No. 20-1066

In The
Supreme Court of the United States

ASHLYN HOGGARD,

Petitioner,

v.

RON RHODES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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

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

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INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, free speech, and free enterprise in the courts of law and public opinion. This case concerns SLF because it has an abiding interest in the protection of our First Amendment freedoms, namely the freedom of speech. This is especially true when a public university suppresses free discussion and debate on public issues that are vital to America's civil and political institutions. Through its 1A Project, SLF equips students with resources to share their ideas, and it defends students' free speech rights both inside and outside the courtroom. SLF is profoundly committed to the protection of American legal heritage, which includes protecting the freedom of speech.

SUMMARY OF ARGUMENT

Colleges have frequently been hailed as the "marketplace of ideas." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Just like at a true market, tables can be found scattered throughout a college campus. Tabling is one of the primary ways students interact

[1] Rule 37 statement: The parties were notified that Amicus intended to file this brief more than 10 days before its filing and consented to its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

with each other and engage in meaningful conversations about current events. It is also how students recruit members to join their organization. Tabling typically occurs in heavily trafficked areas like student unions, sidewalks, and quads. Following suit with these standard practices, Petitioner set up a table to garner interest in her organization and to discuss public affairs such as American politics and the economy. Pet. 2.

Unfortunately for Petitioner, she was a student at Arkansas State University. There, an unwritten Tabling Policy dictated that students could not engage in public discussion in these open areas unless they were formally registered with the University. *Id.* The Eighth Circuit held that the University's free speech policies violated the First Amendment, but it concluded that there was no remedy for Petitioner; the University officials were entitled to qualified immunity because there was no direct case precedent regarding the use of outdoor spaces on campus. *Id.* By focusing on the forum where Petitioner stood, the Eighth Circuit overlooked the real violations in this case: the Tabling Policy and related speech policies were so vague and so broad that they gave University officials unbridled discretion to engage in viewpoint and content discrimination.

Arkansas State University officials had fair warning that their policies were unconstitutional. This Court consistently strikes down rules that are vague, overbroad, and give officials unfettered discretion to

impose rules in a discriminatory way. *See, e.g.*, *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 771 (1988); *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973); *Keyishian*, 385 U.S. at 604; *Kunz v. New York*, 340 U.S. 290, 293–95 (1951). Additionally, there are plenty of cases that show our nation's commitment to preserving political speech and open dialogue, particularly on college campuses. *See, e.g.*, *Meyer v. Grant*, 486 U.S. 414, 421 (1988); *Brown v. Hartlage*, 456 U.S. 45, 52 (1982); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *Keyishian*, 385 U.S. at 603.

As Petitioner points out, this case presents the Court with an opportunity to resolve the circuit split regarding how specific case precedent must be to establish qualified immunity. Additionally, Amicus files this brief to highlight the opportunity for the Court to reaffirm its well-established precedent regarding vagueness, overbreadth, and unfettered discretion that serves to put college officials on notice about First Amendment violations. Finally, Amicus believes this case also provides an opportunity to reiterate the too often ignored value of free expression on college campuses, particularly because open dialogue encourages a well-informed citizenry.

ARGUMENT

I. This case presents an opportunity to reaffirm precedent regarding vagueness, overbreadth, and unfettered discretion that gives college officials fair warning about First Amendment violations.

A. Officials had fair warning that the University's free speech policies were vague and overbroad.

James Madison warned that laws which are "so incoherent that they cannot be understood" pose a serious threat to liberty. The Federalist No. 62, at 379 (James Madison) (Clinton Rossiter ed., Signet Classics 2003). This is especially true for laws that regulate the freedom of expression. The vagueness and overbreadth doctrines often work together to invalidate speech restrictions. *Coates v. Cincinnati*, 402 U.S. 611, 619 (1971) ("[A] statute may be neither vague, overbroad, nor otherwise invalid[.]").

There are only a few limited categories of speech that the First Amendment does not protect, including obscenity, defamation, true threats, and incitement to imminent lawless action.[2] A government restriction on one of these categories cannot be so broad as to touch on constitutionally protected speech. *Broadrick*

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[2] *See, e.g.*, *Gertz v. Robert Welch*, 418 U.S. 323 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Koeppel v. Romano*, 252 F. Supp. 3d 1310 (M.D. Fla. 2017), *aff'd sub nom. Doe v. Valencia Coll.*, No. 17-12562, 2018 WL 4354223 (11th Cir. Sept. 13, 2018).

v. Oklahoma, 413 U.S. 601, 612 (1973). If it does, this Court will strike it down for overbreadth. *See Papish*, 410 U.S. at 670; *Cohen v. California*, 403 U.S. 15, 19–20 (1971). Likewise, a policy "is unconstitutionally vague when 'men of common intelligence must necessarily guess at its meaning.'" *The UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991) (quoting *Broadrick*, 413 U.S. at 607). Due process demands that a law be clear enough for an offender to anticipate the consequences for violating it. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

First Amendment jurisprudence thus makes it clear that college students must receive notice about exactly which speech or conduct would violate campus rules. At Arkansas State University, students like Petitioner were forced to guess where they could or could not table.[3] Their access to campus spaces depended on whether they were a registered student organization. Pet. 2. If they were not officially registered with the school, their speech could be relegated to faraway corners of campus—thus pushing constitutionally protected forms of speech aside in an overbroad manner. But most egregiously, the Tabling Policy dictating these rules was nowhere to be found—in a student

[3] As Petitioner notes, her facial challenge was rendered moot due to recent state legislation banning speech zones. Pet. 6. However, the fact remains that University officials violated Petitioner's First Amendment rights at the time and could engage in similar violations in the future, particularly because the FORUM Act does not explicitly ban vague and overbroad policies. Pet. 6; *see also* A.C.A. § 6-60-1001 to 1010.

handbook, on a website, or even in an email. *Id.* Both the First Amendment and common sense demand an answer to this question: how can students be expected to comply with policies they do not even know exist?

B. Officials also had fair warning that the speech policies gave University administrators unfettered discretion.

This Court looks closely at laws that give state actors "unfettered discretion" to monitor speech. *Lakewood*, 486 U.S. at 757.

> [T]he Supreme Court has made clear that when a decisionmaker has unbridled discretion there are two risks: First, the risk of self-censorship, where the plaintiff may edit his own viewpoint or the content of his speech to avoid governmental censorship; and second, the risk that the decisionmaker will use its unduly broad discretion to favor or disfavor speech based on its viewpoint or content . . . Both of these risks threaten viewpoint neutrality.

Southworth v. Bd. of Regents of Univ. of Wisconsin Sys., 307 F.3d 566, 578–79 (7th Cir. 2002) (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002)). The same holds true in the college setting. *Id.* (holding that when a student organization possesses unbridled discretion to distribute student activity funds, there is a presumption that the organization will not allocate funds on a viewpoint-neutral basis); *see also Jews for Jesus, Inc. v. City Coll. of S.F.*, 2009 U.S. Dist. LEXIS

1613 at *11 (N.D. Cal. 2009) (finding it "highly likely" students would succeed on a First Amendment claim where administrators had unfettered discretion to deny the distribution of literature); *Smith v. Tarrant Cty. Coll. Dist.*, 670 F. Supp. 2d 534, 538 (N.D. Tex. 2009) (finding that a campus policy did not "contain sufficient objective criteria" for decision-making officials to assess requests for permits to use free speech zones) (citing *Kunz*, 340 U.S. at 293–95); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 578 (S.D. Tex.), *dismissed*, 67 F. App'x 251 (5th Cir. 2003) (striking down a policy that allowed a college dean to permit or deny access to speech zones based on what activities he considered "potentially disruptive" because the policy lacked guidelines for him to follow). And when policies lack guidelines to keep officials in check, there is a greater chance the officials will engage in viewpoint- or content-based discrimination informed by personal preferences. *Thomas*, 534 U.S. at 323.

The vague speech policies at Arkansas State University not only fail to notify students about potential consequences for speaking in the "wrong" location, but they also lack guidelines for school officials to follow when assessing reservation requests. For example, a University administrator "admitted that she had extensive discretion; she could even allow speakers to remain in a free-expression area *without* an advanced reservation if she chose." Pet. 5. As a result, the policies grant Arkansas State University officials unbridled discretion to discriminate against speakers based on both the content and viewpoint of speech. And as the

cases above demonstrate, there was more than enough case precedent to put University officials on notice that such unbridled discretion runs afoul of the First Amendment.

II. This case also presents an opportunity for this Court to reaffirm our nation's commitment to political liberty and democracy.

Since 1724, freedom of speech has famously been called the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious* 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). In "response to the repression of speech and the press that had existed in England" and to curb that tyranny in the future, the Founders established the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). They recognized that nowhere are the threats of censorship more dangerous than when a restriction prohibits public discourse on political issues. The Framers thus sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

As this Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown*, 456 U.S. at 52 (quoting *Mills v. Alabama*, 384 U.S 214, 218–19 (1966)). The First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor*, 401 U.S. at 272. It guards against prior restraint or threat of punishment for voicing one's opinions publicly. *Meyer*, 486 U.S. at 421 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940)). It protects and encourages discussion about political candidates, government structure, and political processes. *Mills*, 384 U.S. at 218–19.

Along with providing a check on tyranny, freedom of speech and the press ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Speech about public affairs is thus "the essence of self-government" because citizens must be well-informed. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). They must know "the identities of those who are elected [that] will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *see also Citizens United*, 558 U.S. at 349. For these reasons, public discussion is not merely a right; "[it] is a political duty." *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

The freedom to speak publicly on political issues, especially on our country's college and university campuses, is critical to both a functioning democracy and a well-rounded college experience. College students are in the unique position of being surrounded by diversity of thought, race, religion, and culture. For many, this is the first—and perhaps only—time they will be exposed to a "marketplace of ideas" that differ from their own. The college experience can significantly impact the leaders of tomorrow. College campuses should therefore encourage lively political discussion to develop a well-informed student body and citizenry.

Arkansas State University failed to nurture a moment of political and ideological growth on its campus. What could have been an opportunity for meaningful discussion became a drawn out court battle over basic liberties. Petitioner simply wanted to recruit potential members to her organization and to discuss current events in an open area of campus. The Eighth Circuit Court of Appeals found that the University violated her First Amendment rights, but it also held that there is nothing to be done about it. This case presents the opportunity to reaffirm our founding principles and to recommit college campuses to the pursuit of ideas by holding officials accountable for First Amendment violations. It also presents an opportunity to encourage officials to create constitutional policies—in writing—so that litigation like this is unnecessary in the future.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this amicus curiae brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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