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

MOTION FOR LEAVE TO FILE BRIEF AND *AMICI CURIAE* BRIEF OF FIRST AMENDMENT SCHOLARS

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), *amici curiae* law professors dedicated to the study of the First Amendment ("First Amendment Scholars") respectfully move for leave to file the accompanying brief in support of Petitioner. As required under Supreme Court Rule 37.2(a), all parties were timely notified of the First Amendment Scholar's intent to file this *amici* brief. Petitioner consented. Respondents did not.

The First Amendment Scholars' interest in this case is the sound and orderly development of First Amendment law, particularly in the educational context. The First Amendment Scholars have taught courses on constitutional law or the First Amendment, authored publications on the First Amendment, and dedicated significant attention to the study of First Amendment law.

The accompanying brief explains why the Court's cases clearly establish that Petitioner's political speech is protected under the Court's well-established framework for analyzing core political speech. The brief further explains that the Court's student-speech cases are inapplicable because Petitioner is an adult graduate student and his off-campus political speech had no connection to university affairs or anyone affiliated with the university.

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

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BRIEF FOR FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether it is clearly established that the First Amendment protects a public university student's off-campus political speech unrelated to university affairs?

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are academic scholars who have taught courses on constitutional law or the First Amendment, authored publications on the First Amendment, and dedicated significant attention to the study of First Amendment protections. The *amici* are:

Enrique Armijo, Associate Dean for Academic Affairs and Professor of Law, Elon University School of Law;

Jane Bambauer, Professor of Law, University of Arizona;

Derek Bambauer, Professor of Law, University of Arizona;

Gerard V. Bradley, Professor of Law, Notre Dame Law School;

George W. Dent, Jr., Schott - van den Eynden Professor of Law Emeritus, Case Western Reserve University School of Law;

Michael R. Dimino, Professor of Law, Widener University Commonwealth Law School;

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[1] Pursuant to Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties were notified of the *amici curiae*'s intention to file this brief pursuant to Rule 37.2(a). Petitioner consented; Respondents did not.

Dr. John C. Eastman, Henry Salvatori Professor of Law & Community Service, and former Dean, Chapman University Fowler School of Law; and Senior Fellow, the Claremont Institute;

Richard W. Garnett, Paul J. Schierl / Fort Howard Corporation Professor of Law, Director, Notre Dame Program on Church, State & Society, Concurrent Professor of Political Science, Notre Dame Law School;

Stephen B. Presser, Raoul Berger Professor of Legal History Emeritus, Northwestern University Pritzker School of Law; and

Eugene Volokh, Gary T. Schwartz Distinguished Professor of Law, UCLA School of Law.

Based on their research and publishing activities, *amici* have an interest in the sound and orderly development of First Amendment law, particularly in the educational context.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals applied the wrong constitutional framework and erroneously concluded that whether a public university student's off-campus political speech enjoys First Amendment protection is an "emerging area of constitutional law." That conclusion was in error, but it reflects a regrettably common misunderstanding of the application of this Court's precedents that ought to be corrected.

This Court's cases have long recognized that the First Amendment's strongest protections attach to political speech like Petitioner's. His commentary on

electoral politics and reproductive rights is plainly what the Court has termed "core political speech." Respondents' punishment of otherwise protected speech that they regard as "unprofessional" is a content-based restriction of a sort that tradition has never recognized and that is therefore invalid. Whether Petitioner's speech was offensive, hurtful, or even vulgar is irrelevant in the constitutional calculus. Put simply, it is well established that public officials like Respondents may not condition participation in a public program on abandonment of the right to speak freely in one's personal life outside of that program.

The Court's student-speech cases provide no support at all for Respondents' content-based regulation of Petitioner's speech. Indeed, the Court has already recognized that its precedents "leave no room for the view that…First Amendment protections should apply with less force on [public university] campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972). And it specifically rejected past attempts by public universities to regulate and punish collegiate speech. *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 668–69 (1973). Petitioner's comments were published off-campus, had no connection to university affairs, and were not specifically directed at fellow students, professors, or university officials.

That the Court has approved restrictions on grade school and high school students' speech so as to maintain classroom discipline does not license state officials to regulate an adult student's off-campus political advocacy. The error of the court below in holding otherwise works a wholesale deprivation of the rights

of professional students. It demands correction, but, more important than that, the limits of the Court's student-speech cases require reinforcement.

The Court has recognized its obligation "to be vigilant" and "guard against undue hindrances to political conversations and the exchange of ideas." *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999). To that end, the Petition should be granted.

ARGUMENT

This Court has steadfastly recognized that "[w]hatever 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. This of course includes discussions of candidates…and all such matters relating to political processes." *Mills v. State of Ala.*, 384 U.S. 214, 218–19 (1966); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.").

The court below derogated from that well-established principle when it held that the right of adult students to speak freely off-campus is an "emerging" area of law subject to no definitive standard. The law, however, is clear that Petitioner's political speech enjoys the First Amendment's strongest protection and that the Court's student-speech cases do not authorize states to establish roving commissions to police

university students' off-campus speech for its "professional" quality. Because too many courts have misunderstood these principles, the Court's intervention is required to state them plainly and further clarify the controlling nature of its political-speech cases in this context.

I. The Court's Cases Clearly Establish that the First Amendment Protects Core Political Speech Like Petitioner's

This is a political speech case, and the Court's cases clearly establish that core political speech is protected. Repeatedly, the Court has "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) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

To begin, political speech is protected. The Court has consistently held that "political speech [is] at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003); *Boos v. Barry*, 485 U.S. 312, 318 (1988) (same). Political speech is at the zenith of First Amendment protection because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). The right to free speech reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" even when "vehement, caustic, and sometimes unpleasant[]." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Hustler Magazine, Inc.*

v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."). Because political speech is entitled to the highest protection, "the First Amendment requires…err[ing] on the side of protecting political speech rather than suppressing it." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 457 (2007).

The comments for which Petitioner was sanctioned are obviously core political speech. Petitioner spoke out on electoral politics and the politics and morality of reproductive rights. Lest there be any doubt, these are topics that the Court has specifically identified as falling within the category of "core political speech." *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 168 (2014) (recognizing that speech on abortion is "core political speech"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (recognizing that speech on candidates, elections, and governmental affairs is "core political speech"). That is clearly established.

Equally well established is the general invalidity of novel content-based restrictions on protected speech like Respondents' blanket prohibition on "unprofessional" speech by its students.[2] The stated purpose of

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[2] Restricting "unprofessional" speech is also excessively vague and "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also* Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 Minn. L. Rev. 1801, 1803 (2017) ("[P]ublic colleges and universities are increasingly

Respondents' "Respectful Campus Policy" is to "foster an environment that reflects courtesy, civility, and respectful communication because such an environment promotes learning, research, and productivity." Pet.App.3. To further that purpose, the Respectful Campus Policy prohibits, as relevant here, "unduly inflammatory statements or unduly personal attacks, or [speech that] harass[es] others." Pet.App.5.

Whether or not such a prohibition might pass muster on campus, *see infra* § II (explaining that it would not), applied as a blanket prohibition to all of a student's expressive activities it does not. "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); *see also Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

The Court has only ever permitted content-based restrictions "in a few limited areas" and has "never

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punishing students for their speech when it is deemed inconsistent with vague 'professionalism' standards."); Clay Calvert, *Professional Standards and the First Amendment in Higher Education: When Institutional Academic Freedom Collides with Student Speech Rights*, 91 St. John's L. Rev. 611, 650 (2017) ("The notion of arbitrary and biased enforcement, of course, taps into concerns about the pretextual use of professional standards to stifle student expression."); *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018) (holding that "the unmoored use of the term 'political'" allowed for arbitrary enforcement of a statute restricting speech and requiring "a more discernable approach").

included a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (recognizing that these categories include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct). Respondents' restriction on "unprofessional" speech stands far outside the traditional categories of speech regulation and is therefore invalid. *Id.*; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 n.8 (2008) (recognizing that "it would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech").

Indeed, the Court's cases have specifically disapproved restrictions on "inflammatory" speech like the one here. It is a "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989). Even blatantly hurtful speech is protected, such as yelling "Thank God for Dead Soldiers" outside the funeral of a soldier or proclaiming that "God Hates Fags." *Snyder v. Phelps*, 562 U.S. 443, 454 (2011). "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." *Id.* at 461. "[T]hat society may find speech offensive is not a sufficient reason for suppressing it." *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

Likewise, government has no license to ban speech because it is vulgar. *See Cohen v. California*, 403 U.S. 15, 25 (1971) (holding that wearing a jacket with the

words "F--- the Draft" to express opposition to the Vietnam War and the draft was protected speech). Speech infused with expletives may be "distasteful" but "the Constitution leaves matters of taste and style [] largely to the individual" because "one man's vulgarity is another's lyric." *Id.*; *see also Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944) ("One of the prerogatives of American citizenship is the right to criticize public men and measures—and that…[includes] the freedom to speak foolishly and without moderation.").

In sum, the Court's cases clearly establish that Respondents' content-based restriction cannot be lawfully applied to Petitioner's political advocacy.

II. The Court's Student-Speech Cases Are Clearly Inapplicable

The court below erred when it applied this Court's cases authorizing regulation of grade school and high school students' speech to maintain classroom discipline to an adult's off-campus speech. Nothing in the Court's First Amendment precedents suggests that adult university students like Petitioner may be forced, as a condition of enrolling in a public university, to trade away their cherished First Amendment right to speak freely in their personal lives.

First, the Court's "schoolhouse gate" speech cases provide no basis to restrict speech that is entirely removed from schooling. The competing value that the Court has recognized to justify some regulation of student speech that would otherwise be protected is the need "to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393

U.S. 503, 507 (1969). The Court has gone so far as to permit regulation of student speech to that end at an approved school event, where "[t]eachers and administrators were interspersed among the students and charged with supervising them." *Morse v. Frederick*, 551 U.S. 393, 401 (2007). And it has recognized that speech uttered outside the schoolhouse gate and school events that nonetheless concerns school affairs and makes its way onto school grounds plumbs "the outer boundaries as to when courts should apply school-speech precedents." *Id.* (citing *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 615, n.22 (5th Cir. 2004)).

Well beyond those "outer boundaries" is speech like Petitioner's that occurs off-campus and is unrelated to school affairs. When Petitioner authored and published his Facebook post, he was not on campus. He was not participating in any school-sponsored extracurricular activity. He did not take advantage of any online forum sponsored by the school. Instead, like so many millions of Americans do every day without government reprisal, he posted his thoughts on political affairs to his own personal Facebook page. Pet.App.4. And he had nothing to say in that post about his university and its affairs or any particular classmates, nor did he say anything that could be taken as a threat of violence.

By applying their "Respectful Campus Policy" to Petitioner's speech, Respondents were not acting at all to "prescribe and control conduct in the schools," *Tinker*, 393 U.S. at 507, but instead to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd.*

of Ed. v. Barnette, 319 U.S. 624, 642 (1943). That is, of course, forbidden. *Id.*

Second, even had Petitioner made his Facebook post from campus or handed it out on flyers to those traversing the school green, that would not alter the result because the Petitioner is an adult university student, not a child. As the Court observed in *Healy v. James*, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas." 408 U.S. 169, 180 (1972). For that reason, "[t]he precedents of this Court leave no room for the view that…First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 180. Thus, Respondents had no more authority to sanction Petitioner for his Facebook post than the local police would have to arrest any other citizen for airing her political and moral views by publishing them online.

At this late date, it cannot be seriously disputed that this principle is clearly established. In addition to *Healy*, *Papish v. Board of Curators of the University of Missouri* held that a public university violated a graduate student's First Amendment speech rights when it expelled her for publishing, on campus, a newspaper featuring vulgar and offensive contents. 410 U.S. 667, 668–69 (1973). The rule it applied could not be clearer or more clearly applicable here: "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of de-

cency.'" *Id.* at 670. The university, the Court held, violated the First Amendment when it punished the student "because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution." *Id.* (emphasis added). It was the *dissenters* in *Papish* who believed the First Amendment had less force when it came to "rules which govern conduct on the campus of a state university." *Id.* at 672 (Burger, C.J., dissenting); *see also id.* at 677 (Rehnquist, J., dissenting) (urging different standards for when a student may "be expelled from the University" based on speech than for when a student may "be criminally prosecuted" for the same speech). But the majority held to the contrary, expressly concluding that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech." *Id.* at 671.

The only difference between *Papish* and the present case is that Respondents deem Petitioner's speech "unprofessional" rather than "indecent." *Id.* at 667. But creative variation in the jargon of speech regulation is no basis to circumvent constitutional command.

Third, the Court has recognized that even schoolchildren have the right to engage in "political and religious speech [that] might be perceived as offensive to some." *Morse*, 551 U.S. at 409. Restricting such speech requires more on the part of officials "than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular view-

point." *Tinker*, 393 U.S. at 509. Yet avoiding unpleasantness is the core of Respondents' "Respectful Campus Policy."

Fourth and finally, even the relatively permissive *Tinker* standard—applicable to schoolchildren, not adults—only permits prohibition of otherwise protected speech that stands to "materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513. Political invective outside of the classroom or a school event simply does not fit the bill.

In sum, if it is not clearly established that public university officials may not punish adult graduate students for their off-campus political speech, one would struggle to imagine what is properly considered established First Amendment law. Yet the decision below reflects evident confusion on what should be a basic, unassailable point. For that reason, this Court's review is warranted to make clear that it has already made itself clear.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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