No. 20-1066

IN THE

Supreme Court of the United States

ASHLYN HOGGARD,

Petitioner,

v.

RON RHODES, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether qualified immunity shields public-university officials from liability when the reasoning—but not the holding—of a binding decision gave the officials fair warning they were violating the First Amendment.

2. What degree of factual similarity must exist between a prior case and the case under review to overcome qualified immunity in the First Amendment context?

3. Whether public-university officials should be held to a higher standard than police officers and other on-the-ground enforcement officials for purposes of qualified immunity.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to protecting civil liberties at our nation's institutions of higher education. These rights include freedom of speech, freedom of press, freedom of assembly, due process, academic freedom, legal equality, and freedom of conscience.

Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members across the United States. FIRE believes that, if our nation's universities are to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free-speech rights on campus. FIRE defends these rights at both public and private institutions through public advocacy, litigation, and participation as *amicus curiae* in cases that implicate student rights, like the one now before this Court. *See, e.g.*, *Uzuegbunam v. Preczewski*, No. 19-968 (U.S. argued Jan. 12, 2021).

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[1] Pursuant to Rule 37.6, FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel for all parties were timely notified of FIRE's intent to file this brief and have filed blanket consent for any person or organization to file an amicus brief at the certiorari stage in this case.

FIRE submits this *amicus* brief to highlight the prevalence of campus-speech policies, like the ones challenged in this case, that restrict student expression in violation of the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Qualified immunity does not protect government officials whose actions violate "clearly established . . . constitutional rights." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

This Court has long established that First Amendment protections apply with full force on public university campuses, as in the community at large. *Healy v. James*, 408 U.S. 169, 180 (1972). Under this clearly established principle, courts have routinely struck down campus speech codes that restrict student expression at our nation's public institutions of higher education. *See infra* at 4–8.

Yet too many college and university officials fail to abide by this longstanding precedent. And time and again, courts grant public-university officials qualified immunity, shielding them from liability for enforcing unconstitutional policies to violate students' First Amendment rights, even though the only salient difference between these cases is the defendant.

Unsurprisingly, then, a shocking number of public colleges and universities across the country defy well-established precedent by *still* maintaining speech codes that prohibit student expression protected by the First Amendment. *See infra* at 8–20. These restrictive policies take many forms, including: "free speech zones" that relegate student expression to tiny enclaves on campus and typically require students to obtain approval days or weeks ahead; sweeping speech codes that reach far beyond narrow categories of speech not protected by the First Amendment; and

broad, vaguely worded "civility" mandates that empower administrators to punish critical or dissenting viewpoints. FIRE's two decades of experience defending student rights illustrate all too clearly that public university officials regularly enforce these speech codes to silence even core political speech.[2]

And because students face distinct challenges in being able to litigate their claims to judgment, broad grants of qualified immunity like that at issue in this case effectively eliminate the possibility of holding public university administrators accountable for violating student First Amendment rights. Indeed, with full knowledge of how easily a student challenge can be mooted by graduation, public universities often engage in gamesmanship by rescinding challenged policies during litigation to moot or settle a case on favorable terms, only later to reinstate these same policies. *See infra* at 20–27.

This Court should grant *certiorari* to clarify that qualified immunity does not shield public-university officials from liability for enforcing substantially similar university policies to those that already have been invalidated by other courts.

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[2] *See Cases Archive*, Found. for Individual Rights in Educ., https://www.thefire.org/cases/?limit=all (last visited Mar. 7, 2021).

ARGUMENT

I. Under This Court's Clear First Amendment Rulings, Courts Have Routinely Invalidated University Policies on Campus Expression.

This Court's precedents make clear that the First Amendment applies to public university and college students to the same extent as the public at large. "[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Id.* "Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

Forty years ago, this Court reiterated: "With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981).

University officials have no greater power than other government officials to censor protected speech because they disapprove of its message. *See Papish v. Bd. of Curators of Univ. of Ms.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" (citation omitted)). Nor may they discriminate on the basis of viewpoint, even in

limited public forums they have created. *See Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that a state university violated the First Amendment by withholding student activity funds from religious publication).

Applying these clear principles, courts have consistently struck down restrictions on campus speech on First Amendment grounds. For example, numerous courts have invalidated so-called "free speech zones," such as the one enforced at the time of the events at issue, as incompatible with students' expressive rights.[3] Courts have also routinely declared university speech policies unconstitutionally vague or overbroad.[4] This "state of the law" gives public-university officials "fair warning" that their policies

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[3] *See, e.g.*, *Olsen v. Rafn*, 400 F. Supp. 3d 770, 776 (E.D. Wis. 2019) (enjoining as unconstitutional enforcement of college's policy that restricted "expressive activity" to designated "public assembly areas" on campus, constituting only 480 square feet of a 145-acre campus); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, Case No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio June 12, 2012) (enjoining enforcement of unconstitutional "free speech zone" policy). *See also Shaw v. Burke*, Case No. 2:17-CV-02386-ODW (PLAx), 2018 U.S. Dist. LEXIS 7584, at *22 (C.D. Cal. Jan. 17, 2018) (holding on motion to dismiss that "open, outdoor areas of universities . . . are traditional public fora[,]" regardless of a college's regulations to the contrary).

[4] *See, e.g.*, *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010) (declaring university speech policies overbroad); *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008) (striking down former sexual-harassment policy on First Amendment grounds and holding that because the policy failed to require that speech in question "objectively" created a hostile environment, it provided "no shelter for core protected speech"); (...continued)

restricting campus speech violate the First Amendment. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In light of this well-established precedent, this Court should clarify that the doctrine of qualified immunity offers no refuge to public-university officials enforcing policies that violate students' First Amendment rights, when substantially similar policies have been invalidated by courts. As this Court has observed, qualified immunity does not protect officials who are aware of but ignore well-established principles until applied to them. *See Taylor v. Riojas*, 141 S.

Justice for All v. Faulkner, 410 F.3d 760, 763 (5th Cir. 2005) (affirming district court's holding that University of Texas at Austin's policy on distribution of literature is invalid under First Amendment); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring discriminatory harassment policy overbroad and unconstitutionally vague); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (enjoining enforcement of overbroad "cosponsorship" policy); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (declaring speech policy overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad speech policies); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring speech policy regulating "potentially disruptive" events unconstitutional); *Booher v. Bd. of Regents*, Civil Action No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Corry v. Leland Stanford Junior Univ.*, Case No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (declaring "harassment by personal vilification" policy unconstitutional); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring harassment policy overbroad and unconstitutionally vague); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (finding harassment policy overbroad and unconstitutionally vague).

Ct. 52, 53–54 (2020) (*per curiam*) ("'[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'" (quoting *Hope*, 536 U.S. at 741)).

This Court's characterization of the qualified immunity analysis in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) has engendered widespread confusion as to how specific a prior precedent must be to deny qualified immunity to government officials. *See* Pet. for a Writ of Cert. at 19–21. Consequently, courts like the Eighth Circuit here, have granted qualified immunity to public-university officials who carry out policies substantially similar to those that have been invalidated. *See id.* at 22–24. Unfortunately, this permits public-university officials, like Respondents, to evade their constitutional obligations by essentially arguing that, unless the same exact set of circumstances is replicated in their own case, the law is not clearly established and they may not be held accountable.

Indeed, the record in this case shows that officials at Arkansas State University intentionally chose to ignore clearly established law. When university administrator Elizabeth Rouse was informed that "freedom of speech zones have actually now become unconstitutional in many areas across the country," Rouse responded, "not here, yet."[5] And Rouse proceeded to shut down Petitioner Hoggard's efforts to disseminate information and recruit fellow students to her proposed student organization.

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[5] Video recording from Emily Parry, at 1:05–1:08, 8th Cir. Joint Appendix 346–47.

Unfortunately, this defiant attitude of public university officials—and the speech-restrictive policies it serves to defend—is not limited to officials at Arkansas State University.

II. Most Public Colleges and Universities Still Maintain Policies That Infringe Students' First Amendment Rights.

Contravening the clear mandate of the First Amendment and the overwhelming weight of legal authority, most public institutions impose policies restricting student speech.[6]

FIRE annually reviews and rates speech codes maintained by more than 475 of the largest colleges and universities in the country.[7] Institutions of higher education earn a rating of red-light, yellow-light, or green-light, based on the extent to which they restrict free speech, with a red light being the worst.[8]

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[6] *See generally*, *Spotlight on Speech Codes 2021: The State of Free Speech on our Nation's Campuses*, Found. for Individual Rights in Educ. (Jan. 4, 2021), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2021/01/04162946/fire-spotlight-on-speech-codes-2021.pdf [hereinafter *Spotlight Report*].

[7] *See Spotlight Database*, Found. for Individual Rights in Educ., https://www.thefire.org/resources/spotlight (last visited Mar. 7, 2021).

[8] FIRE's database rates both public institutions, which are bound by the First Amendment, and private institutions, the vast majority of which maintain policies that guarantee students expressive rights. To caution prospective students and faculty, FIRE gives a "warning" rating to those few private institutions that do not promise freedom of expression. *See Using the Database,* Found. for Individual Rights in Educ., https://www.thefire.org/resources/spotlight/using-the-spotlight-database (last visited Mar. 7, 2021).

FIRE also publishes an annual report on the state of free expression on the nation's campuses, *Spotlight on Speech Codes*, highlighting noteworthy policies and national trends. FIRE's 2021 report finds that of the 372 public universities reviewed, 318 received a red- or yellow-light rating. This means that these public institutions maintain either (1) a "severely restrictive" speech policy that "clearly and substantially restricts protected speech" on its face (14.5% of public institutions surveyed); or (2) a policy that could easily be applied to suppress or punish protected expression (71%).[9] Notably, public institutions, which are legally bound to uphold the First Amendment, are nearly as restrictive of speech as private institutions.[10] The figure below shows the 2021 ratings of all institutions.[11]

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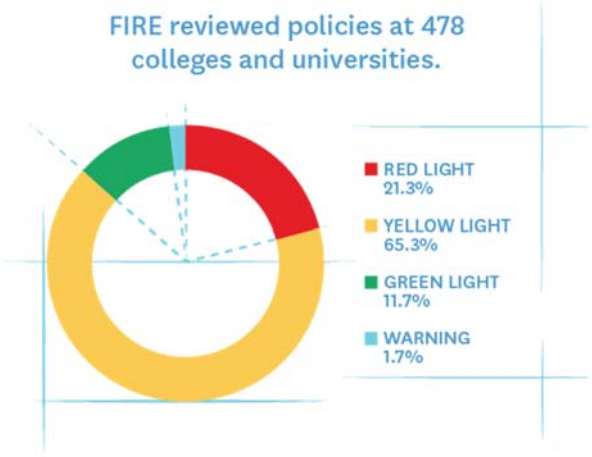
[9] *Spotlight Report*, *supra* note 6 at 2, 7.

[10] *Id*. at 8.

[11] *Spotlight on Speech Codes 2021*, Found. for Individual Rights in Educ., https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2021/ (last visited Mar. 7, 2021).



While the mere existence of these policies (and the concomitant threat of discipline) chills student expression, officials are also actively enforcing them. Since its founding in 1999, FIRE has received thousands of reports of censorship on public college and university campuses. FIRE has successfully defended student and faculty rights in more than five hundred cases nationwide.[12] In doing so, FIRE has witnessed the troubling state of students' expressive rights firsthand. Students' First Amendment rights are not just threatened—they are routinely violated.

A. Campus "Free Speech Zones" Turn the First Amendment on its Head.

Many colleges and universities maintain policies—similar to the one Arkansas State University had in place at the time Petitioner filed this lawsuit—that restrict student demonstrations and other expressive

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[12] *Cases Archive*, *supra* note 2.

activities to specified places on campus, typically small and out-of-the-way areas.

These so-called "free speech zones" in reality function as "free speech quarantines" that turn the First Amendment on its head by banishing student speech to tiny outposts on the fringe of campus.[13] For example, Modesto Junior College in California cabined student expressive activity to the "little cement area"[14] pictured below.

Similarly, Los Angeles Pierce College designated as its "free speech zone" an area of about 616 square feet, comprising approximately .003% of the total area of its 426-acre campus.[15] Valdosta State University of Georgia limited free expression on its entire 168-acre

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[13] *Spotlight Report*, *supra* note 6 at 21–22.

[14] *See Free Speech Zones*, Found. for Individual Rights in Educ. (May 24, 2019), https://www.thefire.org/issues/free-speech-zones.

[15] *See Shaw*, 2018 U.S. Dist. LEXIS 7584, at *6–7.

campus to one small outdoor stage and allowed "only one person or group" to use this "free speech zone" between 12 pm and 1 pm and 5 pm and 6 pm on weekdays.[16]

Exacerbating the harm to students' expressive rights, universities typically impose onerous permitting requirements for students to even use the "free speech zones"—requirements that operate as a prior restraint. Many universities require students to obtain signatures from multiple officials, and receive permission days or weeks in advance. For example, students at Modesto Junior College were required to obtain permission from college administrators at least five days in advance, and could only use the "free speech zones" for a maximum of eight hours each semester.[17]

Yet much campus speech involves spontaneous responses to recent or still-unfolding developments. Requiring a student or student group to remain silent until a university administrator has completed processing paperwork interferes with the student or students' intended message by rendering it untimely and ineffective.

Recognizing the way these "free speech zone" policies infringe students' rights to expression, 18 states have banned public colleges and universities from relegating student expression to "free speech zones."[18]

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[16] *See Free Speech Zones*, *supra* note 14.

[17] *Id.*

[18] *Ohio bans restrictive college free speech zones, enhances protections for student expression*, Found. for Individual Rights in (...continued)

Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Iowa, Kentucky, Louisiana, Missouri, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Virginia statutorily have reaffirmed clearly established law that outdoor areas of public universities are traditional "public forums" for students.[19]

Despite judicial and legislative invalidation, "free speech zones" persist.[20] Below are representative examples currently in effect.

- The University of Massachusetts Dartmouth has designated just one area on campus as a "public forum space," and students wishing to use that space must inform the campus police "at least 48 hours in advance."[21]
- New Jersey's Montclair State University requires students wishing to assemble to obtain permission two weeks in advance, and further specifies that spontaneous demonstrations are only allowed in one of two areas on campus. Students who wish to assemble and exercise their First Amendment rights spontaneously

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Educ. (Dec. 21, 2020), https://www.thefire.org/ohio-bans-restrictive-college-free-speech-zones-enhances-protections-for-student-expression.

[19] *Id*.

[20] *See Spotlight Report*, *supra* note 6 at 36 (listing surveyed colleges and universities with free-speech zones).

[21] *Public Forum Use of University Facilities*, Univ. of Mass. Dartmouth (Aug. 24, 2010), https://www.umassd.edu/policies/active-policy-list/facilities-operations-and-construction/public-forum-use-of-university-facilities/.

must alert the Dean of Students "immediately."[22]

- Eastern Illinois University limits distribution of materials to a single area on campus.[23]

Unfortunately, "free speech zones" are just the tip of the iceberg when it comes to campus speech restrictions.

B. Sweeping and Vague Speech Policies Stifle Student Speech.

Like Arkansas State University System's "Freedom of Expression Policy," university speech policies tend to be overbroad, vaguely worded, or both. *See, e.g.*, *Dambrot*, 55 F.3d 1177, 1182–85 (6th Cir. 1995) (holding that speech code that prohibited "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive . . . environment" was overbroad).

Campus speech restrictions reach far beyond the narrow categories of speech not protected by the First Amendment under this Court's precedent.[24] Campus policies often grant university officials wide discretion

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[22] *Demonstrations and Assemblies*, Montclair State Univ. (Apr. 2, 2018), https://www.montclair.edu/policies/all-policies/demonstrations-assemblies.

[23] *Internal Governing Policies, No. 138.1—Posting and Distribution of Materials*, E. Ill. Univ. (July 27, 2020), https://castle.eiu.edu/auditing/138_1.php?fbclid=IwAR1eLxsMSih9Nkefbar6cFhdlzjoQOTbn_XrqI73uHWcnbQf-wBcgL073HY.

[24] *See generally Spotlight Report*, *supra* note 6 at 12–22. *See also United States v. Stevens*, 559 U.S. 460, 468–71 (2010) (discussing historically unprotected categories of speech).

to silence or punish a stunning range of student speech the officials deem inconvenient, disagreeable, objectionable, or simply unwanted.

Many colleges and universities erroneously believe they may lawfully prohibit offensive expression like profanity and vulgar speech, regardless of whether it constitutes actional obscenity.[25] Below are just five representative examples.

- Lake Superior State University prohibits "postings deemed offensive, sexist, vulgar, discriminatory or suggestive."[26]
- Louisiana State University's policies ban "offensive language" and "suggestive comments"[27];
- Portland State University prohibits "sexual or derogatory comments."[28]
- The University of Texas at San Antonio prohibits posting signs that contain "vulgar" material,

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[25] *Spotlight Report*, *supra* note 6 at 15.

[26] *Student Handbook (Code of Conduct) - Posting Policy*, Lake Superior State Univ., https://www.lssu.edu/campus-life/stay-informed/student-handbook/#toggle-id-5 (last visited Mar. 7, 2021).

[27] *Policy Statement 95: Sexual Harassment of Students*, La. State Univ., 2 (Apr. 1, 2016), https://www.lsu.edu/policies/ps/ps_95.pdf.

[28] *Prohibited Discrimination & Harassment Policy*, Portland State Univ. (Sept. 28, 2017), https://docs.google.com/document/d/e/2PACX-1vRBvO64ghsJ4GeuDWaEv-zmv9r95jMzJDuIEP9Jqx3LwdRjcb9DVWRVYtC3QA6W8Jenhp-txbfpxCRWg/pub.

without limiting this restriction to speech unprotected by the First Amendment.[29]

- Valdosta State University has adopted rules prohibiting "hate-based material."[30]

Additionally, universities commonly turn laudable pleas for civility and respect into unconstitutional mandates.[31] For example, Delaware State University bans verbal abuse, defined as "the use of harsh, often insulting language."[32] University civility policies are particularly problematic for political speech as they "reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause." *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1019 (N.D. Cal. 2007).

As detailed below, other policies are also used to stifle students' political expression.

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[29] *Handbook of Operating Procedures – 9.09 University Posting of Materials*, Univ. of Tex. at San Antonio (Jan. 11, 2021), https://www.utsa.edu/hop/chapter9/9-9.html.

[30] *Information Resources Acceptable Use Policy*, Valdosta State Univ., 6 (July 1, 2020), https://www.valdosta.edu/administration/policies/documents/information-resources-acceptable-use.pdf.

[31] *Spotlight Report*, *supra* note 6 at 18.

[32] *Student Judicial Affairs Handbook: Conduct Standards, Policies and Procedures*, Del. State Univ., 34 (Aug. 2, 2017), https://www.desu.edu/sites/flagship/files/document/21/student-judicial-handbook.pdf.

C. Public Universities Routinely Enforce Their Policies on Campus Expression to Suppress Political Speech.

Public-university policies on campus expression are particularly dangerous for political speech, which this Court has long considered to lie at the core of the First Amendment's protection. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Public-university officials have enforced their policies on campus expression to silence political speech, as Arkansas State University did here with Petitioner Hoggard. Just last year, the Worcester State University chapter of Turning Point USA—the same student group whose rights the Eighth Circuit properly ruled were violated in this case—was denied student group recognition following lengthy questioning concerning its political positions, in part because the student government felt the group would have a "negative impact on campus climate."[33] Similarly, in 2018, a student of Joliet Junior College was detained and interrogated by campus police for passing out flyers from the Party for Socialism and Liberation that read "Shut Down Capitalism."[34]

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[33] *VICTORY: Worcester State can't defend viewpoint discrimination, finally agrees to allow TPUSA students to recruit on campus*, Found. for Individual Rights in Educ. (June 17, 2020), https://www.thefire.org/victory-worcester-state-cant-defend-viewpoint-discrimination-finally-agrees-to-allow-tpusa-students-to-recruit-on-campus.

[34] *VICTORY: Student detained for passing out political flyers settles lawsuit with Illinois college*, Found. for Individual Rights in Educ. (Apr. 18, 2018), https://www.thefire.org/victory-student-detained-for-passing-out-political-flyers-settles-lawsuit-with-illinois-college.

Many colleges and universities also enforce "tabling" policies similar to the one used to restrict Petitioner Hoggard's ability to set up tables to recruit members or engage in other forms of political activity protected by the First Amendment. For example, Western Illinois University officials stopped a "Students for Trump" group from setting up a table to distribute materials or register potential voters in the fall of 2020.[35] When the students initially refused to leave, invoking their First Amendment rights, university employees "formed a human barricade" preventing Students for Trump from conducting the registration drive or communicating their message.[36] Students for Trump withstood this officially sanctioned harassment for more than an hour before leaving.[37]

The 2020 presidential election was not unique in terms of public-university officials interfering with student political expression. University speech policies have been used to suppress speech of all political stripes in other election cycles too.[38] For example, in 2017, the University of South Alabama ordered a student to remove a "Trump/Pence 2016" campaign sign

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[35] Jackson Walker, *Free speech group scolds WIU after employees shut down Students for Trump voter registration drive*, COLLEGE FIX (Oct. 22, 2020), https://www.thecollegefix.com/free-speech-group-scolds-wiu-after-employees-shut-down-students-for-trump-voter-registration-drive.

[36] *Id*.

[37] *Id*.

[38] *See generally 2020 Policy Statement on Political Speech on Campus*, Found. for Individual Rights in Educ. (Feb. 24, 2020), https://www.thefire.org/issues/political-speech (describing censorship of political speech on campuses between 2008 and 2018).

from his dormitory room window.[39] In 2016, Georgetown University Law Center prevented students from tabling in support of Senator Bernie Sanders' presidential campaign, incorrectly claiming that allowing such expression would endanger the school's tax-exempt status.[40] In 2012, Ohio University ordered a student to remove a flyer criticizing both President Barack Obama and Governor Mitt Romney from her residence hall door, citing a campus policy requiring that "political posters not [be] displayed outside room[s] until within 14 days of election date."[41] And in the weeks before the 2008 presidential election, the University of Oklahoma notified students and faculty that "forwarding of political humor/commentary" using their university email accounts was prohibited.[42]

Even outside of election cycles, universities have censored political expression. For example, the University of Alaska Anchorage's policy governing e-mail

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[39] Adam Steinbaugh, *University of South Alabama backs down after ordering student to remove pro-Trump sign*, Found. for Individual Rights in Educ. (Apr. 13, 2017), https://www.thefire.org/university-of-south-alabama-backs-down-over-trump-sign-and-501-c-3-policy.

[40] Jacob Gershman, *Georgetown Law Tells Students: No Political Campaigning on Campus*, WALL ST. J. (Feb. 3, 2016), https://www.wsj.com/articles/BL-LB-53061.

[41] *With Election Day Close, Ohio University Ends Political Censorship in Dorms*, Found. for Individual Rights in Educ. (Oct. 9, 2012), https://www.thefire.org/with-election-day-close-ohio-university-ends-political-censorship-in-dorms-2.

[42] *With Election Weeks Away, Political Speech Under Attack on America's Campuses*, Found. for Individual Rights in Educ. (Oct. 15, 2008), https://www.thefire.org/cases/university-of-oklahoma-ban-on-e-mailing-political-humor-or-commentary.

and other information-technology systems bans posting "[c]ontent related to partisan political activities."[43] Schools have even enforced their "free speech zone" policies to prohibit students from handing out copies of the U.S. Constitution on Constitution Day.[44]

Granting public-university officials qualified immunity in these situations, merely because there is no prior case with these precise circumstances, often means that students' constitutional claims escape review, as students face particular challenges in being able to litigate their claims to judgment.

III. Qualified Immunity Particularly Harms Students, Who Face Twin Hurdles in Vindicating their First Amendment Rights.

The doctrine of qualified immunity, as interpreted to require almost mathematical precision as to factual circumstances, distinctly harms students. To even have their day in court, students must run the mootness gauntlet between graduation and universities tactically rescinding challenged policies in response to litigation.

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[43] *Acceptable Use Policy*, Univ. of Alaska Anchorage, https://www.uaa.alaska.edu/about/administrative-services/policies/information-technology/acceptable-use.cshtml (last visited Mar. 7, 2021).

[44] Alex Morey, *On campus, even the Constitution isn't safe on Constitution Day*, Found. for Individual Rights in Educ. (Sept. 17, 2018), https://www.thefire.org/on-campus-even-the-constitution-isnt-safe-on-constitution-day.

A. Students' Claims for Prospective Relief Are Frequently Mooted by Graduation.

Students are a transient population, with a finite amount of time to seek vindication of their civil rights. Most students at four-year, nonprofit colleges graduate after four years.[45] The most vocal students are likely to be upperclassmen, who, in turn, are likely to be graduating in two years or less.[46] This problem is exacerbated at community colleges, which are primarily two-year institutions.

Meanwhile, the median time it took a federal district court in 2019 to complete a trial was 27.7 months.[47] In the Eastern District of Arkansas, where

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[45] *Digest of Education Statistics, Table 326.10*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, https://nces.ed.gov/programs/digest/d18/tables/dt18_326.10.asp (last visited Mar. 7, 2021).

[46] *See* Paul Vincent Cody, *A Profile of UC Davis Student Organization Leaders and Their Academic Achievement* (2017) (Ph.D. dissertation, University of California, Davis) (finding that students found most opportunities to serve as officers in their third and fourth years at UC Davis), https://search.proquest.com/openview/03fd2b9bf7c88b5b92994df9285f5a11/1?pq-origsite=gscholar&cbl=18750&diss=y; *see also* Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J. L. & Educ. 609, 630 (2011) ("If one assumes that leadership positions are held by juniors or seniors, the window for successful litigation shrinks to just one or two years before the injury becomes moot.").

[47] *Table C-5: U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2020*, Admin. Office of U.S. Courts https://www.uscourts.gov/sites/default/files/data_tables/jb_c5_0930.2020.pdf (last visited Mar. 7, 2021).

this case was filed, that median was 27.1 months.[48] This means that a public university, which presumptively has ample resources with which to file an appeal, is all but assured that a student plaintiff will graduate before appeals are exhausted, and consequently any claims for prospective injunctive relief will be mooted.

Take the recurring situation of First-Amendment challenges to student-led prayer. On mootness grounds, courts have dismissed claims for prospective injunctive relief by students precluded from leading students in prayer[49] as well as those by students objecting to student-led prayer.[50] Among other students who have seen their rights evaporate while waiting for justice are student journalists,[51] ROTC students,[52]

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[48] *Id.* at 4. The trial court decided the present case 20 months and 6 days after it was filed. Case No. 3:17-cv-00327-JLH (E.D. Ark. filed Dec. 13, 2017; dismissed Aug. 19, 2019).

[49] *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (holding that student forced to apologize for religious valedictory speech lacked standing to maintain declaratory and injunctive claims); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000) (holding that First Amendment claims of plaintiffs who were prevented from giving religious speeches at graduation ceremony were moot).

[50] *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (dismissing as moot injunctive and declaratory claims from former students who objected to inclusion of student-initiated prayer at graduation ceremonies).

[51] *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975); *Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007); *Husain v. Springer*, 691 F. Supp. 2d 339, 340–41 (E.D.N.Y. 2009).

[52] *Sapp v. Renfroe*, 511 F.2d 175, 175–76 (5th Cir. 1975) (finding challenge to ROTC guidelines moot after graduation).

and numerous other high school students[53] and college students.[54] The only common thread linking these students is that they graduated before their institutions could be held to account, and thus, before a precedent that would limit the exercise of qualified immunity could be created.

That injunctive and declaratory claims are mooted by graduation provides an incentive for schools to prolong litigation, even when—*especially* when—the school's conduct is constitutionally indefensible.

B. Universities Often Attempt to Moot First Amendment Challenges By Revoking Unconstitutional Policies, Only to Reinstate Them Later.

Even when students have the "good fortune" to be victims of First Amendment violations early enough in their education that they can maintain their student status throughout years of litigation, institutions acting under a challenged policy can, and often do, change the challenged policy on the eve of trial.

Worse, universities have repeatedly re-instituted speech restrictions even after executing settlement agreements that require the challenged restrictions to be eliminated.

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[53] *See*, *e.g.*, *Jacobs*, 420 U. S. at 128; *Adler*, 112 F.3d at 1478; *Cole*, 228 F.3d at 1098–99; *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999); *Ceniceros v. Bd of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 879 n.1 (9th Cir. 1997) (plaintiff lost at trial but won on appeal, but had graduated in the interim, mooting out all but nominal damage claims).

[54] *See*, *e.g.*, *Lane*, 495 F.3d at 1186–87; *Fox v. Bd. of Trs. of the State Univ.*, 42 F.3d 135, 139 (2d Cir. 1994); *Husain*, 691 F. Supp. 2d at 340–41.

For example, a student at California's Citrus College challenged a policy limiting expressive activities to three small "free speech areas" and subjecting students to an advance-notice requirement.[55] In 2003, the college revoked the challenged policies and settled the suit.[56] In 2013, however, the college adopted a renewed regulation limiting students' expressive activities to a narrowly defined free-speech area.[57] When a student challenged this nearly identical policy, the college again agreed to revise it in order to settle the second suit.[58]

A similar pattern unfolded at Pennsylvania's Shippensburg University. There, after students challenged the university's speech code, a federal district court preliminarily enjoined its enforcement. *See Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373–74 (M.D. Pa. 2003). The university then settled the

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[55] *See* Compl. ¶ 12, *Stevens v. Citrus Cmty. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. May 19, 2003), https://www.thefire.org/complaint-against-citrus-college-may-19-2003.

[56] *See Resolution of the Citrus Coll. Bd. of* Trs., Found. for Individual Rights in Educ. June 5, 2003, https://www.thefire.org/resolution-of-the-citrus-college-board-of-trustees-june-5-2003.

[57] *See* Compl. ¶ 2, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. July 1, 2014), https://www.thefire.org/complaint-in-sinapi-riddle-v-citrus-community-college-et-al.

[58] *See* Settlement Agreement, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. Dec. 3, 2014), https://www.thefire.org/settlement-agreement-sinapi-riddle-v-citrus-college.

suit, agreeing to repeal the challenged policies.[59] By 2008, however, the university had readopted the same policies *verbatim*.[60] Students challenged the speech code a second time, and the university again settled and agreed to revise its policies.[61]

Recent litigation challenging the University of Michigan's speech policies illustrates the risk that colleges and universities, if left unchecked by the courts, will reinstate challenged policies. In *Speech First*, a group of students challenged the university's prohibition of "bullying and harassing behavior," which the university defined as including "annoy[ing]" someone "persistently" or "frighten[ing]" a "smaller weaker person." *Speech First, Inc. v. Schlissel*, 939 F.3d 756 at 762 (6th Cir. 2019). The policy subjected students to "a range of consequences, including expulsion." *Id.* at 766.

Although the University of Michigan rescinded the challenged restriction, in part after students challenged it in court, the university "continue[d] to

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[59] *See A Great Victory for Free Speech at Shippensburg*, Found. for Individual Rights in Educ. (Feb. 24, 2004), https://www.thefire.org/a-great-victory-for-free-speech-at-shippensburg.

[60] *See* Compl. ¶ 28, *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. May 7, 2008), https://www.thefire.org/legal-complaint-against-shippensburg-university-2008.

[61] *See* Will Creeley, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement, University Once Again Dismantles Unconstitutional Speech Code*, Found. for Individual Rights in Educ. (Oct. 24, 2008), https://www.thefire.org/victory-for-free-speech-at-shippensburg-after-violating-terms-of-2004-settlement-university-once-again-dismantles-unconstitutional-speech-code.

defend its use of the challenged definitions" and refused to make a commitment not "to reenact" them. *Id.* at 770, 769. Observing that the university had "simply not [provided] a meaningful guarantee" that its new definitions "will remain the same in the future," *id.* at 769, the Sixth Circuit vacated the district court's denial of the students' motion for preliminary injunction, *see id.* at 771. Only after this ruling did the university commit, in a settlement agreement, to refrain from later "reinstat[ing] the removed [harassment] definitions."[62]

Repeat violations of students' First Amendment rights are less likely when students have the ability to litigate their claims to judgment the first time around. Such judgments create precedent that clarifies the law and deters colleges and universities from re-instituting unlawful policies. But the doctrine of qualified immunity allows courts to sidestep the question of whether there even was a constitutional violation. And the confusion on the contours of "clearly established" has resulted in the law stagnating.

Moreover, litigated cases are only the tip of the iceberg. Many students do not realize that restrictions on their speech are unconstitutional. Those who do may nevertheless be daunted by the time, money, emotional toll, and potential repercussions of pursuing judicial redress. For these reasons, the vast majority of instances of campus censorship likely go unreported and unchallenged.

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[62] *See* Settlement Agreement, *Speech First, Inc. v. Schlissel*, No. 4:18-cv-11451-LVP-EAS (E.D. Mich. Oct. 25, 2019), https://speechfirst.org/wp-content/uploads/2019/10/Settlement-Agreement-signed.pdf.

Because graduation or a change in challenged university policies often moot students' facial claims, all students have left are any as-applied claims. Overly strict applications of qualified immunity mean students' constitutional claims evade judicial review. Taking a narrow reading of precedent during a qualified immunity analysis involving common campus speech restrictions transforms the doctrine into one that stymies student plaintiffs, eliminates accountability by affording blanket immunity, impedes the development of the law, and neuters the deterrent power of precedent. By the time a single student manages to win a lawsuit, there are invariably others who have raised the same objections, sought the same relief, and were forced to abandon that pursuit either upon graduation or after a policy change on the eve of litigation. That single result must be read broadly enough to encompass other students with valid claims that did not survive the mootness gauntlet.

CONCLUSION

Without clarification from this Court that qualified immunity is not appropriate when the state of the law provides fair notice that the conduct was unconstitutional, public-university officials will continue to evade accountability for constitutional violations, claiming that rulings like the Eighth Circuit's decision below are not clearly established because they are "not here, yet."

For the above reasons, and those presented by the petitioners, this Court should grant petitioner's writ of *certiorari*.

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Respectfully submitted,

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