No. 19-968

In The Supreme Court of the United States

CHIKE UZUEGBUNAM AND JOSEPH BRADFORD,

Petitioners,

v.

STANLEY C. PRECZEWSKI, JANN L. JOSEPH, LOIS C. RICHARDSON, JIM B. FATZINGER, TOMAS JIMINEZ, AILEEN C. DOWELL, GENE RUFFIN, CATHERINE JANNICK DOWNEY, TERRANCE SCHNEIDER, COREY HUGHES, REBECCA A. LAWLER, AND SHENNA PERRY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a government can infringe individual rights but escape sanction by changing its constitutionally dubious policy after a lawsuit has been filed.

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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 its founding in 1999, FIRE has worked to defend student and faculty First Amendment rights on campuses nationwide. FIRE believes that, if our nation's universities are 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 and regularly files briefs as *amicus curiae* to ensure that students' constitutional rights are vindicated at public institutions. Launched in 2014, FIRE's Stand Up For Speech Litigation Project has coordinated the filing of more than a dozen lawsuits to challenge unconstitutional campus speech codes.

The students FIRE defends rely on access to federal courts to secure meaningful and lasting legal remedies for the irreparable harm of censorship. This case is of interest to FIRE because the Eleventh Circuit's ruling, if allowed to stand, will undermine

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *Amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel for all parties have filed blanket consents to the filing of amicus briefs.

students' already precarious ability to vindicate their First Amendment and other civil rights in court.

The Cato Institute ("Cato") is a nonpartisan public-policy research foundation established in 1977 and 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 limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Cato is concerned with the prevalence of speech-restrictive policies on college and university campuses. To this end, Cato has filed an *amicus* brief contesting speech restrictions in *Speech First v. Fenves*, No. 19-50529 (5th Cir. 2019), and believes that courthouse doors must remain open to students seeking redress for past constitutional violations. Cato recently published Donald Downs's book *Free Speech and Liberal Education: A Plea for Intellectual Diversity and Tolerance* detailing the danger of speech restrictions on college and university campuses.

Amici are both deeply committed to the principles of free speech and the open exchange of ideas. The issue presented in this case bears on students' ability to vindicate and uphold those foundational principles through litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to speak freely is a priceless freedom. Nowhere is this more true than on public college and university campuses, which serve as "vital centers for the Nation's intellectual life." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 836 (1995). The decision below threatens the ability of college and university students to vindicate their First Amendment rights at a time when those rights are increasingly at risk.

Students have few reliable options for securing judicial redress when their free-speech rights are infringed. Equitable-relief claims are frequently mooted by graduation or by revision of the challenged policy, and speech restrictions often do not inflict financial injuries that rise to the level of compensatory damages. As a result, nominal damages, which address violations that do not result in compensable financial loss, are often the only remedy available.

Under the decision below, nominal damages can no longer fulfill that critical role. If standalone nominal-damages claims are mooted just as easily as claims for equitable relief, students will be left with little incentive to challenge unlawful speech codes and other policies and actions in court. Absent precedent clarifying the law and deterring ongoing censorship, student speech rights will become increasingly devalued and colleges and universities will be emboldened to expand their speech restrictions.

The Eleventh Circuit's misguided approach also ignores a critical distinction: unlike prospective equitable relief, nominal damages remedy *past* violations, not ongoing or potential future wrongs. In this regard, the Eleventh Circuit's decision fails to appreciate that the deprivation of a constitutional right is an injustice irrespective of whether it results in monetary loss.

Correcting the Eleventh Circuit's error is all the more important because colleges and universities across the country routinely infringe students' First Amendment and other civil rights. Vague and overbroad campus speech policies abound. These policies grant campus administrators discretion to suppress and punish a stunning range of speech deemed controversial, inconvenient, or simply unwanted. *Amici* have witnessed this troubling trend firsthand: They have received thousands of reports of censorship on public college and university campuses and have defended students and faculty in hundreds of cases nationwide. Compounding the problem is the propensity of colleges and universities to re-institute speech restrictions after executing settlement agreements that require the restrictions to be eliminated. Reversal of the judgment below is necessary to protect students' ability to hold colleges and universities accountable and to vindicate their priceless constitutional rights.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S RULE JEOPARDIZES STUDENTS' ALREADY PRECARIOUS ABILITY TO VINDICATE THEIR CONSTITUTIONAL RIGHTS

A. Nominal-Damages Claims Are Often Students' Sole Path to Relief from Unconstitutional Policies.

Students burdened by unconstitutional speech restrictions have few reliable options for securing relief. Their claims for declaratory or injunctive relief are frequently mooted, either by graduation or by revision of the challenged policy (or both, in the case of Petitioners here). And because suppression of speech often does not inflict financial injuries, students in those circumstances may not have viable claims for compensatory damages. The upshot is that nominal damages are often the only remedy available.

First, students' claims for prospective declaratory or injunctive relief evaporate at graduation. The most outspoken and politically active students tend to be juniors and seniors, such that those most vulnerable to enforcement have the least time to secure redress. Students at public colleges and universities enroll in two- or four-year degree programs, but the median length of time for resolution of a civil case in federal

district court is between 10.8 and 27.8 months, depending on whether the case goes to trial.[2]

First Amendment claims mooted by graduation are thus commonplace. For example, in *Indianapolis School Commissioners v. Jacobs*, this Court held that graduation mooted students' claims seeking a declaratory judgment that school officials had unconstitutionally "interfere[d] with the publication and distribution of" a student newspaper. 420 U.S. 128, 129 (1975) (per curiam). Because the students had graduated, there was "no longer" a "case or controversy . . . between the named plaintiffs and the [school board] with respect to the validity of the rules at issue." *Id.*

Lower courts have repeatedly reached the same conclusion in cases involving students' First Amendment rights. *See*, *e.g.*, *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1225 (10th Cir. 2009) (valedictorian's graduation mooted her equitable-relief claims challenging graduation-speech policy); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 791–98 (9th Cir. 1999) (en banc) (graduation mooted declaratory- and injunctive-relief claims against policy permitting student prayers during graduation ceremony); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098–99 (9th Cir. 2000) (graduation mooted students' equitable-relief claims challenging prohibition on sectarian graduation speeches); *Adler v. Duval Cty.*

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[2] *See* Administrative Office of the U.S. Courts, *United States District Courts—National Judicial Caseload Profile* (2019), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf.

Sch. Bd., 112 F.3d 1475, 1478 (11th Cir. 1997) (graduation mooted students' declaratory- and injunctive-relief claims challenging policy allowing student-initiated prayer at graduation ceremonies); *Fox v. Bd. of Trustees of State Univ. of New York*, 42 F.3d 135, 140 (2d Cir. 1994) (graduation mooted equitable-relief claims challenging regulation preventing cookware demonstration in university dormitory); *Sapp v. Renfroe*, 511 F.2d 172, 175 (5th Cir. 1975) (graduation mooted equitable-relief claims challenging mandatory ROTC training). Colleges and universities can—and in *amici*'s experience do—take advantage of this reality and insulate themselves from liability by prolonging litigation until student-plaintiffs graduate.

Second, colleges and universities can seek to moot claims for equitable relief by revising or disavowing their policies after the start of litigation. For example, one such policy change mooted students' equitable-relief claims in *Husain v. Springer*, even though the college's commitment to the new policy did not extend "indefinitely into the future." 193 F. Supp. 2d 664, 670 (E.D.N.Y. 2002), *aff'd*, 494 F.3d 108 (2d Cir. 2007).[3]

Students' constitutional claims against public colleges and universities are particularly vulnerable to dismissal on this basis because courts apply a relaxed mootness test in suits against government entities.

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[3] The Second Circuit reviewed the case on its merits because the students also pursued claims for nominal damages. *See Husain v. Springer*, 494 F.3d 108, 121–34 (2d Cir. 2007). Under the Eleventh Circuit's rule, those nominal-damages claims would have been dismissed as moot.

Although the general rule is that a defendant's voluntary cessation moots an action only if "there is no reasonable expectation . . . that the alleged violation will recur," *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (cleaned up), courts apply "a rebuttable presumption that the objectionable behavior will *not* recur" when a governmental defendant voluntarily rescinds a challenged policy, *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004).[4] Such special treatment is premised on the "good faith" and trustworthiness of government actors, *see*, *e.g.*, *Fikre v. F.B.I.*, 904 F.3d 1033, 1037 (9th Cir. 2018),[5] yet, as discussed below, colleges and universities do not consistently live up to this trust—e.g., by reinstituting unconstitutional policies after revoking them to end litigation. *See infra* Section II.B.

Third, restrictions on student speech often do not inflict financial injuries, such that compensatory damages may not be available or may be difficult to prove. *See*, *e.g.*, *Lowry ex rel. Crow v. Watson Chapel*

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[4] *See also*, *e.g.*, *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 881 (10th Cir. 2019); *Fikre v. F.B.I.*, 904 F.3d 1033, 1037 (9th Cir. 2018) ("Where that party is the government we presume that it acts in good faith."); *Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009).

[5] *Accord Fed'n of Advert. Indus. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003) ("[W]hen the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine."); 13C Charles A. Wright et al., *Federal Practice and Procedure* § 3533.7 (3d ed. 2008) ("Courts are more likely to trust public defendants to honor a professed commitment to changed ways.").

Sch. Dist., 540 F.3d 752, 765 (8th Cir. 2008) (affirming nominal damages and attorneys' fees awards to student protesters where "the free speech right vindicated was not readily reducible to a sum of money"). The same can be said of infringement on other student civil rights, such as procedural due-process violations and unreasonable searches and seizures. *See*, *e.g.*, *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1275 (11th Cir. 2017) (Wilson, J., dissenting) ("For a number of civil-rights violations (e.g., free speech, procedural due process), compensable damages may not always exist.").

Even when enforcement of a speech restriction against a student causes minor economic injury—for example, the cost of gas to drive to a designated free-speech zone, the cost of printing flyers, or the cost of a website registration—an appropriate legal remedy is often nominal, rather than compensatory, damages. *See Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) ("Nominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages."); *Nominal Damages*, Black's Law Dictionary (11th ed. 2019) (nominal damages are "[a] trifling sum awarded when a legal injury is suffered but there is no *substantial* loss or injury to be compensated" (emphasis added)).

Students with meritorious civil-rights claims thus often have only one remedy available: nominal damages.

B. The Eleventh Circuit's Rule Threatens Students' Access to Relief for Past Violations of Their Constitutional Rights.

In the decision below, the Eleventh Circuit held that Petitioners' claims for nominal damages were mooted by the same events that mooted their claims for injunctive relief: graduation and a post-suit revision to the college's speech code. *See* Pet. App. 3a. Applying its decision in *Flanigan's*, 868 F.3d 1248, the Eleventh Circuit concluded that, once plaintiffs have "receive[d] all the [forward-looking] relief they requested," their "right to receive nominal damages" remains viable only when accompanied by "a well-pled request for compensatory damages." Pet. App. 15a (quoting *Flanigan's*, 868 F.3d at 1264).

Under the Eleventh Circuit's rule, students' standalone nominal-damages claims for past violations of their constitutional rights are mooted just as easily as claims for prospective equitable relief. This is because, according to the Eleventh Circuit, nominal-damages claims do not "have a practical effect on the parties' rights or obligations" and thus, absent a continuing violation or live claim for compensatory damages, seek nothing more than an "impermissible advisory opinion." Pet. App. 14a.

This rule reduces the deterrent value of litigation, emboldening colleges and universities to adopt and enforce more expansive (and constitutionally-deficient)

speech restrictions and limitations on students' other civil rights.

Case law on the constitutionality of college and university speech codes and other policies would also stagnate under the Eleventh Circuit's outlier rule, making it harder for students to ascertain whether their rights have been infringed and to hold campus officials accountable for constitutional violations. Fewer cases would be litigated to a judgment on the merits, leaving in place ambiguities in First Amendment jurisprudence. That outcome would further undermine the value of litigation by making it even easier for offending colleges and universities to avoid liability under the doctrine of qualified immunity—where precedent is already slow to develop. As Judge Willett recently explained:

> [in qualified immunity cases, p]laintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability.

Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018), *opinion withdrawn on reh'g*, 928 F.3d 457 (5th Cir. 2019) (Willett, J., concurring dubitante).

As a result, the Eleventh Circuit's rule would cause students' civil rights to become increasingly

devalued and more difficult to vindicate, and students would be left with little incentive to invest the time and resources required to challenge restrictive university policies and actions, and secure judicially enforced redress. In contrast, the rule applied by other circuits—under which nominal-damages claims are *not* mooted by a student-plaintiff's graduation or a defendant's voluntary cessation—avoids many of these problematic effects.

C. The Decision Below Disregards the Distinctive Role Nominal Damages Play in Remedying Constitutional Violations.

By finding "no reason to treat nominal and declaratory relief differently," *Flanigan's*, 868 F.3d at 1268 n.22, the Eleventh Circuit's approach ignores a critical distinction between prospective and retrospective relief. Unlike prospective equitable relief, nominal damages remedy past wrongs, not future ones. *Flanigan's*, 868 F.3d at 1273–74 (Wilson, J., dissenting); *see also*, *e.g.*, *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1526 (10th Cir. 1992); Charles T. McCormick, *Handbook on the Law of Damages* § 20, at 85 (1935).

Nominal damages are "particularly important in vindicating constitutional interests" because they ensure that government officials respect priceless freedoms where the infringement of those freedoms causes little or no monetary injury. *Cf. New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct.

1525, 1535 (2020) (Alito, J., dissenting). Indeed, "[f]or a number of civil-rights violations (e.g., free speech, procedural due process), compensable damages may not always exist." *Flanigan's*, 868 F.3d at 1275 (Wilson, J., dissenting). "By making the deprivation of such rights actionable for nominal damages without proof of [compensable] injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Student-plaintiffs are no different, and their rights are no less important. In fact, nominal damages are uniquely important in the context of colleges and universities. This Court time and again has reiterated the vital importance of First Amendment and other constitutional rights on public college and university campuses, and nominal damages are often the only relief available for students to vindicate those rights. *See*, *e.g.*, *Rosenberger*, 515 U.S. at 836 ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (emphasizing that, because public universities play a "vital role in a democracy," silencing speech in that context "would imperil the future of our Nation"). Indeed, "[u]niversities have historically been

fierce guardians of intellectual debate and free speech, providing an environment where students can voice ideas and opinions without fear of repercussion." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761 (6th Cir. 2019).

When acting consistent with this nation's founding ideals, colleges and universities engage students and faculty in the pursuit of truth, beauty, and innovation. This engagement benefits not only the students themselves, but society as a whole. By uprooting the most promising avenue for students to ensure that their rights are "scrupulously observed," *Carey*, 435 U.S. at 266, the Eleventh Circuit's rule undermines freedom of expression and thought.

II. PUBLIC COLLEGES AND UNIVERSITIES ROUTINELY INFRINGE STUDENTS' CONSTITUTIONAL RIGHTS

A. Unconstitutional Speech Policies Are Prevalent on Campuses Nationwide.

Notwithstanding their professed commitments to students' free-speech rights, public colleges and universities across the country have adopted sweeping policies that prohibit expression protected by the First Amendment. The widespread and long-running nature of this problem further underscores the importance of students' ability to vindicate their constitutional rights in court by litigating their claims to judgment.

FIRE annually reviews and maintains detailed records of the speech regulations of more than 450 of

the largest colleges and universities in the country.[6] FIRE also publishes an annual report on the state of free expression on the nation's campuses, highlighting noteworthy policies and national trends. FIRE's latest report, *Spotlight on Speech Codes 2020: The State of Free Speech on Our Nation's Campuses*, reveals that almost ninety percent of the 471 institutions surveyed maintain either a "severely restrictive" speech policy that "clearly and substantially restricts protected speech" or a policy that could easily be applied to suppress or punish protected expression.[7] Notably, public institutions, which should be upholding the First Amendment, are as restrictive of speech as private institutions.

These constitutionally-deficient policies tend to be vaguely worded, overbroad, or both. As the following examples illustrate, campus speech restrictions reach far beyond the narrow categories of unprotected speech recognized by this Court's precedent: obscenity, child pornography, incitement to imminent lawless action, fighting words, harassment, true threats, defamation, fraud, and speech integral to criminal conduct. The restrictions grant campus administrators discretion to silence or punish a stunning range of student speech the administrators may deem inconvenient, disagreeable, objectionable, or simply

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[6] *See Spotlight Database*, https://www.thefire.org/resources/spotlight/.

[7] *Spotlight Report* at 2, 6, https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2020/.

unwanted—everything from satire and art to political debate.[8]

Many colleges and universities prohibit offensive expression irrespective of whether it constitutes actionable obscenity, defamation, or harassment. For example, Murray State University bans use of its information technology systems—including the campus Wi-Fi network—in an "offensive, profane, or abusive manner," where "[t]he *perception or reaction* of affected persons is a major factor in determining if a specific action is in violation of this policy." *Spotlight Report* at 15 (emphasis added). The University of

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[8] Censorship is also prevalent at high schools. For example, the Third Circuit recently affirmed a judgment in favor of a student who was expelled from a cheerleading squad based on a social-media post the student published on a weekend and away from school property. *See B.L. ex rel. Levy v. Mahanoy Area School Dist.*, 964 F.3d 170, 176 (3d Cir. 2020). Administrators upheld these sanctions based on rules prohibiting "foul language and inappropriate gestures," sharing "negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet," or engaging in conduct that would "tarnis[h]" the school's "image . . . in any manner." *Id.* Similar cases abound. *See*, *e.g.*, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) (en banc); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc); *see generally* Sanford Ungar, *High Schools: New Front Lines in Battle for Free Speech* (Feb. 21, 2019), https://knightfoundation.org/articles/high-schools-new-front-lines-in-battle-for-free-speech/ (highlighting "aggressive[ ] challenge[s]" to free speech at the high school level); The Free Speech Project, *The Free Speech Rights of High School Students*, https://freespeechproject.georgetown.edu/the-free-speech-rights-of-high-school-students/ (reporting recent censorship of high school student newspapers and graduation speeches).

Texas at San Antonio likewise prohibits posting signs that contain "vulgar" material, without limiting this restriction to speech unprotected by the First Amendment. *See id.*

These are not isolated examples. Lake Superior State University prohibits "postings deemed offensive, sexist, vulgar, discriminatory or suggestive"[9]; Portland State University prohibits "sexual or derogatory comments"[10]; Louisiana State University's policies ban "offensive language" and "suggestive comments"[11]; and Valdosta State University has adopted rules prohibiting "hate-based material."[12]

Universities commonly turn laudable pleas for civility and respect into unconstitutional mandates. For example, Cheyney University of Pennsylvania prohibits posting "inappropriate" and "uncivil" content online. *Spotlight Report* at 19. Delaware State University bans verbal abuse, defined as "the use of

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[9] Lake Superior State Univ., *Posting Policy*, https://www.lssu.edu/campus-life/stay-informed/student-handbook/#toggle-id-5.

[10] Portland State Univ., *Prohibited Discrimination & Harassment Policy* at 2 (Mar. 15, 2013), https://www.pdx.edu/ogc/sites/www.pdx.edu.ogc/files/Policy_on_Prohibited_Discrimination_and_Harassment.Final_.pdf.

[11] La. State Univ., *Policy Statement 95: Sexual Harassment of Students* at 2 (Apr. 1, 2016), https://www.lsu.edu/policies/ps/ps_95.pdf.

[12] Valdosta State Univ., *Information Resources Acceptable Use Policy* (Apr. 29, 2015), https://valdosta.policytech.com/dotNet/documents/?docid=83&public=true.

harsh, often insulting language."[13] Some universities have expanded their discretion yet further: Northeastern University's Internet-usage policy prohibits transmission of any material deemed "annoying" in "the sole judgment of the University." *Spotlight Report* at 20.

On occasion, college and university policies go so far as to prohibit political speech, which this Court has long considered to lie at the core of the First Amendment's protection. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976). For example, the University of Alaska Anchorage's policy governing e-mail and other information-technology systems bans posting "[c]ontent related to partisan political activities."[14]

Such policies have been used to suppress speech of all political stripes, especially during major election cycles.[15] For example: Weeks prior to the 2008 presidential election, the University of Oklahoma notified students and faculty that "forwarding of political humor/commentary" using their university e-mail

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[13] Del. State Univ., *Student Judicial Affairs Handbook: Conduct Standards, Policies and Procedures* at 34 (Aug. 2, 2017), https://www.desu.edu/sites/flagship/files/document/21/student-judicial-handbook.pdf.

[14] Univ. of Alaska Anchorage, *Acceptable Use Policy*, https://www.uaa.alaska.edu/about/administrative-services/policies/information-technology/acceptable-use.cshtml.

[15] *See generally* FIRE, *2020 Policy Statement on Political Speech on Campus* (Feb. 24, 2020), https://www.thefire.org/issues/political-speech/ (describing censorship of political speech on campuses between 2008 and 2018).

accounts was prohibited.[16] In 2012, Ohio University ordered a student to remove a flyer criticizing both President Barack Obama and Governor Mitt Romney from her residence hall door, citing a campus policy requiring that "political posters not [be] displayed outside room until within 14 days of election date."[17] In 2017, the University of South Alabama ordered a student to remove a "Trump/Pence 2016" campaign sign from his dormitory room window.[18]

University censorship of political speech extends beyond the context of elections. For example, in 2018, a student of Joliet Junior College was detained and interrogated by campus police for passing out flyers from the Party for Socialism and Liberation that read "Shut Down Capitalism."[19] Earlier this year, the Worcester State University chapter of Turning Point USA was denied student group recognition following

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[16] FIRE, *FIRE Case Files: University of Oklahoma: Ban on E-mailing Political Humor or Commentary*, https://www.thefire.org/cases/university-of-oklahoma-ban-on-e-mailing-political-humor-or-commentary/.

[17] FIRE Staff, *With Election Day Close, Ohio University Ends Political Censorship in Dorms* (Oct. 9, 2012), https://www.thefire.org/with-election-day-close-ohio-university-ends-political-censorship-in-dorms-2/.

[18] Adam Steinbaugh, FIRE, *University of South Alabama backs down after ordering student to remove pro-Trump sign* (Apr. 13, 2017), https://www.thefire.org/university-of-south-alabama-backs-down-over-trump-sign-and-501-c-3-policy/.

[19] FIRE, *VICTORY: Student detained for passing out political flyers settles lawsuit with Illinois college* (Apr. 18, 2018), https://www.thefire.org/victory-student-detained-for-passing-out-political-flyers-settles-lawsuit-with-illinois-college/.

lengthy questioning concerning its political positions, in part because the student government felt the conservative group would have a "negative impact on campus climate."[20]

Above and beyond such vague and overbroad restrictions on student speech, many colleges and universities have established "free speech zones" that quarantine student demonstrations and other expressive activities to small, typically out-of-the-way areas. *See Spotlight Report* at 23–24. While courts have struck down free speech zones as unconstitutional on multiple occasions, *see infra* n.32, they remain commonplace. *See Spotlight Report Appendix D: Schools with "Free Speech Zones"* (listing surveyed colleges and universities with free-speech zones). For example, the University of Massachusetts, Dartmouth has designated just one area on campus as a "public forum space," and students wishing to use that space must inform the campus police "at least 48 hours in advance."[21]

While the mere existence of these policies (and the concomitant threat of discipline) chills student expression, officials are actively enforcing them. Since

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[20] FIRE, *VICTORY: Worcester State can't defend viewpoint discrimination, finally agrees to allow TPUSA students to recruit on campus* (June 17, 2020), https://www.thefire.org/victory-worcester-state-cant-defend-viewpoint-discrimination-finally-agrees-to-allow-tpusa-students-to-recruit-on-campus/.

[21] Univ. of Mass. Dartmouth, *Public Forum Use of University Facilities* (Aug. 24, 2010), https://www.umassd.edu/policies/active-policy-list/facilities-operations-and-construction/public-forum-use-of-university-facilities/.

its founding in 1999, FIRE has received thousands of reports of censorship on public college and university campuses. FIRE has successfully defended student and faculty rights in more than five hundred cases, nationwide.[22] In doing so, FIRE has witnessed these troubling trends firsthand. Students' First Amendment rights are not just threatened—they are routinely violated.

Moreover, litigated cases are only the tip of the iceberg. Many students do not realize that restrictions on their speech are unconstitutional. Those who do may nevertheless be daunted by the time, money, emotional toll, and potential repercussions of pursuing judicial redress. For these reasons, the vast majority of instances of campus censorship likely go unreported and unchallenged.

In addition to censoring campus speech, colleges and universities often violate other civil rights of their students. Procedural due-process violations in the context of disciplinary proceedings and expulsions are commonplace. In one emblematic example, Valdosta State University expelled a student without a hearing for a satirical environmentalist collage posted on his personal social-media page protesting the construction of parking garages on campus.[23]

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[22] *See* FIRE, *All Cases*, https://www.thefire.org/cases/?limit=all.

[23] *See* FIRE, *Eight Years After Student's Unjust Expulsion from Valdosta State U., $900K Settlement Ends 'Barnes v. Zaccari'* (July 23, 2015), https://www.thefire.org/eight-years-after-students-unjust-expulsion-from-valdosta-state-u-900k-settlement-ends-barnes-v-zaccari/.

Campus police slipped under the student's dorm room door a letter from the university president asserting that the collage constituted a "threatening document" and that the student represented "a clear and present danger to th[e] campus," and informing him that he had been "administratively withdrawn" effective immediately. *See Barnes v. Zaccari*, 669 F.3d 1295, 1308–09 (11th Cir. 2012) (ruling that the university violated the student's "clearly established constitutional right to notice and a hearing before being removed from VSU").

Courts have intervened to correct due-process violations at other colleges and universities as well. *See*, *e.g.*, *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 622–23 (E.D. Va. 2016) (granting expelled student summary judgment on procedural due-process claim based on "the absence of specific notice as to the full scope of the events in issue, the clear deviation from established policies, the failure to provide adequate assurances of proper decision-making on appeal, and the absence of a final decision that permits meaningful review"); *Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 259 (E.D. Pa. 2012) (overturning student expulsion because "the accumulation of mistakes at each step of the [disciplinary] process and failures to comply with the Temple Code resulted in a violation of procedural due process").

Furthermore, unlawful searches and seizures by campus officials and law enforcement are a recurring problem on college and university campuses. *See*, *e.g.*, *Thomas v. Dillard*, 818 F.3d 864, 891 (9th Cir. 2016)

(concluding that campus law enforcement officer "violated [student-plaintiff's] Fourth Amendment rights against unlawful seizure and excessive force," but was nevertheless entitled to qualified immunity); *Taylor v. St. Louis Comm. Coll.*, No. 4:18-cv-272, 2020 WL 1065651, at *5–6 (E.D. Mo. Mar. 27, 2020) (denying campus police officer defendant's motion for summary judgment on excessive use of force claim, where officer "took [student] plaintiff to the ground, . . . plac[ed] his knee between plaintiff's shoulder blades, and . . . applied a transport wrist lock to walk him out of [a] meeting room"), *appeal docketed sub. nom. Taylor v. Caples*, No. 20-1651 (8th Cir. Mar. 27, 2020); *Newman v. San Joaquin Delta Comm. Coll. Dist.*, 814 F. Supp. 2d 967, 975–76 (E.D. Cal. 2011) (denying motion for summary judgment on excessive force and unreasonable seizure claims where defendant campus police officer "slamm[ed] [student] against the wall three times"); *Morale v. Grigel*, 422 F. Supp. 988, 998 (D.N.H. 1976) (holding that school officials' "intensive search[ ]" of student dormitory room "looking for stolen goods" "serve[d] no legitimate interest" and was unconstitutional); *Smyth v. Lubbers*, 398 F. Supp. 777, 793 (W.D. Mich. 1975) (holding that warrantless search of student dormitory room by campus officials and police after midnight and without advance notice, as well as the college regulation pursuant to which the search was carried out, were unconstitutional).

B. Colleges and Universities Often Reinstitute Unconstitutional Policies after Revoking Them to End Litigation.

When students do challenge campus speech restrictions in court, one of the chief alternatives to judgment on the merits—settlement—may not permanently secure institutional compliance with First Amendment obligations. Colleges and universities have repeatedly re-instituted speech restrictions even after executing settlement agreements that require the restrictions to be eliminated.

For example, a student at California's Citrus College challenged a policy limiting expressive activities to three small "free speech areas" and subjecting students to an advance-notice requirement.[24] In 2003, the college revoked the challenged policies and settled the suit.[25] In 2013, however, the college adopted a renewed regulation limiting students' expressive activities to a narrowly defined free-speech area.[26] When a student challenged this nearly identical policy,

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[24] *See* Complaint ¶ 12, *Stevens v. Citrus Cmty. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. May 19, 2003), *available at* https://www.thefire.org/complaint-against-citrus-college-may-19-2003/.

[25] *See* 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/.

[26] *See* Complaint ¶ 2, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. July 1, 2014), *available at* https://www.thefire.org/complaint-in-sinapi-riddle-v-citrus-community-college-et-al/.

the college again agreed to revise it in order to settle the suit.[27]

A similar pattern unfolded at Pennsylvania's Shippensburg University. There, after students challenged the university's speech code, a federal district court issued a preliminary injunction barring its enforcement. *See Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373–74 (M.D. Pa. 2003). The university then settled the suit, agreeing to repeal the challenged policies.[28] By 2008, however, the university had readopted the same policies *verbatim*.[29] Students challenged the speech code a second time, and the university again settled and agreed to revise its policies.[30]

Recent litigation challenging the University of Michigan's speech policies illustrates the risk that

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[27] *See* Settlement Agreement, *Sinapi-Riddle v. Citrus Cmty. Coll. Dist.*, No. 14-cv-05104 (C.D. Cal. Dec. 3, 2014), *available at* https://www.thefire.org/settlement-agreement-sinapi-riddle-v-citrus-college/.

[28] *See* 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.

[29] *See* Complaint ¶ 28, *Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. May 7, 2008), *available at* https://www.thefire.org/legal-complaint-against-shippensburg-university-2008/.

[30] *See* Will Creeley, FIRE, *Victory for Free Speech at Shippensburg: After Violating Terms of 2004 Settlement, University Once Again Dismantles Unconstitutional Speech Code* (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/.

colleges and universities, if left unchecked by the courts, will reinstate challenged policies. In *Speech First*, a group of students challenged the university's prohibition of "bullying and harassing behavior," which the university defined as including "annoy[ing]" someone "persistently" or "frighten[ing]" a "smaller weaker person." 939 F.3d at 762. The policy subjected students to "a range of consequences, including expulsion." *Id.* at 765. Although the university rescinded the challenged restriction, in part after students challenged it in court, the university "continue[d] to defend its use of the challenged definitions" and refused to make a commitment not "to reenact" them. *Id.* at 769, 770. Observing that the university had "simply not [provided] a meaningful guarantee" that its new definitions "will remain the same in the future," *id.* at 769, the Sixth Circuit vacated the district court's denial of the students' motion for preliminary injunction, *see id.* at 771. Only after this ruling did the university commit, in a settlement agreement, to refrain from later "reinstat[ing] the removed [harassment] definitions."[31]

Repeat violations of students' First Amendment rights are less likely when students have the ability to litigate their claims to judgment the first time around. Such judgments—even if supported only by an award of nominal damages—create precedent that clarifies

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[31] *See* Settlement Agreement, *Speech First, Inc. v. Schlissel*, No. 18-cv-11451 (E.D. Mich. Oct. 25, 2019), *available at* https://speechfirst.org/wp-content/uploads/2019/10/Settlement-Agreement-signed.pdf.

the law and deters colleges and universities from re-instituting unlawful policies.

Although violations of students' free-speech rights are seldom challenged in court (and violations that are challenged often become moot or result in settlement agreements), many cases have been litigated to judgment over the past three decades. These decisions—which come from circuits that do not follow the Eleventh Circuit's outlier mootness rule—have consistently struck down campus speech codes on First Amendment grounds.[32] Students' successes in these cases, coupled with the reality that campus censorship

[32] *See McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (declaring university speech policy overbroad); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring discriminatory harassment policy overbroad and unconstitutionally vague); *Olsen v. Rafn*, 400 F. Supp. 3d 770 (E.D. Wis. 2019) (enjoining enforcement of unconstitutionally vague speech and assembly policy); *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) (enjoining enforcement of unconstitutional "free speech zone" policy); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (enjoining enforcement of overbroad "cosponsorship" policy); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (declaring speech policy overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad speech policies); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring speech policy regulating "potentially disruptive" events unconstitutional); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring harassment policy overbroad and unconstitutionally vague); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (finding harassment policy overbroad and unconstitutionally vague).

remains prevalent nationwide, confirm that access to the courts remains as important as ever for students to vindicate their constitutional rights.

CONCLUSION

For the above reasons, and those presented by the petitioners, the lower court should be reversed.

Respectfully submitted,

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