No. 19-1225

In the
Supreme Court of the United States

PAUL HUNT,
Petitioner,
v.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The first and dispositive issue on appeal is whether the Tenth Circuit properly affirmed the district court's grant of qualified immunity to Respondents where Petitioner failed to identify any case law standing for the proposition that Respondents' conduct violated First Amendment law that was clearly established at the time of the events giving rise to this litigation.

Should the Court address Petitioner's constitutional question, the second issue on appeal is whether Respondents' conduct violated Petitioner's First Amendment rights.

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INTRODUCTION

Although an individual's right to speak on topics of their choosing is protected, it is not absolute. Contrary to the position taken by Petitioner, Respondents, in their roles as administrators of a public medical school, have a responsibility to instill professional norms and ensure that medical students are fully prepared to function as professionals in the medical community. This responsibility extends to professionalism concerns arising from a medical student's online conduct. The enforcement of policies intended to ensure that medical students are fully prepared for their chosen profession does not violate a medical student's First Amendment rights.

Even if a colorable argument exists that Respondents' conduct violated Petitioner's rights in an evolving area of the law, the doctrine of qualified immunity limits the liability of public officials in the performance of their duties unless the conduct violated a clearly established statutory or constitutional right at the time of the incident. The right asserted may not be defined at a high level of generality, but instead must clearly prohibit the alleged conduct in the particular circumstances at hand, such that all reasonable public officials would understand that the conduct is unlawful.

Petitioner has not demonstrated that the professionalism enhancement imposed by Respondents violated clearly established law at the time of the events giving rise to this litigation. As such, the Tenth Circuit did not err in affirming the district court's grant of qualified immunity. If the Court elects to review

Petitioner's constitutional claim, it will find that Respondents did not violate Petitioner's First Amendment rights under the particular circumstances of this case. As a general matter, the Tenth Circuit has neither "decided an important federal question in a way that conflicts with relevant decisions of this Court" nor "entered a decision in conflict with another United States court of appeals on the same important matter." S. Ct. R. 10. The Court should therefore deny both the petition for certiorari and Petitioner's demand for summary reversal.

STATEMENT OF THE CASE

I. Factual Background

The University of New Mexico School of Medicine ("UNMSOM") is a state-operated training program for future medical practitioners in the State of New Mexico. In furtherance of its overarching mission to fully prepare its graduates to engage in the practice of medicine, UNMSOM has adopted various policies and procedures, including the UNM Respectful Campus Policy and the UNMSOM Social Media Policy (which expressly incorporates by reference all UNMSOM policies and the Medical Student Professional Code of Conduct). *See* Appellant Paul Hunt's Appendix, Appellate Case 18-2149, Document 010110120480 ("Aplt. App.") 039-046.

The Social Media Policy provides in pertinent part:

- Be mindful that all posted content is subject to review in accordance with UNMSOM policies and the Student Professional Code of Conduct. . . .

- Exercise discretion, thoughtfulness and respect for your colleagues, associates and the university's supporters/community (social media fans). . . .
- UNMSOM does not routinely monitor personal websites or social media outlets, however any issues that violate any established UNM policy will be addressed.
- Violation of this or any UNM policy may result in disciplinary action, up to an including dismissal from UNM.

Id. at 041.

The Respectful Campus Policy provides in pertinent part:

> Individuals at all levels are allowed to discuss issues of concern in an open and honest manner, without fear of reprisal or retaliation from individuals above or below them in the university's hierarchy. At the same time, 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, to violate confidentiality requirements, or engage in other conduct that violates the law or University policy.

Id. at 043.

In November 2012, Petitioner Paul Hunt was a UNMSOM medical student. App. 61. Shortly after the

2012 presidential election, Petitioner posted a statement related to the election on his Facebook page. App. 4. The Facebook post was directed to "all of you who support the Democratic candidates." *Id.* The statement read as follows:

> All right, I've had it. To all of you who support the Democratic candidates. The Republican Party sucks. But guess what. Your party and your candidates parade their depraved belief in legal child murder around with pride.
>
> Disgusting, immoral, and horrific. Don't celebrate Obama's victory tonight, you sick disgusting people. You're abhorrent.
>
> Shame on you for supporting the genocide against the unborn. If you think gay marriage or the economy or taxes or whatever else is more important than this, you're fucking ridiculous.
>
> You're WORSE than the Germans during WW2. Many of them acted from honest patriotism. Many of them turned a blind eye to the genocide against the Jews. But you're celebrating it. Supporting it. Proudly proclaiming it. You are a disgrace to the name of human.
>
> So, sincerely, fuck you, Moloch worshipping assholes.

Id.

On November 15, 2012, Respondent Scott Carroll, M.D., wrote a letter to Petitioner informing him that the Dean of Students had formally referred Petitioner to the Committee for Student Performance and Evaluation ("CSPE"). Aplt. App. 93-94.[1] The referral stemmed from allegations of unprofessional conduct made by at least three other students against Petitioner related to the Facebook post. *Id.* at 93; App. 62. In the letter, Dr. Carroll stated "[w]hile you have every right to your political beliefs, there is still a professionalism standard that must be maintained as a member of the UNM medical school community." Aplt. App. 93. The letter then quoted from the Respectful Campus Policy, stating "the right to address issues of concern does not grant individuals license to make . . . unduly inflammatory statements or unduly personal attacks, or to harass others . . . ." *Id.* The letter informed Petitioner that "CSPE will be conducting an investigation into the allegations at its November 20th meeting" and "would like [Petitioner] to prepare a statement regarding the allegations and be prepared to answer questions from the committee members." *Id.*

Petitioner appeared at the meeting and participated in the investigation. On January 4, 2013, Dr. Carroll again wrote to Petitioner, informing him that the CSPE investigation "substantiated that [Petitioner's] Facebook post was in fact unprofessional conduct due to violations of the UNM Respectful Campus Policy and

[1] Petitioner's Appendix C, App. 55-56, contains at least one typographical error impacting text quoted herein. Respondents have therefore provided an alternate citation to the November 15, 2012 letter from Dr. Carrol to Mr. Hunt.

the UNM School of Medicine Social Medial Policy." App. 57. The letter informed Petitioner that he would not be dismissed from the program, but would be given a two-part "professional enhancement prescription." *Id.* The first part, focusing on ethics, involved mentorship by a faculty member. *Id.* The second part, focusing on professionalism, was comprised of four parts: (1) a reflective writing assignment on the public expression of political beliefs by physicians, (2) an apology letter, which Petitioner could present to anyone of his choice, or no one, (3) rewriting the Facebook post in a professionally appropriate way, and (4) faculty mentorship. *Id.* at 58.

Petitioner successfully completed all aspects of the professional enhancement prescription, although CSPE rejected his first rewrite of the Facebook post. App. 67. Petitioner was advised that he could/should request that any mention of the incident be removed from his Dean's letter prior to the summer before his fourth year of medical school. Aplt. App. 100. Respondents disagree with Petitioner's suggestion that they "declined to remove" the notation of the events from his file at any time. *Compare* Petition for Writ of Certiorari ("Petition") at 8, *with* Aplt. App. 100.

II. Procedural Background

Petitioner filed this case in a New Mexico state court. Respondents removed the case to the United States District Court for the District of New Mexico. Petitioner alleged violations of his First and Fourteenth Amendment rights and sought (1) damages under § 1983, and (2) injunctive and declaratory relief.

Respondents filed a motion to dismiss or for summary judgment based on a qualified immunity theory. The parties fully briefed the motion. The district court found that Respondents were entitled to qualified immunity and granted summary judgment. The district court declined to review Petitioner's constitutional argument.

Petitioner appealed that final judgment to the United States Court of Appeals for the Tenth Circuit. Petitioner argued that the district court erred in granting qualified immunity to Respondents. Petitioner also argued that the district court erred in declining to review Petitioner's constitutional argument. The Tenth Circuit affirmed the district court's grant of qualified immunity because "the law in late 2012 and 2013 would not have given the defendants notice that their response to the Facebook post was unconstitutional." App. 22 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Court of Appeals declined to review Petitioner's constitutional argument. App. 10-11.

REASONS TO DENY THE PETITION

I. The Tenth Circuit Correctly Applied this Court's Qualified Immunity Analysis to the Particular Circumstances of this Case

This is a qualified immunity case. It is black-letter law that "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982)). Dating back to *Harlow*, this language forms the basis of all qualified immunity analyses in all jurisdictions. It applies equally to alleged statutory and constitutional violations of all types. Diligent research reveals no case law from this Court indicating that there is an alternate standard that lower courts should apply. When entitlement to qualified immunity is the issue, the analysis always turns on whether or not the allegedly violated right was "clearly established." *See id.*

It is equally clear that, in order for a constitutional right to be "clearly established," "existing precedent must have placed the statutory or constitutional question *beyond debate*." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (emphasis added) (internal quotation marks and citation omitted). A constitutional question is placed beyond debate by either "controlling authority" from this Court or the relevant circuit court, or "a robust 'consensus of cases of persuasive authority.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). "It is not enough that the rule is suggested by then-existing precedent." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise the rule is not one that every reasonable official would know." *Id.* (internal quotation marks and citations omitted)). While a plaintiff need not identify case law in which "the very action in question has previously been held unlawful," the unlawfulness must

be apparent "in the light of the pre-existing law." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

If there is no case law analyzing "the very action in question," *id.*, a court may analyze whether the alleged constitutional violation is such an "obvious case" that a body of relevant case law is unnecessary to find a violation of clearly established law. *See Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (reversing the Court of Appeal's denial of qualified immunity and noting that "the present case is far from the obvious case where [general statements of law] alone offer a basis for decision"). In his entire brief, Petitioner cites only one case in which a majority of this Court concluded that the alleged conduct was an "obvious" constitutional violation—and that opinion (1) did not analyze a First Amendment claim, and (2) was not unanimous. *See Hope*, 536 U.S. at 738 (applying a qualified immunity analysis to an alleged Eighth Amendment violation); *id.* at 748 (Thomas, J. dissenting) (noting that "[q]ualified immunity jurisprudence has been turned on its head" by the majority). As demonstrated by the absence of relevant authority, it seems that the "obvious case" is exceedingly rare. *Brosseau*, 543 U.S. at 199. *See Wesby*, 138 S. Ct. at 581 (noting the possibility of "the rare obvious case" where the unlawfulness of conduct is clear even though existing precedent does not address similar circumstances).

This Court has "repeatedly" instructed lower courts "not to define clearly established law at a high level of generality" when conducting qualified immunity analyses. *al-Kidd*, 563 at 742 (citing *Wilson*, 526 U.S.

at 615; *Anderson*, 483 U.S. at 639-40). Instead, the stated legal principle must "clearly prohibit" the alleged conduct "in the particular circumstances" at hand, which requires "a high degree of specificity." *Wesby*, 138 S. Ct. at 590 (internal quotation marks and citation omitted). These instructions apply equally to First Amendment claims. *See, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 664-65 (2012) (analyzing the plaintiff's First Amendment claim and holding that "the right allegedly violated must be established not as a broad general proposition but in a particularized sense so that the contours of the right are clear to a reasonable official" (internal quotation marks and citations omitted)).

The instant case results from Respondents' decision to impose a professionalism enhancement on Petitioner for a Facebook post that violated UNMSOM's standards of professional conduct for future medical practitioners. As discussed at length in the briefing to the lower courts, and in the Tenth Circuit's Order and Judgment, there is no case law from any jurisdiction holding that imposing a professionalism enhancement program "in the particular circumstances" present in this case constitutes a violation of Petitioner's First Amendment rights. *Wesby*, 138 S. Ct. at 590. To the contrary, the Tenth Circuit concluded that controlling cases analyzing First Amendment issues in the public university setting, including *Healy v. James*, 408 U.S. 169 (1972) and *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973), failed to send "sufficiently clear signals to reasonable medical school instructors that sanctioning a student's off-campus online speech for the purpose of instilling professional norms is

unconstitutional." App. 19. Moreover, Respondents cited cases from various jurisdictions holding that imposing discipline on professional students in response to online conduct did not constitute a First Amendment violation under the facts of those cases. *See, e.g.*, *Keefe v. Adams*, 840 F.3d 523, 529-33 (8th Cir. 2016) (finding no First Amendment violation when a student was suspended from a nursing program at a public college for "on-line, off-campus Facebook postings" that the school deemed unprofessional and in violation of governing codes of conduct), *cert. denied*, 137 S. Ct. 1448 (2017); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 521 (Minn. 2012) (holding that the imposition of sanctions on a professional student for Facebook posts that violate academic program rules tied to professional conduct standards is not a violation of free speech rights (citing *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 686 (2010)).

Petitioner now argues (for the first time) that the lower courts erred in searching for analogous case law that would put Respondents on notice that the disciplinary action was unlawful because this case presents an "obvious" First Amendment violation. *See* Petition at 18, 21. In support of this claim, Petitioner advances a novel argument that a court applying a qualified immunity analysis to an alleged First Amendment violation should apply a different standard than a court applying a qualified immunity analysis to an alleged Fourth Amendment violation. The rationale underlying Petitioner's theory is that the circumstances that lead to Fourth Amendment violations result from "split-second" decisions, whereas state actors making decisions about speech must need

less specific guidance from courts because the circumstances in which they make their decisions unfold more slowly or are not fact-specific. *See id.* at 20-21.

Petitioner cites no legal authority for the proposition that a diminished standard applies (or should apply) to First Amendment claims. In cobbling together support for this argument, Petitioner misquotes or truncates circuit court opinions *granting* qualified immunity to state actors alleged to have violated the First Amendment. *Compare id.* at 21, *with Volkman v. Ryker*, 736 F.3d 1084, 1090 (7th Cir. 2013) (noting that "[t]here *are* fact-intensive considerations at play" and holding that "this is not so easy a case that citing to a general proposition of law is enough to show that any reasonable office would have known that to restrict or punish [appellant's] speech was unconstitutional") (emphasis added), *and Belsito Commc'ns, Inc. v. Decker*, 845 F.3d 13, 23 (1st Cir. 2016) (affirming the district court's grant of qualified immunity on the appellant's First Amendment claim and holding that the "relevant legal rights and obligations *must be* particularized enough that a reasonable official can be expected to extrapolate from them and conclude that a certain course of conduct will violate the law") (emphasis added).

There is no reasonable argument that the First Amendment case law existing in November 2012 made clear to all public university officials (including public medical school administrators) that sanctioning Petitioner for his objectively unprofessional Facebook post would constitute a First Amendment violation. *See*

al-Kidd, 563 U.S. at 741 ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that *every reasonable official* would have understood that what he is doing violates that right." (emphasis added) (alterations, internal quotation marks, and citation omitted)); *White*, 137 S. Ct. at 551 (holding that qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

Nor is there any reasonable argument that the School of Medicine's conduct constituted an "obvious" constitutional violation. *Brosseau*, 543 U.S. at 199. As stated in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988), the First Amendment rights of public school students "must be applied in light of the special characteristics of the school environment." (Internal quotation marks and citation omitted.) Applying this understanding, *Hazelwood* holds that educators do not violate the First Amendment by exercising control over student speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. There is more involved with training to become, and becoming, a licensed medical practitioner than simply participating in a medical school curriculum. Petitioner's arguments completely ignore the fact that UNMSOM has a legitimate pedagogical concern in ensuring that Petitioner is properly prepared to be a medical provider—if for no other reason than that a medical degree from the school carries with it a tacit endorsement of fitness to practice medicine. It is not patently obvious, and no

court has held, that a medical school (or other professional school) administrator violates a student's First Amendment rights by enforcing standards of professionalism with respect to the student's online activity.

Next, Petitioner attempts to factually distinguish two cases (*Keefe* and *Tatro*) cited by Respondents and the Tenth Circuit for the proposition that qualified immunity was appropriate under the circumstances. *See* Petition at 21-24. This attempt is ineffective and betrays the failure of Petitioner's argument generally.

Neither Respondents nor the Tenth Circuit have asserted that these cases or any other case inarguably *authorized* the School of Medicine to impose discipline in response to Petitioner's online activity. Were that the case, it is exceedingly unlikely that this litigation would have come this far. However, Respondents do not have the burden to prove the existence of case law *authorizing* their conduct; instead, Petitioner has the burden to prove that the conduct was clearly unlawful at the time it occurred. *See, e.g.*, *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 890 (10th Cir. 1992) ("Even if defendants did violate plaintiffs' constitutional rights, as governmental officials performing discretionary duties they are immune from civil liability if their conduct did not violate a clearly established statutory or constitutional right of which a reasonable person would have known." (citing *Harlow*, 457 U.S. at 819)); *Redmond v. Crowther*, 882 F.3d 927, 936 (10th Cir. 2018) (affirming summary judgment on the basis of qualified immunity where "even assuming" violations of the Eighth Amendment occurred, the

plaintiff "fails to cite anything that clearly established th[e] right").

Both *Keefe* and *Tatro* stand for the proposition that a public university may discipline professional students for violations of standards of professionalism for the field in which the student is training. The existence of these cases casts doubt on Petitioner's claim that the discipline imposed by the School of Medicine is an "obvious" violation of the First Amendment. Moreover, Petitioner's failure to bring forward any factually analogous cases that support his argument strengthens Respondents' claim that qualified immunity applies to the particular facts of this case, because Petitioner's interpretation of the law was not "clearly established" at the time of the alleged violation. *Pearson*, 555 U.S. at 231.

Finally, in an apparent attempt to shift attention from the correct analysis, Petitioner repeatedly misstates the analysis courts apply to a defendant's claim for qualified immunity. For example, in asserting that qualified immunity should not apply here, Petitioner argues that "no decision of this Court or the Tenth Circuit comes close to holding that this kind of restriction on speech is protected." Petition at 18. *See also id.* at 24 (stating that out of circuit cases could not have "led Respondents to believe that they could lawfully punish [Petitioner] for exercising his right to free speech"); *id.* at 21 (stating that cases cited by the Tenth Circuit "don't make the case for qualified immunity stronger"). These statements, intentionally or unintentionally, invert the analysis and create confusion in the mind of the reader as to whether a

grant of qualified immunity was appropriate in this case. Again, Petitioner has the burden to prove that the conduct at issue was clearly unlawful at the time it occurred. *Pearson*, 555 U.S. at 231.

The Tenth Circuit properly applied the qualified immunity analysis in this case. As stated in the Judgment and Order, Petitioner has "provided a patchwork of cases connected by broad legal principles, but the law in late 2012 and 2013 would not have given the defendants notice that their response to the Facebook post was unconstitutional." App. 22 (citing *Anderson*, 483 U.S. at 640). Additional analysis of this issue by this Court is unwarranted at this time.

II. Petitioner's First Amendment Rights Were Not Violated

Neither the district court nor the Tenth Circuit decided the underlying constitutional question as to whether Respondents violated Petitioner's First Amendment rights. Instead, the case was decided on the basis of qualified immunity. In doing so, those courts followed this Court's admonitions concerning the advisability of applying the principle of constitutional avoidance in qualified immunity cases. In *Camreta v. Greene*, this Court stated "indeed, our usual adjudicatory rules suggest that a court *should* forbear resolving this [constitutional] issue. After all, a longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." 563 U.S. 692, 705 (2011) (emphasis in original) (internal quotation marks and citations omitted). As was further stated in *Camreta*, "[i]n general, courts should think

hard, and then think hard again, before turning small cases into large ones." *Id.* at 707.

As discussed briefly above, the Court should apply this principle here to avoid expending its scarce resources to unnecessary decide the constitutional issue and turn this small case into a large one. Indeed, it is difficult to imagine a smaller case than this one. Petitioner was not expelled or suspended nor was he even given a failing grade in any course. Instead, he was merely given a few writing assignments and required to meet with a faculty mentor, all of which was designed to further his education as to the professionalism required of a medical doctor. Courts have considered the seriousness of the actions taken by the school in determining whether a First Amendment violation has occurred. *See Doninger v. Niehoff*, 327 F.3d 41, 53 (2d Cir. 2008) (mere disqualification from student office because of offensive web post raises no constitutional concern); *Tatro*, 816 N.W.2d at 524 (student was not expelled or suspended, failing grade in class did not violate First Amendment).[2]

However, should the Court choose to consider the constitutional question, it should find that Respondents' actions were consistent with school-related First Amendment principles announced by the Court and also were consistent with more factually analogous cases decided by other courts pertaining to

[2] While the potential existed that a letter in his file noting the violation might be sent to hospitals to which Petitioner might apply for a residency, such event never occurred as Petitioner did not graduate from UNMSOM.

the First Amendment rights of students in professional schools.

Initially it should be made clear that Petitioner was not punished for the content of his political speech and, therefore, any cases speaking of the strict scrutiny given restrictions on political speech are not applicable. Respondents did not react to the fact that Petitioner's post argued that abortion was a wrongful act of child murder and was a far more important issue than "gay marriage" or "the economy" or "taxes". Instead, the consequences imposed on Petitioner were based on his completely unhinged ad hominem attack on anyone who disagreed with him, asserting they were worse than Nazis, calling them "sick disgusting," "abhorrent," "ridiculous," "Moloch worshipping assholes," who are "a disgrace to the name of human". App. 4. Nor was such language objected to by Respondent because of its "tone" as is suggested by Petitioner, but because the language clearly and unmistakably violated the Respectful Campus Policy which prohibited "untrue allegations, unduly inflammatory statements or unduly personal attacks." Aplt. App. 043. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . ." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (internal quotation marks and citation omitted).

Proof that Respondents' actions were not directed at restricting political speech is shown at Aplt. App 098-099, which is the version of the re-written Facebook post approved by Respondents. As can be seen, the political message concerning abortion remains

essentially the same as in the original post. What has been removed is the vitriolic scree directed at all those who would disagree with Petitioner's position on the issue.

Petitioner argues that this Court has limited a school's ability to regulate student speech by its decisions in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Healy*, 408 US 169 (1972). *Tinker* is the seminal school speech case with respect to high school students. It holds that high school students and teachers retain their First Amendment rights within the schoolhouse and introduced the "materially and substantially interfere" standard for censoring or sanctioning otherwise protected speech. 393 U.S. at 506, 509. In *Healy*, the Court clarified that the same rights generally apply in the university setting but also stated that "as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment, in the particular case'" 408 U.S. at 180.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986), the Court permitted the restriction of student speech that was plainly offensive without a finding of disruption. Then in *Hazelwood*, the Court held that student speech in a school-sponsored medium could be restricted by school officials if the action was "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. Finally, in *Morse v. Frederick*, 551 U.S. 393, 397 (2007), the Court held that schools could restrict student speech that encouraged illegal drug use.

The Court has not to date dealt with a free speech case involving the "special characteristics" of a graduate or professional school. Several lower courts have, however, and their decisions support the constitutionality of the Respondents' actions here.

Particularly on point is *Keefe v. Adams*. There, the Eighth Circuit dealt with the dismissal of a nursing student because of his posting of several offensive Facebook posts which the school believed violated the professionalism standards of The Nurses Association Code of Ethics. *Keefe*, 840 F.3d 523, 529-33 (8th Cir. 2016). Noting that "many courts have upheld enforcement of academic requirements of professionalism and fitness, particularly for a program training licensed medical professionals," the court pointed out that "[f]itness to practice as a health care professional goes beyond satisfactory performance of academic course work." *Id.* at 530.

The Eighth Circuit then went on to hold that, "[g]iven the strong state interest in regulating health professions, teaching and enforcing viewpoint-neutral professional codes of ethics are a legitimate part of a professional school's curriculum that do not, at least on their face, run afoul of the First Amendment," *id.*, and that "[t]herefore college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession both on and off campus, 'so long as their actions are reasonably related to legitimate pedagogical concerns.'" *Id.* at 531 (quoting *Hazelwood*, 484 U.S. at 273).

In concluding that Keefe's First Amendment rights had not been violated, the court also held that, "[c]ourts

should be particularly cautious before interfering with the 'degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession.'" *Id.* at 533 (quoting *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 576 (6th Cir. 1988).

On this latter point, New Mexico, like most if not all states, relies on medical schools to act as gatekeepers to insure that only qualified individuals enter the medical profession by requiring by statute that only graduates of accredited or board-approved medical schools may be licensed to practice medicine. *See* NMSA 1978, § 61-6-11 (2005). Further, the New Mexico Medical Board itself may revoke or suspend the license to practice of a physician or otherwise discipline that practitioner for "unprofessional or dishonorable conduct." NMSA 1978, § 61-6-15A (2017). Consequently it behooves UNMSOM to both instruct its students on the contours of what constitutes professional conduct and to insure that the imprimatur of its diplomas are not conferred on students who do not live up to the standards of the medical profession.

Tatro v. University of Minnesota is also relevant. In that case, the plaintiff was a student in the University of Minnesota's mortuary science program. She posted on Facebook statements that she characterized as "satirical commentary and violent fantasy about her school experience." *Tatro*, 816 N.W.2d at 511. These included posts about dissecting a cadaver. The Minnesota Supreme Court began its analysis by noting that "courts often have applied the *Tinker* substantial disruption standard . . . to the regulation of student

speech over the Internet." *Id.* at 518. The court however declined to do so as *Tinker* "does not fit the purposes of the sanctions here. The driving force behind the University's discipline was not Tatro's violation of academic program rules created a substantial disruption on campus or within the Mortuary Science Program, but that her Facebook posts violated established program rules that require respect, discretion and confidentiality in connection with work on human cadavers." *Id.* at 520. The Minnesota court adopted the following standard: "[W]e hold that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards." *Id.* at 521.

Several cases in other jurisdictions have discussed the appropriate legal framework for First Amendment claims by students in professional programs. In *Oyama v. University of Hawaii,* 813 F.3d 850 (9th Cir. 2015), a student was denied admission to a student teaching program for statements about disabled students and sexual relationships between underage students and teachers. The circuit court, after considering the application of student speech cases such as *Hazelwood* and public employee speech doctrine from *Pickering v. Board of Education,* 391 U.S. 563 (1968), and its progeny, applied the standard adopted by the *Tatro* court, holding "[t]he University of Hawaii's decision to deny Oyama's student teaching application did not offend the First Amendment because it related directly to defined and established professional standards, was

narrowly tailored to serve the University's foundational mission of evaluating Oyama's suitability for teaching, and reflected reasonable professional judgment." 813 F.3d at 868. *See also Keeton v. Anderson-Wiley,* 664 F.3d 865, 872 (11th Cir. 2011) (holding university did not violate student's free speech rights in imposing a remediation plan after student in a counselor education program at a Georgia university stated in class and to fellow students outside class that she would attempt to convert homosexual clients to heterosexuality based on her religious beliefs; university officials determined that these statements expressed her intent to violate the code of ethics of the counseling association); *Yoder v. Univ. of Louisville*, 526 Fed. Appx. 537, 545 (6th Cir. 2013) (non-precedential) (affirming ruling that dismissal of nursing student for blogging about a patient did not violate First Amendment rights of nursing student). In all of these cases, the courts recognized that the First Amendment does not require a university to retain students or accept the behavior of students who do not meet standards for professional behavior in statements made in social media or otherwise outside the classroom.

Petitioner's Facebook post violated the standards of UNMSOM. UNMSOM teaches students that because of the stature of a physician with his or her patients and the influence that the physician can assert over patients or potential patients, it is essential that physician's statements must not be broadcast in inappropriate ways and forums. This is an appropriate pedagogical concern and, under the analysis imposed by this Court in *Hazelwood*, the actions of Respondents

in addressing this concern with Petitioner did not violate his First Amendment rights.

III. Both Additional Review and Summary Reversal Are Unwarranted in this Case

Petitioner makes several additional points and arguments in favor of reversal or additional review. Respondents address these in order.

First, Petitioner broadly asserts that the grant of qualified immunity resulted from a misapplication of the qualified immunity analysis and therefore must be summarily reversed. Petition at 26. Petitioner cites various cases standing for the proposition that this Court has the power to summarily reverse when it believes that a lower court has misapplied the qualified immunity analysis. *Id.* This is correct, as is Petitioner's observation that this procedure has overwhelmingly been used to reverse a denial of qualified immunity. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (summarily reversing the Court of Appeal's denial of qualified immunity); *Brosseau*, 543 U.S. at 201 (same); *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (same); *Stanton v. Sims*, 571 U.S. 3, 10-11 (2013) (same).

Cases summarily reversing a grant of qualified immunity appear harder to find. Although the Court did reverse in *Hope v. Pelzer* and *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), the third case cited by Petitioner, *Tolan v. Cotton*, 572 U.S. 650, 657-59 (2014), was summarily reversed because the Court of Appeals improperly weighed the facts on summary judgment, not because it misapplied the qualified immunity analysis.

Regardless, there is no doubt that the Court can summarily reverse in either direction. Substantively, Petitioner uses these cases, and particularly *Hope v. Pelzer*, to restate his argument that this case presents an obvious constitutional violation by reference to a defendant's "notice" of unlawful conduct "in novel factual circumstances." *See* Petition at 26-27 (citing *Hope*, 536 U.S. at 741). Respondents addressed this argument *supra*.

Next, Petitioner argues that this Court should reverse because "no basis exists for granting qualified immunity" unless the lower courts explain how "unsettled legal issues" in First Amendment cases were "material" to Petitioner's First Amendment claim. Petition at 27. This argument is confusing, given that the existence of unsettled legal issues, or the absence of "clearly established law," is the entire predicate for a qualified immunity defense. *al-Kidd*, 563 U.S. at 741. While it is clear that Petitioner believes that he is entitled to a full constitutional analysis, both the district court and the Tenth Circuit exercised their discretion in conducting a qualified immunity analysis rather than engaging in the constitutional analysis that Petitioner seeks. *See Pearson*, 555 U.S. at 236 (holding that courts have discretion "to decid[e] which of the two prongs of the qualified immunity analysis should be addressed first"); *Camreta*, 563 U.S. at 707 (admonishing courts to "think hard, and then think hard again, before" addressing both prongs of the qualified immunity analysis). Neither court abused its discretion in doing so.

Third, Petitioner argues that the circuit courts are divided on the proper test for granting qualified immunity—both with respect to the degree of factual similarity that must exist to demonstrate that the law is clearly established and the sources that courts may consider in determining the existence of clearly established law. Petition at 27-30.

With respect to the degree of factual similarity that is required to determine that the law is clearly established, the circuit court cases cited by Petitioner do articulate the challenge courts face in striking a balance between defining a right too narrowly and defining it too broadly. *See, e.g.*, *Volkman*, 736 F.3d at 1090 (stating that, "[t]ypically, the difficult part of this inquiry is identifying the level of generality at with the constitutional right must be established" (internal quotation marks and citation omitted)). This challenge is not, however, lost on this Court. In its most recent application of the qualified immunity analysis, this Court stressed the difficulty courts have with this analysis. *See City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) (citing cases and noting that the Court has explained the qualified immunity analysis "many times"). The Court then proceeded to reverse the Court of Appeal's denial of qualified immunity, reiterating that the clearly established constitutional right "must be defined with specificity" and that qualified immunity applies "unless existing precedent squarely governs the specific facts at issue." *Id.* (emphasis added) (internal quotation marks and citation omitted). While *Emmons* is a Fourth Amendment case, the standard applies equally to First Amendment cases. In its most recent application of the

qualified immunity analysis to an alleged violation of the First Amendment, this Court held "that the right allegedly violated must be established not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official." *Reichle*, 566 U.S. at 665 (internal quotation marks and citations omitted). The Court continued its analysis, noting that the question "is not the general right to be free from retaliation for one's speech, but the more specific right" to be free from retaliation under the facts of the case.

If district or circuit courts are periodically applying the qualified immunity analysis incorrectly, that is what the appellate process is for. It stretches credulity, however, to argue that this Court has been unclear as to what the correct standard is, or could further clarify the analysis using the facts of this case.

Finally, Petitioner argues that courts are in disagreement about the sources of law or level of consensus that is necessary to clearly establish the law for purposes of a qualified immunity analysis. It appears that Petitioner would like the Court to define a uniform standard for what sources of authority can be used to clearly establish law for purposes of qualified immunity, which, of course, the Court has never done. *See Harlow*, 457 U.S. at 818 n.32 (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978) and expressly declining to decide whether "the state of the law should be evaluated by reference to the opinions of this Court, the Courts of Appeals, or of the local district courts").

Recent opinions from this Court make clear that controlling precedent is not required and that "a robust consensus of cases of persuasive authority," *al-Kidd*, 563 U.S. at 742 (internal quotation marks and citations omitted), is sufficient as long as "[t]he precedent [is] clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, 138 S. Ct. at 590. Every single circuit court has stated some permutation of this general rule. *See, e.g.*, *Eves v. LePage*, 842 F.3d 133, 144 n.6 (1st Cir. 2016) ("In the absence of controlling authority from the Supreme Court or this court, the . . . burden is to identify a consensus of cases of persuasive authority from our sister circuits" (quotation marks and citations omitted)); *Terebisi v. Torreso*, 764 F.3d 217, 231 (2d Cir. 2014) ("To determine whether the relevant law was clearly established, we consider . . . the existence of Supreme Court or Court of Appeals case law on the subject . . . ."); *Fields v. City of Philadelphia*, 862 F.3d 353, 361 (3d Cir. 2017) ("We do not need Supreme Court precedent or binding Third Circuit precedent to guide us if there is a robust consensus of cases of persuasive authority in the Courts of Appeals." (quotation marks and citations omitted)); *Booker v. S.C. Dept. of Corrs.*, 855 F.3d 533, 545 (4th Cir. 2017) ("A right may be clearly established if a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct in question" or if "based on a consensus of cases of persuasive authority from other jurisdictions" (alterations, quotation marks and citations omitted)); *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (holding that the law is clearly established if the court is "able to point to controlling

authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity" (quotation marks and citation omitted)); *Brown v. Battle Creek Police Dept.*, 844 F.3d 556, 567 (6th Cir. 2016) ("In inquiring whether a constitutional right is clearly established, we must look first to the decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits" (quotation marks and citations omitted)); *Reed v. Palmer*, 906 F.3d 540, 547 (7th Cir. 2018) ("We look first to controlling Supreme Court precedent and our own circuit decisions on the issue. If no controlling precedent exists, we broaden our survey to include all relevant case law . . . ." (quotation marks and citations omitted)); *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001) ("[W]e look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit."); *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989) ("[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test. The available decisional law includes cases from state courts, other circuits, and district courts." (quotation marks and citations omitted)); *Grissom v. Roberts*, 902 F.3d 1162, 1168 (10th Cir. 2018) ("[O]rdinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." (quotation marks and citations omitted)); *Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019) ("For these

purposes, clearly established law consists of holdings of the Supreme Court, the Eleventh Circuit, or the highest court of the relevant state."). These standards (as between the circuits) are not so disparate so as to justify granting certiorari to resolve this issue alone, particularly where there is no analogous case, from any federal or state court, that has held that the conduct at issue in this case constituted a First Amendment violation.

IV. Amici Curiae Briefs

Four different groups have submitted amici curiae briefs in this matter. An amicus curiae brief is helpful only if it raises relevant issues not already brought to the attention of the Court by the parties. S. Ct. R. 37.1. With the exception of issues raised in the briefs that were not raised or decided below, none of the submitted briefs meet this standard.

Review of each brief reveals that the amici curiae believe that a constitutional violation has occurred in this case. Each brief ably argues First Amendment law in support of this position. Each brief cites the same foundational cases for the general proposition that the government cannot generally limit student speech. This argument was also ably made by Petitioner himself. *See* Petition at 10-17; *see also* S. Ct. R. 37.2 (providing that amicus curiae briefs that do not raise new issues are not favored).

That said, none of the briefs specifically address (1) the Tenth Circuit's application of this Court's qualified immunity analysis to the facts of this case, or (2) the issue of whether a state operated medical school

(or other professional school) can regulate a graduate student's online conduct for purposes of instilling professional norms for the student's chosen profession. These are the issues before the Court in this case. General First Amendment analysis, while informative, is unhelpful in deciding the issues before the Court. Respondents have already addressed Petitioner's argument that the conduct at issue constitutes an obvious First Amendment violation and decline to do so again in response to each amici curiae.

In addition to their broad constitutional arguments, some of the amici curiae attempt to frame UNMSOM's policies as either vague or overbroad, to raise tangentially related issues such as "professional speech," or to characterize Petitioner's re-write of the Facebook post at issue as compelled speech. None of these issues were raised or argued to the district court.

It is a well-established general rule "that a federal appellate court does not consider an issue not passed on below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Both Petitioner and the then-amici curiae attempted to raise these issues for the first time on appeal at the Tenth Circuit. The Tenth Circuit declined to review these arguments. App. 9 n.2 (stating that Petitioner did not raise the issues of vagueness, overbreadth, or compelled speech at the district court level and

declining to address the same for the first time on appeal). This Court should do the same.[3]

CONCLUSION

The Court should deny both the petition for certiorari and request for summary reversal.

Respectfully submitted,

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[3] With respect to the issues of vagueness and overbreadth in particular, Respondents would be prejudiced by review at this time. As discussed in their brief to the Tenth Circuit, Respondents' decision to sanction Petitioner was not based on the language of the Respectful Campus Policy alone as implied by amici curiae. Petitioner's online conduct also violated provisions of the UNM Medical School Handbook and the Medical Student Code of Professional Conduct, which are fully incorporated by reference into the Respectful Campus Policy. Because Petitioner did not argue vagueness or overbreadth in the district court, these additional policies were not part of Respondents' defense in that court and are not part of the record on appeal. This absence highlights the rationale underlying the general rule that issues not be raised for the first time on appeal.