No. 18-1917

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SPEECH FIRST, INC.
Plaintiff-Appellant

v.

MARK SCHLISSEL, *et al.*,
Defendants-Appellees

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF *AMICI CURIAE* OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND ALLIANCE DEFENDING FREEDOM

Thomas W. Kidd, Jr.
Ohio Bar No: 0066359
Kidd & Urling LLC
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069
(513) 733-3080
tkidd@kiddurlinglaw.com

Counsel for Amici Curiae

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*.

S/ Thomas W. Kidd, Jr.
Thomas W. Kidd, Jr.
Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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 Michigan. 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.

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation to protect our first constitutional liberties—religious freedom and freedom 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.

speech. Since its founding in 1994, ADF has played a role, directly or indirectly, in many Supreme Court cases, including *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2234 (2014), *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

This case significantly concerns ADF because it implicates the free speech rights of students nationwide. ADF has represented students in numerous cases challenging campus speech codes, often housed in harassment policies, that stifle free speech on campus. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

SUMMARY OF ARGUMENT

The district court's decision seriously threatens the ability of public college and university students to meaningfully redress constitutional violations and prevent their repetition.

Appellants challenged the operative definitions of "harassment" and "bullying" in policies that, by the university's own admission, resulted in sixteen disciplinary cases between 2016 and 2018. Although the lower court ruled that Appellants had standing to challenge those policies, it found their claims were moot because Appellees removed those definitions shortly after the lawsuit was filed and stated that, in fact, the policies had already been under review prior to the initiation of legal action. If policy changes during litigation can so simply moot a student's First Amendment claim, however, students seeking to vindicate their — and their fellow students' — constitutional rights in court will face an all but insurmountable hurdle and lasting uncertainty over the contours of their First Amendment rights.

Speech codes are prevalent on campus, with 91 percent of public colleges and universities surveyed annually by *amicus* FIRE maintaining at least one policy restricting constitutionally protected speech. Speech codes have not fared well in court, however, and some of the most important decisions about the permissible

scope of campus speech policies have come about as the result of facial challenges like the one the lower court found moot in the instant case.[2] If such challenges are easily mooted when a university simply changes a policy during the course of litigation, then universities remain free to continue restricting protected speech, either by resurrecting previous policies or by enacting new policies that have substantially the same effect.

[2] *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (invalidating university speech policies, including harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (invalidating "free speech zone" policy); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-CV-135, 1998 WL 35867183 (E.D. Ky. July 22, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

This is a real risk: *amici* have documented numerous instances in which universities have revised policies under pressure, only to restrict the same type of speech again at a later time. Moreover, *amici*'s experience suggests that the lower court gave too much weight to Appellees' representation that the definitions challenged by Appellants were already under review prior to the litigation. While most university policies do, indeed, undergo regular review, most such reviews do not result in changes affecting the constitutional rights of students.

If courts simply allow universities to police themselves by quickly deferring to assurances that their policies have been fixed, student speech rights are left at risk. Instead, courts must hold universities accountable for maintaining policies that violate students' First Amendment rights, otherwise they will continue to violate them with regularity, if not through the specific policy they altered during litigation, then through other policies that show a similar disrespect for students' rights. Judicial clarity is required to keep students' First Amendment rights secure.

ARGUMENT

I. If Allowed to Stand, the District Court's Ruling Will Hinder Students at All Educational Levels from Vindicating their First Amendment Rights in Court.

A. The Policy Changes that Occurred During This Litigation Were Insufficient to Moot the Students' Constitutional Claims

The lower court erred in holding that the University's voluntary cessation met the "heavy burden" necessary to moot the students' challenge to its harassment and bullying policies. *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 645 (1979).

a. Universities Often Revise Policies Only to Reinstate Them Later.

Appellants point out that "the University could easily undo its unilateral changes to the definitions of 'harassing' and 'bullying,'" noting in particular that Vice President Harper's guarantee that the current administration will uphold students' free speech rights is not binding on future administrators. Brief for Appellant at 23. This concern is wholly consistent with *amici*'s experience. *Amicus* FIRE's archives abound with examples of universities that eliminated problematic restrictions on student speech, only to reinstate them (or substantially similar policies) at a later date. The only real safeguard against continued censorship is

clear judicial precedent delineating the appropriate limits of policies regulating campus speech.

For example, in 2003, student Chris Stevens sued California's Citrus College in federal court, challenging a policy that limited students' expressive activities to three small "free speech areas" and required students to provide advance notice of their intent to use those areas. Complaint, *Stevens v. Citrus Comm. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. filed May 20, 2003). On June 5, 2003, the Citrus College Board of Trustees unanimously adopted a resolution revoking the policies, and the lawsuit was settled. Resolution of the Citrus Coll. Bd. of Trs. (June 5, 2003), *available at* https://www.thefire.org/resolution-of-the-citrus-college-board-of-trustees-june-5-2003.

In 2013, however, the Citrus College Board of Trustees adopted a new "Time, Place, and Manner" regulation, once again limiting students' expressive activities to a designated free speech area — and prompting another lawsuit. Complaint, *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. filed Jul. 1, 2014), *available at* https://www.thefire.org/complaint-in-sinapi-riddle-v-citrus-community-college-et-al. Under this new policy, Citrus student Vincenzo Sinapi-Riddle was threatened with removal from campus for soliciting signatures for a petition against National Security Agency (NSA) spying outside of Citrus' small free speech area, which comprised just 1.37 percent of the college's campus.

Citrus settled with Sinapi-Riddle, once again agreeing to revise its policies. Settlement Agreement, *Sinapi-Riddle*, (C.D. Cal. Dec. 3, 2014), *available at* https://www.thefire.org/settlement-agreement-sinapi-riddle-v-citrus-college.

In 2003, two students at Shippensburg University of Pennsylvania brought a federal lawsuit alleging that several of the university's speech codes violated their First Amendment rights. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003). After a judge in the Middle District of Pennsylvania issued a preliminary injunction against Shippensburg, the university settled with the students, agreeing to repeal the challenged policies as part of the settlement.[3]

The university did not, however, comply with the terms of the settlement. According to a 2008 complaint filed by a Christian student group at Shippensburg, administrators "failed and/or refused to rewrite the [previously challenged policy], and instead, reenacted the stricken policy *verbatim* in the Code of Conduct." Complaint, *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. filed May 7, 2008). In October 2008, Shippensburg settled this second lawsuit as well, agreeing—for the second time—to revise its speech codes.[4]

---

[3] Press Release, FOUND. FOR INDIV. RIGHTS IN EDUC., *A Great Victory for Free Speech at Shippensburg* (Feb. 24, 2004), https://www.thefire.org/a-great-victory-for-free-speech-at-shippensburg.

[4] Will Creeley, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement, University Once Again Dismantles Unconstitutional Speech Code*, FOUND. FOR INDIV. RIGHTS IN EDUC. (Oct. 24, 2008), https://www.thefire.org/victory-for-free-speech-at-shippensburg-after-violating-

In 1989, the University of Wisconsin Board of Regents adopted a rule, Wis. Admin. Code § UWS 17.06(2), prohibiting racist and discriminatory conduct as defined by the Board of Regents in its Policy 14-6, the "Racist and Other Discriminatory Conduct Policy." The United States District Court for the Eastern District of Wisconsin considered the constitutionality of that definition in *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991), and found that "[c]ontent-based prohibitions such as that in the UW Rule, however well intended, simply cannot survive the screening which our Constitution demands." *Id.* at 1181.

Although the Wisconsin Board of Regents repealed § UWS 17.06(2) following the court's decision, it continued to formally recommend the discredited language to UW system institutions through its Policy 14-6, which directed all UW institutions to adopt discriminatory harassment policies and offered suggested policy language identical to the language found unconstitutional by the court in *UWM Post*. When FIRE discovered this in 2013, a number of schools in the UW system maintained discriminatory harassment policies containing language the

---

terms-of-2004-settlement-university-once-again-dismantles-unconstitutional-speech-code.

same as, or substantially similar to, the language ruled unconstitutional in *UWM Post*.[5]

In other instances, FIRE has worked with administrators at colleges and universities to revise problematic policies, only to have other administrators reinstate those policies, or equally problematic policies, at a later date. In 2012, for example, the University of Mississippi revised a policy that had limited unplanned student demonstrations and other expressive activities to designated "Speaker's Corners," severely restricting the ability of students to engage in spontaneous expressive activity on campus. In its place, the university adopted a policy providing that students could engage in spontaneous expression anywhere on campus "so long as the expressive activities or related student conduct does not violate any other applicable university policies."[6]

Recently, however, the university amended that policy to once again prohibit spontaneous student demonstrations on campus, requiring that student organizations must "contact the Dean of Students in advance of the activity and complete a [Registered Student Organization] Event Registration form."[7]

---

[5] Letter from Samantha Harris, Foundation for Individual Rights in Education, to Brent Smith, President, University of Wisconsin System Board of Regents, Apr. 24, 2013 (on file with *amicus* FIRE).
[6] UNIV. OF MISS., *Free Inquiry, Expression, and Assembly* (Jan. 18, 2012) (on file with *amicus* FIRE).
[7] UNIV. OF MISS., *Free Inquiry, Expression, and Assembly* (Nov. 27, 2017), *available at*

Only an injunction from this court can protect students against the possibility that the University will reinstate the old definitions of harassment and bullying, and only a clear statement by this court that those definitions prohibit speech protected by the First Amendment can secure the free speech rights of students at the University and throughout this Circuit against similarly unconstitutional policies going forward.

b. The District Court Gave Too Much Weight to the University's Representation that its Policies Were Already Under Review Prior to Litigation

Based on *amici*'s decades of experience interacting with universities around speech code reform, we also believe the lower court gave far too much weight to the university's assurance that the policy revisions "were the product of a review started before the action was filed to ensure the University's website and policies complied with First Amendment principles and the University's legal obligations." *Speech First v. Schlissel*, No. 4:18-cv-11451, slip op. at 29 (E.D. Mich. Aug. 6, 2018). While universities do indeed review their policies with regularity, these periodic reviews generally do not result in substantive changes affecting students' First Amendment rights. It has long been *amici*'s experience that outside pressure is usually necessary to prompt a university to reform its policies to better protect

---

https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=11079224.

students' free speech rights. Once that pressure dissipates, and/or once the administrators or students involved in the original policy reform effort move on, universities may reinstate problematic policy language. The frequency with which universities make speech-related policy changes under pressure, but state that the policies in question were already under review, illustrates this point.

For example, in November 2016 — less than a month after FIRE sent a certified mailing to a group of public universities warning them about their unconstitutional speech codes — the University of California, Merced announced that it would be revising one of the policies criticized by FIRE. In making that announcement, university spokesman James Leonard told the *Merced Sun-Star* that the policy was being changed as part of "work that's been ongoing for at least 18 months."[8]

In November 2015, FIRE published a blog post criticizing Southwest Minnesota State University for a vaguely worded ban on "cultural intolerance" that appeared in the university's Prohibited Code of Conduct. The university quickly removed the policy from its website, and a university spokesman told a local newspaper that it had been merely a technical error: "Once [FIRE] told us they had

[8] Thaddeus Miller, *UC Merced Changing Policy Related to Free Speech*, MERCED SUN-STAR, Nov. 4, 2016, https://www.mercedsunstar.com/news/local/education/uc-merced/article112688253.html.

found this, we went out, found it, and had IT scrub it.... We didn't change it because of what FIRE did."[9]

In August 2015, Representative Bob Goodlatte, chairman of the U.S. House Judiciary Committee, sent a letter to the presidents of 161 public colleges and universities that received FIRE's poorest speech code rating, asking them why their policies failed to protect the First Amendment rights of students and faculty.

A number of those institutions responded to say their policies had already been under review before Rep. Goodlatte's letter. The University of Massachusetts, for example, responded that "[t]he policy at issue at UMass Amherst has been under review for some time and as updated will be promulgated during the Fall semester of 2015. Neither the new policy nor its supporting guidance contain the language that FIRE attributes to the University."[10] The University of Georgia responded that "[e]arlier this year, we engaged in a comprehensive review and revision of our Freedom of Expression Policy to address and eliminate hypothetical concerns about unduly restrictive applications."[11] The University of Connecticut

---

[9] Susan Du, *Free Speech Crusaders Protect "Cultural Intolerance" at Minnesota Universities*, CITYPAGES, Jan. 25, 2016, http://www.citypages.com/news/free-speech-crusaders-protect-cultural-intolerance-at-minnesota-universities-7985990.

[10] Letter from Brian W. Burke, Senior Counsel, University of Massachusetts – Amherst, to John Coleman, Counsel, House Committee on the Judiciary, Sept. 4, 2015 (on file with *amicus* FIRE).

[11] Letter from Michael M. Raeber, Executive Director for Legal Affairs, University of Georgia, to the Honorable Bob Goodlatte, Chairman, House Committee on the Judiciary, Sept. 4, 2015 (on file with *amicus* FIRE).

responded that "in July 2015, the University, on its own initiative to enhance the policy's clarity with respect to our longstanding commitment to freedom of expression, amended the definition of sexual harassment in this policy...."[12]

As Appellant points out, "if this kind of routine review could justify voluntary cessation, then universities would have an unchecked power to moot lawsuits and evade constitutional scrutiny of their policies." Appellant's Br. at 25. The frequency with which universities, when challenged about the constitutionality of a policy, cite to this type of routine review to deflect criticism should give this Court pause about allowing such representations to render a student's claim moot.

c. Facial Challenges Are Critical to Ending the Nationwide Problem of Unconstitutional Speech Codes.

Preserving the ability of students to seek meaningful judicial remedies is critically important because the First Amendment rights of public college students are threatened with depressing regularity. *Amicus* FIRE annually reviews speech policies maintained by more than 460 colleges and universities; its 2018 report found that 91 percent of public colleges and universities surveyed maintained at least one policy that restricts speech or expression protected by the First Amendment. FOUND. FOR INDIV. RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2018: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, *available at*

[12] Letter from Richard F. Orr, Vice President and General Counsel, University of Connecticut, to John Coleman, Esq., Counsel, House Committee on the Judiciary, Aug. 26, 2015 (on file with *amicus* FIRE).

https://www.thefire.org/spotlight-on-speech-codes-2018. These restrictive speech codes are routinely used to silence students and student organizations. *Amici* FIRE and ADF have received thousands of reports of censorship on public college campuses and have successfully defended student and faculty rights in hundreds of instances.

Some of the most important constitutional challenges to campus speech codes — rulings that have laid the groundwork for FIRE's and ADF's successful advocacy over the years — have been facial challenges like the one Speech First brought to the harassment and bullying policies at the University of Michigan. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008) (upholding facial challenge to university sexual harassment policy by student who was "concerned that discussing his social, cultural, political, and/or religious views regarding these issues might be sanctionable by the University"); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 365 (M.D. Pa. 2003) (invalidating portions of student conduct code challenged by students who alleged that the code "had a chilling effect on [their] rights to freely and openly engage in appropriate discussions of their theories, ideas and political and/or religious beliefs"); *UWM Post v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1164 (E.D. Wis. 1991) (granting summary judgment in First Amendment lawsuit brought by student newspaper that argued discriminatory harassment policy was unconstitutional "on its face"); *Doe*

v. Univ. of Mich., 721 F. Supp. 852, 857 (E.D. Mich. 1989) (upholding facial challenge to racial harassment policy by psychology student who feared discussions of controversial theories in his field "might be sanctionable under the Policy.")

Amici and other free-speech advocacy groups have cited these precedents countless times to persuade other universities to revise similarly unconstitutional policies. If universities may moot students' First Amendment claims simply by changing their policies under pressure during litigation, facial challenges like the ones filed in these foundational cases will rarely, if ever, lead to decisions. In practice, therefore, students will have to wait until after they have been the victim of censorship — and are thus able to bring a claim for damages — to challenge the flawed policy in court.

II. Student-Plaintiffs Already Face Additional Significant Procedural Hurdles to Vindicating Their First Amendment Rights.

If allowed to stand, the district court's ruling will erect another significant barrier to enforcing a student's First Amendment rights, adding to the many already faced by civil rights litigants. Student-plaintiffs face substantial and often insurmountable procedural limitations in litigation under 42 U.S.C. § 1983, too often resulting in constitutional violations going without remedy and perpetuating confusion over the state of the law.

A. Courts Frequently Do Not Reach the Question of Constitutionality Because of the Doctrine of Qualified Immunity.

Students often find their claims for relief stymied by the doctrine of qualified immunity. 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). However, courts are not required to perform the analysis in that order and may decide the law was not clearly established without deciding whether a constitutional injury took place. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). When courts perform this order of analysis, 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. The Supreme Court has compounded the lack of clarity 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 a right could be clearly established based on a single Circuit Court of Appeals decision); *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).

Moreover, qualified immunity presents a particular problem when it stands in the way of the development of constitutional law. As the Fifth Circuit recently wrote, "[d]octrinal reform is arduous, often-Sisyphean work," and "many courts grant immunity without first determining whether the challenged behavior violates the Constitution." *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (concurring dubitante). And because courts often tackle the question of whether a right was clearly established first, "[i]mportant constitutional questions go unanswered precisely because those questions are yet unanswered." *Id.* at 499. As the court explained, the end result of this is a constitutional "Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent." *Id.* This is problematic for student plaintiffs who already face numerous hurdles as they seek to vindicate their constitutional rights in court.

B. Injunctive and Declaratory Claims Are Frequently Mooted by Graduation

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.[13] The most vocal and active students are likely to be upperclassmen, who, in turn, are likely to be graduating in two years or less.[14] This problem is exacerbated at community colleges, which are primarily two-year institutions.

Meanwhile, the *median* time it took a federal district court to complete a trial in 2015 was 25.2 months.[15] In the Eastern District of Michigan, from which this appeal originates, that median was 22.5 months.[16] The net result is that students' constitutional claims against public colleges and universities are frequently mooted when students graduate.

---

[13] 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/d16/tables/dt16_326.10.asp.

[14] *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.").

[15] ADMIN. OFFICE OF U.S. COURTS, TABLE C-5: U.S. DISTRICT COURTS—MEDIAN TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, *available at* http://www.uscourts.gov/sites/default/files/c05mar15_0.pdf.

[16] *Id*. at p. 2.

Among the students who have seen their rights evaporate while waiting for justice are student prayer leaders,[17] objectors to student prayers,[18] student journalists,[19] ROTC students,[20] valedictorians,[21] students who wanted to demonstrate cookware in their dorms,[22] and other high school students[23] and

[17] *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).

[18] *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).

[19] *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).

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

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

[22] *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).

[23] *See, e.g., Bd. of Sch. Comm'rs v. Jacobs*, 420 U. S. 128 (1975); *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000); *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).

college students.[24] The only common thread is that they graduated before their institutions could be held to account.

That injunctive and declaratory claims are mooted by graduation provides an incentive for schools to avoid settling claims, even meritorious claims—*especially* meritorious claims—leaving schools secure in the knowledge that any equitable relief will be moot by the time the case is resolved. Students already face a narrow window when they could potentially receive equitable relief; schools do not need the ability to close that window entirely with the merest suggestion of a change of heart.

Those courts that have preserved the declaratory and injunctive rights of student-plaintiffs after leaving their institutions have done so in light of the potential for future censorship by the same actors. In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court held that a middle school student prevented from giving a graduation prayer could seek injunctive relief against her school district because she was planning to attend high school in the same district. Similarly, in *Moore v. Watson*, 738 F. Supp. 2d 817, 829 (N.D. Ill. 2010), a student who withdrew from his university after the student newspaper for which he served as editor-in-chief was censored had standing to pursue injunctive and declaratory relief because he

[24] *See, e.g.*, *Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007); *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 (E.D.N.Y. 2009).

asserted an interest in returning to school to finish his education. Short of situations where student-plaintiffs have expressed an interest in returning to the institutions that abused them, however, claims for injunctive and declaratory relief are consistently deemed moot.

It is poor public policy to provide incentives for bad actors to continue acting badly. Affirming the district court's ruling, which is poor public policy, would lead to immeasurable constitutional harm in this Circuit and nationwide. Public institutions will be more likely to violate student rights, especially the rights of students nearing graduation, knowing that mootness will end any non-economic claims well before a court could determine what the institution had done. Even public institutions that make innocent mistakes will have a strong incentive to refuse to admit wrongdoing, casting student civil rights into further doubt and disuse.

CONCLUSION

Campus speech codes have been repeatedly defeated in court in an almost unbroken string of legal precedent stretching back nearly thirty years.[25] Despite the clarity of the legal precedent, however, censorship of student expression on our nation's public campuses continues to run rampant. If a college or university can

[25] *See supra* note 2.

avoid legal consequences simply by revising a policy that has been challenged, protecting students' speech rights becomes a never-ending game of whack-a-mole in which an individual student may succeed in beating back a policy, only to have that policy—or one just like it—pop back up again moments later. But unlike the whack-a-mole player still standing at the ready with a rubber mallet, students graduate and move on, making it exceedingly difficult to know whether a university has truly kept its promise to revise a policy unless and until another student or student group is censored. Only a judicial determination that a policy violates students' First Amendment rights can secure those rights going forward.

Dated: November 20, 2018

Respectfully Submitted,

S/ Thomas W. Kidd, Jr.
Thomas W. Kidd, Jr.
Attorney for Amici Curiae
Kidd & Urling LLC
8913 Cincinnati-Dayton Road
West Chester, OH 45069
(513)733-3080
tkidd@kiddurlinglaw.com

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Sixth Circuit.

S/ Thomas W. Kidd, Jr.
Thomas W. Kidd, Jr.
Attorney for Amici Curiae

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 5046 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 Microsoft Office Word 2003 in 14-point Times New Roman font.

S/ Thomas W. Kidd, Jr.
Thomas W. Kidd, Jr.
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on November 20, 2018, which will automatically send notification to the counsel of record for the parties.

S/ Thomas W. Kidd, Jr.
Thomas W. Kidd, Jr.
Attorney for Amici Curiae