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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition ("BIO") confirms the need for the Court's intervention. Respondents believe that the First Amendment affords a university nearly limitless authority to punish the off-campus, political speech of a graduate student for the stated purpose of "instilling professional norms." BIO 31. Respondents thus assert the power to censor *any* student speech—no matter how far removed from the classroom—if they believe it does not "live up to the standards of the medical profession." BIO 21. To them, Mr. Hunt's view that voters who support Democratic Party candidates are morally responsible for legalized abortion even calls his "fitness to practice medicine" into doubt. BIO 13. The Court should be concerned.

The right to speak freely about politics is foundational. No ruling of this Court even comes close to suggesting that this kind of restriction on speech complies with the First Amendment. To the contrary, each and every decision regarding the speech rights of university students—let alone graduate students—makes clear that they retain the full protection of the First Amendment. The idea that this kind of content-based speech restriction might be imposed on a doctor at a public hospital is unimaginable. For that matter, it is settled law that even schoolchildren have First-Amendment rights broad enough to defeat this type of censorship.

Immunity should not shield Respondents from liability for this brazen violation of Mr. Hunt's legal rights. There are some cases where the violation is so obvious that the government officials have fair notice

of what the law requires without elaborate guidance from this Court. This is one of them. University officials do not need specific instructions to know that they cannot punish graduate students for expressing "disrespectful" political views in their personal lives. It would be a challenge to identify a legal proposition more firmly rooted than that.

These errors should be corrected. Respondents' opposition to summary reversal largely depends on their mistaken conception of the First Amendment. And, as the ruling below highlights, further guidance as to the application of qualified immunity is needed. In all events, the Court should not permit this kind of important First Amendment issue to go unreviewed. It warrants the Court's attention.

I. Respondents lack a serious defense to Mr. Hunt's First Amendment claim.

Respondents claim that they didn't violate Mr. Hunt's "First Amendment rights under the particular circumstances of this case." BIO 2. They don't contest, however, that those circumstances involve off-campus political speech and that, in his Facebook post, Mr. Hunt "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." Petition for Writ of Certiorari ("Pet.") 1. Instead, Respondents claim the power to restrict speech about abortion "to instill professional norms and ensure that medical students are fully prepared to function as professionals in the medical community." BIO 1.

That is constitutionally intolerable. Punishing Mr. Hunt for violating the Respectful Campus Policy and Social Media Policy is a content-based restriction on political speech that cannot survive strict scrutiny. Pet. 10-17; First Amendment Scholars Amicus Brief 5-14; Speech First Amicus Brief 12-21; Brechner Center for Freedom of Information *et. al.* Amicus Brief 5-23; Southeastern Legal Foundation Amicus Brief 6-8, 11-13.*

Respondents counter that cases applying strict scrutiny to "restrictions on political speech are not applicable" because Mr. Hunt "was not punished for the content of his political speech." BIO 18. Instead, they say, the post violated University policy because of Mr. Hunt's statement that abortion supporters are "'sick disgusting,' 'abhorrent,' [and] 'ridiculous.'" BIO 18 (quoting App. 4). According to Respondents, the First Amendment allowed them to punish Mr. Hunt for leveling what campus officials deem an "unhinged ad hominem attack on anyone who disagreed with" him over the issue of abortion. *Id*. The argument badly misses the mark.

To begin, Respondents argue that since the University supposedly remained neutral on the issue

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* Respondents suggest that this is a "small case" because Mr. Hunt "was not expelled or suspended nor was he even given a failing grade in any course." BIO 17. But they admit that he was required to comply with a "professionalism enhancement." BIO 1. And they recognize that, even after Mr. Hunt completed these assignments, the Medical School refused to remove the "letter in his file noting the violation might be sent to hospitals to which Petitioner might apply for a residency." BIO 17 n.2.

of abortion, the punishment they imposed on Mr. Hunt was not content based. Their claim of neutrality is dubious. Pet. 11; *infra* 5. But it is also irrelevant. A speech restriction is content based if it is predicated on disapproval of "the idea or message expressed" by the speaker. *Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2227 (2015). Mr. Hunt's "political message concerning abortion" was not just that the practice should be illegal—his message was that voting for Democratic Party candidates supporting legal abortion is morally reprehensible. BIO 18-19. Respondents consider that view to be "unhinged." But they cannot "prohibit the expression of an idea simply because" they deem it "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Punishment for disseminating a disrespectful idea also is viewpoint discrimination—"an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). "Giving offense is," after all, "a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). The Medical School punished Mr. Hunt because his post included "unduly inflammatory statements." BIO 18. However, "that society may find speech offensive is not a sufficient reason for suppressing it." *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

Respondents' reliance on *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), *see* BIO 18, to evade strict scrutiny underscores their contempt for the free-speech rights of their students. Mr. Hunt's post was not "fighting words" or any other category of

unprotected speech. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011); *see United States v. Stevens*, 559 U.S. 460, 468 (2010). It was political speech within the core of the First Amendment's protective sphere. That the post included some vulgar language alters nothing. *Cohen v. California*, 403 U.S. 15, 25 (1971); *see* Scholars Br. 8-9; Speech First Br. 16-17. The notion that the First Amendment protected the speech in *Snyder*, *Stevens*, and *Cohen*—but doesn't protect Mr. Hunt's—is self-refuting.

Respondents' demeaning requirement that Mr. Hunt rewrite his Facebook post confirms why it is so vital to apply strict scrutiny to restrictions on political speech. That Orwellian exercise was meant to teach him the difference between a "vitriolic screed"—which Respondents deem bad—and speech about abortion that is inoffensive to "those who would disagree with [his] position on the issue"—which they deem good. BIO 19. That is alarming enough. But the fact that Mr. Hunt's reeducation was not complete until he rewrote his Facebook post a *second* time to further dilute his previously-expressed political views on abortion and to profess support for many Democratic Party positions, *compare* App. 69, *with* CA10 Doc. No. 18-2149 (Feb. 1, 2019) 98-99, signals that this punishment was not just about sanitizing Mr. Hunt's speech "in the name ... of decency," *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). It suggests the "views he held about abortion ... were the driving force behind his punishment." Southeastern Legal Br. 8.

Respondents' narrow-tailoring argument fares no better. The First Amendment, in their view, allows a "professional school" to regulate the off-campus, political speech of graduate students "for purposes of instilling professional norms for the student's chosen profession." BIO 30-31. The Respectful Campus Policy and Social Media Policy, in other words, "ensure that medical students are fully prepared to function as professionals in the medical community." BIO 1. The argument is unsustainable.

The Court just recently reiterated that labeling censorship as regulation of "'professional speech'" does not salvage it under the First Amendment. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018). The Court has previously approved speech regulations in the name of professionalism only in "two circumstances" that are not "implicated here." *Id.*; *see* Brechner Br. 15-16.

Cases allowing regulation of workplace speech by public employees likewise offer no assistance. Pet. 12-13. This is undoubtedly why Respondents do not rely on those cases. Yet, if Respondents are right that they can punish Mr. Hunt for engaging in this kind of speech "to insure that only qualified individuals enter the medical profession," it means the Medical Board can "revoke or suspend the license to practice ... or otherwise discipline that [doctor] for 'unprofessional or dishonorable conduct'" if he or she expresses the same message as Mr. Hunt. BIO 21 (quoting NMSA 1978, §61-6-15A (2017)). Respondents' unwillingness to follow their own argument to its logical conclusion underscores its weakness. Simply put, this kind of

professionalism-based restriction on political speech is not narrowly tailored.

Respondents seek further refuge in this Court's "schoolhouse" cases, insisting that they "apply in the university setting." BIO 19. But it is settled law that the First Amendment does not "apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972). Regardless, this punishment would violate the First Amendment under *Tinker*. Even as to schoolchildren, those cases offer "no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring). They certainly don't diminish the First Amendment rights of college and graduate students to engage in political speech unconnected to any school program or activity while off campus. Pet. 15-17; Scholars Br. 9-13.

At base, Respondents' position demonstrates a stunning ignorance of the free-speech rights of private citizens. The University has no power to censor the political speech of doctors and, by extension, medical students because of their "stature" and "influence" with patients. BIO 23. The State "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." Scholars Br. 3.

II. Respondents' argument that they did not violate clearly established law is baseless.

Respondents devote most of their opposition to defending the Tenth Circuit's rationale for granting

them qualified immunity. BIO 7-16. But they concede that qualified immunity should be denied if there is an "'obvious' constitutional violation." BIO 9 (quoting *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)). And they recognize a violation is obvious if "'every reasonable official would have understood that what he is doing violates'" the plaintiff's rights. BIO 13 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Those cases are rare. Occasionally, however, a question is "beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017). This is one of those cases. "[I]f 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." Scholars Br. 13.

Indeed, Respondents do not—and cannot—cite a single Supreme Court or Tenth Circuit decision that would lead reasonable university officials to believe the First Amendment permitted them to punish Mr. Hunt for discussing politics on Facebook. That should be unsurprising. It has been "well-established" since *before* 1972 that college students hold undiminished free-speech rights. *Healy*, 408 U.S. at 170; *see also Rosenberger*, 515 U.S. at 829. Respondents didn't need precedent replicating these facts to know their actions were unlawful.

Respondents complain that Mr. Hunt seeks to impose a "novel" rule under which First Amendment claims are reviewed under a "different" qualified-immunity standard than Fourth Amendment claims. BIO 11. That is incorrect. The point is that whether

the official has been afforded fair notice is more fact-intensive in excessive force and search-and-seizure disputes than in free-speech cases. Pet. 20-21. When it comes to speech, the "unlawfulness" of censorship will more often than not be "apparent 'in the light of the pre-existing law.'" BIO 8-9 (quoting *Hope*, 536 U.S. at 739). That is the case here.

Respondents similarly object that approaching the issue from this perspective wrongly puts the onus on them to find controlling precedent that "inarguably *authorized*" them "to impose discipline in response to Petitioner's online activity." BIO 14. But that is not Mr. Hunt's position. Respondents are ignoring that it is clearly established that "a 'heavy burden' rests on the college to demonstrate" it had a compelling need to censor a student's political speech. *Healy*, 408 U.S. at 184. "Unless there is a constitutionally recognized exception," in other words, "students retain 100% of their speech rights." Speech First Br. 19. The issue is whether Respondents reasonably concluded that their stated goal of "ensuring that Petitioner [was] properly prepared to be a medical provider" qualified as one of those recognized exceptions. BIO 13.

Unable to locate helpful controlling precedent, Respondents lean on a handful of out-of-circuit cases in a doomed attempt to cloud clearly established law. BIO 14-15, 20-23. As they tell it, these decisions made it impossible for them to understand "in November 2012 ... that sanctioning Petitioner for his objectively unprofessional Facebook post would constitute a First Amendment violation." BIO 12. But three of their five cases were issued *after* November 2012. Even if out-

of-circuit cases count, *but see* Pet. 22-23, the qualified-immunity test isn't so forgiving that officials can claim detrimental reliance on rulings that *didn't even exist* "at the time of [their] alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

Neither case that did exist then—*Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012), and *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011)—is like this one. Respondents describe *Tatro* as a "relevant" case. BIO 21. But it doesn't even meet that low bar. Pet. 23-24. And, in *Keeton*, the student "expressed her intent to violate several provisions of the American Counseling Association's Code of Ethics" in class and in curriculum-related discussions with classmates. 664 F.3d at 869; *see id.* at 872-88. None of that is true here. Mr. Hunt never "expressed an intent to impose [his] personal [political] views on [his patients]." *Id.* at 872; Pet. 5-7.

Respondents' other cases likewise don't involve punishment for off-campus political speech that has nothing to do with the program in which the student enrolled. *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016), was about speech directed at classmates that, unlike here, clearly "violated the professionalism standards of the Nurses Association Code of Ethics." BIO 20; *see Oyama v. Univ. of Hawaii*, 813 F.3d 850, 868 (9th Cir. 2015) (same); *Yoder v. Univ. of Louisville*, 526 Fed. Appx. 537, 545 (6th Cir. 2013) (same).

In sum, Respondents posit a theory of qualified immunity under which universities are encouraged to violate free-speech rights with impunity. In the Tenth

Circuit's view, Respondents would have been entitled to immunity had Mr. Hunt made these same remarks in church, as a candidate for public office, or even to his friends. That cannot be right. Flagrantly unlawful punishment of political speech isn't immunized simply because no court had faced the same factual scenario and found a First Amendment violation. The absence of a case replicating these facts is not because the law is unsettled. It is because this violation of Mr. Hunt's free-speech rights was so brazen.

III. The decision below should not be allowed to stand.

Summary reversal or full review is warranted. Pet. 24-30. Respondents agree that summary reversal is appropriate when "a lower court has misapplied the qualified immunity analysis," BIO 24, and that lower courts continue to struggle "in striking a balance between defining a right too narrowly and defining it too broadly," BIO 26. The disagreement here is over whether qualified immunity was erroneously granted below and whether this case is a suitable vehicle for addressing the misapplication of qualified-immunity law more broadly. Respondents' reasons for urging the Court to deny review—which turn on the ruling below being correct—are unpersuasive.

In all events, however, the Court should grant review to hear this important First Amendment case. Even if qualified immunity is conceivably justified, deciding whether there has been a violation "is often appropriate." *Pearson*, 555 U.S. at 236. It especially important that the Court "clarify the legal standards governing" free-speech rights in the higher-education

setting. *Camreta v. Greene*, 563 U.S. 692, 707 (2011); Pet. 24-25.

In the past, universities believed that students were best trained "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). "The quality and creative power of student intellectual life" was once "a vital measure of a school's influence and attainment." *Rosenberger*, 515 U.S. at 836.

Sadly, that is no longer true. Universities now prefer to stifle free speech in the name of orthodoxy. The University of New Mexico's Respectful Campus Policy is just the tip of the iceberg. Universities across the nation are outlawing speech that is deemed biased or uncivil instead of letting the best idea win. "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." Speech First Br. 9. The chilling effect cannot be overstated.

The Court's intervention is needed in order to stem the tide. University officials have forgotten that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." *Matal*, 137 S. Ct. at 1764. Overturning the judgment below would serve as an important and timely reminder.

CONCLUSION

The Court should grant certiorari or summarily reverse the judgment below.

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