by a specific monetary award.<sup>46</sup> Because courts cannot calculate an economic loss in certain cases, especially when there is a constitutional violation, nominal damages can be awarded to redress the injury in other ways.<sup>47</sup> Instead of an exact economic compensation for the injury, nominal damages can redress injuries by providing the ability for a plaintiff to sue in federal courts, by recognizing the violation and harm caused, and by changing the relationship between the parties.<sup>48</sup> Providing redress through these different avenues, some argue, means an injury is still redressable with an award of nominal damages and so these cases should have standing in federal courts.<sup>49</sup>

In the 2021 Supreme Court Case *Uzuegbunam v. Preczewski*, the Court evaluated these competing arguments and addressed whether, under Article III, nominal damages alone can redress an injury and keep a case alive even after the policy causing the harm is revoked.<sup>50</sup>

## II. UZUEGBUNAM V. PRECZEWSKI

### A. Facts

In 2016, Georgia Gwinnett College prohibited a student, Chike Uzuegbunam, from engaging in conversations or distributing religious

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<sup>43</sup> See *id.* at 941–49.

<sup>44</sup> Grealish, *supra* note 19, at 743–46.

<sup>45</sup> Cambre, *supra* note 11, at 955.

<sup>46</sup> *Id.* at 936.

<sup>47</sup> *Id.* at 949.

<sup>48</sup> See *id.*; See also James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1621 (2011).

<sup>49</sup> See Cambre, *supra* note 11, at 949.

<sup>50</sup> *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021).

literature about his evangelical Christian faith while on campus.<sup>51</sup> Campus officers confronted Uzuegbunam twice while he shared his faith with others, an important practice in evangelical Christian faith.<sup>52</sup> The first time he was confronted, a campus officer stopped Uzuegbunam while he was distributing written religious materials at the school's outdoor plaza.<sup>53</sup> Later, when Uzuegbunam inquired about the policy he was violating, a school official confirmed he needed a permit and, even with a permit, he could only distribute written religious materials or speak about his religion in two designated "free speech expression areas" on campus.<sup>54</sup> Complying with the school's policy, Uzuegbunam applied and received a permit.<sup>55</sup> After receiving the permit, he continued to advocate for his faith within the confines of one of the designated free speech expression areas.<sup>56</sup> While in a designated free speech expression area, campus officers confronted Uzuegbunam a second time, notifying him that he was violating a campus policy prohibiting the use of free speech expression areas to disturb the peace.<sup>57</sup> This time, Uzuegbunam was threatened with disciplinary action if he continued his activities.<sup>58</sup>

Uzuegbunam and Bradford, another student who decided not to speak because of Uzuegbunam's experiences, sued multiple college officials.<sup>59</sup> The students sought nominal damages and injunctive relief, arguing that the school's policies and their enforcement violated their First Amendment rights.<sup>60</sup> Initially, the college officials defended their school's policies by arguing Uzuegbunam's advocacy for his faith qualified as "fighting words."<sup>61</sup> However, the officials later revoked the disputed policies and argued that the case was then moot.<sup>62</sup> The students responded that, while their claim for injunctive relief was no longer active, the case was still live because they continued to seek nominal damages for their injuries.<sup>63</sup>

### *B. Procedural History*

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<sup>51</sup> *Id.* at 796.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 796–97.

<sup>55</sup> *Id.* at 797.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

The District Court dismissed the case holding the students' claim for nominal damages alone did not establish standing.<sup>64</sup> The Eleventh Circuit affirmed the lower court's decision and held nominal damages did not establish standing if the students did not also request compensatory damages.<sup>65</sup> The United States Supreme Court granted certiorari.<sup>66</sup>

### C. Majority Opinion

Justice Thomas authored the majority opinion.<sup>67</sup> Justices Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett joined the opinion.<sup>68</sup> The Supreme Court reversed the lower courts' decisions and held nominal damages alone can redress Uzuegbunam's injury.<sup>69</sup> The Court began their decision by confirming that Uzuegbunam's case satisfies the first two elements of standing and then focused the opinion on addressing whether nominal damages alone can redress the plaintiffs' injury.<sup>70</sup>

The Court relied primarily on early common law precedent to establish its position.<sup>71</sup> Early English common law courts required plaintiffs to prove monetary damages in every case.<sup>72</sup> Later courts altered this position when Lord Holt authored an opinion in an English common law voting rights case.<sup>73</sup> Lord Holt's opinion established a theory that every legal injury causes some form of damage, even if plaintiffs could not prove monetary damages.<sup>74</sup> This new theory of legal injuries necessitated courts to award nominal damages when plaintiffs did not seek other forms of damages, such as compensatory or punitive damages.<sup>75</sup>

While the Court conceded Lord Holt's theory was applied inconsistently throughout early English cases, the Court insisted this was the established legal theory in English common law and that this theory was later applied to early cases in the United States.<sup>76</sup> To show the theory's acceptance in early American cases, the Court cited to *Webb v. Portland Manufacturing*

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 794.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 802.

<sup>70</sup> *Id.* at 797.

<sup>71</sup> *Id.* at 798.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 799 (citing *Ashby v. White*, 2 Raym. Ld. 938, 955, 92 Eng. Rep. 126, 137 (K. B. 1703)).

<sup>74</sup> *Id.* at 798.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 799.

*Company*.<sup>77</sup> In *Webb*, Justice Story reasoned that because common law recognized that “every violation imports damage,” if a plaintiff’s rights are violated, the party can recover nominal damages without evidence of actual damages from the injury.<sup>78</sup>

After Justice Thomas grounded the majority’s decision in common law precedent, he addressed the relationship between nominal damages and compensatory damages.<sup>79</sup> The majority disagreed with the respondent’s argument that nominal damages are reserved for cases where plaintiffs seek compensatory damages but cannot prove a specific amount.<sup>80</sup> Justice Thomas emphasized that nominal damages are not a “consolation prize” when compensatory damages are not proven, nor are compensatory damages a prerequisite to nominal damages.<sup>81</sup> Instead, the Court held that nominal damages are awarded by default until plaintiffs establish they are entitled to other forms of damages.<sup>82</sup>

The majority opinion recognized that, while plaintiffs may seek nominal damages without compensatory damages, in these cases nominal damages alone must still redress the injury to meet the requirements in Article III.<sup>83</sup> Because the injury must be redressed, the majority detailed how a single dollar redresses a constitutional injury.<sup>84</sup> Justice Thomas argued nominal damages change the relationship between parties by taking one dollar from the defendant and bestowing this dollar to the plaintiff, showcasing how nominal damages are more than merely symbolic.<sup>85</sup> While this single dollar may not provide full redress, the majority maintained that a partial remedy still satisfies the redressability requirement.<sup>86</sup>

Lastly, the majority addressed the impact this decision will have on future litigation and whether federal courts will experience an influx of cases merely because a plaintiff seeks an award of one dollar.<sup>87</sup> To address this concern, Justice Thomas pointed to the lack of amount-in-controversy requirements for federal question jurisdiction, explaining that “petitioners still would have satisfied redressability if instead of one dollar in nominal damages they sought one dollar in compensation for a wasted bus fare to

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<sup>77</sup> *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (C.C.ME 1838).

<sup>78</sup> *Id.* at 508; *see also Uzuegbunam*, 141 S. Ct. at 799–800.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 800–01.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 801.

<sup>87</sup> *Id.* at 802.



travel to the free speech zone.”<sup>88</sup> Additionally, the majority clarified their holding by explaining that plaintiffs must still meet other standing requirements outlined in Article III, but when analyzing Article III standing requirements, nominal damages alone may be sufficient to satisfy the redressability requirement.<sup>89</sup>

Thus, based on common law precedent, the Court held that nominal damages alone can redress a constitutional violation.<sup>90</sup> Applying this holding to Uzuegbunam’s case, Uzuegbunam has standing because nominal damages can redress his First Amendment injury.<sup>91</sup>

#### *D. Justice Kavanaugh’s Concurring Opinion.*

Justice Kavanaugh also filed a concurring opinion expressing his agreement with the Court on the history and precedent established in the majority’s opinion.<sup>92</sup> However, Justice Kavanaugh wrote separately to note that a defendant should be able to pay the nominal damages sought by a plaintiff to end litigation without a judgment on the merits of the case.<sup>93</sup>

#### *E. Chief Justice Roberts’ Dissenting Opinion.*

Chief Justice Roberts filed a dissenting opinion.<sup>94</sup> He argued that nominal damages cannot redress the plaintiffs’ harm so, when the plaintiffs only seek nominal damages, the Court cannot grant any effectual relief and the case is moot.<sup>95</sup> The Chief Justice argued the majority’s opinion expanded the judicial branch too far and the common law precedent is not clear or persuasive enough to support the majority opinion.<sup>96</sup>

The Chief Justice began by expressing concern for the majority opinion’s expansion of the judicial branch as allowing the Court to issue advisory opinions.<sup>97</sup> Citing to Founding Fathers such as Alexander Hamilton and John Marshall, the Chief Justice stressed the importance of standing requirements in limiting the judicial branch’s scope.<sup>98</sup> The Chief Justice

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (Kavanaugh, J., concurring).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 803 (Roberts, C.J., dissenting).

<sup>95</sup> *Id.*

<sup>96</sup> *See id.* at 805–06.

<sup>97</sup> *Id.* at 803.

<sup>98</sup> *Id.*

argued that when a court's decision cannot alleviate or compensate the plaintiff's injury, justices become "advice columnists" issuing advisory opinions on policies without redressing actual controversies.<sup>99</sup>

In addition to allowing advisory opinions, the Chief Justice argued that the majority opinion also expands the judicial branch by granting standing to any plaintiff seeking one dollar in nominal damages.<sup>100</sup> Roberts explained that plaintiffs in most cases could claim nominal damages, making it difficult to conceive of a case that would not have standing under the majority opinions new policy.<sup>101</sup>

While the Chief Justice was concerned with the impact the majority opinion will have on the reach of the judiciary, he also disagreed with the majority's interpretation of common law precedent.<sup>102</sup> He argued that, while common law is important, it must be balanced with American "founding-era decisions" regarding separation of powers.<sup>103</sup> As an example, English judicial practice allowed courts to issue advisory opinions to the Crown, but American founding-era decisions created an independent judiciary disallowing the Court to issue advisory opinions to other branches.<sup>104</sup>

Additionally, Chief Justice Roberts emphasizes the lack of clarity throughout early common law cases.<sup>105</sup> The Chief Justice pointed out that early common law allowed nominal damages as prospective, not retrospective, relief, and the early courts' holdings varied as to whether they could grant nominal damages without showing compensable harm.<sup>106</sup> More importantly, Chief Justice Roberts argues the foundational opinions the majority cites are equally unreliable.<sup>107</sup> He notes Lord Holt's opinion was originally a dissenting opinion but became the prevailing opinion largely due to a political dispute, not on the merits of his reasoning.<sup>108</sup> The Chief Justice then dismisses Justice Story's opinion in *Webb v. Portland Manufacturing Company* because of directly conflicting opinions Justice Story expressed in other legal documents.<sup>109</sup>

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<sup>99</sup> *Id.* at 804.

<sup>100</sup> *Id.* at 808.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 805–06.

<sup>103</sup> *Id.* at 805.

<sup>104</sup> *Id.* at 804–05.

<sup>105</sup> *Id.* at 805.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 806.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Lastly, Chief Justice Roberts agrees with Justice Kavanaugh's concurring opinion and insists the Court acknowledge an exception allowing defendants to end litigation by paying the nominal damages before the Court resolves the case on its merits.<sup>110</sup> The Chief Justice explains this exception to the majority's opinion may save federal courts from issuing "reams of advisory opinions."<sup>111</sup>

### III. ANALYSIS

In *Uzuegbunam*, the Court immediately established that the first two elements in Article III were met because there was an injury in fact that was traceable to the defendant's conduct.<sup>112</sup> The majority then focused the entirety of its analysis on the redressability requirement, the third element of standing. Instead of dedicating the analysis to redressability alone, the majority opinion should have analyzed the injury in fact requirement in greater depth to more concretely establish that nominal damages alone can redress a past injury. By grounding the decision in early common law, the Court fails to provide analysis for why nominal damages alone can redress a constitutional injury beyond noting that there is "money changing hands."<sup>113</sup>

To address these concerns, first, this Section will argue that analyzing the injury in fact requirement helps rebut Chief Justice Roberts's argument about expanding the judiciary's role by allowing advisory opinions. Second, this Section will argue that nominal damages do provide redress for constitutional violations. Lastly, this Section will argue that providing a way to redress injuries that satisfy the injury in fact requirement prevents the Court from giving violators a free pass, and thus, is important to developing constitutional analysis.

*A. The majority's opinion should have dedicated more analysis to the injury in fact requirement as a rebuttal to the dissent's concern about advisory opinions.*

Chief Justice Roberts's dissent warned that the majority opinion will expand the power of the judicial branch by allowing the Court to issue advisory opinions.<sup>114</sup> Because the Chief Justice believes that awarding a

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<sup>110</sup> *Id.* at 808.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 797.

<sup>113</sup> *Id.* at 800.

<sup>114</sup> *Id.* at 803 (Roberts, C.J., dissenting). Chief Justice Roberts also wrote a similar dissent in *Campbell-Ewald Co. v. Gomez* where he noted that it is beyond the Court's ability to "say a

trivial sum in nominal damages does not fully redress an injury, he is concerned that, by allowing nominal damages alone to satisfy the redressability requirement, the Court will be placed in a role of issuing prohibited advisory opinions.<sup>115</sup>

While the Chief Justice's concern about expanding the role of the judiciary is valid, the Court could refute Chief Justice Roberts's argument by including analysis about the injury in fact requirement. To satisfy the injury in fact requirement, Article III requires plaintiffs' injuries to be concrete and actual.<sup>116</sup> A plaintiff lacks standing if their injury is a generalized grievance that is common to all members of the public or the injury is merely hypothetical.<sup>117</sup> If the plaintiff's injury is not concrete and actual, the Court's decision does not solve a concrete and actual controversy, but instead addresses a generalized grievance or a hypothetical issue.<sup>118</sup> However, if plaintiffs can prove there is an injury in fact, the Court will be adjudicating on a controversy stemming from a specific and concrete incident and therefore will not be academically addressing an issue from a hypothetical or generalized scenario.<sup>119</sup> Therefore, if plaintiffs can demonstrate that there is a concrete and actual injury, there is less risk of issuing an advisory opinion, and the Court should provide more deference in granting standing.

Further, the redressability element is an inefficient area for the Court to limit its power and prevent overreach because there are few legal standards determining what remedy fully solves a harm. Without strict standards that direct which cases have a cognizable harm, the Court acts exactly in the way Chief Justice Roberts fears and uses its discretion to determine which cases will be addressed.<sup>120</sup> By doing so, the Court exercises its power under the guise of Article III principles.<sup>121</sup> Instead, the injury standard is a better area to limit the judiciary's role because the Court can assess whether a plaintiff's injury is concrete and actual.<sup>122</sup> Currently, the Court often gives brief treatment of the injury analysis, like in *Uzuegbunam*, so there is little analysis as to why some injuries are concrete and actual and others are not.<sup>123</sup>

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plaintiff is right" when there is no longer a concrete interest. Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO L. J. 1263, 1275 (2021).

<sup>115</sup> *Id.*

<sup>116</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>117</sup> F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 691 (citing *United States v. Richardson*, 418 U.S. 166, 176–77 (1974); *Lujan*, 504 U.S. at 560–61).

<sup>118</sup> See Grealish, *supra* note 19, at 760.

<sup>119</sup> *Id.* at 761.

<sup>120</sup> Nichol, *supra* note 6, at 1941.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1941–42.

<sup>123</sup> *Id.* at 1942.

Consequently, determinations about injuries are unpredictable, and, some commentators argue, judges allow their own sympathies about the merits of cases to impact their standing decision.<sup>124</sup> As a result, Article III provides minimal limitations to the courts' power.<sup>125</sup> Instead, if the Court in *Uzuegbunam*, and other similar cases, developed and applied a uniform injury in fact analysis, the Court could establish strong precedent about what constitutes a concrete and actual injury and use this defined standard to limit the judiciaries' role, which aligns with Chief Justice Roberts's ultimate goal.

Applying the concrete and actual injury analysis to *Uzuegbunam*, the majority held the injury was an injury in fact.<sup>126</sup> The injury in *Uzuegbunam* was not hypothetical because the school's policies and their enforcement actively stopped Uzuegbunam from speaking about his religion on the school's campus.<sup>127</sup> Although the school later rescinded the policy,<sup>128</sup> Uzuegbunam was injured in an actual and concrete manner while the policy was in place.<sup>129</sup> When the school changed their policy, the harm Uzuegbunam experienced was not erased because the harm was already done.<sup>130</sup> In *Uzuegbunam*, addressing the merits of this case would not advise on the law, but instead apply the law to a concrete and actual harm that had occurred.

*B. Nominal damages are an adequate remedy for non-economic, constitutional violations.*

Satisfying the injury in fact requirement lessens the risk of issuing an advisory opinion. However, to satisfy all Article III requirements and respond to the Chief Justice's argument completely, the injury must be redressable.<sup>131</sup> Typically, remedies are given to provide complete relief or to "preserve or restore the plaintiff's 'rightful position,' namely 'the position plaintiff would have been in but for the wrong.'"<sup>132</sup> Consequentially, the harm that is sought to be redressed should be measurable so the Court can determine what

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<sup>124</sup> Gene R. Nichol Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 334 (2002); Bandes, *supra* note 3, at 234; Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and their Connections to Substantive Rights*, VA. L. REV. 633, 640–41 (2006).

<sup>125</sup> Gene R. Nichol Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650-51 (1985).

<sup>126</sup> *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021).

<sup>127</sup> *Id.* at 796–97.

<sup>128</sup> *Id.* at 797.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> U.S. CONST. art. III, § 2.

<sup>132</sup> Bayefsky, *supra* note 114, at 1270–71.

remedy would restore the plaintiff to their “rightful position.”<sup>133</sup> When there is a concrete and actual injury, an injury in fact, a case should still have standing in federal courts even when the harm is not a calculable economic loss, especially when the injury is a violation of fundamental constitutional rights that the Court is tasked with protecting. Nominal damages can provide complete remedies in these situations and therefore can be complete remedies for non-economic harms.

The majority opinion in *Uzuegbunam* alludes to the importance of protecting constitutional rights by warning that any rule counter to common law theories would fail to provide a remedy for violations of rights that cannot be monetarily valued.<sup>134</sup> The risk of failing to grant parties standing when there is an injury in fact is more problematic than the Court in *Uzuegbunam* indicates. First, when plaintiffs’ constitutional rights are violated, it is difficult, and sometimes impossible, to show a compensable injury that a precise economic remedy can redress.<sup>135</sup> Further, the Court held in *Stachura* that compensatory damages cannot be “based on the abstract ‘value’ or ‘importance’ of constitutional rights.”<sup>136</sup> Instead, there needs to be a more tangible assessment to determine the damages in a constitutional case.<sup>137</sup> In response, the Court in *Uzuegbunam* employs common law examples of voting rights violations or due process violations to demonstrate the difficulty of calculating economic loss in constitutional cases.<sup>138</sup> This presents the key issue: Can the legal system provide an adequate remedy when injunctive relief or economic damages are not sufficient to solve the harm?

In constitutional rights cases, like *Uzuegbunam*, where neither injunctive relief nor monetary awards fully redress the harm, the Court should view its role as redressing constitutional violations and should award nominal damages in these cases. The Chief Justice’s view of separation of powers assumes the judiciary’s role is to resolve harm to individual rights.<sup>139</sup> Therefore, under his view, if there is not an injury to an individual that can be resolved by the Court, then the Court cannot enforce the Constitution.<sup>140</sup> However, by limiting standing to only the cases that the Court can resolve with the limited remedies recognized by the Court, the Court creates a value laden assessment of injuries that are worthy of a judicial decision that

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<sup>133</sup> *Id.* at 1272.

<sup>134</sup> *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021).

<sup>135</sup> Grealish, *supra* note 19, at 750.

<sup>136</sup> *Memphis Community Sch. Dist. v. Stachura* 477 U.S. 299, 310 (1986).

<sup>137</sup> *See id.*

<sup>138</sup> *Uzuegbunam*, 141 S. Ct. at 800.

<sup>139</sup> Bandes, *supra* note 3, at 277.

<sup>140</sup> *Id.*

excludes many constitutional injuries.<sup>141</sup> When the Court only can award economic damages or injunctions against behavior, individual rights can be violated as long as there is no economic damage and the behavior ceases before the Court hears the case. This establishes dangerous precedent and prevents the Court from protecting individuals' constitutional freedoms.

Further, when an injury is a constitutional violation, providing economic compensation rarely allows a plaintiff to return to their "rightful position." Instead, the Court should consider other ways in which a plaintiff may be restored to their "rightful position" outside of an economic context. Awarding nominal damages is one way in which the legal system could include an evaluation of the plaintiffs' dignity, give plaintiffs respect in ways beyond economic values, and engage in further analysis on constitutional principles.<sup>142</sup> By considering dignity in addition to the economic loss a plaintiff endures, federal courts could restore a plaintiff's status as the prevailing party as a remedy.<sup>143</sup> If dignitary respect is the adequate relief to a concrete harm of denied rights, then nominal damages can restore the plaintiff to the plaintiff's rightful position as the prevailing party and provide dignity and respect to the plaintiff.<sup>144</sup>

*C. Awarding nominal damages when there is an injury in fact is important to prevent granting defendants a "free pass" to violate constitutional rights and to further constitutional legal precedent.*

Nominal damages can remedy non-economic harms and should be awarded in cases like *Uzuegbunam*, where constitutional violations or other injuries without calculable economic harm may prevent plaintiffs from meeting standing requirements. By denying standing for controversies on the grounds that precise economic damage cannot be measured, two issues arise. First, actors are given a free pass to violate constitutional rights or harm others without any legal repercussions. Second, by failing to grant standing,

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<sup>141</sup> *Id.* at 278.

<sup>142</sup> See Bayefsky, *supra* note 114, at 1294–95.

<sup>143</sup> *Id.* at 1307. The law has acknowledged the need to recognize dignity and respect owed to plaintiffs in antidiscrimination law and equal protection jurisprudence. Specifically, the Supreme Court has deemed homophobic laws "dignitary wounds." *Id.* at 1924 (quoting *Obergefell v. Hodges* 135 S. Ct. 2584, 2606 (2015)). Additionally, the Supreme Court has recognized laws that differentiate based on gender determinations deprive individuals of dignity. *Id.* at 1294–95 (citing *Sessions v. Morales-Santana* 137 S. Ct. 1678, 1698 (2017)). And, even though the Court did not use the word "dignity," dignity was a driving idea in the Court's decision on segregation in *Brown v. Board of Education*. *Id.* at 1294.

<sup>144</sup> Bayefsky, *supra* note 114, at 1326–27.

the Court ceases to decide certain constitutional cases on their merits, therefore stalling the evolution of constitutional law.<sup>145</sup>

Allowing parties, like the school in *Uzuegbunam*, to create and enforce unconstitutional or harmful policies only to later revoke them when the harmed party sues over a concrete and particularized injury creates a free pass for defendants to harm others without legal repercussion.<sup>146</sup> This is especially problematic when governments institute policies that harm citizens and then revoke the policy, and as a result, are never held accountable for the harm caused.<sup>147</sup> If federal courts refuse plaintiffs standing to sue when they have experienced concrete and actual injuries, courts will allow defendants to violate legal rights as long as they can later revoke their policies without causing calculable economic harm.<sup>148</sup> The court should not allow a past harm to go unaddressed simply because a policy was revoked.<sup>149</sup>

Further, it is critical for the evolution of constitutional law to establish that nominal damages can redress constitutional claims and therefore satisfy Article III standing requirements.<sup>150</sup> Allowing federal courts to dismiss cases based on standing before the courts can address important constitutional issues slows the evolution of constitutional analysis.<sup>151</sup> When constitutional issues are not decided on their merits, precedent is not created, and constitutional rights become stagnant.<sup>152</sup> However, if nominal damages can satisfy the redressability requirement and establish standing, federal courts can then make determinations on the substance of the case.<sup>153</sup> Judgment on the merits of constitutional issues furthers constitutional analysis on issues with which society is currently grappling.<sup>154</sup>

In conclusion, the Court's holding in *Uzuegbunam* is correct. However, because the majority opinion focused its analysis on the redressability requirement in Article III, the Court missed an opportunity to utilize the injury in fact requirement to better supported its opinion. By supplementing the redressability reasoning with analysis about the injury in fact requirement, the majority's rebuttal of Chief Justice Roberts's dissent would explain the rarity of advisory opinions in cases like *Uzuegbunam*. Additionally, while cases like *Uzuegbunam* should have standing under

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<sup>145</sup> Grealish, *supra* note 19, at 750.

<sup>146</sup> See Davis & Reaves, *supra* note 24, at 328.

<sup>147</sup> See *id.* at 329–33.

<sup>148</sup> See *id.*

<sup>149</sup> Grealish, *supra* note 19, at 759.

<sup>150</sup> *Id.* at 750.

<sup>151</sup> See Davis & Reaves, *supra* note 24, at 340–41.

<sup>152</sup> *Id.*

<sup>153</sup> Cambre, *supra* note 11, at 952

<sup>154</sup> See *id.*



Article III, it is also important for constitutional law that courts grant these cases standing and decide these cases on their merits. Granting standing when there is an injury in fact, even if there is no calculable economic harm, prevents allowing actors a free pass to violate constitutional rights and allows for the evolution of constitutional analysis.