No. _____

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

PETITION FOR WRIT OF CERTIORARI

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Petitioner

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QUESTION PRESENTED

In 2012, Petitioner Paul Hunt was a student at the University of New Mexico School of Medicine. Mr. Hunt posted comments on his personal Facebook page concerning abortion and the recent presidential election. He did not identify himself as being affiliated with the University, did not reference the Medical School, and did not direct his comments to faculty, classmates, or any other individual. Yet Mr. Hunt was punished for violating the University's Respectful Campus Policy and Social Media Policy because his political speech was deemed "unprofessional."

Mr. Hunt filed suit claiming, as relevant, that punishing him for engaging in political speech as a private citizen violated the First Amendment. The district court held that Respondents were entitled to qualified immunity and granted summary judgment. The Tenth Circuit affirmed. In the view of the court of appeals, there was no clearly established law that notified "reasonable medical school administrators that sanctioning a student's off-campus, online speech for the purpose of instilling professional norms is unconstitutional."

The question presented is:

Whether Respondents violated Mr. Hunt's clearly established rights as a private citizen under the First Amendment by punishing him for his off-campus, political speech.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioner Paul Hunt was appellant before the U.S. Court of Appeals for the Tenth Circuit.

Respondents Board of Regents of the University of New Mexico; Scott Carroll, M.D. in his individual and official capacities; John Doe; Jane Doe; Members of the Committee for Student Promotion and Evaluation, in their individual and official capacities; Teresa A. Vigil, M.D., in her individual and official capacities; and Paul Roth, M.D., in his individual and official capacities were Appellees before the Tenth Circuit.

Pursuant to Rule 14(b)(iii), Petitioner is not aware of any "directly related" cases in state or federal courts.

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Paul Hunt respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

INTRODUCTION

There is no right that is more deeply rooted in our nation's history and tradition than the freedom of private citizens to engage in political speech. That is precisely the right Mr. Hunt exercised. In the wake of the 2012 presidential election, he used his Facebook page to speak his mind about the issue of abortion. His rhetoric may have been harsh—but there is no dispute that his speech was fully protected under the First Amendment. That civil or criminal authorities would punish Mr. Hunt for his political speech as a private citizen is simply unimaginable.

Mr. Hunt did not surrender the protection the First Amendment affords him by enrolling in medical school at the University of New Mexico. Whatever authority that university officials may have to restrict speech in the name of "professionalism," it clearly does not reach these comments. He was off campus, he used his personal Facebook account, he did not identify himself as being affiliated with the University, he did not reference the Medical School, and he did not direct his comments to faculty, classmates, or any other individual. This speech thus could not be punished if Mr. Hunt was public employee, an undergraduate student, a high school student, or even a grade school student. There is a limit to the government's ability to restrict the private speech of those citizens who are employed by or matriculate at public institutions. The line was flagrantly crossed here.

The Tenth Circuit's decision to grant qualified immunity to Respondents was demonstrably wrong. 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. Nor does it turn on marginally relevant out-of-circuit decisions or the existence of unsettled—but immaterial—legal issues. 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.

Summary reversal is justified in this instance. Time and again, the Court has explained that error correction is appropriate when the judgment below badly misapplies the standard for assessing whether officials should receive qualified immunity. That the Tenth Circuit made this mistake in a free-speech case only makes the need for intervention that much more urgent. Whether the Court holds that Respondents are not entitled to qualified immunity, or remands for the Tenth Circuit to perform the qualified-immunity analysis under the proper test, the judgment should not be allowed to stand.

It also is appropriate to grant the petition given the division in the circuit courts. They are divided, in particular, over how close the facts need to be for the law to be clearly established and over the role of out-of-circuit cases in affording notice of what federal law requires. The lower courts have been asking the Court

for guidance on these important issues of federal law. This is an opportunity to provide it. The Court should grant the petition or, in the alternative, summarily reverse the judgment below.

OPINIONS BELOW

The U.S. Court of Appeals for the Tenth Circuit's unpublished opinion is available at 792 Fed. Appx. 595 and is reproduced in the Appendix ("App.") 1-23. The U.S. District Court for the District of New Mexico's opinion is reported at 338 F. Supp. 3d. 1251 and is reproduced at App. 24-54.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit issued its unpublished opinion on November 14, 2019. This Court granted an extension to file a petition for certiorari to and including April 10, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

STATEMENT OF THE CASE

A. Factual Background

Petitioner Paul Hunt was a 24-year-old student at the University of New Mexico School of Medicine in 2012 ("Medical School" or "University"). Shortly after the 2012 presidential election, he posted comments on his personal Facebook page regarding his "opposition to abortion and the recent election results." App. 55. In full, Mr. Hunt's Facebook post read:

> 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 worshiping assholes.

App. 4, 27.

Dr. Eve Espey, a member of the Medical School faculty, became aware of Mr. Hunt's comments and summoned him to her office to discuss them. App. 61-62. At that meeting, Dr. Espey threatened Mr. Hunt with various disciplinary measures and advised him that she would be referring him to the University's Committee for Student Promotion and Evaluation ("CSPE"), which might expel him, suspend him, order neuropsychological testing, or impose other sanctions. App. 62-63. She warned Mr. Hunt not to take a "free speech angle" in response to the charges or "things will go very poorly" for him. App. 63.

That same day, Respondent Dr. Scott Carroll, the CSPE Chair, informed Mr. Hunt of the referral. The letter explained that Dr. Espey made the referral

"due to allegations of unprofessional conduct made by other students related to a recent post you made on Facebook regarding your opposition to abortion and the recent election results." App. 55. "While you have every right to your political and moral opinions and beliefs," the letter added, "there is still a professional standard that must be maintained as a member of the UNM medical school community." App. 55. The CSPE would be conducting an investigation and holding a hearing to determine whether Mr. Hunt's comments violated the University's Respectful Campus Policy and the Social Media Policy. App. 56.

The Respectful Campus Policy, as quoted in the letter, provides:

> *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 violate the law or the University policy.*

App. 55 (italics and emphasis in original).

The Social Media Policy, also as quoted in the letter, provides:

> *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 and including dismissal from UNM.*

App. 56 (italics in original).

The CSPE found that Mr. Hunt's Facebook post violated those two policies. Mr. Hunt was notified that "instead of dismissing [him] from the school," the CSPE would impose a "professionalism ... prescription composed of two components: an ethics component and a professionalism component, each with its own mentor." App. 57. "The ethics component" included "a reflective writing assignment on patient autonomy and tolerance." App. 57. "The professionalism component" included "a reflective writing assignment on public expression of political beliefs by physicians," "an apology letter," a revised Facebook post that would be written in "a passionate, but professionally appropriate way," and a year of monthly meetings with a faculty mentor. App. 58. All written materials required CSPE's approval. App. 58. The "CSPE also voted to require notation of [Mr. Hunt's] Dean's Recommendation Letter provided to residency training programs" that Mr. Hunt could ask the CSPE "to remove ... at some point in the future." App. 58.

Mr. Hunt tried to comply with the punishment the CSPE had imposed. He successfully completed all of the writing assignments. Notably, though, CSPE initially rejected his rewritten Facebook post even though Mr. Hunt had removed the expletives. App. 30,

69-70. Yet the University declined to remove the notation from his file at that juncture and advised Mr. Hunt to petition to have it removed near the end of "Phase II" of the program, *i.e.*, about three years later. App. 7-8. It was at that juncture that Mr. Hunt decided to file a civil action.

B. Proceedings Below

Mr. Hunt filed a § 1983 action in state court alleging, *inter alia*, that the UNM Board of Regents and other University officials had violated his right to free speech under the First Amendment. App. 8, 30-31. He sued the defendants in their official and individual capacities, and he sought declaratory, injunctive, and monetary relief. App. 8, 30-31. The defendants removed the action to federal court pursuant to 28 U.S.C. § 1331, and sought dismissal or, in the alternative, summary judgment. App. 8, 31.

The district court granted summary judgment to Respondents on the individual-capacity claims.[1] In so doing, the district court did not decide the merits of Mr. Hunt's claims. It instead held that Respondents were entitled to qualified immunity. App. 35-46. In the district court's view, Mr. Hunt did not have a clearly-established First Amendment right because, "at the time of the disciplinary action at issue in this case, neither the Supreme Court nor the Tenth Circuit

[1] The court dismissed the claims against the Board of Regents and the official-capacity claims against the individual defendants. App. 8, 32-34. It also rejected Mr. Hunt's Fourteenth Amendment procedural due process claim. App. 46-50. Mr. Hunt does not seek review of those rulings.

had considered whether graduate and professional schools specifically (or universities generally) can regulate off-campus, online speech by students that the university deems to be unprofessional or which violate its applicable rules of professionalism." App. 36.

The Tenth Circuit affirmed. Despite noting that the relevant First Amendment cases protecting student speech "at first blush … appear favorable to Mr. Hunt," the court ultimately concluded that those cases "fail to supply the requisite on-point precedent," App. 19, 22, because they do not address "off-campus, online speech," App. 13. Specifically, the court held that Mr. Hunt had "failed to identify a case where a medical school administrator acting under similar circumstances as the defendants in this case was held to have violated the First Amendment." App. 22 (cleaned up). Thus, the law at that time "would not have given the defendants notice that their response to the Facebook post was unconstitutional." App. 22.

As a result, the Tenth Circuit could not "say that every reasonable officer in the position of the defendants here would have known that their actions violated the First Amendment." App. 13 (citation and quotations omitted). In its judgment, neither Supreme Court nor Tenth Circuit precedent would "have sent sufficiently clear signals to reasonable medical school administrators that sanctioning a student's off-campus, online speech for the purpose of instilling professional norms is unconstitutional." App. 19. And, there was no "clearly established weight of authority from other circuits" supporting Mr. Hunt's position. App. 20.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" and "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10. As explained herein, the Court should grant the petition or, in the alternative, summarily reverse the judgment below.

I. The University's punishment of Mr. Hunt for his political speech flagrantly violated the First Amendment.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). That is especially true for political speech. *See infra* 24-25. Furthermore, the Court has explained that "colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). Indeed, the First Amendment's importance is at its apex at colleges and universities. *See id.*; *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957).

The University clearly lost sight of this when it punished Mr. Hunt for certain comments he made on his personal Facebook page regarding his "opposition to abortion and the recent election results." App. 55. In the University's view, Mr. Hunt's "unprofessional" political statements violated the Respectful Campus

and Social Media policies because they were "unduly inflammatory" and "unduly personal attacks." App. 55. That is a textbook content-based restriction on speech; the University is regulating Mr. Hunt's speech "based on its communicative content." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)); *Reno v. ACLU*, 521 U.S. 844, 868 (1997). And, given that his rewritten Facebook post was rejected even though the few expletives had been removed, App. 30, 69-70, it also constitutes viewpoint discrimination, which is "an egregious form of content discrimination," *Rosenberger*, 515 U.S. at 829. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

But the punishment is not content neutral even if, as the Tenth Circuit held, Mr. Hunt was punished for his rhetoric and not his point of view. Respondents may think that Mr. Hunt made his political points in a disrespectful and inflammatory manner. But a state official may not restrict speech "in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). Indeed, "the point of all speech protection … is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995). Restrictions because of the "impact that speech has on its listeners ... is the essence of content-based regulation." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000) (citation

and quotations omitted); *see also Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

As a consequence, the University's punishment of Mr. Hunt is "presumptively unconstitutional" and is sustainable only if Respondents can prove that their restriction on his speech is "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. The University claims to have a compelling interest in maintaining a "professionalism standard" within its "medical school community." App. 5, 28, 55. Any interest it may have in "instilling professional norms," however, is not compelling as applied to the private, off-campus, political speech of a graduate student.

The quickest way to see how obvious the First Amendment violation is here is simply to assume that this had happened in the professional environment itself instead of at the medical school. In other words, assume that a doctor employed at a state hospital was punished for making the same "unduly inflammatory" comments. The University has no compelling interest in punishing speech in the name of professionalism, after all, if that speech could not be restricted under the "customary professional standards" themselves. App. 19; *see NAACP v. Button*, 371 U.S. 415, 438-39 (1963) (explaining that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights").

That would be an easy case. The government may not punish a public employee for engaging in lawful speech in his or her private life—whether it is on a Facebook page, at the dinner table, or at a civic

event—even if the rhetoric is considered to be harsh. The Court has held that "when public employees make statements pursuant to their *official duties*," they are not "speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (emphasis added). Rarely, however, can public employees be punished for speaking "about matters of public concern" as "*private citizens*." *Id.* at 419 (emphasis added). The employer would need to demonstrate that the speech restriction is "necessary" for the workplace "to operate efficiently and effectively." *Id.*

Punishing lawful speech because of its tone cannot meet that high bar. "Official communications" that are "inflammatory or misguided" can be punished in order to "promote the employer's mission." *Id.* at 422-23. But that kind of restriction has never been extended to private speech. The notion that a public employee could be disciplined for engaging in this kind of political speech outside the workplace finds no support in the law. *See, e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465-67 (1995). Public employees have not surrendered the basic First Amendment rights that they hold as private citizens. *See, e.g.*, *Janus v. American Federation of State, County, & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2472 (2018).

Instead of evaluating whether the University's "professionalism" rationale could pass muster on its own terms, the lower courts viewed the case through the prism of school discipline. But analyzing this as a

"student speech" case, as the Tenth Circuit did, does not turn this into a difficult First Amendment issue. App. 13-22. This is a clear constitutional violation under *any* First Amendment standard that might be applied to these facts.

To begin, it is doubtful that private, off-campus, political speech of medical students is entitled to less protection than lawful speech by any other private citizen. In *Papish*, for example, a graduate student "was expelled for distributing *on campus* a newspaper 'containing forms of indecent speech.'" 410 U.S. at 667 (emphasis added). The Court held that the speech at issue could not be "labeled as constitutionally obscene or otherwise unprotected," that the punishment was content-based, and that it could not "be justified as a nondiscriminatory application of reasonable rules governing conduct." *Id.* at 670-71. Nothing in *Papish* signals that universities are given special latitude to restrict the speech of graduate students—let alone impose content-based restrictions on private, political speech that occurs off campus.

At a minimum, graduate students are entitled to the same level of protection as their undergraduate peers. In that context, the Court similarly explained that a university can make "its students adhere to generally accepted standards of conduct." *Healy*, 408 U.S. at 192. It was equally clear, however, that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than *in the community at large*." *Id.* at 180 (emphasis added). At no point did the

Court suggest that college students have diminished First Amendment rights—let alone, once again, in the context of private, political speech that is not spoken on campus.

In fact, this would be a clear First Amendment violation even if the discipline arose in the context of secondary education. For sensible reasons, the Court has permitted greater restrictions on speech when it comes to high school and grade school students. Given "the special characteristics" of this setting, secondary schools can prohibit otherwise protected speech that "would materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). This includes the authority to prohibit "lewd speech at a school assembly," even absent evidence of disruption. *Bethel School District v. Fraser*, 478 U.S. 675, 677, 685 (1986).

But this authority to restrict student speech applies on school grounds, *i.e.*, "in the classroom," in the "cafeteria, or on the playing field, or on the campus during the authorized hours." *Tinker*, 393 U.S. at 512-13. It likewise applies to school-sponsored events that are held off campus. *See Morse v. Frederick*, 551 U.S. 393, 400-01 (2007). There is no authority, however, for diminishing the First Amendment rights of students "outside the school context." *Id.* at 405; *see also id.* at 434 (Stevens, J., dissenting). Put simply, there is no justification to depart from the scrutiny that content-based speech restrictions ordinary receive outside "the special characteristic of the school setting." *Id.* at 424

(Alito, J., concurring); *see Bethel*, 478 U.S. at 688 n.1 (Brennan, J., concurring in the judgment).

Tinker and its progeny, accordingly, offer no aid to the University. If Mr. Hunt were in high school, his private speech—unconnected to any school-sponsored event—would be fully protected. Any other conclusion would have "ominous implications." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (Smith, J., concurring). "Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student's classmates got wind of the entry, took issue with it, and caused a significant disturbance at school." *Id.* To be certain, "the school could clearly punish the students who acted disruptively." *Id.* However, "if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law." *Id.* Mr. Hunt's lawful speech should be entitled to at least as much constitutional protection as this hypothetical high-school blogger.

This was a flagrant First Amendment violation from every vantage point. That is unsurprising. The Constitution abhors restrictions on speech because of the message being conveyed or the way in which the speaker chooses to convey that message. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019). Respondents may have found Mr. Hunt's political statements to be disrespectful. But that is not a basis for restricting his right to speak as a private citizen on matters of public concern—even if he uses coarse language. "One of the

prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944).

What matters here is that Mr. Hunt exercised his right to speak publicly—and passionately—about abortion. His political speech, that is, falls squarely in the heartland of what the First Amendment is meant to protect. The University's punishment of Mr. Hunt for lacking enough "tolerance" for opposing viewpoints therefore crossed a clear line. App. 57. "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011). Free speech "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." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

II. Respondents are not entitled to qualified immunity.

Instead of reaching the merits of this dispute, the Tenth Circuit granted qualified immunity to the Respondents. That decision was plainly incorrect. Mr. Hunt's rights under the First Amendment are clearly established.

The point of qualified immunity is to shield government officials from civil damages stemming from "'insubstantial claims' against" them. *Pearson v.*

Callahan, 555 U.S. 223, 231 (2009) (citation omitted). Accordingly, officials are not immune if they violated a federal constitutional or statutory right that was "clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). There is, in turn, a violation of "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." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (cleaned up).

Qualified immunity plainly should have been denied under that standard. Mr. Hunt's constitutional right to freely speak on this matter of public concern as a private citizen—in an off-campus forum that was unconnected to any University-sponsored event—was "beyond debate." *Id.* No decision of this Court or the Tenth Circuit comes close to holding that this kind of restriction on speech is protected. Indeed, this is "the obvious case" where immunity would be unavailable "even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam). That there are myriad cases making clear that punishing Mr. Hunt for his speech violates the First Amendment should have made the lower courts' task here only that much easier.

The Tenth Circuit disagreed because no court had ruled against a public graduate school on these facts. In its view, the "requisite on-point precedent" would be "a case where a medical school administrator acting under similar circumstances as the defendants in this case was held to have violated the First

Amendment." App. 22 (cleaned up). By "similar circumstances," the Tenth Circuit meant a case where "a graduate-level" student engaged in "off-campus ... online speech," was then punished by the school for lack of professionalism, and brought a successful First Amendment claim. App. 22. Without such a case, according to the Tenth Circuit, University officials did not have "notice that their response to the Facebook post was unconstitutional." App. 22.

This is a deeply flawed approach to evaluating whether government officials are entitled to qualified immunity. This Court does "not require a case directly on point" to find the law to be clearly established. *Al-Kidd*, 563 U.S. at 741. And for good reason. Just as "it defeats the qualified-immunity analysis to define the right too broadly (as the right to be free of excessive force), it defeats the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas)." *Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 508-09 (6th Cir. 2012). To be sure, "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). But this Court has never held "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* That standard would make it virtually impossible "to hold public officials accountable when they exercise power irresponsibly." *Pearson*, 555 U.S. at 231.

Whether the body of pre-existing law makes the unlawfulness apparent will differ depending on the

source of the underlying federal right. For example, the Court has "stressed that the 'specificity' of the rule is 'especially important in the Fourth Amendment context.'" *Wesby*, 138 S. Ct. at 590 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). This is doubly true in excessive force cases since it is "sometimes difficult for an officer to determine how the relevant legal doctrine ... will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. at 308 (citation omitted); *see Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018). Because "excessive-force claims often turn on 'split-second decisions' to use lethal force," in other words, "the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately." *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (Oldham, J.).[2]

But this is not a concern in free-speech cases. There are no split-second decisions and the outcome rarely turns on narrow factual issues since the Court has been emphatic that "content-based restrictions on political speech are expressly and positively forbidden by the First Amendment." *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) (citation and quotations omitted). Government officials have long been on notice that "*content-based* restriction on *political speech* in a *public forum* … must be subjected to the most

[2] This is also true in other Fourth Amendment contexts, such as whether "a search or seizure will be deemed reasonable given the precise situation encountered." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017).

exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (emphasis in original). At bottom, "it is the "rare case in which a speech restriction withstands strict scrutiny." *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring in the judgment) (cleaned up)).

It was thus inappropriate for the Tenth Circuit to search for precedent replicating these facts. That approach to qualified immunity is unwarranted when there are "no fact-intensive considerations at play." *Volkman v. Ryker*, 736 F.3d 1084, 1090 (7th Cir. 2013). Rather, the contours of the constitutional right need only 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." *Belsito Communs., Inc. v. Decker*, 845 F.3d 13, 23 (1st Cir. 2016). University officials should (and do) know that the First Amendment does not tolerate punishing the private, political speech of a student because they think that his rhetoric is in bad taste. This isn't a close call.

The Tenth Circuit leaned on a handful of lower court cases in granting qualified immunity. App. 16-22. But those cases don't make the case for immunity stronger. Some of those cases indicate that the Tenth Circuit has "not yet decided" what standard "applies to university students' extracurricular speech." App. 16-17, n.3 (citations and quotations omitted). Some suggest that there is uncertainty as to what standard applies to off-campus speech generally, App. 20-22, as well as in the specific context of "online speech," App. 18-19. Other cases suggest that there is disagreement over how the free-speech rights of higher-education

students compare to free-speech rights of secondary-school students and public employees. App. 20-22.

Identifying doctrinal uncertainty only matters, however, if resolving it would alter the outcome of the case. It would not here. As explained, the punishment that Mr. Hunt suffered violated the First Amendment regardless of how these legal questions are ultimately settled. Uncertainty as to immaterial legal questions does not license government officials to run roughshod over the constitutional rights of private citizens. The Tenth Circuit needed to explain how the outcome in this case turned on the resolution of *any* of these legal questions. Its failure to do so renders the decision below unsustainable.

Finally, the Tenth Circuit pointed to two out-of-circuit decisions that, in its judgment, rejected a First Amendment claim similar to the one Mr. Hunt brings. App. 11 (citing *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016)); App. 21-22 (citing *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012)). As an initial matter, out-of-circuit decisions cannot cloud a legal understanding that is otherwise clearly established. These cases are not controlling for those who call New Mexico home. Law is created via litigation when "the judicial power is" exercised "to issue binding judgments." William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1811 (2008). "Courts reduce their opinions and verdicts to judgments precisely to define the rights and liabilities of the parties." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015). If "we can't expect officers to keep track of persuasive authority from every one of [the] sister circuits," *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir.

2020), then surely they cannot benefit from out-of-circuit cases misapplying controlling precedent. They are either charged with knowledge of the law outside of where they live or not. The answer cannot turn on whether that body of law supports or undermines a qualified-immunity defense.

Regardless, neither case should have led these University officials to believe that punishing Mr. Hunt's political speech would be lawful. In *Keefe*, the Eighth Circuit upheld the removal of a student from a nursing program for posting comments on Facebook that "were threatening and related to the classroom." 840 F.3d at 526. In particular, "the posts were directed at classmates, involved their conduct in the Nursing Program, and included a physical threat related to their medical studies." *Id.* at 532. The court therefore held that punishing Keefe for violating the Nurse Association Code of Ethics did not violate the First Amendment. *See id*. at 535-37.

Tatro involved Facebook posts by a Mortuary Science student in which she discussed "stabbing someone with a trocar and hiding a scalpel in her sleeve." 816 N.W.2d at 513 (footnote omitted). Tatro also made comments about a human cadaver that the students were dissecting in class. *See id.* at 512-13. The Minnesota Supreme Court upheld the decision to punish her against a First Amendment challenge. As the court explained, the "academic program rules requiring respectful treatment of human cadavers are consistent with the statutory professional conduct standard requiring mortuary science professionals to treat the deceased 'with dignity and respect.'" *Id.* at

522 (quoting Minn. Stat. § 149A.70 (2010)). Given this holding, the Minnesota Supreme Court did not need to decide whether the "stabbing" comments provided an independent basis for upholding the punishment. *See id.* at 524.

Neither case is remotely like this one. Unlike in *Keefe*, Mr. Hunt did not criticize the curriculum or the faculty, threaten classmates, or otherwise disrupt the educational program in which he enrolled. He made comments about abortion that the University officials considered distasteful. And, unlike in *Tatro*, Mr. Hunt did not engage in any kind of speech that violated an identified professional standard or referenced the educational program. *Keefe* and *Tatro* involved speech that it may be necessary to restrict in order to ensure that professional and educational environments can properly function. That is not the case here. *See supra* 13-16. Those out-of-circuit cases therefore could have in no way led Respondents to believe that they could lawfully punish Mr. Hunt for exercising his right to free speech.

III. The Court should grant the petition or, in the alternative, summarily reverse the judgment below.

The Court should not allow the judgment below to stand. "Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against." *Hill v. Colorado*, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting). "The Founders sought to protect the rights of individuals to engage in political speech because a self-governing

people depends upon the free exchange of political information." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting); *see Citizens United v. FEC*, 558 U.S. 310, 391-93 (2010) (Roberts, C.J., concurring).

Therefore, "the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation and quotations omitted). That special duty to ensure that the government does not stifle political speech warrants intervention here. It is "dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech." *Davis v. FEC*, 554 U.S. 724, 743 n.8 (2008). Yet the University censored Mr. Hunt's speech because of the way in which he expressed opposition to abortion. That is deeply concerning. Those "citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative of their cause." *Hill*, 530 U.S. at 787-88 (Kennedy, J., dissenting). The Court should protect Mr. Hunt's constitutional right to speak his mind.

It is also important that qualified immunity is not interpreted so broadly that it defeats meritorious federal claims. Again, "just as defining a right too broadly may defeat the purpose of qualified immunity, defining a right too narrowly may defeat the purpose of § 1983." *Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 732 (7th Cir. 2013). The purpose behind qualified immunity is to ensure that an official is not held liable for damages without "fair notice that her conduct was

unlawful," *Brosseau*, 543 U.S. at 198—not to stack the deck against a private citizen who seeks to recover for the violation of his federal rights.

Summary reversal would be appropriate. The Court does not hesitate to summarily correct "a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999); *see, e.g.*, *Hunter v. Bryant*, 536, 502 U.S. 224, 227-28 (1991) (explaining that the decision below reflected "confusion" over the "import" of the relevant Supreme Court precedent). The Court is especially willing to invoke its "summary reversal procedure … to correct a clear misapprehension of the qualified immunity standard." *Brosseau*, 543 U.S. at 198 n.3. More often, the Court takes this step when qualified immunity has been denied. *See, e.g.*, *Taylor v. Barkes*, 575 U.S. 822 (2015); *Stanton v. Sims*, 571 U.S. 3 (2013). But it also intervenes when qualified immunity has been inappropriately granted. *See, e.g.*, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); *Tolan v. Cotton*, 572 U.S. 650 (2014).

This decision reflects a demonstrably erroneous application of both First Amendment and qualified immunity precedent. In fact, the Tenth Circuit made the same error the Court corrected in *Hope v. Pelzer*, 536 U.S. 730 (2002). The Eleventh Circuit granted immunity because the plaintiff had failed to identify "earlier cases with 'materially similar' facts." *Hope*, 536 U.S. at 733. But that "rigid gloss on the qualified immunity standard," the Court explained, "is not consistent with our cases." *Id.* at 739. The Court thus reiterated that there is no "requirement that previous

cases be 'fundamentally similar'" and "that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741.

The Court need look no further than *Hope* to see why summary reversal is warranted here. Correcting this error ensures that the judgment below is not "followed elsewhere" and that it will not "undermine the values qualified immunity seeks to promote." *Wesby*, 138 S. Ct. at 589.

At a bare minimum, the Court should reverse the judgment and require the Tenth Circuit to redo the qualified immunity analysis. *Cf. Sause v. Bauer*, 138 S. Ct. 2561 (2018). Even assuming the Tenth Circuit correctly stated the qualified immunity test at a high level, it never explained why the unsettled legal issues it identified and the resulting disagreement on those issues among the lower courts were material to the resolution of Mr. Hunt's First Amendment claim. *See supra* 21-24. No basis exists for granting qualified immunity without that explanation. To the contrary, engaging in that inquiry will confirm that immunity is unavailable under these facts.

Review is also warranted given the entrenched circuit split over the proper test for granting qualified immunity. In particular, the "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). Some circuit courts, like the Tenth Circuit, require near perfect identity of

facts in order for the law to be clearly established. *See, e.g.*, *Volkman*, 736 F.3d at 1090. Some courts employ a "flexible standard, requiring some, but not precise factual correspondence with precedent." *Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 932 (8th Cir. 2016). Other courts recognize—especially in "obvious cases"—that immunity ought to be denied where "the unlawfulness of the defendants' conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Simon v. City of New York*, 893 F.3d 83, 88 (2d Cir. 2018).

Courts have noted the difficulty of "striking a balance between defining the right specifically enough that officers can fairly be said to be on notice that their conduct was forbidden, but with a sufficient 'measure of abstraction' to avoid a regime under which rights are deemed clearly established only if the precise fact pattern has already been condemned." *Id.* at 97. One judge has described this inquiry as "a doozy." *Morrow*, 917 F.3d at 874. It is important that the Court resolve this dispute. "If the right is defined too narrowly based on the exact factual scenario presented, government actors will invariably receive qualified immunity. If, on the other hand, the right is defined too broadly, the entire second prong of qualified immunity analysis will be subsumed by the first and immunity will be available rarely, if ever." *Golodner v. Berliner*, 770 F.3d 196, 206 (2d Cir. 2014).

The circuit courts also disagree over the sources that can constitute clearly established law. In some circuits, "for a right to be clearly established, there must be a Supreme Court or [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." *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007) (cleaned up). In others, "[w]hen neither the Supreme Court nor [the circuit] has recognized a right, the law of our sister circuits … cannot act to render that right clearly established." *Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006). The Eleventh Circuit considers decisions from "the highest court of the relevant state" as well as other state courts. *Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019). And the Ninth Circuit has even held that "unpublished decisions of district courts may inform [the] qualified immunity analysis." *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).

Those lower courts that consider out-of-circuit precedent also disagree over "the level of ... consensus necessary to put the relevant question 'beyond debate.'" *Morrow*, 917 F.3d at 879-80. The Fifth Circuit has held that "recognition of the state-created-danger doctrine in *six circuits* was insufficient to create a robust consensus." *Id.* (emphasis in original) (citing *McClendon v. City of Columbia*, 305 F.3d 314, 330 (5th Cir. 2002) (en banc)). In the Eighth Circuit, by contrast, "the fact that two circuit cases and fifteen district court cases directly support a proposition and the Supreme Court implicitly supports that same position is sufficient to demonstrate that the law was "clearly established.'" *Turner v. Ark. Ins. Dep't*, 297 F.3d 751, 759 (8th Cir. 2002).

The petition provides the Court with a chance to resolve these circuit splits. The Tenth Circuit erred

by searching myopically for factually identical cases and by relying on out-of-circuit decisions to conclude that the law is not clearly established. Granting the petition and resolving these divisions among the lower courts will provide much needed guidance. The Court should not allow this confusion over the proper test for qualified immunity to linger.

CONCLUSION

The Court should grant the petition for certiorari or, alternatively, summarily reverse the judgment below.

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Petitioner

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