No. 21-1827

In the United States Court of Appeals for the Fourth Circuit

DIJON SHARPE,
Plaintiff-Appellant,

v.

WINTERVILLE POLICE DEPARTMENT, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AMICUS BRIEF OF THE INSTITUTE FOR JUSTICE SUPPORTING PETITION FOR EN BANC REVIEW

Anya Bidwell
Brian A. Morris
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9329
abidwell@ij.org
bmorris@ij.org

Counsel for Amicus Curiae
The Institute for Justice

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit public interest law center committed to defending the essential foundations of a free society. Central to that mission is promoting accountability to the Constitution for government officials and state actors. To accomplish that, the Institute for Justice launched its Project on Immunity and Accountability, which is devoted to a simple idea: if we the people must follow the law, our government must follow the Constitution. Section 1983 is the best, most reliable way to sue individual government officials for violating constitutional rights. But immunity doctrines, such as qualified immunity, let the government avoid constitutional accountability. These immunity doctrines are not rooted in the text of Section 1983 or the common law from 1871, but in judge-made policy decisions.

The panel majority exacerbated these problems. Despite finding that Dijon Sharpe has a plausible First Amendment claim, it still granted qualified immunity. But because he asked for nominal damages—and nothing more—that judge-made doctrine should not bar his claim.

INTRODUCTION

The doctrine of qualified immunity is both atextual and ahistorical. Jurists of all stripes, including members of nearly every court of appeals, the panel *in this case*, and Justices of the United States Supreme Court all agree that Section 1983's immunity doctrines are policy choices and unmoored from both its statutory text and the common law in 1871. Those realities justify the Supreme Court revisiting the doctrine of qualified immunity wholesale. This case, however, presents an opportunity for a more incremental approach to fixing qualified immunity that this Court very much could (and should) implement.

Qualified immunity does not apply when a plaintiff seeks only injunctive or declaratory relief. That's because, when only that relief is on the table (rather than compensatory damages), the policy concerns behind qualified immunity disappear. After all, even if the Supreme Court's rationale for creating qualified immunity was right (it's not), police officers don't have to worry about potential bankruptcy—and thus "hesitate" on the job—when the repercussions for violating the constitution don't include personal monetary liability. Put simply, injunctive and declaratory relief are not about the money.

Neither are nominal damages. Since the Founding, nominal damages have never been about money, but rather, about vindicating rights. So just like injunctive and declaratory relief, "the objectives of qualified immunity" would remain intact when a plaintiff asks only for $1.00 to vindicate his constitutional rights. *See Camreta v. Greene*, 563 U.S. 692, 728 (2011) (Kennedy, J., dissenting).

But neither the Supreme Court nor this Court have evaluated whether qualified immunity applies to lawsuits seeking only nominal damages. As such, this issue of first impression is a textbook "question of exceptional importance" for the full Court. Fed. R. App. P. 35(a)(2).

Answering that question provides the plaintiff with a choice when filing a Section 1983 claim: does he prioritize money damages or proving a constitutional violation? Dijon Sharpe made that choice: he plausibly pleaded that the police violated his First Amendment rights. And all he wanted in return was the right to prove that claim and, if he won, nominal damages. J.A. 12.

The Court should grant en banc review and allow his claim to proceed. That result would (1) adhere to the common law about nominal damages, (2) avoid the policy concerns outlined in *Harlow v. Fitzgerald*,

457 U.S. 800 (1982), (3) advance development of constitutional law, and (4) allow relief for a completed constitutional violation whether a relevant court has recognized that right in a prior holding.

ARGUMENT

The Court Should Grant Rehearing En Banc Because Qualified Immunity Does Not Apply To Nominal Damages.

Qualified immunity does not apply to every Section 1983 lawsuit. Instead, the judge-made doctrine has judge-made exceptions. Two of those exceptions are relevant here. Qualified immunity does not apply to claims seeking declaratory or injunctive relief. *See, e.g.*, *Meredith v. Fed. Mine Safety & Health Rev. Comm'n*, 177 F.3d 1042, 1049 (D.C. Cir. 1999); *Hydrick v. Hunter*, 669 F.3d 937, 939–40 (9th Cir. 2012).

The rationale behind those exceptions is simple. The Supreme Court created qualified immunity to protect state officials from "personal monetary liability" that, if imposed, could cause officials to (1) "hesitate and react with indecision," or (2) "be reluctant to participate in public service" altogether. *Am. Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (citation omitted); *see also Harlow*, 457 U.S. at 813 ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any

available alternative."). The Supreme Court didn't want state officials thinking about losing their home (or life savings) when they made a spur-of-the-moment decision. *But c.f.* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 18–48 (2017) (analyzing empirical evidence showing why the Supreme Court's policy concerns were wrong).

But when personal monetary liability is off the table, those policy concerns disappear. That's as true for nominal damages as it is for injunctive or declaratory relief. Historically, nominal damages provided the same relief—allowing common-law plaintiffs to "obtain a form of declaratory relief." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798 (2021) (citation omitted). So when a plaintiff sued for nominal damages at common law, he was seeking only the "vindication of his right[s]"—not monetary compensation. Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 66–67 n.1 (1st ed. 1879) (collecting 19th century cases).

The same is true today. For example, in a recent high-profile case, a jury awarded Gwyneth Paltrow $1.00 in nominal damages following a trial about who was at fault for a skiing collision. *See* Sam Metz, *Gwyneth Paltrow Gets Vindication at Ski Collision Trial*, Associated Press (Mar.

31, 2023), https://tinyurl.com/Ski-Verdict. The $1.00 verdict was "a symbolic amount [Ms. Paltrow] asked for in order to show it wasn't about money," but rather, to "stand up for what is right." *Id.* The same was true for Taylor Swift, who famously sought $1.00 in nominal damages against a radio host for sexual assault. As Justice Kagan later explained, Ms. Swift, by seeking nominal damages, wanted to say, "I'm not really interested in your money. I just want a dollar, and that dollar is going to represent something to both me and to the world of women who have experienced what I've experienced. And that's what happened. The jury gave her a dollar." Tr. of Oral Arg., *Uzuegbunam v. Preczewski*, No. 19-968, 75:16–25 (U.S. Jan. 12, 2021); *id.* at 88:15–18 (Barrett, J.) (same).

That's the same reason that qualified immunity does not apply to injunctive or declaratory relief—it's not about the money. Neither are nominal damages. But that doesn't mean nominal damages are insignificant—especially in qualified immunity cases. Instead, as the Supreme Court has recognized, allowing nominal damages to vindicate constitutional rights is "importan[t] to organized society [so] those rights [are] scrupulously observed," *Carey v. Piphus*, 435 U.S. 247, 266 (1978), and they "*affect[] the behavior of the defendant*." *Hewitt v. Helms*, 482

U.S. 755, 761 (1987). As a result, the Court should take this case en banc and explain, for the first time, that qualified immunity does not apply when a plaintiff seeks nominal damages.

A. Historically, Nominal Damages *Were* Declaratory Relief.

For centuries, common law recognized that plaintiffs could vindicate their rights through nominal damages. James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 Colum. L. Rev. 1601, 1620 & n.92 (2011) (tracing nominal damages "to the fourteenth century"). Indeed, before Congress passed the Declaratory Judgment Act, "[t]he award of nominal damages was one way for plaintiffs at common law to obtain a form of declaratory relief." *Uzuegbunam*, 141 S. Ct. at 798 (cleaned up).

Nominal damages, then, were not about money, but about vindicating rights. As an analogue, think about the common law tort of trespass. A trespass occurred whenever there was a "mere entry upon the land." *Little v. Stanback*, 63 N.C. 285, 287 (1869). And thus, when a trespass occurred, even if the intrusion were limited to walking on just "a single sprig of grass," the trespass was still a trespass, which "entitle[d] the plaintiff to nominal damages." *Id.* Those nominal

damages did not represent monetary relief; they were "used to establish a boundary or to declare that a defendant's entry onto the property is unlawful, which in turn protects the plaintiff's [future] property right[s]." Sadie Blanchard, *Nominal Damages As Vindication*, 30 Geo. Mason L. Rev. 227, 237 (2022); *Whipple v. Cumberland Mfg. Co.*, 29 F. Cas. 934, 936 (D. Maine 1843) (No. 17,516) (Story, J.) (detailing how it was "well-known" that nominal damages applied "wherever a wrong is done to a right").

That history fits perfectly with Section 1983 claims for nominal damages. When a constitutional violation occurs, an award of nominal damages equates to "relief on the merits of [the] claim" even if the plaintiff receives just $1.00. *Uzuegbunam*, 141 S. Ct. at 801. So just like the early trespass cases, nominal damages in a Section 1983 case establish that the complained-of conduct was unlawful, which in turn protects constitutional rights in the future. *Carey*, 435 U.S. at 266 (explaining that the value of a nominal-damages award is its clarifying effect on the law, which benefits society as a whole). In the end, then, by looking to the history of nominal damages, "one can make [an] airtight

argument that the defense of qualified immunity should not apply to suits brought for nominal damages." Pfander, *supra*, at 1627.

B. Nominal Damages Avoid *Harlow's* Policy Concerns.

The Supreme Court created qualified immunity for policy reasons. *Harlow*, 457 U.S. at 813–14. Chief among them was "to shield [public officers] from undue interference with their duties and from potentially disabling threats of liability." *Id.* at 806. Those concerns, according to the Supreme Court, are counterbalanced by the need to vindicate constitutional violations. *Id.* at 813–14. So when compensatory or punitive damages are involved, the Supreme Court weighed the competing interests it had created, and decided to place its thumb on the scale to immunize officials unless they violated "clearly established" law. *Davis v. Scherer*, 468 U.S. 183, 194–95 (1984). In other words, where money damages are sought, the interest in providing victims with financial redress gives way to, in the Supreme Court's view, the more substantial interest in not deterring officials from vigorously exercising their duties.

But when non-monetary damages are sought, the balance of interests flips. Any possible concern about an officer's "hesitation" or

"reluctance" when facing personal liability, if it even existed in the first place, disappears when only $1.00 is on the line. And without that risk, the benefit of vindicating constitutional rights easily prevails—obviating the need for qualified immunity. *C.f. Harlow*, 457 U.S. at 819 n.34 (limiting to "civil *damages*," not "injunctive or declaratory relief").

What's more, while *Harlow* was concerned about the general costs of litigation, 457 U.S. at 816, "virtually all law enforcement defendants are [now] provided with counsel free of charge." Schwartz, *supra*, at 59. As such, there is no policy justification to apply qualified immunity to lawsuits for just nominal damages—and no "evils" to balance. And unless the full Court steps in, qualified immunity would operate to deny constitutional rights.

Further still, removing the defense of qualified immunity for nominal damages is a net positive for policy considerations. The Supreme Court has criticized qualified immunity because it undermines the development of constitutional law by allowing courts to duck important constitutional questions. *Camreta*, 563 U.S. at 706–07 (citing *Pearson v. Callahan*, 555 U.S. 223, 237 (2009)). But by allowing claims for nominal damages to proceed without first determining whether the

right was "clearly established," more cases would resolve "the merits of unsettled constitutional claims." Pfander, *supra*, at 1628. And it would actually hold state officials liable when they violate constitutional rights—something often missing because of qualified immunity.

C. Every Violation of a Right Imports Damage.

The Supreme Court has resolved any doubt whether a plaintiff has standing to vindicate a completed constitutional violation through nominal damages. In *Uzuegbunam*, the plaintiff engaged in protected speech on a college campus. 141 S. Ct. at 796. After the college made him stop under a campus policy, the plaintiff sued for injunctive relief and nominal damages. *Id.* at 797. The college, however, quickly scrapped the challenged policy, which mooted the injunctive relief.

But the Supreme Court said that the plaintiff still had standing because he asked for nominal damages.[1] *Id.* at 801–02. The plaintiff "experienced a completed violation of his constitutional rights when [the

[1] The Supreme Court, even before *Uzuegbunam*, recognized that nominal damages are available for constitutional violations. *E.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (equal protection); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (First Amendment); *Carey*, 435 U.S. at 266 (procedural due process).

college] enforced [its] speech policies against him." *Id.* at 802. And because, at common law, "every violation [of a right] imports damage," *id.* (quoting *Webb*, 29 F. Cas. at 509), the plaintiff suffered an injury "even if he cannot or chooses not to quantify that harm in economic terms." *Uzuegbunam*, 141 S. Ct. at 802.

That's the exact situation here. The officers "physically attacked" and threatened to arrest Mr. Sharpe for exercising his First Amendment rights, J.A. 10, which caused him to suffer a completed constitutional violation. *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 679 (4th Cir. 2023). As such, because Mr. Sharpe asked for nominal damages, his claim should move forward even if his First Amendment right was not "clearly established" at the time.

D. In 1871, Congress Abrogated Common-law Immunities When It Created Section 1983.

At the end of the day, this entire discussion about qualified immunity is gratuitous. Nearly forty years ago, Justice Thurgood Marshall noted that immunity for state officials conflicted with Section 1983's unambiguous language and Congress's intent to abrogate common-law immunities. *Briscoe v. LaHue*, 460 U.S. 325, 347–64 (1983) (Marshall, J., dissenting). Justice Marshall was correct. Congress

abrogated common-law immunities that existed in 1871 when it created Section 1983. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 235–41 (2023). The text enacted by Congress made state officials liable "notwithstanding" "any . . . custom[ ] or usage"—that is, notwithstanding common-law defenses like immunity. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13; Inst. for Just. Amicus Br., *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, No. 21-806 (U.S. Sept. 23, 2022) (elaborating on the Notwithstanding Clause). Judge Willett recently explained this truth: "the Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*." *Rogers v. Jarrett*, No. 21-20200, slip op. at 12–15 (5th Cir. Mar. 30, 2023) (Willett, J., concurring).[2] Thus, if this Court wanted to apply Section 1983's original text, qualified immunity would be off the table altogether. But

[2] In 1874, Congress compiled the Revised Statues for the first time. In doing so, "[t]he Reviser of Federal Statutes made an unauthorized alteration to Congress's language" by omitting the Notwithstanding Clause. *Rogers*, slip op. at 13–14 (Willett, J., concurring). That omission, however, did not incorporate the common law back into Section 1983. Inst. for Just. Amicus Br., *Talevski*, at 13–18.

at the very least, claims for nominal damages should not be precluded by qualified immunity.

CONCLUSION

The Court should grant rehearing *en banc*.

April 14, 2023.

Respectfully submitted,

s/ Anya Bidwell
Anya Bidwell
Brian A. Morris
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9329
abidwell@ij.org
bmorris@ij.org

Counsel for Amicus Curiae
The Institute for Justice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was filed electronically on April 14, 2023, and thus, will be served electronically upon all counsel.

s/ Anya Bidwell
Anya Bidwell

CERTIFICATE OF COMPLIANCE

Under Federal Rules of Appellate Procedure 29(b)(4) and 32(g), I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this brief contains 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/Anya Bidwell
Anya Bidwell