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 OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* SPEECH FIRST IN SUPPORT OF PETITIONER

Jason Torchinsky
Counsel of Record
Shawn Toomey Sheehy
Dallin B. Holt
Holtzman Vogel Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE SPEECH FIRST IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Speech First, a membership association of students, parents, faculty, alumni, and concerned citizens, is committed to restoring the freedom of speech on college campuses through advocacy, education, and litigation. Speech First, therefore, respectfully moves for leave of the Court to file the accompanying amicus brief is support of Petitioner's Petition for Writ of Certiorari, asking the Court to grant the Petition for Writ of Certiorari or, alternatively, summarily reverse the judgment below.

In support of its motion, *amicus curiae* asserts that public colleges and universities across the country, including the University of New Mexico Medical School, have clearly contravened this Court's First Amendment jurisprudence in establishing and enforcing unconstitutional student speech policies. Specifically, by punishing a graduate medical student for an online post made off-campus on a personal account discussing his personal, political, and social beliefs, the university severely overstepped. Moreover, the Tenth Circuit's clear misunderstanding and misapplication of this Court's precedent regarding a student's right to free speech is a prime example of the chilled speech environment that currently exists at the University of New Mexico, and in schools across the country.

Accordingly, *amicus curiae* asserts that the current state of chilled-speech environments that exist in public colleges and universities across the country, as evidenced by the facts of Petitioner's case, present a prime opportunity for this Court to ensure that schools and courts understand the limits of restricting free speech of students—both on and off campus. Therefore, this Court should grant Petitioner's Petition for Writ of Certiorari and Amicus Curiae requests that its motion to file the attached amicus brief be granted

Counsel for Respondents objected to the filing of Speech First's amicus brief.

Respectfully submitted on this 18th day of May, 2020.

Jason Torchinsky
Counsel of Record
Shawn Toomey Sheehy
Dallin B. Holt
Holtzman Vogel
Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law
Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE

Speech First is a membership association of students, parents, faculty, alumni, and concerned citizens. Launched in 2018, Speech First is committed to restoring the freedom of speech on college campuses through advocacy, education, and litigation. For example, Speech First has challenged speech-chilling policies at the University of Michigan, *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); the University of Texas, *Speech First, Inc. v. Fenves*, No. 19-50529 (5th Cir. docketed June 7, 2019); the University of Illinois, *Speech First, Inc. v. Killeen*, No. 19-2807 (7th Cir. docketed Sep. 19, 2019); and Iowa State University, *Speech First, Inc., v. Wintersteen*, No. 4:20-cv-2 (S.D. Iowa filed Jan. 2, 2020).[1] Accordingly, Speech First has a vital interest in the outcome of this case.

[1] No party's counsel authored any part of this brief. No person other than the *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief. On May 4, 2020, counsel for Petitioner consented to the filing of this brief. On May 11, 2020, counsel for Respondents objected to the filing of this brief. Accordingly, *amicus curiae* simultaneously file the attached Motion for Leave to File.

SUMMARY OF THE ARGUMENT

For far too long America's colleges and universities have regulated the speech of their students, becoming the arbiters of what is and what is not an acceptable idea. Now, in this case, a public university is expanding its reach to regulate what is an acceptable form of expression for speech made in the speaker's personal capacity, off-campus, and online on a personal account. For three reasons, this Court should grant certiorari.

First, there is currently a student free speech crisis on campuses, and public universities across the country have enacted and enforced content-based speech codes. These speech codes permit university officials to become arbitrary enforcers punishing students for speech administrators deem offensive. Students at some public universities are then required to attend re-education programs.

Second, this Court should grant certiorari because the public university here went far beyond regulating and enforcing speech codes on campus. The University of New Mexico Medical School regulated Petitioner's off-campus personal speech. As part of Petitioner's punishment, the University will annotate all of his medical residency applications, noting the supposed violation.

Third, the University of New Mexico's actions here clearly contravene this Court's university speech jurisprudence.

To correct these errors and to provide guidance to the lower courts, the Petition should be granted.

ARGUMENT

Mr. Hunt exercised his right to free speech to speak about salient political issues on his personal Facebook page. App.61 Shortly thereafter, fellow students voluntarily visited Mr. Hunt's Facebook page and read his Facebook post. App.55. Those students informed on Mr. Hunt, reporting his speech to the Dean of Students. App.55.

Unfortunately, Mr. Hunt's now eight-year odyssey from speaking about salient political issues on his own Facebook page, through the disciplinary labyrinth of the University of New Mexico's Committee on Student Performance Enhancement ("CSPE") is all too common. More common still was that CSPE found Mr. Hunt in violation of the schools "Respectful Campus Policy" and "Social Media Policy," and sentenced him to a four phase "professionalism enhancement prescription" complete with apology letters and a rewritten Facebook post that that was subject to CSPE's prior approval. App.62-67. Though university campuses conjure images of wide verdant lawns beneath Gothic stone towers, the tapestry of the modern American university is now cluttered with speech codes and "bias response teams" enforced and staffed by administrators with titles like "Dean of Student Life."

For the past twenty years, secondary schools and universities have confronted online student speech. School officials' responses to online student speech deemed offensive have ranged from school disciplinary action to informing law enforcement. *See*

Alexander G. Tuneski, Note, *Online, Not On Grounds: Protecting Student Internet Speech,* 89 Va. L. Rev. 139, 144-146, nn. 8-25 (2003) (citing examples from as early as 2000 of school officials punishing students for online speech). Instead of protecting student speech, officials at institutions of higher learning have turned to stifling it through malleable and subjective speech codes.

This Court should grant certiorari to provide guidance on this common and recurring issuing impacting our country's most important right: the right to free speech.

I. University and College Speech Codes Consistently Stifle Students' Speech.

"The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

As the Supreme Court has long recognized, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools [of higher education]." *Healy v. James*, 408 U.S. 169, 180 (1972). American universities are "peculiarly the marketplace of ideas," training future leaders "through wide exposure to that robust exchange of ideas which

discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (cleaned up). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957).

Put simply, "First Amendment protections [do not] apply with less force on college campuses than in the community at large," *Healy*, 408 U.S. at 180, and 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 decency,'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973).

Sadly, however, many institutions of higher learning have forgotten that they exist to broaden the marketplace of ideas, not restrict it. *Healy*, 408 U.S. at 180-81. Just as Respondents did below, these institutions have mistakenly taken the position that since this Court has not precisely spoken on a specific issue pertaining to student speech (*i.e.* a graduate medical student posting a message online on his personal account, using his personal computer, while being off-campus), that they are justified in ignoring decades of relevant case law governing student free speech. App.22. In claiming this constitutional ignorance, universities and colleges have ignorantly drafted, approved, and implemented policies which not only stifle student speech when applied to specific situations, but also

create a chilling effect across campus (and now off-campus) by their mere existence.

Instead of promoting the "robust exchange of ideas," universities are often more interested in protecting students from ideas that make them uncomfortable. *Keyishian*, 385 U.S. at 603. Universities do this by adopting policies and procedures that discourage speech by students who dare to disagree with the prevailing campus orthodoxy. One tried-and-true method of discouraging "unorthodox" speech is the campus speech code.

Speech codes, according to the Individual Rights in Education ("FIRE"), are "university regulations prohibiting expression that would be constitutionally protected in society at large." FIRE, *Spotlight on Speech Codes 2019: The State of Free Speech On Our Nation's Campuses* at 10 (Feb. 8, 2019), bit.ly/2GAyfKJ. Recycled ideas from the 1980s, speech codes punish students for undesirable categories of speech such as "harassment," "bullying," "hate speech," and "incivility." Because they impose vague, overbroad, content-based restrictions on speech, these policies violate the First and Fourteenth Amendments. Federal courts almost always strike them down. *Id.* at 10, 26. Today, more than a quarter of universities have speech codes that earn a "red light" rating from FIRE because they "both clearly and substantially restrict[] protected speech." *Id.* at 2.

For example, *amicus curiae* Speech First recently sued the University of Texas at Austin over the

university's speech codes. *See generally* Complaint, *Speech First, Inc. v. Fenves*, 384 F. Supp. 3d 732 (W.D. Tex. 2019) (No. 1:18-cv-1078). Before Speech First filed suit, the university maintained multiple speech codes: (1) it broadly banned "verbal harassment" which extended to "offensive" speech, including "insults, epithets, ridicule, [and] personal attacks" "based on the victim's ... personal characteristics, or group membership, ... ideology, political views, or political affiliation"; (2) it prohibited electronic communications that are "uncivil," "rude," or "harassing" under its technology policy; and (3) it maintained a residence hall manual which proscribed yet another version of "harassment," which it defined as including "racism, sexism, heterosexism, cissexism, ageism, ableism, and any other force that seeks to suppress another individual or group of individuals." *Id.* ¶ 3. These policies all encompassed protected speech and provided no clear guidance about how to comply, yet the University threatened to investigate and discipline students who violated them.

Similarly, before Speech First filed a lawsuit, the University of Michigan maintained a disciplinary code that broadly prohibited "harassment" or "bullying," and doled out extra punishments if those actions were motivated by "bias." Complaint at ¶ 3, *Speech First, Inc. v. Schlissel*, 333 F. Supp. 3d 700 (E.D. Mich. 2018) (No. 2:18-cv-11451), *rev'd,* 939 F.3d 756. The University interpreted and applied those amorphous concepts in a way that captured staggering amounts of protected student speech and expression. For example, the University defined "harassment" as "unwanted negative attention

perceived as intimidating, demeaning, or bothersome to an individual." *Id.* This meant that a student could face significant penalties (up to and including expulsion) if another student perceived his or her speech as "demeaning" or "bothersome." *Id.* ¶ 2. Under that regime, an overly sensitive student could effectively dictate another students' speech. Additionally, that policy failed to provide clear notice about what was prohibited conduct and had a profound chilling effect on protected speech and expression.

Universities also shield students from uncomfortable ideas by preventing or discouraging them from speaking in public areas. Some universities do this by requiring students to get pre-approval before they can share their message. Others go so far as to ban popular places and methods of speaking altogether.

For example, Speech First recently challenged an anti-speech policy at the University of Illinois at Urbana-Champaign. *See generally* Complaint, *Speech First, Inc. v Killeen*, No. 3:19-cv-03142 (D. Ill. filed May 30, 2019). Before Speech First's lawsuit, the University prohibited "post[ing] and distribut[ing] leaflets, handbills, and any other types of materials" about "candidates for non- campus elections" unless and until that individual receives "prior approval" from the University. *Id.* ¶ 3. The University provided students with no published guidance as to whether or when it will approve or deny permission to engage in political speech.

Similarly, Speech First recently sued Iowa State University ("ISU") over its prohibition on "chalking"—*i.e.*, writing messages on campus sidewalks with chalk. *See* Complaint at ¶ 3, *Speech First, Inc., v. Wintersteen*, No. 4:20-cv-00002. Chalking was often used to communicate messages involving social and political issues. *Id.* Further, ISU's Acceptable Use of Information Technology Resources Policy prohibited students from using email to communicate about campaigns and ballot issues. *Id.* ¶ 4 Finally, ISU's Campus Climate Reporting System tasked a team of ISU administrators to respond to "bias incidents" across campus—again, leading to a subjective determination of what a few administrators deemed to be a "bias" incident. *Id.* ¶ 5.

These policies are taking a toll on students. A 2019 Knight Foundation study found that over two-thirds of college students believe the climate on their campus prevents people from speaking freely. *See* Knight Foundation, *College Students Support the First Amendment, but Some Favor Diversity and Inclusion Over Protecting the Extremes of Free Speech* (May 13, 2019), kng.ht/31Qsz8w. That number is astonishing and unacceptable.

This erosion of First Amendment protections is taking its toll on academic diversity in higher education as well. For example, a poll conducted by College Pulse on behalf of the College Fix found that in a survey of 1,000 Republican and Republican-leaning college students, nearly three-quarters of them have withheld their political views in class for fear their grades would suffer. Jennifer Kabbany,

Poll: 73 percent of Republican students have withheld political views in class for fear their grades would suffer, College Fix (Sept. 4, 2019), bit.ly/37rR1hP. That silence is unsurprising given how hostile universities and some faculty can be to opposing viewpoints.[2]

Even former mayor of New York City Michael Bloomberg has noticed this dangerous trend on campuses. As he said in a recent column, "[o]ne of the most disturbing aspects of the retreat from liberal political discourse can be found on the training grounds for tomorrow's leaders: college campuses." Michael Bloomberg, *Democracy Requires Discomfort*, Bloomberg Opinion (Sept. 15, 2019), bloom.bg/2HjY2Xd. Not only is that retreat from discourse bad for the personal development of students, but it is also harmful to the country. When dangerous ideas are silenced and forced underground, where they do not have the benefit of being refined and tested against other arguments, they can lose outside perspective and become dangerously singular in focus. Higher education is supposed to be the first line of defense to combat radical ideology by seeking transparency, objectivity,

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[2] For example, while recognizing that Gonzaga University is a private school, and therefore is governed by different standards surrounding free speech, as an illustration of the subjective manner which many student and faculty view certain speech, last year a visiting professor at Gonzaga University Law School published an article in the American Bar Association Journal about how he interpreted a student wearing a Make America Great Again hat in his class as possibly "directing a hateful message toward" him personally. Jeffrey Omari, *Seeing Red: A professor coexists with 'MAGA' in the classroom*, ABA Journal (July 3, 2019), bit.ly/2UQwml2.

and understanding. It is impossible for a university to foster honest discourse in the classroom when mainstream political viewpoints are discouraged, chilled, and punished.

It is not surprising, then, that in recent decades numerous courts have ruled that university and college speech policies unconstitutionally restricted student speech. *See, e.g.*, *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *2 (S.D. Ohio June 12, 2012) (policy establishing a speech permit program was unconstitutional); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 869 (N.D. Tex. 2004) (Texas Tech's speech policy was overbroad and a prior restraint on speech); *The UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1165 (E.D. Wis. 1991) (University of Wisconsin's harassment policy was an unconstitutional content-based restriction of student speech); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 237, 253 (3d Cir. 2010) (University of the Virgin Island's policy of prohibiting speech that caused individuals "mental harm" or "frighten[ed], degrad[ed] or disgrace[ed] any person" was unconstitutional); *Husain v. Springer*, 494 F.3d 108, 113 (2d Cir. 2007) (College of Staten Island's policy, that led to the school overturning a student government election because of content published in a school newspaper was unconstitutional); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-85 (6th Cir. 1995) (Central Michigan University's discriminatory harassment policy that vaguely prohibited speech that inferred "negative connotations about the individual's racial or ethnic affiliation" was unconstitutional); *Coll.*

Republicans v. Reed, 523 F. Supp. 2d 1005, 1024 (N.D. Cal. 2007) (San Francisco State University's policy that punished student conduct that was not "civil" or that was "inconsistent with SF State goals, principles and policies" was unconstitutionally vague and overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 372-74 (M.D. Pa. 2003) (Shippensburg University's speech code that, among other things, prohibited "acts of intolerance" or conduct that "harm[ed] another" was unconstitutionally overbroad).

* * *

On college and university campuses across the country, students are asking themselves: should I open my mouth and risk punishment—or simply remain silent and avoid potential issues with the school? This is a problem. America can, and must, do better.

II. Respondents' Policies and Actions Are Blatant and Obvious Violations of the First Amendment.

This Court finds itself in a similar situation to that of the Court that decided *Healy* in 1972. In *Healy*, a college president denied official recognition to a student political group on grounds that recognition of the group could lead to potential disruption and violence. 408 U.S. at 170-76. Despite the facts of the dispute being novel, the Court applied "well-established First Amendment principles" and decided the matter. *Id.* at 170-71. "While the factual background of this particular case

raises these constitutional issues in a manner not heretofore passed on by the Court, and only infrequently presented to lower courts, *our decision today is governed by existing precedent*." *Id.* (emphasis added). Here, just as in *Healy*, this exact factual background has not often found its way to the courts. However, despite this, the Court's established First Amendment precedent surrounding the restriction of school speech is no less applicable now than it was at the time it was decided. Accordingly, this matter is clearly "governed by existing precedent." *Id.*

The University of New Mexico ("UNM") adopted what they called "The Respectful Campus Policy". App.55. This policy 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.*

Id. (italics and emphasis as UNM provided to Petitioner).

Like many of the policies and codes referenced herein, UNM's policy included vague and overly broad language which is open to multiple subjective interpretations depending on the hearer. Words such as "unduly inflammatory," "unduly personal attacks," and "harass" could be interpreted many different ways depending on the individual. With policies such as the one in question, the most sensitive students often determine the limits of what is "inflammatory" or an undue "personal attack." In the case of Mr. Hunt, UNM decided that even though his Facebook post opposing abortion did not reference his professors, classmates, or in any way implicate UNM, but because some individuals associated with UNM saw the post and subjectively determined that it was unduly inflammatory, personal, and harassing—it therefore violated UNM policy and he needed to be punished. One has to wonder if Mr. Hunt had used similar passion regarding a recent professional sporting event, if UNM would have ever been made aware of the post? Certainly, if UNM similarly punished all students who used profanity, both in spoken and written word, there would be a public outcry—but since UNM punished a position that most in academia view to be unpopular there was primarily silence from the UNM community.

Worst still, by enacting their speech code, UNM imposed a content-based restriction on student speech. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. Accordingly, content-based speech restrictions are subject to

strict scrutiny and presumptively unconstitutional. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). A regulation is content-based if it requires "enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotations omitted).

A restriction on speech is content-based—and subject to strict scrutiny—even if the provision does not take a position on the subject. *Reed*, 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech."). The First Amendment is not concerned with the motives behind content-based speech restrictions because "[t]he vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Id.* at 2229. Accordingly, the First Amendment rejects the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Id.*

UNM's speech code thus is a content-based restriction because in order to determine if a student's speech is a violation, it requires "enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 573 U.S. at 479. While UNM's speech code might not have been drafted with the intent to unconstitutionally restrict

certain content, that is the intent with which UNM administrators are using the code. *See Reed*, 135 S. Ct. at 2229. The fact that Mr. Hunt rewrote his post without expletives and it was still rejected by UNM as being a violation of the speech code, further illustrates the manner in which UNM officials were using the speech code to censor the content/viewpoint of Mr. Hunt's speech. App.30, 69-70.

The situation here is analogous to that of *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, an individual was convicted for "maliciously and willfully disturbing the peace . . . by offensive conduct." *Id.* at 16 (cleaned up). The offensive conduct that the State of California charged him with was wearing a jacket that said "Fuck the Draft" while inside a Los Angeles courtroom. *Id.* The convicted individual "did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence." *Id.* at 16-17. This Court, in a short and direct opinion, found that California unconstitutionally infringed on the speaker's First Amendment rights. *Id.* at 26. The Court strongly rejected the notion that "one particular scurrilous epithet from the public discourse, either upon the theory of [avoiding violence] or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." *Id.* at 22-23. A state's rationale to generally avoid certain words in discourse is "untenable" and reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Id.*

(quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)). In discussing that many use the "particular four-letter word" more to express emotion than anything else, the Court states that "one man's vulgarity is another's lyric . . . . it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id* at. 25. "[T]he State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.*

As with *Cohen*, Mr. Hunt used a particular four-letter word that some find offensive. There is nothing on the record that his Facebook post caused any violent reactions—nor was his post directed to anyone at UNM. UNM's alleged desire that their students speak in a professional manner online is not a constitutionally recognized rationale to sanction one's speech—especially on a matter of public and social import such as abortion. While Mr. Hunt's mother might have been able to punish him for using such words as a child in the home, UNM does not have such authority.

In 1972, this Court held "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Healy*, 408 U.S. at 180-81 (citation omitted).

The Tenth Circuit incorrectly held that this Court's precedent left open the idea that while a

public university could not restrict certain student speech in the undergraduate environment, that perhaps in the name of espousing "customary professional standards" that public graduate professional schools can restrict that which could not be restricted while an undergraduate student. *See* App.19. This proposition is wholly unsupported by this Court's precedent. When similar arguments have been made regarding the application of free speech laws on college and university campuses, this Court held:

> [T]he 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. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

Healy, 408 U.S. at 180 (citation omitted). As speech is protected no less on college campuses than in society at-large, so it is as you advance from undergraduate to graduate professional schools—the need to protect speech by reducing restrictions only increases as you advance in schooling. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682-83 (1986) (holding that when schooling children, school officials act *in loco parentis*, but as children grow the need to protect them from certain ideas diminishes). While a university's desire to maintain order and encourage professionalism is important, they must do so narrowly and the mere "undifferentiated fear or apprehension of a disturbance is not enough to

overcome the right to freedom of expression on a college campus." *Id.* at 191. It goes without saying, that if a public college or university could not restrict speech on campus, they certainly cannot then restrict speech off-campus. It also goes without saying that if a high school could not restrict speech, then a college or university certainly could not.

In *Tinker*, the first case which recognized a school's right to restrict student speech in rare circumstances, clarified their holding with this often forgotten caveat, in that: "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker*, 393 U.S. at 511. Unless there is a constitutionally recognized exception, students retain 100% of their speech rights.

Simply stated, the controlling law is that unless the student speech is expressly prohibited, it is allowed. *See id.* at 511. The Tenth Circuit's holding that because Petitioner could not produce a case with identical facts as his situation, therefore he loses, is backwards. *See* App.19-20. Because, absent a constitutional exception, he was "entitled to freedom of expression of [his] views." *Tinker*, 393 U.S. at 511. When restricting a student's speech in the name of an alleged interest, "a 'heavy burden' *rests on the college* to demonstrate the appropriateness of that action." *Healy*, 408 U.S. at 184 (emphasis added); *see Near v. Minnesota*, 283 U.S. 697, 713-716 (1931); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

"[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what will be orthodox in politics, nationalism, religion, or matters of opinion or force citizens to confess to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). While some of Petitioner's words used in his post might make some uncomfortable—and given the current political environment, it might make some angry, those are not sufficient grounds to formally punish a student.

Mr. Hunt's post was not directed at any students or professors. Mr. Hunt did not discuss the university in any way, shape, or form. Mr. Hunt did nothing except express his political and social views in a manner some might find disagreeable and offensive—but that is not the standard for the government to punish someone under the First Amendment. "[A] principal 'function of free speech under our system of government is to invite dispute. It 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." *Tex. v. Johnson*, 491 U.S. 397, 408-09 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1,4 (1949). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414; *see Snyder*, 562 U.S. at 460-61 (holding that we cannot react to speech we disagree with "by punishing the speaker. 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."). While UNM's actions in limiting Mr. Hunt's speech is a clear Constitutional violation, in cases involving restrictions that are closer to the constitutional line, a tie always goes to the speaker, not the censor. *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 474 (2007).

* * *

Over the past decades, colleges and universities have misapplied clear precedent from this Court regarding student free speech. This matter is a prime opportunity for the Court to make it clear that its precedent does not allow for an institution of higher learning, or of any level of learning, to punish political speech a student makes off-campus that in no way involved the school—besides the fact that the speaker was a student there. The First Amendment does not allow for that type of censorship. "[F]reedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB*, 367 U.S. 1, 137 (dissenting opinion) (1961).

CONCLUSION

We respectfully urge this Court to grant the petition for certiorari or, alternatively, summarily reverse the judgment below.

Respectfully submitted,

Jason Torchinsky
Counsel of Record
Shawn Toomey Sheehy
Dallin B. Holt
Holtzman Vogel
Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law
Counsel for Amicus Curiae