No. 13-16524

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In the United States Court of Appeals for the Ninth Circuit

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Mark L. OYAMA,
*Plaintiff-Appellant,*

v.

UNIVERSITY OF HAWAII, *et al.*,
*Defendants-Appellees.*

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On Appeal from the District Court for the District of Hawaii
No. 1:12-cv-00137-HG-BMK
The Honorable Helen Gillmor, Judge

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# BRIEF OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND THE STUDENT PRESS LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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## RULE 26.1 DISCLOSURE STATEMENT

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All parties have consented to the filing of this *amicus* brief.

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## INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights in Education, Inc. ("FIRE"), is a non-profit, tax-exempt educational and civil liberties organization dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE has defended constitutional liberties on behalf of thousands of students and faculty who are challenged by those willing to deny fundamental rights and liberties within institutions of higher education. In the interest of protecting student and faculty rights at our nation's colleges and universities, FIRE has participated as *amicus curiae* in many cases. *See, e.g.*, *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012); *Adams v. Trustees of the University of North Carolina–Wilmington*, 640 F.3d 550 (4th Cir. 2011); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

The Student Press Law Center ("SPLC") is a nonprofit organization dedicated to educating high school and college students about the First Amendment and to supporting student freedom from censorship. The

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. All parties have consented to the filing of this brief.

Center regularly advocates on behalf of students in court as *amicus curiae* by opposing government actions that restrict students' First Amendment rights. *See*, *e.g.*, *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012); *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005); *Owasso Independent School Dist. No. I-001 v. Falvo*, 534 U.S. 426 (2002).

Consistent with *amici* FIRE's and SPLC's aim to preserve freedom of speech on university campuses, *amici* have an interest in preventing the University of Hawaii from depriving Oyama of educational opportunities based on the personal views Oyama expressed to professors.

## SUMMARY OF ARGUMENT

The University of Hawaii dismissed Oyama from its teaching credential program, in part because "the views [he had] expressed regarding students with disabilities and the appropriateness of sexual relations with minors were deemed not in alignment with standards set by the Hawaii Department of Education" and other entities. *Oyama v. Univ. of Hawaii*, 2013 WL 1767710, *13 (D. Haw. April 23, 2013). Oyama was never accused or even suspected of any sort of sexual misconduct or disability discrimination. He never stated he would engage in any such

misconduct or discrimination. Yet he was dismissed from a public university program partly because of his "views," and his "unwillingness to change his views." *Id.*

If the district court's decision is affirmed, universities will be similarly empowered to dismiss students from a wide range of programs for holding views that the administration dislikes or otherwise sees as "not in alignment with standards set by" the government or the administrators. All that administrators would have to do is frame their speech restrictions under the guise of upholding "standards" for the student's prospective profession or course of study.

University speech codes, though struck down by many court decisions in recent decades, could thus be revived, and, indeed, made much broader. After all, the rationale below is not limited to, for instance, speech that is "so severe, pervasive, and objectively offensive" that it "rises to the level of actionable 'harassment'"[2] ("harassment" being a common test in recent campus speech codes). Rather, as this case shows, the rationale could easily apply to normal, reasoned, substantive

[2] *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651–52 (1999).

discussion of contested policy issues. Students who value their prospective future degrees will know to simply shut up when it comes to views that the administration, faculty, or professional licensing bodies consider unsuitable.

This would be the very sort of viewpoint discrimination that the Supreme Court has roundly condemned, and it would cast the "pall of orthodoxy" that the Court has said the First Amendment precludes. The decision below should therefore be reversed, and Oyama's termination should be reevaluated without regard to his "views," his views' lack of "alignment" with orthodox views, or his unwillingness to change his views.

## ARGUMENT

### I. University Dismissals of Students Based on Their "Views" Being "Out of Alignment" With Government Orthodoxy Would Authorize Suppression and Deterrence of a Vast Range of Student Speech

#### A. The District Court's Rationale Would Lead to a Revival and Broadening of University Speech Codes

Professors and administrators often think less of students because of the students' speech. They may think that a student who expresses certain views will be a bad fit for a profession, or might even in the future engage in misconduct related to those views.

Law professors might rationally think that a socialist student who thinks that "all property is theft," and who thinks our legal and political system is fundamentally corrupt, might make a poor lawyer, or might even violate the legal rules in pursuit of radical change. Likewise, law professors might think that a student who bitterly condemns the adversarial system, and thinks that all citizens—including lawyers—must serve the common good rather than their clients,[3] would be a bad lawyer and might eventually violate the ethical obligations imposed on lawyers.

The same is true of many other professional schools and university departments. A biology professor might question a student's commitment to scientific thinking if the student expresses what the professor sees as unscientific views, such as skepticism of the theory of evolution. *Cf.* Lisa Falkenberg, *Professor's Refusal to Recommend Creationist Students Draws Complaint, Investigation*, AP, Jan. 30, 2003, *available at* http://www.boston.com/news/daily/30/prof.htm. A climatology professor might say the same about skepticism related to global warming.

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[3] *Cf.* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39, 87-90 (1989) (arguing that an attorney's duty of zealous advocacy should be subordinate to an attorney's duty as an officer of the court in more situations than the Model Rules require).

Before 1974, homosexuality was seen by the psychiatric profession as a mental illness. During that era, professors might have thought that a student who thought that homosexuality is normal showed a lack of good medical judgment, and might well counsel and treat patients in irresponsible ways (by the standards of the profession of the time). *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 882 (11th Cir. 2011) (Pryor, J., concurring) (noting this as an example). Today, professors might think the same of a student who thinks homosexuality is improper. They may worry that the student will discriminate against gay and lesbian patients—even if the student assures her instructors that she would follow all the professional obligations imposed on her. *Cf., e.g.*, *Ward v. Polite*, 667 F.3d 727, 734-35 (6th Cir. 2012).

If the decision below is affirmed, all these students could be terminated from their academic programs. The students' "views," universities could argue, are "out of alignment" with the profession—or with just the portion of the profession represented on the faculty or in the administration. Moreover, universities could claim that the students' views suggest that the students might do badly (or even do wrong) in the profession.

The inevitable consequence of such policies would be that students would know not to express themselves on certain topics, for fear that they will be dismissed from academic programs and thus be unable to enter their chosen professions. Indeed, rational students would be deterred not just in their speech on campus, but also in anything they publish or say, whether online, in letters to the editor, or for that matter in casual conversation.

After all, faculty could conclude that the students' views are "out of alignment" with orthodox views regardless of where the students' views were expressed. And this would harm not only students, but also academic and professional discourse more generally. *Healy v. James*, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas.") (internal quotation omitted). Disciplines would stagnate, as new entrants learn that they must remain strictly in "alignment" with established dogma, rather than exploring unconventional or controversial views.

Yet both the Supreme Court's precedents and the large body of recent case law striking down campus speech codes hold that such university actions cannot be constitutional. "Our Nation is deeply committed

to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion . . . ." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Universities are barred from restricting student speech based on the viewpoint of the speaker, even when it comes to student group access to funding programs or to classrooms. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30, 832 (1995); *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981); *Healy* , 408 U.S. at 187.

As the Supreme Court has held, even advocacy of "violence and disruption," or the use of vulgarity and similar unprofessional discourse, cannot justify university suppression of student speech. *Healy*, 408 U.S. at 187; *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973). Likewise, numerous courts have struck down university-level speech codes that restrict student speech. In *Dambrot v. Central Mich. Univ.*,

for instance, the Sixth Circuit held that a university's speech code that restricted written literature or slogans that "infer[red] negative connotations about . . . individual[s'] racial or ethnic affiliation" was unconstitutional viewpoint discrimination. 55 F.3d 1177, 1184-85 (6th Cir. 1995). In *DeJohn v. Temple University*, the Third Circuit struck down as unconstitutional a university's prohibition on "gender-motivated" speech that was likely to cause disruption. 537 F.3d 301, 316-17, 320 (3d Cir. 2008). In *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, the Fourth Circuit held that a university could not constitutionally impose punishment for a fraternity's "ugly woman" contest that involved racist and sexist speech. 993 F.2d 386, 388-89, 391, 393 (4th Cir. 1993). For more decisions striking down campus speech codes, see *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247-48, 250 (3d Cir. 2010); *College Republicans v. Reed*, 523 F. Supp. 2d 1005, 1010-11, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 870-72 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Bd. of Regents of N. Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404, *28-*31 (E.D. Ky. 1998); *UWM Post, Inc. v. Regents*, 774 F. Supp. 1163,

1165-66, 1173, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856, 864-66 (E.D. Mich. 1989).

If universities may dismiss students from educational programs on the grounds that the student's views fail to comply with dominant professional norms, then most of these campus speech codes could be revived merely by being slightly reworded (for instance, on the theory that allegedly bigoted or otherwise offensive speech is contrary to professional norms). Indeed, if university student speech expressing calm, reasoned views on important public policy topics such as age of consent laws and disability education policy is stripped of First Amendment protection, then universities would have a virtually free hand in engaging in the viewpoint discrimination that the Supreme Court has long condemned. As the speech code cases show, even well-intentioned university administrators often face substantial pressure—from activists, legislators, other administrators, faculty, or students—to restrict student speech. The decision below would give administrators a roadmap to impose such restrictions.

### B. The District Court's Rationale Is Not Necessary to Support Universities' Power to Mandate Proper Student Conduct

Universities, of course, may demand that a student's *conduct* comply with the law, with valid school rules, and with applicable professional regulations. *Healy*, 408 U.S. at 189; *Keeton*, 664 F.3d at 881 (Pryor, J., concurring). They may and should teach students that the students must comply with legal and professional norms.

They might even be able to insist that students—especially those placed in practicums and clinical environments—"affirm in advance [their] willingness to adhere to reasonable campus [rules]," *Healy*, 408 U.S. at 193, as well as to professional rules. And "[w]hen a student expresses her intent to violate the rules of a state-sponsored clinical program, the university may require her to provide reasonable assurances that she will comply with its requirements before the university permits the student to participate in the clinical program." *Keeton*, 664 F.3d at 881.

But a student's mere disagreement with professional, university, or legal norms, and desire to change such norms through lawful processes, cannot justify dismissing the student from an educational program. *See*

*Healy*, 408 U.S. at 187. As Eleventh Circuit Judge Pryor noted, "we have never ruled that a public university can discriminate against student speech based on the concern that the student might, in a variety of other circumstances, express views at odds with the preferred viewpoints of the university. Our precedents roundly reject prior restraints in the public school setting." *Keeton*, 664 F.3d at 882 (Pryor, J., concurring). This Court has likewise never upheld such speech restrictions. *See also United States v. Robel*, 389 U.S. 258, 266-68 (1967) (concluding that even concerns about sabotage in the defense industry cannot justify barring employment of Communist organization members in defense facilities).

Nor can such restrictions be justified on the theory that the school is merely excluding people for speech that would get them rejected by licensing boards after they graduate. Licensing boards cannot exclude applicants based on the applicants' views, either. "The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 4-6, 8 (1971) (plurality opinion).

A licensing body may not "recommend denial of admission solely because of an applicant's beliefs that [it] found objectionable," because "the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs." *Id.* at 10 (Stewart, J., concurring in the judgment).

Indeed, as this Court recently held, even "a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine." *Pickup v. Brown*, 728 F.3d 1042, 1053 (9th Cir. 2013). "[O]utside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment." *Id.* at 1054. Likewise, teachers cannot be barred from the profession for publicly expressing heretical views about disability discrimination or the age of consent, or for expressing such views in conversations with colleagues or professors. And if professional licensing boards cannot exclude applicants based on their viewpoints being supposedly "out of

alignment" with professional "standards," then universities cannot exclude students on this basis, either.

*Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), offers a helpful illustration of the First Amendment principles involved in this case. In *Ward*, the Sixth Circuit acknowledged that a student could be expelled from a counseling program if the student failed to abide by the rules of the program—in that case, professional rules related to counseling clients who are in same-sex relationships. *Id.* at 740-41.

But the court held that, in the absence of a showing that such rules were violated, the university could not expel a student based on her anti-homosexuality views, and based on her request to be reassigned from counseling a gay client (a request that, she argued, was permitted by professional rules). *Id.* at 730, 737-38. The court therefore remanded the case and held that a reasonable jury could find that the student did not violate the professional rules, and that the school was punishing her for her viewpoint in violation of the First Amendment. *Id.* at 735.

Just as the student in *Ward* could not be dismissed from her educational program simply for holding views that some in the University do not like, Oyama may not be dismissed from his educational program

simply for expressing views that some in the University did not like. Here too a remand is necessary to determine whether Oyama's dismissal was indeed based on his viewpoint.

## II. The District Court Erroneously Relied on *Hazelwood School District v. Kuhlmeier* and *Brown v. Li* to Justify the University's Unconstitutional Viewpoint Discrimination

Naturally, a university must be able to assign grades to student projects, which will inevitably be based on the content of student speech. And when a university is itself trying to create speech using student input, for instance when it assigns students to draft a university publication, write an explanation of certain material, or teach a class session, the university must have the authority to control what goes into that university speech.

Yet this authority coexists with student speech rights:

> Th[e] danger [to speech from chilling individual thought and expression] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

*Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835-36 (1995). "Discussion by adult students in a college classroom should not

be restricted." *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008); *see also Doe v. Univ. of Mich.*, 721 F. Supp. 852, 865, 866 (E.D. Mich. 1989) (striking down a student speech code that restricted student speech in classroom discussions, including a statement by a social work student "that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight"). And Oyama's expression of his views that "were deemed not in alignment with standards set by the Hawaii Department of Education," *Oyama*, 2013 WL 1767710, at *13, happened in discussions with professors, not in graded projects or in speech on behalf of the school.

In this respect, the chief cases relied on by the district court—*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002)—are inapposite. This Court has not held that *Hazelwood* applies to university student speech. *Flint v. Dennison*, 488 F.3d 816, 829 n.9 (9th Cir. 2007). But, in any event, *Hazelwood* rested on the theory that a high school student newspaper expressed the voice of the high school, and that therefore high school authorities had the power to restrict what that voice communicates. *Hazelwood*, 484 U.S. at 263-64. "[T]he standard . . . for determining

when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Id.* at 272-73. Here, Oyama's views were clearly Oyama's, and not the University's. In the words of Judge Pryor,

> *Hazelwood* does not suggest that [a university] can discriminate against [a student's] speech because it will someday confer a degree upon her. Nor does *Hazelwood* permit a public university to retaliate against student speech whenever it occurs in a classroom. And *Hazelwood* does not allow retaliation against disfavored speech that occurs outside the classroom.
>
> Although we have concluded that *Hazelwood* allows a public university to "limit in-school expressions which suggest the school's approval," we have never held that *Hazelwood* permits a public university to punish a student's expressions of opinion when the speech is not school-sponsored or does not suggest the school's approval.

*Keeton*, 664 F.3d at 882 (Pryor, J., concurring) (citation omitted); *see also* Frank D. LoMonte, *"The Key Word is Student": Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 351 (2013) ("Even if there were instances in which *Hazelwood* made sense at the college level, in no event should *Hazelwood* ever apply in the disciplinary setting. *Hazelwood* is about the ability of a school to withhold its name and financial support from speech, not about the ability to suspend or expel a student for having spoken.").

Similarly, *Brown v. Li* involved a student facing consequences for violating the established conventions related to how a student project was to be composed. Indeed, this project was the key student project for master's students: the thesis. *Brown*, 308 F.3d at 943. This project had to be "co-signed by a committee of professors," *Id.* at 954, who thus in some measure had to endorse what the student was saying. Moreover, a concurring judge on the *Brown* panel (whose vote was necessary for the result) ruled against the student solely because the student's behavior in changing the thesis after it had been approved was "decepti[ve]," and because "faculty members who comprise the thesis committee are jointly responsible with the candidate for the content of the thesis." *Id.* at 956 (Ferguson, J., concurring in the judgment).

Here, Oyama was not dismissed solely based on the low quality or inappropriate nature of a graded work, on any alleged deception, or on any refusal to comply with the rules for projects that had to be co-signed by professors. Rather, he was dismissed partly based on views he expressed in exchanges with faculty members—the very sort of exchanges in which students are routinely encouraged to express their views, and in which such expression is particularly valuable for maintaining a vi-

brant climate of academic freedom. *See Healy*, 408 U.S. at 180-81; *DeJohn*, 537 F.3d at 315. *Brown*, like *Hazelwood*, thus does not justify the University of Hawaii's viewpoint-discriminatory dismissal of Oyama.

## III. This Case Should Be Remanded to Determine Whether Oyama Would Have Been Dismissed But for the Constitutionally Impermissible Reliance on His Views

The University has also given various other reasons why it thinks that Oyama falls below their academic standards. Those reasons might be valid; *amici* express no opinion on their soundness. But while the University might be able to reach the same result with respect to Oyama relying solely on those reasons, it cannot dismiss Oyama based even in part on his First Amendment-protected views.

A government actor that relied in part on an unconstitutional basis may still justify its bottom-line result by showing that it would likely have reached the same result without the unconstitutional grounds. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). When a litigant shows that his speech "was a 'motivating factor'" in an adverse government decision, a court should "determine whether the [government has] shown by a preponderance of the evidence that it would

have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287 (footnote omitted). This Court should therefore remand the case so the district court can apply the *Mt. Healthy* rule.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and remand for a determination of whether the University would likely have dismissed Oyama even without considering his constitutionally protected speech.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amici Curiae* Foundation for Individual Rights in Education and Student Press Law Center

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Century Schoolbook.

s/ Eugene Volokh

Attorney for *Amici Curiae* Foundation for Individual Rights in Education and Student Press Law Center

Dec. 9, 2013

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on Dec. 9, 2013.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

s/ Eugene Volokh

Attorney for *Amici Curiae* Foundation for Individual Rights in Education and Student Press Law Center

Dec. 9, 2013