No. 19-2807

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Speech First, Inc.,

Plaintiff-Appellant,

v.

Timothy L. Killeen, In His Official Capacity as President of the University of Illinois, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois, No. 3:19-cv-3142 (Bruce, J.)

BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, AND ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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August 21, 2020

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New Parties: Foundation for Individual Rights in Education; Alliance Defending Freedom

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Attorney's Signature: /s/ Kimberly S. Hermann Date: August 21, 2020

Attorney's Printed Name: Kimberly S. Hermann

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Case No. 19-2807,
Speech First, Inc. v. Timothy L. Killeen, et al.

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August 21, 2020.

/s/ Kimberly S. Hermann

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INTEREST OF AMICI CURIAE[1]

Southeastern Legal Foundation (SLF) is a national, nonprofit public interest law firm and policy center. Since 1976, SLF has advcated for constitutional individual liberties, limited government, free speech, and free enterprise in the courts of law and public opinion.

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 engages in targeted litigation and frequently participates as amicus curiae to ensure that student First Amendment rights are vindicated when violated at public universities.

Alliance Defending Freedom (ADF) 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 speech. Since its founding in 1994, ADF has played a role, directly or indirectly, in many Supreme Court cases.

[1] Fed. R. App. P. 29 statement: All parties consented to the filing of this amici curiae brief. No counsel for either party authored this brief in whole or in part. No person or entity other than Amici and their members made a monetary contribution to its preparation or submission.

This case concerns Amici because students that they regularly defend rely on access to federal courts to secure meaningful and lasting legal remedies to the irreparable harm of censorship.

SUMMARY OF ARGUMENT

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

Appellant challenged the University's policy prohibiting students from posting and distributing political campaign literature. The district court found its claims were moot because the University repealed the rule during litigation, and the panel affirmed. If policy changes during litigation can so easily moot a student's First Amendment claim, students seeking to vindicate their constitutional rights in court will face an insurmountable hurdle to doing so. The lasting uncertainty will result in a continued chilling of student speech while guaranteeing that lawsuits over abuses that could have been avoided will continue to be filed.

Speech codes are prevalent on campus, with 88 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 this one.[2] If such challenges are mooted when a university changes a policy during litigation, then universities remain free to restrict protected speech in the future, either by resurrecting previous policies or by enacting new policies that have the same effect.

This is a real risk, as will be detailed below. If courts defer to institutional assurances that their policies have been fixed, student speech rights will be left at risk. Rather, courts must hold universities

[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 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 vague and overbroad); *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).

accountable for violating students' First Amendment rights. Judicial clarity is required to keep students' First Amendment rights secure.

ARGUMENT

I. The panel's ruling hinders 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 panel erred in holding that the University's voluntary cessation met the "heavy burden" necessary to moot the students' challenge to its prior-approval rule. *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 645 (1979).

Appellant points out that "[u]niversities frequently revise their policies after they are sued in order to moot the case and avoid an adverse judgment[.]" Pet. for Reh'rg En Banc at 17. This concern is wholly consistent with Amici's experience. Because universities often eliminate problematic restrictions on student speech, only to reinstate them (or similar policies) at a later date, the only real safeguard against continued censorship is clear precedent delineating the constitutional limits of policies regulating campus speech.

For example, in 2003, student Chris Stevens sued California's Citrus College, challenging a policy that limited students' expressive

activities to three small "free speech areas" and required students to provide advance notice to use those areas.[3] On June 5, 2003, the Citrus College Board of Trustees adopted a resolution revoking the policies, and the lawsuit was settled.[4] In 2013, however, the Citrus College Board of Trustees adopted a new "Time, Place, and Manner" regulation, again limiting students' expressive activities to a designated free speech area and prompting another lawsuit.[5] 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 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.[6]

In 2003, two students at Shippensburg University of Pennsylvania

[3] Complaint, *Stevens v. Citrus Comm. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. May 20, 2003), ECF No. 1.

[4] Resolution of the Citrus Coll. Bd. of Trs. (June 5, 2003), https://www.thefire.org/resolution-of-the- citrus-college-board-of-trustees-june-5-2003.

[5] Complaint, *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. Jul. 1, 2014), ECF No. 1, https://www.thefire.org/complaint-in-sinapi-riddle- v-citrus-community-college-et-al.

[6] Settlement Agreement, *Sinapi-Riddle v. Citrus Comm. Coll. Dist.* (Dec. 3, 2014), https://www.thefire.org/settlement-agreement-sinapi-riddle-v-citrus-college.

brought a lawsuit alleging that the university's speech codes violated their First Amendment rights. *Bair*, 280 F. Supp. 2d 357. After the district court issued a preliminary injunction against Shippensburg, the university settled, agreeing to repeal the challenged policies as part of the settlement.[7] 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."[8] In October 2008, Shippensburg settled this second lawsuit as well, agreeing—for the second time—to revise its speech codes.[9]

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 its Policy 14-6. The district court

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[7] Press Release, FIRE, *A Great Victory for Free Speech at Shippensburg* (Feb. 24, 2004), https://www.thefire.org/a-great-victory- for-free-speech-at-shippensburg.

[8] Complaint, *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08- cv-00898 (M.D. Pa. May 7, 2008), ECF No. 1.

[9] Will Creeley, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement, University Once Again Dismantles Unconstitutional Speech Code*, FIRE (Oct. 24, 2008), https://www.thefire.org/victory-for-free-speech-at-shippensburg-after-violating-terms-of-2004-settlement-university-once-again-dismantles-unconstitutional- speech-code.

considered the constitutionality of that definition 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." *UWM Post,* 774 F. Supp. 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 suggested policy language identical to the language found unconstitutional by the court in *UWM Post*. When Amicus FIRE discovered this in 2013, a number of schools in the UW system maintained policies containing language the same as, or substantially similar to, the language ruled unconstitutional in *UWM Post* a shocking 22 years before.[10]

In 2012, the University of Mississippi revised a policy that 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.

[10] Letter from Samantha Harris, FIRE, to Brent Smith, President, Univ. of Wis. Sys. Bd. of Regents (Apr. 24, 2013) (on file with Amicus FIRE).

Instead, the university adopted a policy providing that students could engage in spontaneous expression anywhere on campus "so long as the expressive activities . . . [do] not violate any other applicable university policies."[11] Recently, however, the university amended that policy to again prohibit spontaneous student demonstrations, requiring that student organizations "contact the Dean of Students in advance of the activity and complete an Event Registration form."[12]

Only an injunction from this Court can protect students against the possibility that the University will reinstate restrictions on distributing political campaign literature. And only a clear statement by this Court that the rule impermissibly burdens 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. Facial challenges are critical to ending the nationwide problem of unconstitutional speech codes.

The First Amendment rights of public college students are regularly

[11] Univ. of Miss., *Free Inquiry, Expression, and Assembly* (Jan. 18, 2012) (on file with Amicus FIRE).

[12] Univ. of Miss., *Free Inquiry, Expression, and Assembly* (Nov. 27, 2017), https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=11079 224.

threatened. Amicus FIRE annually reviews speech policies at over 460 colleges and universities; its 2020 report found that 88 percent of public colleges and universities surveyed had at least one policy that restricts speech or expression protected by the First Amendment.[13] These restrictive speech codes are routinely used to silence students and student organizations.

Some of the most important constitutional challenges to campus speech codes have been facial challenges like the one at issue here. *See, e.g.*, *DeJohn*, 537 F.3d at 305 (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*, 280 F. Supp. 2d at 365 (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*, 774 F. Supp. at 1164 (granting summary judgment in lawsuit brought by student newspaper arguing university policy was unconstitutional "on its face");

[13] FIRE Spotlight on Speech Codes 2020: The State of Free Speech on our Nation's Campuses, https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2020.

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

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 must 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 because 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.[14] The most vocal and active students are often upperclassmen who will graduate within two years.[15]

[14] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics Digest of Education, Table 326.10, https://nces.ed.gov/programs/digest/d16/tables/dt16_326.10.asp.

[15] *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).

Meanwhile, the *median* time it took a federal district court to complete a trial in 2015 was 25.2 months.[16] The net result is that students' constitutional claims against public universities are frequently mooted when students graduate. Students who have seen their rights evaporate while waiting for justice include 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 college students.[23] The only common thread is that they graduated before their institutions could be held to account.

That claims are often mooted by graduation provides an incentive

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[16] Admin. Office of U.S. Courts, Table C-5: U.S. District Courts—Median Time Intervals from Filing to Disposition of Civil Cases Terminated, http://www.uscourts.gov/sites/default/files/c05mar15_0.pdf.

[17] *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000).

[18] *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997).

[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).

[23] *See, e.g.*, *Lane*, 495 F.3d at 1186–87; *Fox*, 42 F.3d at 139; *Husain*, 691 F. Supp. 2d at 341.

for schools to avoid settling 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 to receive equitable relief. Courts preserve the equitable rights of student-plaintiffs when there is the potential for future censorship by the same actors. Unless student-plaintiffs express an interest in returning to their school, claims for equitable relief are frequently deemed moot. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that a middle school student prevented from giving a graduation prayer could seek injunctive relief because she planned on attending high school in the same district); *Moore v. Watson*, 738 F. Supp. 2d 817, 829 (N.D. Ill. 2010) (holding 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 equitable relief because he planned on returning to the school).

The panel's decision leads 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 whether the institution's policies

were constitutional.

CONCLUSION

The Court should grant the petition for rehearing en banc.

Respectfully submitted,

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August 21, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Seventh Circuit Rule 29 because it contains 2594 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Seventh Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) and Seventh Circuit Rule 32(c) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 11-point type for footnotes.

August 21, 2020. /s/ Kimberly S. Hermann

CERTIFICATE OF FILING AND SERVICE

On August 21, 2020, I filed this Brief of Amici Curiae Southeastern Legal Foundation, Foundation for Individual Rights in Education, and Alliance Defending Freedom in Support of Plaintiff-Appellant's Petition for Rehearing En Banc using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

August 21, 2020. /s/ Kimberly S. Hermann