No. 18-2149

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL HUNT,
Plaintiff-Appellant

v.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, *et al.*,
Defendants-Appellees

On Appeal from the United States District Court for the District of New Mexico
No. 1:16-cv-00272
The Honorable Judith C. Herrera, United States District Judge

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BRIEF AMICI CURIAE OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, CATO INSTITUTE, AND PROFESSOR EUGENE VOLOKH IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici certifies that (1) amici do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in amici.

INTEREST OF AMICI CURIAE[1]

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student First Amendment rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights on campus. FIRE coordinates and engages in targeted litigation to ensure that student First Amendment rights are vindicated when violated at public institutions like the University of New Mexico. The students FIRE defends rely on access to federal courts to secure meaningful and lasting legal remedies to the irreparable harm of censorship. If allowed to stand, the lower court's ruling will threaten the possibility of redress following violations of students' First Amendment rights.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for amici states that no counsel for a party authored this brief in whole or in part and no person, other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs.

Professor Eugene Volokh is Gary T. Schwartz Distinguished Professor of Law at the UCLA School of Law, where he specializes in First Amendment law. He is the author of *The First Amendment and Related Statutes* (6th ed. 2016).

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The District Court's decision to grant qualified immunity in this case presents a serious threat to the ability of public college and university students to meaningfully redress constitutional violations and prevent their repetition.

Plaintiff was disciplined for an impassioned anti-abortion Facebook post pursuant to university policies prohibiting "unduly inflammatory" or "disparaging" speech. There are decades of case law clearly establishing that speech cannot be prohibited on these bases alone, that public university students have robust First Amendment rights, and that basic First Amendment principles apply to online speech. Instead of considering this extensive body of law, however, the lower court looked only for cases addressing "whether graduate and professional schools specifically (or universities generally) can regulate off-campus, online speech by students that the university deems to be unprofessional or which violate its applicable rules of professionalism," and found no clearly established authority at the time the discipline was imposed. Framing the question so narrowly all but guarantees that qualified immunity will attach, frustrating the ability of litigants to vindicate their rights in court even when a constitutional violation has taken place.

The lower court also exercised its discretion to consider only whether the Plaintiff's rights were clearly established without reaching the question of whether a constitutional violation had occurred. Particularly in combination with the court's

extremely narrow construction of the relevant legal question, this makes the development of new constitutional law almost impossible. This compounds the difficulty that students—whose constitutional claims are often mooted by graduation or by policy changes during litigation—face when bringing a constitutional challenge to university policies and practices.

Under the lower court's holding, future constitutional violations will be left without remedy, and lasting uncertainty over the contours of student First Amendment rights will impermissibly chill campus speech on matters of public concern. Despite remarkable precedential clarity with regard to the unconstitutionality of broad and vague restrictions on public college student speech rights, censorship is commonplace on campuses nationwide. As in the instant case, public colleges continue to violate student First Amendment rights to limit controversy or criticism. When students face a series of virtually insurmountable hurdles to obtaining a judicial determination or legal consequence, student speech rights are left at risk. Judicial clarity is required to keep students' First Amendment rights secure.

ARGUMENT

I. The District Court Construed the First Amendment Question Too Narrowly.

A. The Policies Under Which Plaintiff-Appellant Was Punished Are Clearly Unconstitutional as Established by a Long Line of Decisions.

The lower court construed the constitutional question far too narrowly in conducting its qualified immunity analysis when it focused so heavily on the fact that Plaintiff-Appellant was a professional student and that his speech was made on the internet. In looking only at "whether graduate and professional schools specifically (or universities generally) can regulate off-campus, online speech by students that the university deems to be unprofessional or which violate its applicable rules of professionalism," the lower court ignored decades of precedent clearly establishing the First Amendment rights of students to speak out on matters of public concern.

Nothing mandates that district courts construe the constitutional right before them as narrowly as possible, as the District Court did here. "It is not necessary, of course, that 'the action in question has previously been held unlawful.'" *Ziglar v. Abassi*, 137 S. Ct. 1843, 1867 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances.").

To the contrary, as this Court has explained, "the qualified immunity analysis involves more than 'a scavenger hunt for prior cases with precisely the same facts. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'" *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) (internal citations omitted) (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007)). In *Perea*, this Court held that two Albuquerque police officers were not entitled to qualified immunity on an excessive force claim where they had pushed a mentally ill man from his bicycle when he tried to pedal away from them during a welfare check and subsequently tasered the man ten times, ultimately leading to his death. In denying the officers qualified immunity, the Court did not look only for cases involving the use of tasers against mentally ill cyclists, but rather for cases on the broader question of the use of force against people who have only committed minor infractions and who are already subdued. *Id.* at 1202. *See also Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004) ("We do not find it unreasonable to expect the defendants — who hold themselves out as educators — to be able to apply [a well-known legal] standard, notwithstanding the lack of a case with material factual similarities. ... Our precedents would be of little value if government officials were free to disregard fairly specific statements of principle they contain and focus their attention solely

on the particular factual scenarios in which they arose.") (internal citations omitted).

The policies under which Plaintiff-Appellant was punished—the Respectful Campus and Social Media Policies—were clearly unconstitutional as established by a long line of First Amendment decisions. The University of New Mexico's Respectful Campus Policy prohibits students from making, among other things, "unduly inflammatory statements"—precisely what Plaintiff-Appellant was accused of doing. *Hunt v. Bd. of Regents of the Univ. of N.M.*, No. 16-272, at 2 (D.N.M. Sept. 6, 2018). Under any reasonable reading of First Amendment case law, however, this provision is overly broad.

It is clearly established that the fact that speech is inflammatory does not strip it of constitutional protection. As the U.S. Supreme Court held in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), free speech "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." In *Procunier v. Martinez*, 416 U.S. 396, 416 (1974), the Supreme Court held that a regulation allowing prison officials to censor prisoner mail that contained "inflammatory political, racial, religious or other views" was overly broad because it was "not narrowly drawn to

reach only material that might be thought to encourage violence. . . ."[2] *See also PeTA v. Rasmussen*, 298 F.3d 1198, 1206 (10th Cir. 2002) ("the state may not prevent speech simply because it may elicit a hostile response.").

The medical school's Social Media Policy prohibits, in pertinent part, "engaging in dialogue that could disparage colleagues, competitors, or critics," and "reporting, speculating, discussing or giving any opinions on university topics or personalities that could be considered sensitive, confidential or disparaging." *Hunt*, No. 16-272, at 2.

It is clearly established that the state may not prohibit speech on matters of public concern simply because it is disparaging. The Supreme Court has held that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'" and that "[t]he arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'" *Snyder v. Phelps*, 562 U.S. 443, 453 (2010) (internal citations omitted). Plaintiff-Appellant's Facebook post about abortion—a topic that is the ongoing subject of

[2] Although the Court later narrowed the scope of its ruling in *Martinez* in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), that narrowing did not affect the Court's holding that a restriction on the expression of inflammatory views was overly broad.

one of America's longest-running and most contentious public debates—unquestionably meets this definition.

In *Snyder*, the Court addressed the question of whether the Westboro Baptist Church's picketing of a military funeral was conduct protected by the First Amendment. It is difficult to imagine expression more disparaging than the signs carried by WBC members, with their messages of "God Hates Fags" and "Thank God for Dead Soldiers." But the Court ruled that WBC members were speaking on a matter of public concern and that although their speech "may fall short of refined social or political commentary," it was entitled to First Amendment protection:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain. On the facts before us, we cannot react to that pain 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.

Id. at 460–61.

It is also clearly established that public university students have robust First Amendment rights. As the Supreme Court held in *Healy v. James*, 408 U.S. 169, 180 (1972), "the 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, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" (internal citations omitted.)

Notably, *Healy* involved a public university's refusal to recognize a campus chapter of Students for a Democratic Society (SDS) during a time of intense turmoil on campus, for fear of the type of "violent and disruptive" activities that had been associated with the national SDS organization—a restriction that has clear parallels with UNM's fear of "inflammatory" expression on its campus. *Id.* at 178.

In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973), the Supreme Court directly addressed the issue of offensive written communications on college campuses, holding in response to the university's censorship of a student publication that "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.'"

Healy, *Papish*, and their progeny have given rise to a long line of district and circuit court cases from around the country striking down public university speech codes on First Amendment grounds.[3] *See McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008);

[3] It should be noted that this Court's decision in *Yeasin v. Durham*, 719 F. App'x 844 (10th Cir. 2018), dealt with tweets that the plaintiff had posted about his ex-girlfriend, allegedly in violation of a no-contact order—not a speech code. *Yeasin* is inapposite to this case, in which the Plaintiff-Appellant was charged with violating a policy prohibiting speech, not conduct, and his speech was about a matter of public concern rather than a personal relationship.

Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); *Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams*, 12-cv-155, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at S.F. St. Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

While any constitutional question could, in theory, be construed so narrowly—i.e., whether tasering mentally ill cyclists after pushing them from their bicycles constitutes excessive force—as to find that the law was not clearly established, it strains credulity to argue that UNM officials would not have known it was impermissible to punish a medical student for a provocative social media post on an issue of public concern.

B. The Fact that Plaintiff's Speech Took Place Online Does Not Change the Calculus

The District Court also erred in ignoring the fact that it has been well-established law since 1997 that basic First Amendment principles apply to online

speech. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (striking down portions of the Communications Decency Act (CDA) as vague). As the Supreme Court explained more than twenty years ago in *Reno*, the Court's traditional First Amendment analysis applied to Congress's attempt to regulate speech on the internet. *Id.* at 874. Indeed, the Court struck the CDA down as a content-based restriction on speech that lacked "the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* In so holding, the Court distinguished its precedent dealing with the broadcast media because the internet was neither invasive nor scarce. *Id.* at 869–70. As the Court recognized, the internet was instead an expressive media that allows "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* at 870. In other words, online speech is entitled to the same level of protection as speech made on the sidewalk or in a public park. The District Court erred in ignoring this precedent insofar as it held that Plaintiff-Appellant's speech deserved less protection because it was made online instead of on campus.

II. The District Court Should Have Addressed the First Step of the Qualified Immunity Analysis.

Particularly in light of the well-established case law on unconstitutional campus speech policies, explained above, the lower court should have conducted a complete qualified immunity analysis and addressed the First Amendment question directly. Although the District Court had the discretion to address whether

Plaintiff-Appellant's rights were "clearly established" at the time of his alleged injury without deciding whether a constitutional violation took place, its refusal to address the underlying constitutional issue perpetuates stagnation in the law and increases the significant procedural barriers student plaintiffs face in enforcing their constitutional rights, discussed in more detail below.

Qualified immunity protects government officials from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1979). This personal immunity creates a high bar for a student plaintiff to reach in seeking remedy for a constitutional injury because "officials are liable not for all of their unconstitutional acts, but only for their *clearly* unconstitutional acts …." Michael G. Collins, *Section 1983 Litigation in a Nutshell* 163 (5th ed. 2016) (emphasis added).

The Supreme Court has established a two-part test for qualified immunity: (1) whether the facts establish violation of a constitutional right, and (2) whether the right was "clearly established" at the time of the government actor's conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In *Saucier*, the Court required lower courts to answer both questions if granting an official qualified immunity, reasoning that this sequence allows "the law's elaboration from case to case …. The law might be deprived of this explanation were a court simply to skip ahead

…." *Id*. at 201. And while the Court eliminated *Saucier*'s mandate in *Pearson v. Callahan*, holding that courts *may* decide the law was not clearly established without deciding whether a constitutional injury occurred, it still recognized that following "the *Saucier* protocol is often beneficial." 555 U.S. 223, 236 (2009).

Indeed, as an ever-growing number of jurists and scholars confirm, the *Saucier* court's concern for the development of constitutional law was well founded. *See Zadeh v. Robinson*, 902 F.3d 483, 499–500 (5th Cir. 2018) (Willett, J.) (concurring dubitante) (collecting cases and scholarship). When courts decide that a constitutional right was not clearly established without opining on the scope of the right itself, the contours of the law are not advanced or clarified by courts, increasing the likelihood that the law will be no more clearly established for the next plaintiff. [4]

Judge Don Willett of the U.S. Court of Appeals for the Fifth Circuit aptly explained the conundrum faced by civil rights litigants in a recent concurring

[4] The Supreme Court has compounded the lack of clarity in the law by declining to rule on the source or quantity of existing precedent necessary for a right to be "clearly established." *See Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) (assuming but not finding that a right could be clearly established based on a single circuit court of appeals decision); *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012) ("Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case . . . ."); *Harlow*, 457 U.S. at 818 n.32 (declining to decide whether the state of the law should be evaluated by reference to decisions of the Supreme Court, appellate courts, or district courts).

opinion, in which he wrote separately to register his "disquiet" over the modern qualified immunity regime:

> Doctrinal reform is arduous, often-Sisyphean work. And the entrenched, judge-made doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful. … Forgoing a knotty constitutional inquiry makes for easier sledding. But the inexorable result is "constitutional stagnation"—fewer courts establishing law at all, much less clearly doing so. … Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. … Heads defendants win, tails plaintiffs lose.

Zadeh, 902 F.3d at 498–99 (Willett, J.) (concurring dubitante).

The District Court here skipped to the second step of the qualified immunity analysis based on the conclusion that "[t]here have been few cases dealing with the right to regulate online speech" by public institutions of higher education. As explained above, the lower court's framing of the issue ignores decades of precedent relevant to campus speech codes and the Supreme Court's admonishment that First Amendment rights are not treated differently because they are exercised on the internet. It is particularly important in the context of technology and social media that courts take the time to articulate how established principles apply to modern forums. *See id.* at 499 ("Result: blurred constitutional contours as technological innovation outpaces legal adaptation."). This Court should therefore reverse the District Court's grant of qualified immunity and firmly hold that Defendants violated Plaintiff's clearly established First Amendment

rights when they applied the University of New Mexico's facially unconstitutional policies to punish him for social media posts on a matter of public concern.

III. Student Plaintiffs Already Face Significant Hurdles in Vindicating Their Constitutional Rights in Court.

A. Injunctive and Declaratory Claims Are Frequently Mooted by Graduation.

Grants of qualified immunity based on excessively narrow readings of precedent inflict a specific and disproportionate harm on student populations, who already face significant hurdles to reaching rulings that create precedent.

Students are a transient population, with a finite amount of time to seek vindication of their civil rights. Most students at four-year nonprofit colleges graduate after four years.[5] The most vocal and active students are likely to be upperclassmen, who, in turn, are likely to be graduating in two years or less.[6] This problem is exacerbated at community colleges, which are primarily two-year institutions.

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[5] U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, TABLE 326.10, *available at* https://nces.ed.gov/programs/digest/d18/tables/dt18_326.10.asp.

[6] *See* Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J.L. & EDUC. 609, 630 (2011) ("If one assumes that leadership positions are held by juniors or seniors, the window for successful litigation shrinks to just one or two years before the injury becomes moot.").

Meanwhile, as of September 2017, the *median* time it took a federal district court to complete a trial during the prior year was 25.2 months.[7] In the District of New Mexico, from which this appeal originates, that median was 31.3 months.[8] The net result is that a public college or university, which presumptively has ample resources with which to file an appeal, is all but assured that graduation will moot claims for injunctive and declaratory relief before appeals are exhausted.

Among the students who have seen their rights evaporate while waiting for justice are student prayer leaders,[9] objectors to student prayers,[10] student

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[7] ADMIN. OFFICE OF U.S. COURTS, TABLE C-5: U.S. DISTRICT COURTS—MEDIAN TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, BY DISTRICT AND METHOD OF DISPOSITION, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2017, *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_c5_0930.2017.pdf.

[8] *Id*. at p. 4. The trial court decided the present case 28 months and 29 days after it was filed. *Hunt*, No. 16-272 (D.N.M. filed Apr. 8, 2016; dismissed Sept. 6, 2018).

[9] *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (student forced to apologize for religious valedictory speech held to lack standing to maintain declaratory and injunctive claims); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000) (finding First Amendment claims moot where plaintiffs were prevented from giving religious speeches at graduation ceremony).

[10] *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (dismissing as moot injunctive and declaratory claims from former students who objected to inclusion of student-initiated prayer at graduation ceremonies).

journalists,[11] ROTC students,[12] valedictorians,[13] students who wanted to demonstrate cookware in their dorms,[14] and numerous other high school students[15] and college students.[16] The only common thread linking these students is that they graduated before their institutions could be held to account, and thus, before a precedent that would limit the exercise of qualified immunity could be created.

That injunctive and declaratory claims are mooted by graduation provides an incentive for schools to prolong litigation, even when—*especially* when—the school's conduct is constitutionally indefensible.

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[11] *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975); *Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007); *Husain v. Springer*, 691 F. Supp. 2d 339, 340–41 (E.D.N.Y. 2009).

[12] *Sapp v. Renfroe*, 511 F.2d 175, 175–76 (5th Cir. 1975) (finding challenge to ROTC guidelines moot after graduation).

[13] *See*, *e.g.*, *Corder*, 566 F.3d at 1225; *Cole*, 228 F.3d at 1098–99.

[14] *Fox v. Bd. of Trs. of the State Univ.*, 42 F.3d 135, 139 (2d Cir. 1994) (dismissing as moot injunctive and declaratory claims of students prevented from demonstrating cookware in their dorms as part of sales pitch).

[15] *See*, *e.g.*, *Jacobs*, 420 U. S. at 128; *Adler*, 112 F.3d at 1478; *Cole*, 228 F.3d at 1098–99; *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999); *Ceniceros v. Bd of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 879 n.1 (9th Cir. 1997) (plaintiff lost at trial but won on appeal, but had graduated in the interim, mooting out all but nominal damage claims).

[16] *See*, *e.g.*, *Lane v. Simon*, 495 F.3d at 1186–87; *Fox v. Bd. of Trs. of the State Univ.*, 42 F.3d 135, 139 (2d Cir. 1994); *Husain v. Springer*, 691 F. Supp. 2d 339, 341–41 (E.D.N.Y. 2009).

B. Injunctive and Declaratory Claims Are Frequently Mooted by Policy Changes During Litigation.

Even when students have the "good fortune" to be victims of administrative wrongdoing early enough in their education that they can maintain student status throughout years of litigation, institutions acting pursuant to a challenged policy can, and often do, change the challenged policy on the eve of trial. In such cases, courts frequently find as moot the declaratory and injunctive claims that arose under the prior policy, provided the court has some reason to believe the original policy won't be reinstated.[17]

Such policy changes can be entirely voluntary[18] or imposed by statute,[19] but to be effective, they must be accompanied by evidence showing that "it is

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[17] *See, e.g.*, *Speech First, Inc. v. Schlissel*, 333 F. Supp. 3d 700, 714 (E.D. Mich. 2018) (plaintiff's First Amendment challenge to University of Michigan harassment and bullying policies was moot because university changed them "within a month of [plaintiff's] initiation of this lawsuit"); *Uzuegbunam v. Preczewski*, No. 1:16-cv-04658 (N.D. Ga. May 25, 2018) (finding as moot First Amendment challenge to two policies that Georgia Gwinnett College revised "after Plaintiffs filed suit against Defendants").

[18] *See*, *e.g.*, *Husain v. Springer*, 494 F.3d 108, 120 (2d Cir. 2007) (injunctive claim against school cancelling student election due to student media coverage found moot after election policy changed); *Boston's Children First v. Boston Sch. Comm.*, 240 F. Sup. 2d 318, 322–23 (D. Mass. 2003) (finding as moot request for injunctive relief prohibiting race-conscious school assignment program when plaintiffs had not sought reclassification under replacement race-blind program), *aff'd sub nom*. *Anderson v. City of Boston*, 375 F.3d 71 (1st Cir. 2004).

[19] *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1195 (9th Cir. 2000) (finding trial court had properly dismissed as moot requests for injunctive and declaratory relief against race-conscious admissions policy that state legislature had subsequently altered by statute).

'absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur.'"[20] While not every school is willing to meet that threshold,[21] it is entirely within the school's control to do so. *Amicus* FIRE has, on more than one occasion, witnessed this very kind of judicially inspired revelation in schools that have violated student rights.[22] That creates yet another incentive for schools to drag out litigation as long as possible: Even if it appears that the student will get a trial before graduation, the school always has the option to simply walk away from declaratory and injunctive claims by changing its policy and making a statement disavowing the former policy.[23]

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[20] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (citing *Friends of Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

[21] *See, e.g.*, *DeJohn*, 537 F.3d 301at 309 (rejecting defendant's claim that injunctive relief was moot where defendant could re-institute original policy after litigation ended).

[22] *See*, *e.g.*, *Roberts*, 346 F. Supp. at 857 (granting mootness dismissal of claim against enforced speech code policy because university replaced it with an "interim policy" during lawsuit); *DeJohn*, 537 F.3d at 309 (rejecting mootness claim by defendant college that abandoned policy during lawsuit without making adequate showing the policy would not be reinstated).

[23] Of course, surviving mootness is not the end of the story. It is possible for a case to have non-moot injunctive claims but ultimately not be entitled to injunctive relief. *See Freedom from Religion Found. v. Concord Cmty. Sch.*, 240 F. Supp. 3d 914, 919–20, 294–25 (N.D. Ind. 2017) (refusing to dismiss as moot injunctive claims against religious school plays where the play format had subsequently changed and school had not clearly indicated it would never return to that format, but also denying a permanent injunction where plaintiff had indicated it would never perform the specific shows in question).

While judicial economy requires that the government always be permitted to voluntarily correct its errors, the net result is that, by avoiding precedent, schools are empowered to repeatedly attempt to violate student rights, merely withdrawing a policy when they're caught only to reinstate it, or a substantially similar policy, at a later date. Again, *amicus* FIRE has, on more than one occasion, seen this pattern, too.[24]

In light of these obstacles to reaching a ruling, taking a narrow reading of precedent during a qualified immunity analysis involving student rights undermines the purpose of qualified immunity. By the time a single student manages to win a lawsuit, there are typically dozens of others who have raised the same objections, sought the same relief, and were forced to abandon that pursuit either upon graduation or after a policy change on the eve of litigation. That single result must be read broadly enough to encompass the dozens of students with valid claims that did not survive the mootness gauntlet.

[24] *E.g.,* at Pennsylvania's Shippensburg University, which settled a speech code case in 2004 only to attempt to enforce another unconstitutional code in 2008; and California's Citrus College, which repeated the pattern in 2003 and 2013, respectively. *See generally* Greg Lukianoff & Adam Goldstein, *Speech Code Hokey Pokey: How Campus Speech Codes Could Rebound*, THE VOLOKH CONSPIRACY, Sept. 12, 2018, *at* https://reason.com/volokh/2018/09/12/speech-code-hokey-pokey-how-campus-speec.

CONCLUSION

Campus speech codes have been repeatedly defeated in court in an almost unbroken string of legal precedent stretching back nearly thirty years. Despite the clarity of the legal precedent, however, censorship of student expression on our nation's public campuses continues to run rampant. If the doctrine of qualified immunity means that new constitutional precedent cannot develop in the absence of cases with identical or near-identical fact patterns, the development of constitutional law will stagnate and students' First Amendment rights will remain insecure. We respectfully urge this Court to overturn the District Court's grant of qualified immunity in this case.

Dated: February 8, 2019

Respectfully submitted,

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(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5168 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: February 8, 2019

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I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on February 8, 2019, which will automatically send notification to the counsel of record for the parties.

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