No. 19-1225

IN THE

Supreme Court of the United States

PAUL HUNT,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF NEW MEXICO *et al*.,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* OF THE JOSEPH L. BRECHNER CENTER FOR FREEDOM OF INFORMATION, STUDENT PRESS LAW CENTER, THE ELECTRONIC FRONTIER FOUNDATION AND THE NATIONAL COALITION AGAINST CENSORSHIP, FILED IN SUPPORT OF APPELLANT, SEEKING REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, *Amici* the Brechner Center for Freedom of Information, the Student Press Law Center, the Electronic Frontier Foundation and the National Coalition Against Censorship (collectively, "Amici") respectfully move for leave to file the accompanying brief *amicus curiae* in support of Petitioner-Appellant Paul Hunt's petition for a writ of certiorari.

Petitioner has consented to the filing of this brief. Respondents have withheld consent to the filing of this brief. Accordingly, this motion for leave to file is necessary.

Amici are, collectively, organizations that advocate on behalf of the First Amendment rights of all citizens, in particular young people, to enjoy the full benefits of digital citizenship, including the use of online technologies during their off-campus, out-of-school hours to engage in discourse on issues of social and political concern. This case implicates the core concerns of the *Amici* organizations and the constituents they serve. *Amici* have appeared repeatedly before this Court and before state and federal appeals courts nationally as friend-of-the-court where a case, like this one, raises the prospect of fundamentally altering the legal landscape not just for the parties involved but for all speakers. *Amici* filed a brief accepted by the Tenth Circuit U.S. Court of Appeals in the case below, and have familiarity with the factual and legal issues that could be beneficial to inform the Court's deliberations. Because this case is the first of its kind to hold that public institutions of higher education may discipline speakers for non-disruptive political speech in their off-hours time, *and* may compel speakers to rescind

and rewrite their political remarks to be more "civil," it portends a radical shift in settled First Amendment principles that warrant especially close consideration by the Court.

Because of their combined many decades' worth of history providing both direct legal representation as well as *amicus* support on cases of this kind, in which the freedom of online political speech faces existential threats, *Amici* believe they can provide an addition depth of perspective as to the potentially sweeping impact of the ruling below.

Respectfully submitted,

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QUESTION PRESENTED

Can a state university discipline a college student for core political speech, voiced off campus, because the speech is presented in an offensive manner, contrary to the Court's ruling in *Morse v. Frederick* that "offensiveness" does not deprive speech of First Amendment protection against discipline?

CORPORATE DISCLOSURE STATEMENTS

Amicus, the Joseph L. Brechner Center for Freedom of Information is an academic unit of the University of Florida, a public institution of higher education. The Center does not issue stock and is neither owned by, nor is the owner of, any other corporate entity in part or in whole.

Amicus, the Student Press Law Center is a nonprofit corporation incorporated under the laws of the District of Columbia with offices in Washington, D.C. The Center does not issue stock and is neither owned by nor is the owner of any other corporate entity in part or in whole. The corporation is operated by a 15-member Board of Directors.

Amicus, the Electronic Frontier Foundation (EFF) does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus, the National Coalition Against Censorship (NCAC) is an IRS 501(c)(3) nonprofit corporation organized under the laws of New York with offices in New York City, N.Y. It neither has ownership in, nor is owned by, any other corporate entity in whole or in part.

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INTEREST OF *AMICI CURIAE* [1]

The Brechner Center for Freedom of Information (the "Brechner Center") in the College of Journalism and Communications at the University of Florida in Gainesville is a center of research dedicated to advancing access to civically essential information. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering and publishing news. The Center is exercising the academic freedom of its faculty to express scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The Student Press Law Center ("SPLC") is a non-profit, non-partisan organization that, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. The SPLC provides free legal information and educational materials for student journalists, and its legal staff jointly authors the widely used media-law text, *Law of the Student Press*. Because of the heavy censorship of on-campus student journalism, students are increasingly taking their speech off

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[1] Pursuant to Sup. Ct. R. 37 counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation of submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent to all parties was timely requested.

campus to address issues important to their lives outside of school-supervised publication. The SPLC consequently has special concern for maintaining the safety of non-school-funded websites as places where young journalists can call public attention to problems in their schools without fear of government censorship. Although this case does not involve student journalism, the district court's logic and ultimate conclusions could be applied to student journalists in a way that greatly circumscribes their ability to speak on matters of public concern.

The Electronic Frontier Foundation ("EFF") is a non-profit civil liberties organization that has worked for 30 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 30,000 dues-paying members have a strong interest in helping the courts and policy-makers apply First Amendment principles in a manner that protects the constitutional rights of those who use technology to communicate. EFF works directly with students, student journalists, and young adult community activists to increase awareness and facilitate engagement in advocacy for digital freedom issues. EFF frequently assists students of all educational levels who are threatened with disciplinary action from school officials who seek to impose their authority over student's off-campus, online activities, and recognizes that such attempts pose a serious infringement on students' First Amendment rights. EFF has a strong interest in maintaining this Court's landmark holding in *Tinker* as a shield against infringements on student's speech rights rather than as a sword to punish off-campus speech.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has worked through education and advocacy to protect the First Amendment rights of thousands of authors, teachers, students, librarians, readers, artists, museum-goers, and others around the country. NCAC is particularly concerned about laws affecting online speech which are likely to have a disproportionate effect on young people who use social media as a primary means of communication, may engage in ill-considered but harmless speech online, and may employ abbreviated and idiosyncratic language that is subject to misinterpretation. NCAC joins this brief to assist the Court in understanding the dangers posed by the decision under review.[2]

SUMMARY OF ARGUMENT

When a college student speaks on personal time outside the confines of the campus to a willing audience of social media users, the college's legitimate interest in regulating the student's speech is at its nadir; particularly, when that speech is being regulated because some find it offensive. This Court has rejected the idea that the offensiveness of speech alone can be the basis for punishing speech, even in the school setting.

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[2] NCAC's members include organizations such as the American Civil Liberties Union, Authors Guild, American Association of University Professors, PEN American Center, and the National Council of Teachers of English. The views presented in this brief, however, are those of NCAC alone and do not necessarily represent the views of any of its members.

This case involves a college's overreach of disciplinary authority into an adult-age student's political speech, which was punished solely on the grounds that it offended one or more audience members who voluntarily encountered it. The speaker, Paul Hunt, did not threaten violence, commit libel or otherwise step outside the boundaries of what the First Amendment protects. Nevertheless, the Tenth Circuit erred in finding that no clearly-established law would have put Respondents[3] on notice that a state agency has no power to punish a student's off-campus political speech on the grounds of a vague "respectful speech" policy.

Contrary to the decision below, the existence of clearly established law does not turn on locating precedent that perfectly replicates the facts of this case. The law is clearly established where, as here, fundamental legal principles gave government officials fair notice that censoring speech would be unlawful. This Court's First Amendment jurisprudence afforded Respondents clear warning that punishing Mr. Hunt's speech would be unconstitutional. This Court's ruling in *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 511 (1969), set a high bar—proof of a material and substantial disruption—before a K-12 school may discipline a child for on-campus speech to a captive listening audience. It is inconceivable that a *less* demanding burden would apply when the speaker is not a child, when the speech is not on-campus, and when the audience is not captive.

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[3] For simplicity, the collective Defendant/Appellees will be referred to as "the University," except where the status of particular defendants is material.

The question in this case is whether colleges can discipline students for non-disruptive, off-campus speech merely because the college feels the speech is "unprofessional" or offensive. Answering "yes" to this question would put far too much discretion in the hands of government institutions to silence critics and whistleblowers, as well as directly undermine what this Court said in *Morse v. Frederick*, 551 U.S. 393, 409 (2007). As this Court has recently re-emphasized, there is no categorical "professional speech" exception to the First Amendment. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). This case exemplifies exactly why state government officials cannot be given 24/7 "professionalism policing" authority over students' speech during their off-hours: Because it is an invitation to censor the core political speech that the First Amendment most rigorously protects.

ARGUMENT

I. Punishing a Student for Off-Campus Speech Solely Because it is Offensive Contravenes This Court's Opinion in *Morse v. Frederick*

This Court has explicitly rejected the argument that student speech—even at the K-12 level—may be proscribed merely because it is "offensive." *See Morse v. Frederick*, 551 U.S. 393, 409 (2007) (involving a high school student who unfurled a pro-drug banner at a school event). The Court explained that adopting a broad "offensiveness" rule would stretch its school speech precedents too far: "After all," the Court stated, "much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."

Id. Justice Alito stated it even more precisely in his concurrence when he said that this restriction on speech encouraging illegal drug use stood at the "far reaches of what the First Amendment permits." *Id*. at 425. He specifically stated that he joined the majority in *Morse* with the understanding that the opinion did not endorse any further extension of the government's ability to suppress free speech. *Id.*

With its own precedent as a guide, the Court cannot let the Tenth Circuit opinion stand. For the University to believe, as the courts below were willing to indulge, that it was "reasonable" to extend punitive authority over core political speech under a facially unconstitutional "civility" policy would require believing that a college student in his mid-20's using social media in his off-campus personal life receives less First Amendment protection than a middle-schooler like Mary Beth Tinker speaking on school grounds during class time. It is inconceivable that this is the law, and *Morse* makes clear that it is not. The bounds of what may be considered "offensive" are practically limitless, and, even in a school setting, this Court has said such unfettered authority to censor speech based on such a vague standard is not permissible.

II. Political Speech Addressing Matters of Public Concern is Entitled to the Highest Constitutional Protection

Paul Hunt's speech addressed one of the most divisive political issues in contemporary American society, the legality of abortion. Time and again, this Court has said that political speech is entitled to the highest degree of First Amendment protection, and that any content-based penalty on such speech is unconstitutional absent the most compelling justification. "'[S]peech on public issues occupies the highest rung

of the hierarchy of First Amendment values, and is entitled to special protection.'" *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). Political speech cannot be punished merely because it is "upsetting" or "arouses contempt." *Id.* at 458. Decades ago, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), Justice Douglas wrote:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute…is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Id. at 4 (citation omitted).

Thus in *Snyder*, this Court held that defendants could not be held liable for picketing a military funeral with signs with such offensive slogans as: "Thank God for Dead Soldiers," "Priests Rape Boys," and "God Hates Fags." The issues these statements pertained to—"the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy"—were, according to the Court, matters of "public import" and thus could not be restricted.

Id. at 444. The Court explained that we must tolerate this sort of "insulting," even "outrageous" speech in public debate "to provide adequate 'breathing space' to the freedoms protected by the First Amendment.'" *Id.* at 458 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)); *see also United States v. Alvarez*, 567 U.S. 709, 716 (2012) ("'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content'" (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

Speech does not lose its First Amendment protection merely because it is hyperbolic or even if it includes references to violence. This Court made that unmistakably clear in *Watts v. United States*, 394 U.S. 705 (1969), holding that a criminal conviction could not stand even for speech interpreted as wishing to bring about the violent death of the president of the United States, when uttered in the context of a political diatribe. Hunt's speech thus would indisputably be immune from government sanction anywhere other than the campus of an educational institution. So, the only question becomes whether First Amendment rights are so profoundly diminished in the college setting that punishment of core political expression becomes permissible purely because the speech is "disrespectful."

They are not, and it does not.

III. College Students Enjoy Strong First Amendment Rights, Especially Off-Campus

While the Court has at times recognized a diminished level of First Amendment protection in the educational setting for K-12 students, the Court has made no such pronouncement in the context of higher education. In fact, there is every indication that the Court believes college students are entitled to a heightened level of protection approaching, if not equivalent to, that enjoyed by "real-world" speakers outside the campus. Indeed, the Court has said that the free exchange of ideas essential to higher education cannot exist without forceful constitutional protection:

> [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. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Healy v. James, 408 U.S. 169, 180–81 (1972). More recently, in *Rosenberger v. Rector and Visitors of University of Virginia*, the Court noted that the danger

of chilling speech "is especially real in the University setting," explaining:

> [U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

515 U.S. 819, 835–36 (1995) (internal citation omitted); *see also McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 242-47 (3d Cir. 2010) (explaining why "[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools" and stating that Supreme Court precedent applying in the K-12 context "cannot be taken as gospel in cases involving public universities").

Vivid rhetoric and imagery is commonplace in the abortion debate, and those who choose to read about the issue know, or should reasonably anticipate, that they will encounter upsetting words. Indeed, even in-person on campus (to say nothing of online), colleges lack authority to silence anti-abortion speech, regardless of whether it is offensive or inflammatory. *See, e.g., Center for Bio–Ethical Reform, Inc. v. Black*, 234 F.Supp.3d 423, 435 (W.D.N.Y. 2017) (stating "there is no question" that displaying a mural in a public space on a college campus comparing abortion to genocide is protected First Amendment expression). It cannot be

the case that a student's right to freedom of expression diminishes on social media, where—unlike on the lawn of the campus—speech is voluntarily encountered by viewers who have elected to receive it, and who can instantly leave if offended.

Even in the K-12 setting, strong First Amendment protections apply to peaceful, non-disruptive political speech. *See Tinker*, 393 U.S. at 513 (stating that merely "causing discussion" is not sufficient grounds for a public school to punish political speech). *Tinker* is the default standard that governs all cases involving content-based punishment for speech, unless one of a handful of narrow exemptions—none of which is at issue here—applies.

In a case that, like this one, involved punishment under a college-level code of conduct, the Court made clear that "the 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.'" *Papish v. Bd. of Curators of the Univ. of Missouri*, 410 U.S. 667, 670 (1973) (involving a college student who was expelled for distributing an underground newspaper with offensive political messages). Specifically, the plaintiff was found to have violated provisions of the student code that required students "to observe generally accepted standards of conduct" and that prohibited "indecent conduct or speech"—language difficult to distinguish from the vague "disrespectful speech" standard at issue here.

IV. *Tinker* Provides Ample Notice That a "Respectful Speech" Policy is Unconstitutional, Especially When Applied to Off-Campus Speech on Personal Time

While the *Tinker* standard may or may not apply at the college level, a college student most certainly does not have First Amendment rights *inferior* to those of the middle- and high-school students who brought the case in *Tinker*. The only cases that can be read to suggest otherwise were not on the books at the time of this disciplinary decision, originate from other jurisdictions, and likely are not good law today as a result of more recent Supreme Court authority. Because *Tinker* would have put a reasonable decision maker on notice of the bare minimum of constitutional protection to which a speaker at the college level is entitled, and because it is undisputed that Hunt's Facebook post did not cross the threshold to be punishable under *Tinker*, the inquiry is over.

More to the point, it is not even certain in the K-12 context that *Tinker* is the proper standard for punishment or whether some even more protective standard applies when the student is speaking online outside of school functions. On this point, the fractured opinions in the Fifth Circuit's *Bell v. Itawamba County Sch. Dist.*, 799 F.3d 379 (2015), in which the judges could come to no consensus on the extent to which *Tinker* must be modified to accommodate the greater free-speech interests when a student speaks on off-campus personal time, are especially instructive. In other words, the debate—even at the K-12 level—is between two choices: Either *Tinker* applies, or a modified version of *Tinker* applies with a heightened burden that the disciplinarian must meet. There simply is not any debate—even in the realm of K-12

student speech—that something less than *Tinker*'s proof of "substantial disruption" would suffice to sustain discipline for off-campus social-media speech. The University cannot have been unaware that it lacked "professionalism policing" authority over the non-disruptive online speech of a 24-year-old graduate student.

Hunt simply expressed, albeit vitriolically, his condemnation of a political movement and its adherents. The speech neither "targeted" anyone on the campus of the University nor even referenced the school in any way. It was neither calculated to cause any disturbance at the University, nor foreseeably would do so. He did not call on anyone to commit violence nor indicate that he planned to do so, nor was he disciplined on the grounds that his speech was taken as a threat or that anyone felt threatened. He was punished for the perceived "incivility" of his comments, as if a public university could enforce civility in political discourse under threat of discipline.

It is of great importance to all students, especially student journalists and editorial commentators, that the Court draw a sharp line cabining the disciplinary authority of public universities over students' online speech. When a school regulates speech on school grounds, the school is restricting the ability to communicate with other members of the immediate school community. But when a university regulates speech on social media, the university is restricting the student's ability to speak with *everyone*: friends, family, elected officials, the news media. This is why a university's authority over social media must necessarily be narrower than its authority over in-school speech during class. Otherwise, students will be compelled during every waking moment to conform their speech

to what would be suitable in a professional setting. It takes little imagination to see how this level of control would invite abuse. Are anti-Trump protesters who march on Washington, D.C., carrying signs with slogans about "grabbing her by the pussy" engaged in "disrespectful" (or, in the words of the University's policy, "unduly inflammatory") speech that will now become punishable by college disciplinary boards? While this case is about Facebook, if colleges have control over everything a student says off-campus on personal time, that subsumes not just social media but letters to the newspaper, interviews with a television station, remarks to a meeting of the Board of Regents, or anything else that a college might desire to regulate. The potential to chill so much whistleblowing speech is intolerable.

Nor is enrollment in medical school a 24/7 waiver of all First Amendment liberties. As this Court held in *Agency for Int'l Dev. v. Alliance for Open Society Intern.*, 570 U.S. 205 (2013), receipt of a government benefit—even a purely discretionary one as to which there is no vested entitlement—may not be conditioned on a broad waiver of First Amendment rights; rather, a waiver requirement is constitutional only if the scope of the waiver is narrowly tailored to restrict no more than the speech necessary for the effective operation of the government program. *See id.* at 221. There is no connection between the ability of a medical school to effectively teach medicine and a requirement to refrain from uncivil political statements on social media.

The University knew two things to a legal certainty: First, that it could not punish Hunt for political protest speech *on the physical grounds of the campus* without, at minimum, demonstrating a material and

substantial disruption of school functions, and second, that no diminished level of First Amendment protection applies to online speech as compared with in-person speech. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (refusing to hold that speech on websites is entitled to a diminished level of First Amendment protection, as is speech on FCC-licensed airwaves: "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"); *see also Packingham v. North Carolina*, 137 S. Ct. 1730, 1733 (2018) (finding that a broad proscription on ex-offenders using social media could not be sustained, because social media is "the modern public square" in which people share ideas, look for jobs, and otherwise engage in speech that once occurred in-person). This is all the notice that a public university needs to understand that lawful, non-disruptive political speech on social media is beyond the government's authority to punish.

V. There is no Diminished First Amendment Protection for Speech in a Professional Training Program

The ruling below, that the University could reasonably have believed that a student's speech loses protection when uttered in the "professional" context, runs squarely contrary to established First Amendment jurisprudence that this Court recently re-emphasized in the case of *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (hereinafter, "NIFLA"). In the *NIFLA* case, the Court rejected the contention that a state can freely regulate what employees of a pregnancy clinic say to their clients. Writing for the Court, Justice Thomas explained that the same rigorous level of scrutiny

applies to all content-based restrictions on speech, including restrictions that apply in the professional setting:

> [T]his Court has not recognized 'professional speech as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.' This court has been reluctant to mark off new categories of speech for diminished constitutional protection. … And it has been especially reluctant to exempt a category of speech from the normal prohibition on content-based restrictions.

NIFLA, 138 S. Ct. at 2371-72 (internal quotes and brackets omitted). Also instructive on this point is the Eleventh Circuit's decision in *Wollschlaeger v. Governor*, 848 F.3d 1293 (11th Cir. 2017) (*en banc*) to invalidate portions of a Florida statute restricting physicians' communications with their patients about firearms. The court rejected the State of Florida's attempt to defend the statute on the grounds that speech by medical professionals is really conduct—that is, incidental to the delivery of services—and therefore subject to diminished constitutional protection: "[W]e do not think it is appropriate to subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review." *Id*. at 1311.

The *only* support that the Tenth Circuit found for concluding that a reasonable decision-maker could have believed Hunt's speech to be constitutionally unprotected was derived from out-of-circuit cases decided *years after* the disciplinary action. These later-decided cases plainly cannot have been in the minds of University disciplinarians in 2012. The primary

support for the misguided idea that professional students, such as those enrolled in medical school, might be entitled to a diminished level of free-speech protection is the Eighth Circuit's much-disputed ruling in *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016). There, a Minnesota student expelled from a community-college nursing program after classmates complained about his coarse, insulting speech on Facebook lost his bid for reinstatement, when the Eighth Circuit fashioned a "professional speech" workaround to the First Amendment.

There is substantial reason to doubt that *Keefe*, a 2-1 opinion that drew a vigorous dissent, was correctly decided (or that, after *NIFLA*, it remains good law). Commentators have universally denounced the *Keefe* opinion as wrongly decided, calling it "absurd"[4] and "disturbing."[5]

Keefe's doubtful continued vitality aside, even the Eighth Circuit's expansive notion of government punitive authority cannot be squared with what happened here. The courts below misconceived the core holding of *Keefe* that speech is punishable if it violates "established professional standards," which is

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[4] *See* Lindsie Trego, *When a Student's Speech Belongs to the University: Keefe, Hazelwood, and Tatro*, 16 FIRST AMEND. L.R. 98, 116 (Fall 2017) (criticizing as "absurd" the Eighth Circuit's notion in *Keefe* that a college ratifies or adopts a professional student's speech on off-campus personal time by keeping him enrolled in a pre-professional program).

[5] See David Hudson, *Thirty Years of Hazelwood and its Spread to College and University Campuses*, 61 HOW. L.J. 491, 516 (Spring 2018) (characterizing *Keefe* as "disturbing" for its departure from this Court's strong protection of college student speech and its implication that colleges' punitive authority follows students throughout their lives).

to say, the formal standards of a regulated profession that the student intends to enter. The court below shorthanded this standard into "professionalism," but these are two very different things. The University did not purport to be punishing Hunt for violating the standards of the medical profession. Rather, the punishment was for violating the University's own civil-speech code, the type of code that courts have repeatedly struck down as unconstitutionally overbroad. *See., e.g., Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863-64 (E.D. Mich. 1989) (invalidating university speech code, which contemplated sanctions for speech that "stigmatizes" others or is "demeaning," and stating that universities cannot penalize speech "simply because it was found to be offensive, even gravely so, by large numbers of people"). Nothing in the *Keefe* case—or in any accepted understanding of the First Amendment—can be read to invest a public university with punitive authority over "unprofessional" speech during personal off-hours time.

The notion that a public university can punish a student for sharply worded political opinions on the grounds of "unprofessionalism" overlooks the reality that, even in the professional world, there are First Amendment boundaries that government regulators may not cross. For instance, in *Schoeller v. Bd. of Registration of Funeral Dirs.*, 977 N.E.2d 524 (Mass. 2012), the Massachusetts Supreme Court decided that the First Amendment precluded revoking the license of a funeral director on the basis of "unprofessional speech," the grounds for which Hunt was disciplined here. In *Schoeller*, a funeral director lost his license after giving a newspaper interview during which, in an attempt at humor, he described dissecting human bodies in ghoulish detail. The court observed that, although the funeral director was speaking about his

work, he was doing so (as was Hunt) outside of his professional capacity; consequently, speech could be punished only if the regulation was narrowly tailored to serve a compelling governmental interest. *Id.* at 534.

As *Schoeller* illustrates, it is insufficient for a public university to point either to its own internal "civility codes" or (as with the *Keefe* case) to point to the external standards of a professional regulatory body, without inquiring whether those codes and standards can be constitutionally applied to the speech at issue. They cannot, and the University must necessarily have known that when punishment was imposed.

To be sure, a public university may enforce narrowly tailored prohibitions on speech necessary for its academic programs to function. So, had Hunt been using Facebook to disseminate privileged information from his clients' medical records, he would forfeit First Amendment protection, whether viewed under *Tinker*'s "substantial disruption" standard or under "real-world" First Amendment standards, because of the obvious invasion of legally protected privacy rights. But that is quite far from the case here. Because there is no basis to believe that profane political commentary on social media is a punishable violation of "established professional conduct standards," there was no "accepted" standard on which to base disciplinary action, even if *Keefe* were to apply.

VI. Compelling a Speaker to Moderate His Political Expression Violates Clearly Established Supreme Court Precedent

The court below failed to thoroughly analyze the First Amendment infirmity of the University's "respectful speech" policy or the way the policy was

applied in Hunt's case. The policy enforced against Hunt provides that "the right to address issues of concern does not grant individuals license to make untrue allegations, unduly inflammatory statements or unduly personal attacks, or to harass others." As there is no allegation that Hunt said anything factually false, attacked any identifiable individual, or directed the post toward anyone in a harassing manner, the university's disciplinary action must rest on the phrase "unduly inflammatory"—and that is the question with which the district court failed to grapple: A policy empowering government officials to impose punishment for "unduly inflammatory" speech is unconstitutionally overbroad.

A prohibition that sweeps in harmless or even societally beneficial speech along with the invidious speech it targets is an unconstitutionally overbroad policy. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *see also United States v. Stevens*, 559 U.S. 460 (2010) (striking down overbroad statute criminalizing animal cruelty videos, which encompassed within its prohibition videos of, for example, hunters shooting their prey). The Tenth Circuit—in a case that, unlike the *Keefe* case, was actually binding legal precedent in New Mexico at the time—drew a roadmap for recognizing an unconstitutionally overbroad prohibition on speech in *Nat'l Gay Task Force v. Bd. of Educ. of City of Okla. City*, 729 F. 2d 1270 (10th Cir. 1984) (hereinafter cited as "*NGTF*"). There, the Court struck down on overbreadth grounds a statute exposing teachers to discipline for "public homosexual conduct," which was expansively defined to include advocacy speech about homosexuality. The Court readily found the prohibition to be unconstitutionally broad and—notably—declined to read into the statute an implicit "*Tinker*

threshold" that punishment could apply only where speech substantially disrupted school operations. *Id.* at 1274. The statute in that case applied to speech that might "adversely affect" students or co-workers, but the Court found that to be an overly sweeping prohibition lacking in materiality: "Any public statement that would come to the attention of school children, their parents, or school employees that might lead someone to object to the teacher's social and political views would seem to justify a finding that the statement 'may adversely affect' students or school employees." *Id.* at 1275.

If the prohibition in *NGTF* was unconstitutionally broad, then the prohibition here is doubly so. Unlike in the *NGTF* case, there is not even the veneer of an "adverse effect" requirement in the University's policy; *any* "unduly inflammatory" speech appears to be regarded as punishable, regardless of the context and regardless of its impact (or, for that matter, regardless of whether anyone reads it at all).

Further, the courts below failed to analyze the university's punishment as a matter of "compelled speech," an especially noxious and disfavored brand of censorship. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down "equal time" statute that required newspapers to publish columns responding to their editorials). As this Court has aptly stated, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley v. Nat'l Federation of Blind*, 487 U.S. 781, 798-97 (1988). By ordering Hunt to publish what was termed a "professionally appropriate" version of his Facebook post—*see Hunt v. Bd. of Regents*, 338 F.Supp.3d 1251, 1267 (D.N.M. 2018)—University administrators

crossed the line from punishing speech to compelling speech. If a speaker publishes a toned-down version of his beliefs, it may convey a lack of forceful conviction. Hunt's choice of words was his to make, not the state's. And whatever uncertainty there might be about the protection of First Amendment rights in the educational setting, we know for a fact that educational institutions receive no special license to compel speech, because this Court's most famous pronouncement in the realm of compelled speech, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), involved a public school. As Justice Jackson memorably declared, in holding that a K-12 school could not force a student to stand and recite the Pledge of Allegiance in derogation of her beliefs:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642.

And if there is any "fixed star" in the realm of liability for violating the First Amendment, it is that no official, high or petty, can claim to be ignorant of the prohibition against putting words into a citizen's mouth. The law can scarcely get more "clearly established." The University's directive for Hunt to rewrite and re-post a toned-down version of his anti-abortion commentary—which would give the impression that his anti-abortion views are milder than they really are, and that he regrets having expressed forceful opposition—violated 75 years' worth of settled First Amendment precedent. The University cannot have reasonably believed otherwise, and the Tenth

Circuit plainly erred in affording the University the undeserved benefit of qualified immunity.

CONCLUSION

For all of the aforesaid reasons, the petition for certiorari should be granted and the decision of the Tenth Circuit U.S. Court of Appeals vacated.

Respectfully submitted,

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