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 A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Southeastern Legal Foundation (SLF) respectfully moves for leave to file the accompanying amicus curiae brief in support of Petitioner Paul Hunt. Petitioner has consented to the filing of this amicus curiae brief. Respondents have withheld consent to the filing of this amicus curiae brief. Accordingly, this motion for leave to file is necessary.

SLF 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. SLF regularly appears as amicus curiae before this and other federal courts to defend the United States Constitution and the protection of free speech. 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.

SLF agrees with Petitioner that the lower court's decision warrants review because this Court consistently strikes down campus rules that are vague, overbroad, and discriminatory based on viewpoint or content. *See*, *e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973). Therefore, the University had sufficient notice that restrictions like the Respectful Campus Policy are presumptively unconstitutional. And regardless of whether this Court treats Petitioner as a private citizen or an undergraduate student in its analysis, the University violated the First Amendment.

SLF believes that the arguments set forth in its brief will assist the Court in resolving the issues presented by the petition. SLF has no direct interest, financial or otherwise, in the outcome of the case. Because of its lack of a direct interest, SLF believes that it can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, SLF respectfully requests that this Court grant leave to participate as amicus curiae and to file the accompanying amicus curiae brief in support of Petitioner.

Respectfully submitted,

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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.

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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 were once hailed as the "marketplace of ideas." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). But at an alarming rate, students who eagerly step on to university grounds expecting to live, work, learn, and grow, quickly discover that they must tread

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

carefully and avoid saying anything that could seem offensive or polarizing. Students typically cannot predict what words will offend their peers, what topics are too ideological, and when or how university administrators will discipline them for saying the wrong thing. The result: students self-censor to avoid punishment, because those consequences are not worth the risk of exercising their First Amendment rights.[2]

At the University of New Mexico, one student chose not to censor his political speech on social media, and he paid the price. University officials threatened expulsion. Pet'r App. 63. They required the student to undergo an investigation, defend himself against charges of racism and antisemitism, and agree to ethics training. *Id.* at 64–67. They even recommended that the University dean notify each medical residency program about the incident, placing a stain on the student's future career. *Id.* at 66. They did all of this because the Respectful Campus Policy bans "inflammatory statements."[3] *Id.* at 55.

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[2] Sanctions at the University of New Mexico include suspension, expulsion, and neuropsychological testing. Pet'r App. 62–63. Sanctions like these often impose a chilling effect on students like Petitioner. *See*, *e.g.*, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 372–73 (M.D. Pa. 2003).

[3] As Petitioner notes, the University of New Mexico School of Medicine also has a Social Media Policy. Pet. 6–7. But because the Social Media Policy serves mainly as an enforcement mechanism, this brief will focus only on the Respectful Campus Policy.

The University argues that they are entitled to qualified immunity because there was no case precedent about medical students sharing political posts on social media from off campus. Pet'r App. 22. But this masks the real issue: the policy is so vague and so broad that the University could have punished Petitioner no matter where he was standing or what platform he used.

Regardless of the status of social media cases in 2012, precedent already showed that the Respectful Campus Policy was unconstitutional. This Court consistently strikes down campus rules that are vague, overbroad, and discriminatory based on viewpoint or content. *See*, *e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973). There are also plenty of cases that show our nation's commitment to preserving political speech. *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). Therefore, the University had sufficient notice that restrictions like the Respectful Campus Policy are presumptively unconstitutional. And regardless of whether this Court treats Petitioner as a private citizen or an undergraduate student in its analysis, "[t]his is a clear constitutional violation under *any* First Amendment standard[.]" Pet. 14.

ARGUMENT

I. The Tenth Circuit Court of Appeals erred in finding that there was no precedent to guide University of New Mexico administrators because there is overwhelming case law about unconstitutional speech codes.

A. The University's Respectful Campus Policy is 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.[4] A government restriction on one of these categories cannot be so broad as to touch on constitutionally protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). If it does, this Court

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[4] *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).

will strike it down for overbreadth. *See Papish*, 410 U.S. at 670 (finding that a university could not expel a student who distributed a political cartoon depicting rape, with the headline "M—f— Acquitted," because neither the cartoon nor the headline was "constitutionally obscene or otherwise unprotected"); *Cohen v. California*, 403 U.S. 15, 19–20 (1971) (finding that a speaker could not be convicted for wearing a shirt in court that said "F—the Draft" because merely offensive language does not amount to obscenity).

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).

Likewise, students must receive notice about exactly which speech or conduct would violate campus rules. At the University of New Mexico, a student can face punishment for "unduly inflammatory statements" that violate the Respectful Campus Policy. Pet'r App. 55. This applies wherever the student speaks, whatever platform he uses, and whatever level of education he pursues. *Id.* at 55–56. And, as this case shows, it even applies to students who violate an unwritten standard of professionalism. Pet'r App. 55.

This raises a few questions. First, what distinguishes an "unduly" inflammatory statement from any other inflammatory statement? Surely the University does not mean to imply that some offensive comments are deserved, while others are unwarranted. Second, how can a student know what conduct is professional or unprofessional without written criteria to follow? And most importantly, what exactly is "inflammatory"?

In today's world, one can hardly look at social media without feeling a mixture of emotions. It is inevitable that political speech—the cornerstone of the Free Speech Clause—will inflame others. Nothing in the Respectful Campus Policy gives students adequate notice about the consequences for expressing political beliefs. *See* Pet'r App. 55. Petitioner could hardly anticipate such severe punishment for sharing his political views on social media. The University considered Petitioner's words "inflammatory" in part because he used expletives, even though this Court time and again protects that language. Pet. 4–7. Thus, by failing to define "inflammatory," the policy is so broad that it allows the University to treat constitutionally protected speech as unprotected speech. *Id.*

B. The Respectful Campus Policy discriminates against speakers based on content and viewpoint.

No matter the circumstances, " 'viewpoint discrimination' is forbidden." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). A school policy that disfavors certain

ideas is always unconstitutional. *Id.* (listing cases that ban viewpoint discrimination); *Rosenberger*, 515 U.S. at 835 (finding that a university engaged in viewpoint-based discrimination when it denied funding to a religious-affiliated student newspaper).

Similarly, a school policy that discriminates against the content of speech is almost always unconstitutional. *See Papish*, 410 U.S. at 670 (finding that a university engaged in content-based discrimination when it expelled a student because it disapproved of the content of her speech). A university must show that a content-based restriction serves a compelling government interest and is narrowly tailored to achieve that interest. *Boos v. Barry*, 485 U.S. 312, 329 (1988) (striking down a ban on signs criticizing foreign government within 500 feet of embassies because even if the ban served a compelling interest, "it is not narrowly tailored; a less restrictive alternative is readily available"). And in a "highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests,'" are compelling enough to justify restrictions on First Amendment rights. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (holding that the possibility that individuals would feign religious objections to working on Saturday did not justify infringing on employee's religious liberty) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (finding that a state could not restrict union officials from persuading workers to join unions because they did not incite workers to imminent lawless action)).

Here, the Respectful Campus Policy is not narrowly tailored to serve a compelling interest. Although some may have considered Petitioner's statements to be polarizing, the University failed to show that Petitioner incited imminent lawless action or presented a grave danger to the public in this "highly sensitive" First Amendment area. *See* Pet'r App. 63–68. Thus, the University cannot argue that there are serious abuses at stake here. Nor can it argue that the policy—which imposes a blanket ban on "inflammatory statements"—is narrowly tailored. There are other, less restrictive means available, such as prohibiting social media posts that are obscene or incite imminent lawless action.

Moreover, University administrators determined that the content of Petitioner's social media post was offensive and therefore punishable. Pet'r App. 26. They stated that an unwritten professional standard outweighed any personal political views Petitioner held. Pet'r App. 55. Even Petitioner's first attempt to rewrite his post, where he removed expletives and expressed understanding for politically opposing views, did not satisfy the University. Pet'r App. 69. This suggests that it was not just the content of Petitioner's speech, but even the views he held about abortion, that were the driving force behind his punishment.

C. The Respectful Campus Policy gives University officials unfettered discretion.

This Court looks closely at laws that give state actors "unfettered discretion" to monitor speech. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

> [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. Chi. 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 v. New York*, 340 U.S. 290, 293–95 (1951)); *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).

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 Respectful Campus Policy not only fails to notify students about potential consequences for engaging in political speech, but it also lacks guidelines for school officials to follow when assessing that speech. As a result, the policy allows administrators at the University to make judgment calls about inflammatory speech through the lens of personal bias, just as they did with Petitioner. *See* Pet'r App. 63–68. One official even used her position to threaten Petitioner not to argue that the University violated his First Amendment rights. Pet'r App. 63. The policy therefore granted University officials unbridled discretion to discriminate against Petitioner based on both the content of his speech and his viewpoint. The University then used the full force of its power to sanction Petitioner.

II. This case 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 created 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 public 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.

The University of New Mexico 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. For better or worse, "[g]iving offense is a viewpoint" that demands constitutional protection. *Matal*, 137 S. Ct. 1744 at 1763. This case presents the chance to reaffirm our founding principles and to recommit college campuses to the pursuit of ideas, no matter how vehemently we may oppose them.

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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